No. 22-13626

United States Court of Appeals for the Eleventh Circuit

HOUSTON COUNTY, GEORGIA, AND
HOUSTON COUNTY SHERIFF CULLEN TALTON, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-APPELLANTS,

v.

ANNA LANGE,
PLAINTIFF-APPELLEE.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, NO. 5:19-cv-392, HON. MARC T. TREADWELL, PRESIDING

BRIEF OF CHRISTIAN EMPLOYERS ALLIANCE AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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SEPTEMBER 30, 2024

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Lange v. Houston County, Ga., No. 22-13626:

The undersigned counsel of record certifies that he is aware of no persons or entities not listed on prior filings who have an interest in the outcome of this case.

/s Christopher Mills
Christopher Mills

Counsel for *Amicus Curiae*

September 30, 2024

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STATEMENT OF THE ISSUE

Whether excluding sex-change operations from a health plan facially discriminates based on sex in violation of Title VII.

INTEREST OF *AMICUS CURIAE*

Christian Employers Alliance is an alliance of Christian-owned businesses in the United States. CEA's mission as a ministry is to unite, equip, and represent Christian-owned businesses to protect religious freedom and provide the opportunity for employees, businesses, and communities to flourish. CEA members share a commitment to living out their Christian faith in everyday life. CEA provides advocacy on legal policy issues on behalf of its members. One of these issues is that male and female are immutable realities defined by biological sex. CEA recently obtained a permanent injunction against the EEOC from "interpreting or enforcing Title VII . . . or any implementing regulations thereto against CEA or its present or future members . . . in a manner that would require them to provide insurance coverage for gender-transition procedures in" their health plans. *Christian Employers Alliance v. EEOC*, No. 1:21-cv-195, 2024 WL 935591, at *11 (D.N.D. Mar. 4, 2024). Because the panel's logic mirrors the EEOC's, the CEA has a significant interest in this case.[1]

[1] No party's counsel authored, and no party, party's counsel, or other person—other than *amicus curiae*, its members, or its counsel—contributed money for this brief.

SUMMARY OF THE ARGUMENT

Anna Lange is a biological male who sought a vaginoplasty as a treatment for gender dysphoria. Houston County's health insurance plan does not cover this or other "sex change" surgeries. The question is whether that non-coverage facially discriminates against Lange "because of . . . sex" under Title VII. 42 U.S.C. § 2000e-2(a)(1).

It does not. No matter one's sex—or gender identity—one cannot have a sex-change surgery funded by the insurer. With almost no reasoning, the panel offered three drive-by theories for its prior holding to the contrary: that the exclusion discriminates based on sex, gender identity, and gender nonconformity. All fail. Sex is irrelevant to the exclusion. So is gender identity: for instance, whether one seeks to transition or detransition, the exclusion bars coverage. For the same reason, gender stereotypes are irrelevant to the exclusion.

If Lange were nonetheless correct that the exclusion constitutes facial discrimination under Title VII, the consequences would be far-reaching and, in cases like this involving gender dysphoria, self-defeating. On Lange's and the panel's logic, it is *providers* of transitioning interventions who are discriminating based on sex, gender identity, and sex stereotypes. Those providers diagnose gender dysphoria based on sex stereotypes and gender identity, and prescribe interventions based on sex. So on Lange's theory, not only are these providers violating federal law (if they receive

federal funds), but the County's refusal to fund discriminatory procedures could not be unlawful sex discrimination. What's more, Lange's and the panel's logic would force health plans to cover all procedures used in one sex, regardless of their use. That result conflicts with precedents of the Supreme Court and this Court.

Last, beyond being legally unsound, Lange's approach would have significant negative consequences. It would result in an inundation of Title VII litigation involving employers—especially religious employers—who object on religious (and often scientific) grounds to covering experimental, sterilizing "sex change" procedures. The Court should not open the door to this type of intrusive litigation against religious employers on such a flimsy legal theory. The Court should reverse.

ARGUMENT

I. The coverage policy does not facially discriminate.

The exclusion here does not facially discriminate based on sex, gender identity, or sex stereotypes. "[C]hanging [a person's] sex (or even their transgender status) would not change [the plan's] choice to decline coverage for the requested services." *Kadel v. Folwell*, 100 F.4th 122, 181 (4th Cir. 2024) (Richardson, J., dissenting). All plan participants, no matter their sex, gender identity, or conceptions of sex roles, cannot have "sex change" operations covered. Thus, the plan could not facially discriminate based on sex.

A. The exclusion does not discriminate based on sex.

The exclusion's rule "applies equally to both sexes": neither gets sex-change operations covered. *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1228 (11th Cir. 2023). The panel proclaimed that "Lange's sex is inextricably tied to the denial of coverage," Panel Op. 10, but how? If Lange were a female, the insurer still would not cover sex-change surgery.

Even narrowing the discrimination claim to the specific procedure—Lange's vaginoplasty—no female could obtain the inversion and removal of male genitalia involved in Lange's desired operation. *See* Panel Op. 2 (Brasher, J., dissenting). It is impossible. It is, in the Supreme Court's terms, an operation that "only one sex can undergo." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022) (holding that regulation of such procedures does not facially discriminate).

No wonder, then, that the panel relied on generalities from *Bostock* rather than apply its "straightforward rule": "chang[e] the employee's sex" and see if it "yield[s] a different choice by the employer." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 659–60 (2020). Here, neither males nor females get coverage for a transitioning vaginoplasty or any other "sex change" operation, so there is no facial sex discrimination. The policy "does not distinguish between males and females in any respect." *Corbitt v. Sec'y of the Alabama L. Enf't Agency*, No. 21-10486, 2024 WL 4249209, at *6 (11th Cir. Sept. 20, 2024).

B. The exclusion does not discriminate based on gender identity.

Likewise, one can be cisgender, agender, transgender, non-binary, or anything else—and sex-change surgeries are excluded. The panel asserted that "transgender persons are the only plan participants who qualify for gender-affirming surgery." Panel Op. 9. The exclusion is not of "gender-affirming surgery," but of "sex change" surgery. And the panel is incorrect: individuals wishing to detransition could desire sex-change operations;[2] some individuals who do not identify as transgender seek the operations;[3] and many individuals that seek sex-change operations (and identify as transgender now) will not ultimately identify as transgender.[4] Beyond detransitioners, it is not even obvious that no other "cisgender" individual could desire a sex-change operation. Assuming otherwise seems to rely on gender stereotypes. *See* Panel Op. 9 n.5 (asserting that "cisgender people" "would never seek" various operations that would be physically possible (quoting *Kadel*, 100 F.4th at 149)).[5]

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[2] E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health, S42 (2022) (hereinafter "SOC-8").

[3] J. Hodax & S. DiVall, *Gender-Affirming Endocrine Care for Youth with a Nonbinary Gender Identity*, 14 Therapeutic Advances in Endocrinology & Metabolism (2023), https://doi.org/10.1177/20420188231160405.

[4] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 455–56 (5th ed. 2013) (hereinafter "DSM-5").

[5] Whether "the only Health Plan participants impacted by the Exclusion" *at present* "are transgender people"—specifically, only Lange—is irrelevant to whether the exclusion facially discriminates. *Lange v. Houston Cnty.*, 608 F. Supp. 3d 1340, 1355 (M.D. Ga. 2022).

Even if the panel were right that only "transgender persons" seek sex-change operations, Panel Op. 9, it would make no difference. First, as Judge Brasher explained, "the plan doesn't seem to provide the equivalent of a sex change surgery to anyone." Panel Op. 8 (dissenting op.).

More, "[b]ecause the [insurance] policy divides [employees] into two groups"—those who want sex-change operations and those who do not—and *at least* the group that does not seek sex-change operations could include transgender employees,[6] "there is a 'lack of identity' between the policy and transgender status." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496–97 & n.20 (1974)); *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993); *Corbitt*, 2024 WL 4249209, at *7.

This logic generally applies under Title VII. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133–36 (1976). Congress amended Title VII to prescribe a different result *only* for discrimination "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). That amendment made it unlawful "to treat pregnancy-related conditions less favorably than other medical conditions," even though

[6] "[N]ot all" transgender people suffer from gender dysphoria, and only some with gender dysphoria "seek[] medical treatment to alter body characteristics." DSM-5, *supra* note 4, at 451–54; W. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons*, 102 J. Clinical Endocrinology & Metabolism 3869, 3875 (2017) (similar).

the group of non-pregnant employees includes some women. *Newport News Ship-building & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983). The amendment did *not* address "medical conditions" *not* "related" to "pregnancy" or "childbirth," 42 U.S.C. § 2000e(k). That left the default rule of *Geduldig* and *Gilbert* in place as to all other medical conditions: there is a "lack of identity between the [exclusion] and gender" when the exclusion divides members into two groups and at least one group "includes members of both sexes." *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496–97 & n.20). Here, at least one group—those who do not seek sex-change operations—includes both transgender and non-transgender persons.

At the panel stage, the United States tried to read Congress's pregnancy amendment as entirely abrogating *Geduldig* and *Gilbert* and covering *every* medical condition. The United States claimed that "Congress's aim" was "to categorically "reject[] th[e] reasoning' used in" those cases. United States Panel Br. 16 (quoting *Newport News*, 462 U.S. at 676, 684).

The reason the United States relied on this highly truncated quotation from *Newport News* to make this sweeping claim is two-fold: the statutory text does not support the United States' assertion of "Congress's aim" about unrelated medical conditions, and *Newport News* itself focused on *pregnancy*. The amended statute simply "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News*, 462 U.S. at 684. The

United States used this narrow pregnancy amendment to argue that "by extension, denying health insurance coverage to transgender employees for gender-affirming surgery constitutes sex discrimination under the statute, even though not all transgender individuals will seek out such treatment." United States Panel Br. 16.

Like the panel, the United States appears to assume that *only* "transgender employes" will seek "sex change" operations. As explained above, that assumption is wrong, even ignoring the United States' conflation of "sex change" and "gender-affirming" surgeries.

But the deeper problem with the United States' argument is that the statutory amendment does not "extend[]" beyond "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Transgender status is not "related" to pregnancy or childbirth. Courts "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (cleaned up). To read the pregnancy amendment as abrogating the underlying nondiscrimination principles articulated in *Geduldig* and *Gilbert*—and still applied in equal protection cases—would violate the rule that "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 590 U.S. at 654. Congress knows how to abrogate broader tests by reference to caselaw when it wants to: the Religious Freedom Restoration Act, for instance, "restore[d] the compelling interest test as set forth in

Sherbert v. Verner, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," disapproving of "*Employment Division v. Smith*, 494 U.S. 872 (1990)." 42 U.S.C. § 2000bb. It did not do so here, instead limiting its textual abrogation of *Gilbert* to pregnancy-related conditions.

In context, the Supreme Court's references to Congress "rejecting" *Gilbert* make the same point: *See Newport News*, 462 U.S. at 684 ("Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant, Congress has unequivocally rejected that reasoning."); *id.* ("The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.").

To be sure, the statutory amendment says that "[t]he terms 'because of sex' or 'on the basis of sex' *include, but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (emphasis added). This language—"include, but are not limited to"—avoids an interpretation of Title VII that would *limit* sex discrimination to pregnancy or related conditions. It does not expand the statute to *un*related medical conditions.

The United States' effort to draw a larger rule out of the Supreme Court's references to "rejection" of *Gilbert* "read[s] too much into too little." *Nat'l Pork*

Producers Council v. Ross, 598 U.S. 356, 373 (2023). "The language of an opinion is not always to be parsed as though [courts] were dealing with language of a statute." *Id.* (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). "Instead," the Supreme Court has "emphasize[d]," its "opinions dispose of discrete cases and controversies and they must be read with a careful eye to context." *Id.* at 373–74. "And when it comes to" "the language" the United States "highlight[s]" about rejections of *Gilbert*, that language "appeared in a particular context": cases involving pregnancy-related conditions. *Id.* at 374.

Thus, the principles of *Geduldig* and *Gilbert* apply here, and there is no facial discrimination based on gender identity. But to end this discussion where it started, even if *Geduldig* and *Gilbert* did not apply, there still would be no facial discrimination based on gender identity. The plan does not cover equivalent operations for non-transgender persons, *and* both groups here—those who seek and those who do not seek "sex change" operations—may include individuals of all gender identities.[7]

[7] Even if the exclusion did somehow facially discriminate on gender identity, it is not obvious that it would facially discriminate based on *sex*—the characteristic covered by Title VII and "assum[ed]" by the Supreme Court to refer to "biological distinctions." *Bostock*, 590 U.S. at 655; *see id.* at 660 (discussing a hypothetical of "an employer who fires a transgender person" that makes sense only if the person's sex is biological). *Bostock* assumed a simple definition: transgender means the opposite of one's biological sex. *See id.* at 660–61 ("transgender status [is] inextricably bound up with sex"). The panel parroted this assumption. Panel Op. 8–9. This assumption is dubious. We are now told that there are "more than 100 gender identities." The Trevor Project, *National Survey on LGBT Youth Mental Health 2019*, at 7,

C. The exclusion does not discriminate based on gender stereotypes.

Regardless of whether one conforms to sex (or gender) stereotypes, sex-change operations are excluded. As explained above, some gender *conforming* individuals may desire those operations, and some gender nonconforming individuals will *not* desire them. So again, regardless of whether one applies *Geduldig* and *Gilbert*, there is no facial discrimination. *See Adams*, 57 F.4th at 809. "[B]iological sex" "is not a stereotype," *id.*, and the exclusion "does not further any particular gender stereotype," *Eknes-Tucker*, 80 F.4th at 1229.

II. The panel's logic is self-defeating and far-reaching.

The panel's rejection of the above analysis is self-defeating, because municipalities need not fund procedures that are themselves discriminatory. If the panel is right that the exclusion discriminates based on sex "[b]ecause transgender persons

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https://perma.cc/5MTL-GFBG. And, the American Academy of Pediatrics tells us, being transgender is not limited to those "whose gender identity does not match their assigned sex," but "also encompasses many other labels individuals may use to refer to themselves" and "can be fluid, shifting in different contexts." J. Rafferty, *Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4, at 2 (Oct. 2018), https://perma.cc/8PYT-CGUG. For instance, a prominent athlete who is biologically female and identifies as transgender and non-binary recently competed for the United States in the Olympics—in the female competition. I. Yip, *Nonbinary runner Nikki Hiltz advances to semifinals for Team USA*, NBC News (Aug. 6, 2024), https://perma.cc/AJ75-2MPS. Nothing prohibits a biological female from identifying as a transgender female. And once transgender status is untethered from sex, *Bostock*'s logic breaks down. But this Court need not confront these conundrums to grasp the point that the exclusion here does not facially differentiate based on sex or gender identity.

are the only plan participants who qualify for gender-affirming surgery," Panel Op. 9, that would mean that the exclusion simply discourages sex discrimination by medical providers—making the exclusion lawful.

As gender-transition specialist (and expert witness for the United States) Dr. Daniel Shumer recently testified elsewhere, doctors choose many gender transition procedures as purported treatments for gender dysphoria—the basis of Lange's requested surgery—based on sex. Deposition of Daniel Shumer 90:1–2, 94:9–95:23, *Boe v. Marshall*, No. 22-cv-184, Doc. 557-39 (M.D. Ala. May 27, 2024) (hereinafter "Shumer") ("I would need to know their anatomical hormonal sex."). Doctors would not perform Lange's penile inversion on a female. They would not give a male testosterone to transition, or a female estrogen. *Id.* at 90:15–18; Hembree et al., *supra* note 6, at 3886–87; SOC-8, *supra* note 2, at S128–30 (separating surgical options by persons "assigned male at birth (AMAB) and assigned female at birth (AFAB)"). Doctors similarly make these decisions based on gender identity, refusing transitioning procedures to those whose gender identity aligns with their sex (or are non-binary or other). Shumer 98:14–99:10. And they consider gender nonconformity, making decisions based on a diagnosis founded in stereotypes like whether a person prefers "typical masculine clothing," "games[] or activities stereotypically used or engaged in by the other gender," and "playmates of the other gender." DSM-5, *supra* note 4, at 452.

Asked if his transitioning treatments discriminate based on sex, Dr. Shumer insisted that these choices simply reflect "appropriate medical management." Shumer 99:18–100:2. But on Lange's and the panel's theory, these choices constitute facial sex discrimination that (for providers accepting federal funds) violates federal law: a person's "sex is inextricably tied to" what gender dysphoria interventions they are offered. Panel Op. 10; *see* 42 U.S.C. § 18116(a) (prohibiting sex discrimination under "any health program or activity, any part of which is receiving Federal financial assistance").[8]

Applying the panel's logic, then, the County plan's refusal to fund sex-change operations *mirrors* federal non-discrimination law (at least in cases involving gender dysphoria) by prohibiting *providers* from discriminating based on sex using the County's money. Prohibiting sex discrimination could not be discrimination because of sex—making the panel's logic self-defeating. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the" Fourteenth Amendment.); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (upholding "a reform measure aimed at eliminating" discrimination). To put

[8] Many common medical procedures used only in one sex would likewise be unlawful on the panel's logic. Fertility clinics, for instance, would be liable for deciding to implant fertilized eggs only in females.

it in Title VII's terms, a person whose purported treatments are themselves discriminatory is not "similarly situated" to other plan participants. *Bostock*, 590 U.S. at 657.

Continuing the descent into madness, if the panel were right that the County's exclusion is sex discrimination, then a plan would also discriminate by covering transitioning hormones—say, testosterone for females to look more "masculine"—and refusing to cover testosterone for males who want to look more "masculine." Same goes for any number of other implants, augmentations, enhancements, and drugs. *And* it would violate Title VII to fail to cover "sex change *reversals*." Panel Op. 6 (Brasher, J., dissenting). In essence, the panel's logic means that any procedure related to gender transition gets special (and universal) coverage, regardless of why or how the procedure is used. *See id.* at 9; *see also* En Banc *Amicus* Brief of Alabama et al. 12–18 (showing that the same logic would apply to *all* treatments tied to sex); *contra Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 259 (1981) (explaining that Title VII "does not demand that an employer give preferential treatment").

All this is nonsense. That sex-change operations "are themselves sex-based" does not make every regulation pertaining to them discriminatory. *Eknes-Tucker*, 80 F.4th at 1228 ("treatments for gender dysphoria are different for males and for females because of biological differences between" them). Slicing off a male's genitals is not the same procedure as correcting a female's congenital absence of a vagina.

Giving a female testosterone to transition is not the same procedure as giving testosterone to a male to treat hypogonadism (or to win the Tour de France). Contra the district court, a mastectomy "for cancer treatment" is not the same procedure as removing a woman's healthy breasts "for sex change." *Lange*, 608 F. Supp. 3d at 1358.

These realities are presumably why the panel (and the United States) made no effort to identify an analogous "other operation[]" (or "same treatment") covered by the County's plan. Panel Op. 10; United States Panel Br. 10–11. That flaw is of a piece with the rest of the panel opinion, which substitutes inapplicable generalities from *Bostock* for *Bostock*'s test, Supreme Court and circuit precedent, and logic.

III. The consequences of the panel's decision would be severe.

Redefining Title VII's prohibition against sex-based discrimination to forbid employers from choosing to cover "some treatment and not others," Panel Op. 10, would have devastating consequences for employers. Employers already pay huge sums for healthcare coverage, and those costs are rising. *2023 Employer Health Benefits Survey*, KFF (Oct. 18, 2023), https://www.kff.org/report-section/ehbs-2023-summary-of-findings/ (employers paid $17,393 on average for each family premium and $7,034 for each single premium in 2023, up 7% from 2022). Traditionally, employers have had flexibility in structuring benefits packages, offering more coverage as an incentive for prospective employees or choosing a cheaper plan to cut costs. Adopting Lange's and the panel's reasoning would leave employers with no options,

requiring them to cover *any* treatment labeled "gender-affirming care." In addition to hormone therapy and genital surgery, this could include prosthetics, voice therapy and surgery, facial surgery and body contouring, and hair removal. *See* SOC-8, *supra* note 2, at S18 (designating each "[m]edically necessary"). As noted, the panel's reasoning could further require employers to cover *any* procedure connected to "sex"—from fertility treatments or care for sexual dysfunction to cosmetic procedures and abortions.

The United States is not blind to the unreasonableness of these obligations—at least when the weight falls on its own shoulders. The military's health insurance program covers mental health treatment and hormone procedures for gender dysphoria but excludes all surgical treatments. TRICARE Policy Manual 6010.60-M, Chapter 7, § 1.3 at 3.1 (revised Dec. 6, 2022). Medicare, meanwhile, does not cover gender transition hormone or surgical procedures for minors. *Gender Reassignment Services for Gender Dysphoria*, https://perma.cc/8FB5-9VUS (revised Nov. 9, 2023).

Religious employers face special threats from Lange's and the panel's theory. Many "employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore requiring them to pay for . . . these procedures will have a severe impact on their ability to honor their deeply held religious beliefs." *Bostock*, 590 U.S. at 731 (Alito, J., dissenting). For members of the CEA

specifically, covering experimental gender-transition procedures offends religious convictions "that male and female are immutable realities defined by biological sex and that gender reassignment is contrary to" their Christian values. *CEA*, 2024 WL 935591, at *8. As a district court recently recognized in granting CEA a permanent injunction against the EEOC's enforcement of this same interpretation of Title VII, that interpretation would force CEA's members to choose between providing this coverage in violation of their beliefs and "fac[ing] harsh consequences like paying fines and facing civil liability." *Id.*

Other religious employers have raised the same concerns. *See, e.g.*, *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1147 (D.N.D. 2021) (finding that a "refusal to perform or cover gender-transition procedures would result in the [religious plaintiffs] losing millions of dollars in federal healthcare funding and incurring civil and criminal liability" while compliance with the mandate "would violate [the plaintiffs'] religious beliefs as they sincerely understand them"), *aff'd Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022) (affirming permanent injunction for the plaintiffs).

These fears are well-founded. The EEOC "has never disavowed an intent to enforce Title VII's prohibition on gender-transition exclusions in health plans" against religious employers, *Religious Sisters*, 513 F. Supp. 3d at 1142, and it has not provided any "official guidance indicating any exemptions for employers . . . on

religious grounds." *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 921 (5th Cir. 2023). In fact, the EEOC has even resisted pre-enforcement challenges of its interpretation of sex discrimination against a *church*. *Bear Creek Bible Church v. EEOC*, No. 18-cv-00824, 2021 WL 5052661 (N.D. Tex. Oct. 31, 2021). If the EEOC's and panel's interpretation of Title VII takes root, a flood of RFRA challenges will be forthcoming. *Cf., e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Autocam Corp. v. Burwell*, 573 U.S. 956 (2014); *Eden Foods, Inc. v. Burwell*, 573 U.S. 946 (2014).

Even if religious employers ultimately prevail, repeated challenges result in investigations and lawsuits that cost considerable time and money—and burden religious freedom. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("[T]he very process of inquiry" "may impinge on rights guaranteed by the Religion Clauses."). While the members of CEA are protected by injunction, other employers face oppressive litigation if they refuse to violate their religious convictions. And entities like the County would have no apparent recourse from being compelled to spend taxpayer monies to fund controversial, experimental procedures based on an unsupported reading of Title VII.

CONCLUSION

The Court should reverse.

Respectfully submitted,

s/ Christopher Mills

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SEPTEMBER 30, 2024

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/s Christopher Mills
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s/ Christopher Mills
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