No. 15-2056

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

G. G., BY HIS NEXT FRIEND AND MOTHER, DIERDRE GRIMM,

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

On appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division
(Case No. 4:15-cv-00054-RGD-DEM)

Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Defendant-Appellee

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that it is not a publicly-held corporation, issues no stock, and has no parent corporation.

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INTEREST OF THE *AMICI*[1]

The Becket Fund for Religious Liberty is a non-profit law firm that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

The Becket Fund has also represented religious people and institutions with a wide variety of views on the issue of gender identity, including both LGBT and non-LGBT clients. As a religious liberty law firm, the Becket Fund does not take a position on policy issues concerning gender identity, but focuses instead on these issues only as they relate to religious liberty.

The Becket Fund submits this brief to urge the Court to ensure that its ruling preserve space for legislative accommodations for religious objectors in the specific context of this case and in the broader context of LGBT rights generally.

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[1] No party's counsel authored any part of this brief. No person other than *Amici Curiae* contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In recent years, both the courts and the Nation generally have struggled with deep social conflicts concerning the nature of the human family, personal autonomy, and Americans' most profound views about the world and their place in it. And in a time marked by severe political polarization, these social conflicts have inevitably acquired a political valence.

Yet some of the conflicts that came to the Courts did not have to happen, or at least not on such a large scale. Had these conflicts had a longer time to gestate in public and legislative debate, much of their scope might have been avoided. But the perceived political advantages to be had on both sides meant that the social conflicts presented to the courts for decision were broader and deeper than if they had been allowed to run through the legislative process first.

This case involves another broad and deep social conflict that can and ought to be ameliorated through legislative consideration first. Redefining "sex" under Title IX to include "gender identity" will open a Pandora's box of litigation with massive impact on religious organizations and individuals well beyond the education arena. It will directly infringe the right of religious health care providers to rely on their best medical and moral judgment in determining appropriate care for transgender individuals. It will impede the ability of emergency shelters to provide critical services that respect diverse health, safety, and religious needs of the homeless

populations they serve. It will constrain the right of religious organizations to hire faith-observant employees to carry out their religious missions. And it will have untold and unintended impact on religious organizations in states that look to federal law in construing their own nondiscrimination laws.

Congress and state legislatures can never perfectly anticipate the measures necessary to protect the full diversity of religious exercise in our Nation. Hence the Free Exercise and Establishment Clauses and the imperative that they be robustly applied. But excluding legislative bodies from the policy-making process both threatens individual freedoms and leads to the impression that citizens lack a voice on issues of fundamental importance to them. In contrast, allowing the legislative process to play out has historically balanced religious protections with other interests in ways that have minimized social conflict and the need for litigation *en masse*. In that spirit, the Court should reject Plaintiff-Appellant's invitation to short-circuit the legislative process, an invitation that would otherwise increase social conflict, mass litigation, and judicial burdens.

ARGUMENT

I. Skirting the legislative process to redefine "sex" under Title IX will create widespread conflicts that extend far beyond the education arena.

This Court's interpretation of the term "sex" in Title IX cannot be viewed in isolation. Many federal agencies have aggressively moved to expand the definition of "sex" under a range of laws, bootstrapping from one agency action to the next,

while also dismissing concerns about conflicts for religious believers. With the resulting web of agency rules and regulations, construing "sex" in Title IX to include "gender identity" will confirm agency action in a number of other arenas with widespread impact on religious organizations. This will unnecessarily generate social conflict that can only be resolved through extensive litigation.

A. Conflicts for health care providers

The challenge posed to religious organizations by redefining "sex" under Title IX is perhaps most evident with respect to Section 1557 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010). There, rather than impose new non-discrimination requirements, Congress simply incorporated pre-existing laws, including Title IX. 42 U.S.C. § 18116(a) (prohibiting discrimination "on the ground prohibited under . . . title IX of the Education Amendments of 1972"). And Title IX is the only statute incorporated into Section 1557 that prohibits discrimination on the basis of sex. *Id.*

Six years after the Act's passage, the Department of Health and Human Services ("HHS") issued "implementing" regulations that define "sex" to include "gender identity." 45 C.F.R. 92.101(a)(1), 92.4 ("HHS Rule"). Lacking any evidence of congressional intent, HHS relied instead on the Department of Education's interpretation of "sex" in its now-withdrawn "Dear Colleague" letter of May 2016, previously at issue in this lawsuit, as well on this Court's original decision relying

on that same letter. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,389 & nn.66 & 67 (May 18, 2016). The HHS Rule thus defines "gender identity" as an individual's "internal sense of gender, which may be male, female, neither, or a combination of male and female." *Id*. at 31,467.

Notably, Title IX includes an express exemption for religious organizations, which provides that Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). But despite Congress's incorporation of Title IX into the Affordable Care Act without limitation, and despite pleas from over 150 commenters that the exemption be included in the new regulation,[2] HHS refused.

HHS justified its decision by announcing that "there are significant differences between the educational and health care contexts that warrant different approaches." 81 Fed. Reg. at 31,380. Citing no legislative or other authority, HHS thus concluded it would rather make its own "determinations" about religious exemptions "on a

[2] *See, e.g.*, U.S. Conference of Catholic Bishops *et al*., Comment on the Dep't of HHS Proposed Rule: Nondiscrimination in Health Programs & Activities (Nov. 6, 2015), http://bit.ly/2jzoz95 (writing on behalf of ten religious groups); Council for Christian Colleges & Universities, Comment on the Dep't of HHS Proposed Rule: Nondiscrimination in Health Programs & Activities (Nov. 9, 2015), http://bit.ly/2jqDazK (writing on behalf of 143 religious colleges and universities).

case-by-case basis." *Id.* Thus, religious organizations in the healthcare context are now subject to additional liability related to "sex" discrimination with no clear religious protections.

The liability that flows from this new HHS Rule is significant. Specifically, Section 1557's "sex" non-discrimination provision applies to any "entity that operates a health program or activity, any part of which receives Federal financial assistance." 45 C.F.R. 92.4 (definition of "Covered entity"). By HHS's own estimate, the HHS Rule applies to almost every health care provider in the country, including around 133,000 hospital and nursing facilities, 445,000 clinical laboratories, 1,200 community health centers, 171 health-related schools, as well as to "almost all licensed physicians." 81 Fed. Reg. at 31,445.

And the HHS Rule has major implications for covered entities and individuals. First, it requires them to offer gender transition procedures or be liable for "discrimination." 81 Fed. Reg. at 31,455. Thus, for example, the HHS Rule states that a health provider willing to perform a hysterectomy for a woman with cancer would be deemed "discriminatory" if unwilling to perform the same procedure for a gender transition. *Id.* This reasoning applies across the full "range of transition-related services," *id.* at 31,435-36, and across all ages of patients, including children, *id.* at 31,408 (stating in context of services for "children" that "arbitrary age, visit, or coverage limitations could constitute discrimination, including discrimination

based on age"). The HHS Rule also requires covered entities to pay for any gender transition procedures in their health insurance plans. 45 C.F.R. 92.207(b).

Failure to comply with these requirements carries significant risk for religious organizations, which would face massive financial penalties, including loss of Medicare, Medicaid, and other federal funds; debarment from federal contracting; enforcement proceedings brought by the Department of Justice; liability under the False Claims Act, including treble damages; and private lawsuits brought by patients or employees for damages and attorneys' fees. *See* 45 C.F.R. 92.301, 81 Fed. Reg. at 31,439-31,440, 31,472.

Indeed, HHS itself recognized that as "a result of the new [HHS Rule], complex cases that involve novel issues of law and complicated facts will dramatically increase," and thus that the agency would "ramp up its investigative staff." Office for Civil Rights, Department of Health and Human Services, *Justification of Estimates for Appropriations Committee*, *Fiscal Year 2017* 2 (2016), http://bit.ly/2jzcJMt. Not surprisingly, in the first year after HHS issued the new Rule, at least five complaints were filed against healthcare entities, three of which are Catholic hospitals.[3] The ACLU even has an active campaign to identify clients

[3] *See* Compl. for Declaratory, Compensatory, & Injunctive Relief, *Conforti v. St. Joseph's Hosp. Sys.,* No. 17-50 (D.N.J. Jan. 5, 2017) (claiming violation of § 1557

who were treated at "Catholic-sponsored hospital[s]" so that it can file lawsuits against them for following their "religiously based Directives."[4]

Religious organizations in turn have already been compelled to seek protections, with the HHS Rule having taken effect on July 18, 2016. 81 Fed. Reg. at 31,376. In proceedings in Texas and North Dakota, the Becket Fund currently represents seven religious organizations, including multiple hospitals, health clinics run by religious sisters, a religious university, and an association of 18,000 religious health professionals. While none of the plaintiffs has any objection to providing general medical services to transgender individuals, they have medical, ethical, and moral concerns about providing gender transition services. *See, e.g.*, Br. at 8-10,

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because Catholic hospital refused to provide gender transition medical services); Compl. & Jury Demand, *Dovel v. Pub. Library of Cincinnati & Hamilton Cty.*, No. 16-955 (S.D. Ohio Sept. 26, 2016) (claiming employer violated § 1557 by failing to provide insurance coverage for gender transition); Compl., *Prescott v. Rady Children's Hosp. – San Diego*, No. 16-2408 (S.D. Cal. Sept. 26, 2016) (claiming violation of § 1557 because hospital referred to patient with wrong gender pronouns); Compl., *Robinson v. Dignity Health*, No. 16-3035 (N.D. Cal. June 6, 2016) (claiming Catholic employer violated § 1557 by failing to provide insurance coverage for gender transition); Admin. Compl., *ACLU v. Ascension Health*, U.S. Dept. of Health & Human Servs., Office for Civil Rights (Oct. 25, 2016) (claiming violation of § 1557 because Catholic hospital refused to provide postpartum tubal ligation).

[4] ACLU, *Do You Believe a Catholic Hospital Provided You or a Loved One Inadequate Reproductive Health Care?*, http://bit.ly/2dFjFEZ (last visited May 15, 2017).

Franciscan Alliance v. Burwell, No. 16-108 (N.D. Tex. Oct. 21, 2016), ECF No. 25; Mem. at 9-10, 21-22, *Religious Sisters of Mercy v. Burwell*, No. 16-386 (D.N.D. Nov. 17, 2016), ECF No. 6.[5]

These concerns arise, in part, from the plaintiffs' religious and professional commitments to follow the Hippocratic Oath's injunction to "do no harm." The consequences of gender transition services are not fully understood. Indeed, HHS's own experts have written, as recently as last summer, that "[b]ased on a thorough review of the clinical evidence available at this time, there is not enough evidence to determine whether gender reassignment surgery improves health outcomes." Ctrs. for Medicare & Medicaid Servs., *Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery* (June 2, 2016), http://go.cms.gov/1ZjgTTk.

There are also sound medical reasons for not covering these procedures, particularly for children. Guidance documents relied on by HHS during the rulemaking process explain that "[g]ender dysphoria during childhood does not inevitably continue into adulthood," with "persistence rates" ranging only from 6 to 27%. World Prof'l Ass'n for Transgender Health, Standards of Care for the Health

[5] In the Texas lawsuit, the district court has issued an injunction against the HHS Rule. *See* Order, *Franciscan Alliance*, No. 16-108 (N.D. Tex. Dec. 31, 2016), ECF No. 62 (granting preliminary injunction); *see also Religious Sisters*, 16-386 (D.N.D. Jan. 23, 2017), ECF No. 36 (staying enforcement of Section 1557).

of Transsexual, Transgender, and Gender-Nonconforming People, 11 (7th ed. 2012), http://bit.ly/2igZ48t ("WPATH Report") (cited in 81 Fed. Reg. at 31,435 n.263).

Moreover, for both children and adults, medical transition procedures carry significant health risks. The Institute of Medicine has noted that transgender individuals "may be at increased risk for breast, ovarian, uterine, or prostate cancer as a result of hormone therapy." Institute of Medicine of the National Academies, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 264 (2011). The same study found that "longer duration of hormone use . . . may well exacerbate the effects of aging, such as cardiac or pulmonary problems." *Id.* at 265. And the WPATH report notes that hormone therapy is associated with increased risk of cardiovascular disease, Type 2 diabetes, gallstones, venous thromboembolic disease, and hypertension. WPATH Report at 40.

All these concerns warrant careful consideration in the legislative process and through public discourse. But because Section 1557 directly incorporates Title IX, expanding the definition of "sex" in this case would directly impact its interpretation under Section 1557 as well, exposing tens of thousands of entities and individuals with medical, ethical, and moral objections to liability without the benefit of Title IX's statutory exemption.

B. Conflicts for other social services providers

In the final days of 2016, HHS issued a new regulation further extending the Title IX non-discrimination requirement, through the HHS Rule, to grant recipients under the Runaway and Homeless Youth Act. Runaway and Homeless Youth, 81 Fed. Reg. 93, 030, 93,062 (Dec. 20, 2016) (incorporating 45 C.F.R. pt. 92).

Grants under the Act are generally awarded to organizations, including religious organizations, that provide short-term and emergency care to homeless youth. This new expansion of the Title IX sex non-discrimination requirement will make federal grants conditional on whether religious organizations treat those they serve "consistent with [their] gender identity," rather than their biological sex, including by "assign[ing] them housing based on their gender self-identification." 81 Fed. Reg. at 93,047, 93,062. By incorporating 45 C.F.R. pt. 92, the regulation also subjects grant recipients to HHS's interpretation of Title IX's non-discrimination provision as applied to employee health benefits and the use of bathrooms and similar facilities. 45 C.F.R. 92.207(b); 81 Fed. Reg. at 31,409. The regulation offers no exemption or accommodation for the religious beliefs of grant recipients, again forcing religious organizations to choose between their religious beliefs about gender identity and their religiously-mandated ministries to the homeless.

Although not directly incorporating Title IX, the Department of Housing and Urban Development ("HUD") has applied a similar rule to the provision of

emergency shelters, citing other agencies' expanded definition of "sex" in support of its own.

Specifically, in September 2016, HUD adopted a new rule ("HUD Rule") prohibiting "sex" discrimination in "temporary, emergency shelters with shared sleeping quarters or shared bathing facilities" that receive certain HUD funding. *See* Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,764 (Sept. 21, 2016). Where such facilities are segregated by sex, the new HUD Rule requires access for all individuals on the basis of the "gender with which [the] person identifies, regardless of the sex assigned to that person at birth." 24 C.F.R. 5.100, 5.106(c); 81 Fed. Reg. at 64,766.

HUD cited no clear statutory authority for the HUD Rule. Similarly, in response to comments questioning the agency's redefinition of "sex" to include "gender identity," HUD has contended that its authority is based on general policy statements by Congress encouraging HUD to "create strong, sustainable, inclusive communities and quality affordable homes for all" and to "address 'the needs and interests of the Nation's communities and of the people who live and work in them.'" 81 Fed. Reg. at 64,769 (quoting 42 U.S.C. § 3531). Further citing its general rulemaking authority, HUD argues that "Congress has not only given [it] this broad mission but also . . . broad authority to fulfill this mission and implement its responsibilities

through rulemaking." *Id.* Finally, in construing the term "sex," the agency has suggested that its authority is found in its own prior interpretations, as well as similar interpretations by the Equal Employment Opportunity Commission, the Department of Justice, the Office of Personnel Management, and the Office of Federal Contract Compliance Programs. *Id.* at 64,470 & n.12.

With this cobbled-together authority, HUD not only redefined "sex" to include "gender identity," but dismissively rejected concerns about forcing residents "to share facilities with opposite-sex adults where their religions prohibit that." 81 Fed. Reg. at 64,773. HUD responded that asking residents to sleep or use restrooms with others of their biological sex would constitute "arbitrary exclusion, isolation, and ostracism" that "will not be tolerated." *Id.* It compared these concerns to racism and discrimination against the disabled, concluding that "accommodat[ing] the religious views of another shelter resident" could not justify racial discrimination. *Id.*

Related concerns rooted in privacy and safety were also summarily dismissed. The originally proposed rule would have allowed emergency shelters "under narrow circumstances" to make "a case-by-case determination" that alternative accommodations might be "necessary to ensure health and safety." 81 Fed. Reg. at 64,765. But the final version of the rule abandoned that approach. Instead, shelter providers are instructed to "post a notice of rights . . . to clearly establish expectations," to look for "opportunities to educate and refocus" occupants, and to

have "policies and procedures in place" to help resolve "conflicts that escalate." *Id.* at 64,767-68.

Such recommendations give short shrift to the complex issues faced by hundreds of religious organizations that operate emergency shelters. It is estimated that around 40% of the homeless population suffers from alcohol dependence. Seena Fazel *et al.*, *The Prevalence of Mental Disorders among the Homeless in Western Countries: Systematic Review and Meta-Regression Analysis*, 5 PLoS Med. 1670, 1675 (2008), http://bit.ly/2jwjpe5. Roughly 25% struggle with other forms of substance abuse. *Id.* Anywhere from 20-45% experience some form of mental illness, including nearly 13% who suffer from psychotic illnesses such as schizophrenia. John Ashmen, *Invisible Neighbors* 25 (2010); Fazel, 5 PLoS Med. at 1672. The statistics are even higher for transgender homeless individuals, National Health Care for the Homeless Council, *Gender Minority and Homelessness: Transgender Population*, 3 In Focus 1, 2-3 (2014), http://bit.ly/2ftAYdk, who are also disproportionately likely to be subjected to violence within the homeless community, Margot B. Kushel *et al.*, *No Door to Lock: Victimization Among Homeless and Marginally Housed Persons*, 163 Arch. Intern. Med. 2492, 2495 (2003), http://bit.ly/2jwvgcg.

In these circumstances, "post[ing] a notice of rights," having "policies and procedures" in place, and seeking "opportunities to educate and refocus" occupants about their rights and responsibilities are essentially meaningless as remedial tools.

81 Fed. Reg. at 64,767-68. As a whole, religious and other emergency shelter operators serve all who come through their doors. *See, e.g.*, Association of Gospel Rescue Missions, Comment on the Dep't of Hous. & Urban Dev. Proposed Rule: FR–5863–P–01 Equal Access in Accordance With an Individual's Gender Identity in Cmty. Planning & Dev. Programs (Jan. 19, 2016), http://bit.ly/2iXuowc ("*To be clear, there is no rescue mission that is a member of AGRM that will not serve every person who comes to them in need of assistance, regardless of gender or gender identity*."). Yet to operate effectively, they need the freedom and flexibility to rely upon their ethical principles to meet the safety, privacy, and religious concerns of those they serve, including the concerns of transgender individuals.

But ruling that "sex" under Title IX includes "gender identity" will automatically extend that ruling through to the Runaway and Homeless Youth Act. It will also condone HUD's decision to unilaterally apply that same definition to emergency shelters. This leaves religious operators of emergency shelters with no option but to abandon their own convictions or seek relief through the courts. Allowing Congress to first balance the competing interests at stake would give it opportunity to find better solutions that narrow the area of conflict.

C. Conflicts in conducting internal affairs

Construing "sex" to include "gender identity" will also subject religious organizations to a new category of employment discrimination lawsuits, impeding

their ability to carry out their missions by hiring employees who not only share, but also comply with, their faith.

The Department of Justice recently abandoned its longstanding position that "Title VII's prohibition of discrimination based on sex [in employment] did not cover discrimination based on transgender status or gender identity *per se*." Mem. from the Att'y Gen. on Treatment of Transgender Employment Discrimination Claims Under Title VII, to United States Attorneys 1 (Dec. 15, 2014). The EEOC has likewise redefined "sex" to include "gender identity." *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). And although Title VII includes an exemption for religious organizations, the EEOC improperly construes it narrowly so that it "only allows religious organizations to prefer to employ individuals who share their religion." EEOC Compliance Manual, Section 12-I.C.1 (July 22, 2008), http://bit.ly/2ifbGzn.

But many religious organizations require more from their employees, including that they abide by the organization's code of conduct—which often includes standards of sexual conduct—and not just that they share the same denomination. Extending the definition of "sex" to include matters touching on the type of sexual conduct that religious teachings frequently touch on, creates inevitable conflict. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, Oxford J. of

L. and Religion 368 (2015) (noting that "sexual orientation" and "gender identity" non-discrimination requirements are "at odds with sexual morality as historically taught by the nation's major religions"). Thus, a religious employer would argue that applying its code of conduct to employees is conduct exempt from Title VII under the religious exemption, while the EEOC would argue that it is unlawful "sex" discrimination.

The best reading of the Title VII exemption supports the conclusion that religious organizations should be exempt when their employment decisions are made with a sincere religious motive. *Id.* But the EEOC takes the narrower position. And if this Court concludes that the definition of "sex" includes "gender identity," that will impact the definition under Title VII as well. Thus, a broad swath of religious organizations will find themselves in need of immediate legal relief just to continue their longstanding religious hiring practices. Again, the Court should avoid such social conflict when the issue at hand is still percolating through the legislative process.

D. Conflicts under state laws

Finally, a ruling by this Court that federal laws outlawing sex discrimination also prohibit discrimination on the basis of gender identity will have a significant impact on state law. This is because many states construe their laws in harmony with judicial interpretations of federal laws, while other states have determined that the

construction of analogous federal laws is highly persuasive authority as to the meaning of similar state court provisions.[6] The Appendix lists examples of state laws which could be affected.

The ripple effect in state law, in turn, will likely have a significant impact on the scope of religious exceptions based on sex in those same state anti-discrimination laws. The net result would disrupt decades of efforts by citizens nationwide to use the political process to effectively balance sensitive interests. It also may prevent legislative experimentation to discover solutions to seemingly intractable conflicts.

CONCLUSION

The decision below should be reversed.

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[6] *See, e.g.*, *Moody-Herrera v. Dep't of Nat. Res.*, 967 P.2d 79, 83 (Alaska 1998) ("In interpreting the [Alaska Human Rights Act], we have previously looked for guidance in the parallel body of federal employment discrimination law of Title VII . . . and the accompanying federal cases."); *Harris v. City of Santa Monica*, 294 P.3d 49, 56 (Cal. 2013) ("[B]ecause of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes") (citation omitted); *Dep't of Health Servs. v. Comm'n on Human Rights & Opportunities*, 503 A.2d 1151, 1157 (Conn. 1986) ("We have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute."); *Bd. of Regents v. Weickgenannt*, 485 S.W.3d 299, 306 (Ky. 2016) ("Because of its similarity to federal civil-rights legislation, the [Kentucky Civil Rights Act] tracks federal case law for guidance on claims based on gender discrimination.").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4168 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus curiae* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 15th day of May, 2017.

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CERTIFICATE OF SERVICE

I certify that on May 15, 2017, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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