23-1453

United States Court of Appeals

for the

Fourth Circuit

DONNA BUETTNER-HARTSOE; N.H., by and through her Parent and Next Friend Donna Buettner-Hartsoe,

Plaintiffs/Appellees,

– v. –

BALTIMORE LUTHERAN HIGH SCHOOL ASSOCIATION, d/b/a Concordia Preparatory School,

Defendant/Appellant,

and

LUTHERAN CHURCH-MISSOURI SYNOD,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS ("NAIS"), THE NATIONAL BUSINESS OFFICERS ASSOCIATION ("NBOA"), THE ASSOCIATION OF INDEPENDENT SCHOOLS OF GREATER WASHINGTON ("AISGW"), THE SOUTHERN ASSOCIATION OF INDEPENDENT SCHOOLS ("SAIS"), THE VIRGINIA ASSOCIATION OF INDEPENDENT SCHOOLS ("VAIS"), THE NORTH CAROLINA ASSOCIATION OF INDEPENDENT SCHOOLS ("NCAIS"), AND THE PALMETTO ASSOCIATION OF INDEPENDENT SCHOOLS ("PAIS")

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- Counsel has a continuing duty to update the disclosure statement.

No. 23-1453 Caption: Buettner-Hartsoe, et al. v. Baltimore Lutheran High School Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Association of Independent Schools of Greater Washington ("AISGW")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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Signature: /s/ Evan T. Shea Date: June 12, 2023

Counsel for: AISGW

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No. 23-1453 Caption: Buettner-Hartsoe, et al. v. Baltimore Lutheran High School Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Independent Schools ("NAIS")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Evan T. Shea Date: June 12, 2023

Counsel for: NAIS

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No. 23-1453 Caption: Buettner-Hartsoe, et al. v. Baltimore Lutheran High School Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Business Officers Association ("NBOA")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Evan T. Shea Date: June 12, 2023

Counsel for: NBOA

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No. 23-1453 Caption: Buettner-Hartsoe, et al. v. Baltimore Lutheran High School Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Association of Independent Schools ("NCAIS")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s/ Evan T. Shea Date: June 12, 2023

Counsel for: NCAIS

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No. 23-1453 Caption: Buettner-Hartsoe, et al. v. Baltimore Lutheran High School Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Palmetto Association of Independent Schools ("PAIS")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s/ Evan T. Shea Date: June 12, 2023

Counsel for: PAIS

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No. 23-1453 Caption: Buettner-Hartsoe, et al. v. Baltimore Lutheran High School Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Southern Association of Independent Schools ("SAIS")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Evan T. Shea Date: June 12, 2023

Counsel for: SAIS

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Virginia Association of Independent Schools ("VAIS")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Evan T. Shea Date: June 12, 2023

Counsel for: VAIS

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae, the National Association of Independent Schools ("NAIS"), the National Business Officers Association ("NBOA"), the Association of Independent Schools of Greater Washington ("AISGW"), the Southern Association of Independent Schools ("SAIS"), the Virginia Association of Independent Schools ("VAIS"), the North Carolina Association of Independent Schools ("NCAIS"), and the Palmetto Association of Independent Schools ("PAIS") (collectively, "*Amici*"), are all nonprofit membership associations dedicated to supporting the important missions of independent, private schools.[2] [3] They represent approximately 2,500 independent, private schools serving preschool through high school students. Those

[1] No counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money intended to fund preparing or submitting this brief, and no person—other than the *Amici*, their members, or their counsel—contributed money intended to fund preparing or submitting this brief. Additionally, all parties consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

[2] More information about each of these organizations can be found at:
https://www.nais.org/about/
https://www.nboa.org/
https://www.aisgw.org/
https://sais.org/
https://www.vais.org/
https://www.ncais.org/
https://palmettoschools.org/

[3] "Private school" is the umbrella term for all non-public schools. "Independent schools" are one type of school under the private school umbrella. They are called independent because they are independently financed (primarily through tuition and charitable contributions) and are governed by independent boards of trustees.

schools educate over 750,000 students each year and employ more than 60,000 teachers nationwide. Independent schools are nonprofit organizations, tax-exempt under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), and are each guided by their own missions, overseen by independent boards of trustees, and primarily financed through tuition and charitable contributions. Fifty-four (54) other school-based nonprofit organizations signed a letter in support of *Amici's* efforts, which is Exhibit 1 to their amicus brief filed in the district court. JA507.

The issue on appeal in this matter—whether tax-exempt status constitutes "federal financial assistance" for purposes of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1683 ("Title IX")—will determine whether members of *Amici* continue to have the freedom and flexibility to design and implement their own policies and procedures to combat sex-based discrimination and harassment, and, in many cases, whether members of *Amici* are able to continue operating as tax-exempt nonprofits at all. If the district court's decision stands, it could impose massive, prescriptive, and frequently changing one-size-fits-all compliance regimes on the members of *Amici* that would erode their fundamental independence and severely restrict their ability to tailor programs to the individual needs of their communities, school sizes, and missions, and threaten to overwhelm them, both financially and administratively.

SUMMARY OF THE ARGUMENT

Amici urge this Court to reverse the district court's ruling that tax-exempt status constitutes "federal financial assistance" for purposes of Title IX. If allowed to stand, the district court's ruling would expand the reach of Title IX far beyond what Congress intended and threaten to erode the fundamental independence of the nation's independent schools. The district court's ruling is contrary to the plain language of the Title IX statute, Title IX's legislative history, federal agency interpretations, and the weight of federal court authority on this issue. Congress can only bind private actors under legislation tied to federal spending (such as Title IX) if it does so unambiguously, and if the federal fund recipients subject to the legislation accept its requirements knowingly and voluntarily. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *see also Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1569 (2022). In order to prevail in this matter, the Appellees must meet a burden under *Pennhurst* of showing that Congress unambiguously intended tax-exempt status to constitute "federal financial assistance." They cannot do so.

Affirming the district court decision below would have broad ramifications. The Department of Education's Title IX regulations include, among many other things, a specific and elaborate grievance procedure that mandates the hiring of a Title IX coordinator (and other staff trained to investigate and adjudicate sexual

harassment and other misconduct allegations and apply complicated legal concepts), which could be extended to independent schools if they are brought under Title IX.[4] Worse still, if other courts follow the logic of the district court, they may extend other federal regulations that rely on the term "federal financial assistance" to independent schools.

Independent schools have protected their students, staff, and other community members through different, but rigorous and effective, safeguards tailored to each school's size and mission. Those state and local law compliant policies are developed with the specific needs of the schools' communities in mind. Subjecting those schools to cumbersome and one-size-fits-all compliance regimes would strip away that discretion and independence, and those organizations and their community members would *not* be better off. Moreover, conversion into a taxable entity to avoid this restrictive infrastructure is not a viable alternative. Tax exemption is vital for independent schools. Relinquishing that status would be next to impossible for most of these schools, as it would significantly impair their financial sustainability and access and affordability by hamstringing fundraising efforts and could make education and athletic accreditations harder to obtain, among many other challenges.

[4] It is worth bearing in mind that, because Title IX is not limited to schools but applies to any "Education program or activity," these regulations could conceivably apply to a two- or three-person tax-exempt educational advocacy group, such as a financial literacy or anti-smoking organization. *See* 20 U.S.C. § 1681.

For these reasons, the district court's ruling also threatens the very existence of these important institutions.

ARGUMENT

I. Independent schools have relied on longstanding authority that tax exemption is not "federal financial assistance."

For many years, independent schools throughout the country have relied on federal regulations and a consensus among federal agencies, education lawyers, and other professionals that, by foregoing federal funds, they would not be bound to the one-size-fits-all requirements of federal statutes (such as Title IX) that mandate strict and cumbersome regulatory infrastructures. The district court's holding flies in the face of that longstanding authority and is contrary to Congress's intent, the Supreme Court's Spending Clause jurisprudence, federal agency interpretations of Title IX, and lower-court judicial precedent.

A. *Congress did not intend the definition of "federal financial assistance" in the Title IX statute to include tax-exempt status.*

Title IX provides, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). While Title IX does not specifically define "federal financial assistance," Congress's intent, as evidenced below, was to stop the expenditure of public dollars (whether via federal grants,

loans, or otherwise) on programs that violate Title IX's terms—not to regulate all organizations with a tax exemption.

In interpreting statutes, the Supreme Court and this Court look to the statute as a whole, including its surrounding provisions. *See, e.g.*, *Morgan v. Sebelius*, 694 F.3d 535, 538 (4th Cir. 2012) (" 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy' ") (quoting *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)).

Here, Title IX's administrative enforcement provision, 20 U.S.C. § 1682, which provides that the administrative remedy for a violation of Title IX is termination of federal funding, lists several examples of "federal financial assistance" as including "by way of grant, loan, or contract other than a contract of insurance or guaranty." Those examples all involve the *expenditure* of federal funds, not *exemption* from taxation.[5] Likewise, revocation of an entity's tax-exempt status is not listed among the remedies for a violation of the Title IX statute that are set forth in those provisions.

[5] Indeed, the Supreme Court has drawn a bright line between these concepts in other contexts. *See, e.g.*, *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (holding that state taxpayers only have standing to challenge specific *appropriations of government funds*, which the court defined as involving the extraction of tax money from taxpayers and then government spending of that money through government programs, and *not tax credits or other so-called tax expenditures*) (emphasis added).

As this Court explained in *Reyes-Gaona v. North Carolina Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001), "the doctrine of expressio unis est exclusio alterius instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded." Congress was plainly aware of nonprofit tax-exempt statuses at the time of Title IX's passage in 1972 (indeed, tax exemptions for certain organizations have existed under federal law since the Tariff Act of 1894) yet did not include any reference to tax exemptions in the Title IX statute.

The Supreme Court's opinion in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), supports this interpretation. In *Cannon*, the Court observed that one of Congress's primary aims in enacting Title IX was "to avoid the use of federal *resources* to support discriminatory practices." *Id*. at 704 (emphasis added). In reaching that conclusion, the Court relied upon Title IX's extensive legislative history, including the commentary by Representative Patsy Takemoto Mink (D-HI), a central figure in securing the passage of the Title IX legislation, which focused on the use of federal tax dollars, not tax exemption. *Id*. at n.36 (quoting 117 Cong. Rec. 39252 (1971)).

Other legislative history supports the conclusion that Congress's focus was on preventing the expenditure of federal dollars (i.e., funds raised through taxes and spent by the federal government) on programs that violate Title IX's terms. For

example, Congresswoman Bella Abzug (D-NY), another key figure in Title IX's passage, explained during debate in the House of Representatives that Title IX "does not regulate all institutions of higher learning. *It merely regulates those that accept Federal money.*" 117 Cong. Rec. 39258 (emphasis added).

Indeed, a hypothetical scenario presented in a 1984 House Judiciary Committee report, in connection with Congress's efforts to clarify Title IX following the Supreme Court's decision in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), confirms that private schools were not intended to be covered by Title IX unless they receive "direct federal funds"—

> A private school *which receives no direct federal funds* invites Officer Friendly to speak to a sixth grade class about traffic safety. Officer Friendly's salary is paid through a Safe Streets Act grant from the Department of Justice. Is the school covered under Title IX or Title VI as a result of Officer Friendly's appearance?
>
> No. A private school would *not* bring itself within coverage of the statutes merely by having a police officer who works for a department that receives federal funds speak at the school.

H.R. Rep No. 98-829, at 30-31 (1984) (emphasis added). At the time of the House report, as is true now, nearly every independent K-12 school in the country was tax exempt. If tax exemption brought a school under Title IX, the answer to this question could not have been an unqualified and *unambiguous* "No." Perhaps more to the point, under what standard could a tax-exempt independent school receiving no other federal funding and that is aware of this history be said to be on clear notice it *would*

be regulated by Title IX as required by the Supreme Court precedent described below?

B. *Under* Pennhurst *and* Cummings, *Congress can only bind private actors under legislation tied to federal spending such as Title IX if it does so unambiguously and the federal fund recipients subject to the legislation accept its requirements knowingly and voluntarily.*

Even if Congress had intended to extend the requirements of Title IX based on tax exemption alone, under Supreme Court precedent interpreting Congress's spending power, the government is required to do so "unambiguously," and the subject entities must "voluntarily and knowingly" accept those terms. *See Pennhurst*, 451 U.S. at 17; *see also Cummings*, 142 S. Ct. at 1569. That has not occurred. Instead, the statutory scheme and legislative history, and as discussed below, agency regulations, establish clearly that "federal financial assistance" *does not* and was never intended to include tax exemption. Indeed, it has become a practice among federal government agencies to provide notice to recipients of federal funds of the federal statutes that are applicable to them by virtue of their receiving those funds. Neither the IRS nor any other agency issues such a notification regarding tax-exempt status, to independent schools or to anyone else.

Soule by Stanescu v. Connecticut Ass'ns of Sch., Inc., 57 F.4th 43, 54 (2d Cir. 2022) is illustrative. In *Soule*, the Second Circuit held that claims brought against a school athletic conference by female athletes (alleging that it was a violation of Title IX to allow female transgender athletes to compete as female in school athletic

events) were barred under *Pennhurst*. *Id*. at 56. The Court reasoned that the school was not sufficiently on notice that it would be a violation of Title IX to allow transgender athletes to compete, citing, *e.g*., the lack of regulations so stating and the weight of federal court authority holding that it was *not* a violation of Title IX. *Id*. at 54-56. Likewise, as discussed more fully below, Title IX regulations have never stated that tax-exempt status constitutes federal financial assistance, and the weight of authority holds that tax exempt status is not federal financial assistance. Accordingly, independent schools have not "knowingly accepted" that they are subject to Title IX by virtue of their tax-exempt status; it follows under *Pennhurst* that as a result, they are not subject to Title IX.

C. *Title IX regulations do not include tax exemptions in their definitions of "federal financial assistance."*

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), where a statute is silent or ambiguous, agency interpretations of that statute are binding on courts unless procedurally defective or clearly contrary to Congress's intent. *People for the Ethical Treatment of Animals v. United States Dep't of Agric*., 861 F.3d 502, 506-07 (4th Cir. 2017). Even where *Chevron* deference is not appropriate, under *United States v. Mead Corp*., 533 U.S. 218, 234-35 (2001), agency interpretations are still entitled to respect based on their persuasiveness. Regulations implementing Title IX do not include tax exemptions in the definition of "federal financial assistance." Under *Chevron* and *Mead*, that

fact alone controls any analysis of whether an institution's tax-exempt status brings it within Title IX's jurisdiction. Independent schools have long relied on these regulations (and the fact that agencies agree tax-exempt status alone does not constitute "federal financial assistance") and many have specifically declined valuable federal funds because they do not want to become subject to federal regulations such as Title IX. *See, e.g., Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 847–48 (2d Cir. 1996) (schools "can avoid the requirements" of Spending Clause legislation "by declining federal funding.").

The administrative enforcement provisions of Title IX direct each individual federal department and agency to promulgate its own rules and regulations to effectuate the provisions of Title IX as to each agency's individual programs.[6] The relevant regulations[7] define "federal financial assistance" to include specific "grants

[6] *See* 20 U.S.C. § 1682 (empowering agencies that extend grants or other assistance to education programs or activities to promulgate their own rules and regulations under Title IX).

[7] The district court below and the leading case on this issue, *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n Illinois, Inc.*, 134 F. Supp. 2d 965, 971-72 (N.D. Ill. 2001), have cited the Department of Education regulation 34 C.F.R. § 106.2(g) and its definition of "federal financial assistance." However, tax exemptions under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), are administered by the Internal Revenue Service ("IRS"), a bureau of the Department of the Treasury. The appropriate authority to look to is thus the Department of Treasury's Title IX regulations. However, the result is the same because the definitions in the two regulations, along with those of 21 other agencies, are all the same, and none of them reference tax-exempt status. In other words, the agencies tasked with implementing

or loans," "grants of real or personal property," "services of Federal personnel," "sale or lease of Federal property" or another "contract, agreement, or arrangement." 31 C.F.R. § 28.105; 34 C.F.R. § 106.2(g).

Tax exemptions are not on this list and thus fall outside the definition of "federal financial assistance."[8] *See Reyes-Gaona*, 250 F.3d at 865 (canon of construction that what is omitted from a list "was intended to be omitted or excluded"). The conduct of the executive branch further confirms this view. To our knowledge, the federal government has never brought an enforcement action or launched so much as a compliance review against a tax-exempt entity that does not receive federal funds for failing to have a Title IX program. The district court below

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Title IX *all agree* that tax-exempt status does not constitute "federal financial assistance."

[8] While the Supreme Court in *Regan v. Tax'n With Representation of Washington*, 461 U.S. 540, 544 (1983) commented that "[a] tax exemption has much the same effect as a cash grant," *Regan* was not a Title IX case—it decided whether the IRS denial of 501(c)(3) status to an entity that was substantially engaged in political lobbying violated the First Amendment. It did not hold that a tax exemption constituted a "cash grant" for any purpose under federal law. Moreover, the Court in *Regan* specifically noted in a footnote that "[i]n stating that exemptions and deductions, on one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." *Id*. at 544 n.5. Moreover, *Regan* is distinguishable because it involved a challenge to the federal government's regulation of taxation and not an effort to expand the scope of Spending Clause legislation like Title IX, which, as noted above, requires that Congress have spoken unambiguously and that the federal fund recipients subject to the expansion accept those requirements knowingly and voluntarily.

acknowledged these facts but declined to give the agency interpretations proper deference.

D. *A majority of the courts that have addressed this issue have held that "federal financial assistance" does not include tax-exempt status.*

Receipt of "federal financial assistance" brings an entity under the jurisdiction of a web of federal statutes and regulations, and a number of district courts have considered the question of whether tax-exempt status constitutes "federal financial assistance" under Title IX, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. ("Title VI"), and/or The Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*. (the "Rehabilitation Act"). The overwhelming majority of those courts have held that tax-exempt status does not constitute "federal financial assistance." *See Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n Illinois, Inc*., 134 F. Supp. 2d 965, 971-72 (N.D. Ill. 2001) (relying on the common federal agency definition of "federal financial assistance" quoted above and the Supreme Court's decision in *Department of Transp. v. Paralyzed Veterans of Am*., 477 U.S. 597, 606-07 (1986), in which the Supreme Court held that Title IX applies only to entities that receive federal money, not those that merely benefit economically from federal programs); *Zimmerman v. Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 332 (E.D.N.Y. 2012) (holding that tax-exempt status "does not constitute Federal financial assistance within the meaning of Title IX"); *Merrifield v. Beaven/Inter-Am. Companies, Inc*., No. 89 C 8436, 1991 WL 171376, at *3 (N.D. Ill. Aug. 30, 1991) ("The term 'assistance'

[under the Rehabilitation Act] connotes transfer of government funds by way of subsidy, not merely exemption from taxation."); *Martin v. Delaware L. Sch. of Widener Univ.*, 625 F. Supp. 1288, 1302 n.13 (D. Del. 1985), *aff'd*, 884 F.2d 1384 (3d Cir. 1989) ("'Assistance' [under the Rehabilitation Act] connotes the transfer of government funds by way of subsidy, not merely exemption from taxation."); *Bachman v. Am. Soc. of Clinical Pathologists*, 577 F. Supp. 1257, 1265 (D.N.J. 1983) (holding that plaintiff's tax-exempt status did not constitute "Federal financial assistance" for purposes of the Rehabilitation Act); *Stewart v. New York Univ.*, 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976) (holding that tax deductions and exemptions afforded law school by federal law did not constitute "Federal financial assistance" under Title VI).[9]

The Supreme Court decisions in *Grove City* and *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999), cited by Appellees and in the district

[9] Other courts, while not directly ruling on the issue, have expressed skepticism that tax-exempt status qualifies as "Federal financial assistance." *See, e.g.*, *Russo v. Diocese of Greensburg*, No. CIV.A09-1169, 2010 WL 3656579, at *3 (W.D. Pa. Sept. 15, 2010) ("expressing doubt" that tax-exempt status qualified as "Federal financial assistance" for purposes of Title IX and the Rehabilitation Act); *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890, at *17 n.4 (E.D. Tenn. Feb. 20, 1995) (noting that it was not basing its holding that the defendant was subject to Title VI on the association's tax-exempt status qualifying as "Federal financial assistance," because that is a minority view).

court's opinion below, do not answer the question before this Court.[10] Both of those cases involved the separate question of whether the defendant was a "recipient" of "federal financial assistance" (with both opinions concluding that an entity receiving either direct or indirect assistance may still qualify as a "recipient"). *Grove City*, 465 U.S. at 564; *Smith*, 525 U.S. at 468. Here, the question is whether a tax exemption is "federal financial assistance" for purposes of Title IX. As set forth above, it is not. While the "assistance" in both the *Grove City* and *Smith* cases involved an actual cash transfer from the federal government to the defendant, a tax exemption involves no actual receipt of funds from the federal government.

II. The district court's decision threatens the independence and continued existence of independent schools and other nonprofit entities nationwide.

Independent schools have long protected their students and staff through different, but rigorous and effective, safeguards tailored to their size and mission.

[10] *Amici* are aware of only three judicial opinions, aside from the district court's decision below, holding that tax exemptions do constitute "federal financial assistance" for purposes of Title VI, Title IX, or the Rehabilitation Act. *See E.H. v. Valley Christian Acad.*, No. 221CV07574MEMFGJSX, 2022 WL 2953681, at *7 (C.D. Cal. July 25, 2022); *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1192–93 (S.D.N.Y. 1988), *aff'd*, 882 F.2d 621 (2d Cir. 1989) (noting, without analysis that the defendant was subject to Title IX because it "receives federal assistance indirectly through its tax exemption *and directly through grants from the Department of Energy and EPA*," rendering the former essentially dicta) (emphasis added); *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972). While Appellees and the district court below cited to a footnote in *M.H.D. v. Westminster Sch.*, 172 F.3d 797 (11th Cir. 1999), the Eleventh Circuit in that case did not rule on whether tax exemptions constitute "Federal financial assistance" under any of those statutes.

The district court's holding would eliminate any flexibility, and it threatens to undermine the fundamental independence that makes independent schools what they are. The Department of Education's Title IX regulations and accompanying guidance impose complex, prescriptive, and proscriptive requirements that threaten the foundational purpose of independent schools. These regulations include elaborate processes for responding to sexual harassment and other misconduct that could be extended to apply to all independent schools of all sizes, complexity, and means should their tax-exempt status qualify as "federal financial assistance."

Additionally, the term "federal financial assistance" appears in many other statutes and regulations, including regulations governing awards of federal grants. If the Court extends the definition of that term in Title IX to include tax-exempt status, courts may apply the same logic to those other statutes, layering still more regulations onto independent schools. Those other laws and restrictions contain requirements that would be almost impossible for many independent schools to meet, forcing them to consider converting or reorganizing as a taxable entity to avoid those restrictions, which would threaten their entire financial model.

A. *Independent schools protect their communities through different, but rigorous and effective, safeguards tailored to their size and mission that are compliant with state and local laws.*

Independent schools care deeply about protecting their students and other community members and have long been focused on regulating community health,

safety, and conduct issues through the promulgation of policies that are legally compliant, mission-consistent, and tied to deeply held beliefs in the community. When advised of behavior that may have caused harm, independent schools respond effectively and promptly, pursuant to thoughtful policies and procedures in compliance with state and local laws, industry standards of best practice, and consistent with their individual missions and cultures. In reliance on the longstanding authority discussed in Section I above, they have not always chosen to institute the exact policies and prescriptive measures required by Title IX, but have instead opted to develop policies and procedures to combat sex-based discrimination and harassment that more closely align with their unique identity, culture, and community size and budget.

For many different reasons, application of Title IX's prescriptive regime would have a unique and detrimental impact on independent schools that are members of *Amici*.

Title IX's regulations are formulaic and not suitable for most independent school environments, a large number of which have small and close-knit communities. Title IX's regulations take a "checking of the boxes approach" to handling allegations of sexual harassment, but an individual school—with a unique culture and nimble administration—can tailor its own policies and procedures to respond in a manner better fitting the school's mission and makeup. Additionally,

while Title IX's regulations create a rigid timeline for investigating complaints, many independent schools can speed up, slow down, or change the order of steps in an investigation to better serve the school community, including both the accuser(s) and accused(s). Indeed, a nimble independent school can in many cases address complaints more expeditiously and effectively without sacrificing fairness or accuracy when left with the freedom to construct its own processes.

The requirement that all parties have an opportunity to retain a lawyer raises concerns as to fairness and equity if one side in the dispute can afford a lawyer and the other cannot. Similarly, Title IX regulations that would prevent independent schools from keeping allegations under review confidential are problematic. These are often small communities, both in terms of number of people and physical space, where students cannot avoid one another. In environments like those, news of allegations can spread quickly, creating a spectacle, disrupting the classroom environment, and—most importantly—making the process even more stressful for the accused(s) and accuser(s) alike.

The adversarial nature of the Title IX protocol is also inconsistent with some independent schools' values, which often prioritize dynamic and circumstances-based conflict resolution. Many schools deploy approaches that are trauma-informed and age-appropriate, and the prescriptive requirements of Title IX may hinder schools' ability to do so. In addition, a more compassionate and personal

process is often better for both the accuser(s) and accused(s) and results in all parties being more forthcoming with information about events that transpired.

Finally, the provision of the Title IX regulations prohibiting schools from taking interim measures, such as removing the accused(s) from the school pending an investigation for any reason other than an immediate threat to the physical health and safety of another could be disastrous for certain schools. Many independent schools are one-building campuses with fewer classes per grade than public schools. Separating the accused(s) and accuser(s) would be impossible. Not having the flexibility to remove an accused person when appropriate based on the judgment of school administrators would result in greater stress and disruption for all involved, jeopardizing the mental health of both the accused(s) and accuser(s) alike.

The point is not that independent schools do not wish to act—the point is that they wish to act and have built systems to act, promptly and efficiently, in a manner consistent with their own respective independent educational ethos and mission. The district court's holding would deprive them of that flexibility, yet that flexibility and carefully tailored approach to education is exactly why so many students, families, educators, and other community members choose independent schools. Indeed, to require all independent schools and other small nonprofits to comply with the inflexible and cumbersome infrastructure of Title IX and other federal laws would be contrary to public policy and the public good.

As the Supreme Court explained in *Bob Jones University v. United States*, 461 U.S. 574, 587–88 (1983), "in enacting both § 170 and 588 § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." While the holding of *Bob Jones* is that nonprofits must abide by public policy in order to retain their tax-exempt status, that does not mean that all nonprofits must operate according to a one-size-fits-all procedure defined by the federal government. As discussed, independent schools have developed their own processes for addressing allegations of sexual harassment that better satisfy the broader aims of Title IX in the unique settings of those schools.

B. *The Department of Education's Title IX regulations and guidance contain many impractical and inflexible requirements.*

Title IX regulations include a host of shifting requirements that could, now or in the future, apply to tax-exempt schools and other nonprofits with educational programs. The most complicated aspect of current Title IX compliance is the requirement to have a fully-staffed Title IX coordinator and adopt complex, legalistic grievance procedures for dealing with harassment complaints. *See* 34 C.F.R. § 106.8(a) (appointment of Title IX coordinator); (c) (requirement of grievance procedures); *see also id.* § 106.45 (elements of grievance procedure).

There are many others, including restrictions on athletics and donations to support a gender-specific cause or program.

As an initial matter, both the substantive and detailed procedural requirements imposed on schools change regularly, and a new presidential administration will often add its own new requirements and obligations. Following longstanding guidance from the Obama-era Education Department instructing schools how Title IX should be interpreted in school settings, the Trump Administration issued regulations, effective August 14, 2020, that significantly changed schools' obligations, adding a set of detailed and prescriptive required procedures for investigating and adjudicating allegations of sexual harassment. The current Department of Education has, in turn, issued its own notice of proposed rulemaking reflecting its intention to issue yet another new set of regulations, *see* 87 Fed. Reg. 41390 (July 12, 2022), with final regulations significantly changing the Trump-era regulations currently expected to be published in the fall of 2023.[11] The Trump-era regulations were accompanied by a nearly 2,000-page Preamble. The Biden notice of proposed rulemaking was accompanied by a nearly 700-page Preamble, and has

[11] *See* U.S. Dep't of Educ. Regulatory Agenda, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1870-AA16; *see also* U.S. Dep't of Educ. Blog, A Timing Update on Title IX Rulemaking (May 26, 2023), https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/.

received in excess of 240,000 public comments, suggesting its publication will be even more significant than the Trump-era final rule. This ping-pong approach places independent schools squarely in the crosshairs of partisan disputes in precisely the manner they wish to avoid, preferring instead to provide consistent, reasoned, and effective responses to complaints of sexual misconduct that do not change with every election. The alternative would require them to manage a constantly changing and increasingly intricate set of rules governing compliance.

Current regulations specify in granular detail requirements for investigating and adjudicating sexual harassment complaints. Some of the more detailed requirements are:

- The school must have at least three different staff members to serve as an investigator, a decision-maker for the initial finding, and the decision-maker for the appeal, respectively. *See* 34 C.F.R. §106.45(b)(8)(iii)(B). Each of those individuals must be trained on and apply legal principles including, but not limited to, (1) privilege; (2) standards of proof; and (3) the rules of evidence. *See* 34 C.F.R. §106.45(b)(1)(iii). Additionally, they must know the technical legal definition of harassment and summarily dismiss cases that do not satisfy that definition, while being legally required to adjudicate cases that do satisfy it. *See* 34 C.F.R. §106.45(b)(3).

- Each school must employ an elaborate investigation and adjudication process and implement what essentially amount to a prescribed set of rules of civil procedure. The regulations require robust notice requirements (34 C.F.R. § 106.45(b)(2)). The accused and complainant must have the opportunity to present witnesses (including fact and expert witnesses) and other inculpatory and exculpatory evidence, inspect and review evidence, and have others present at proceedings during the adjudication of complaints (34 C.F.R. § 106.45(b)(5)). The investigator must draft a written investigative report (34 C.F.R. §

106.45(b)(5)), and the decision-maker must make a written determination regarding responsibility that includes half a dozen different prescribed subsections, including findings of fact, application of the school's written sexual misconduct policy, and a rationale. 34 C.F.R. § 106.45(b)(7). An appeal must be allowed on one or more of three different prescribed grounds. 34 C.F.R. § 106.45(b)(8). And records of most of the above must be maintained for every complaint for seven years. 34 C.F.R. § 106.45(b)(10).

- While these elaborate proceedings are underway, the school can take no disciplinary action against the accused student unless the school finds that a student is an immediate threat to the physical health and safety of another student (a decision that can, itself, be challenged by the accused). 34 C.F.R. § 106.44 (a) & (c). This means under certain circumstances that a teacher cannot remove a disruptive student from class if he or she has been accused of sexual harassment until the procedures above have been completed, including an appeal. Schools are also prohibited from restricting the ability of either party to discuss the allegations under investigation (*e.g.*, no gag orders). 34 C.F.R. § 106.45(b)(5)(iii).

Compliance with many of these strict directives would be nearly impossible for small or modest sized independent schools. Eleven percent of the members of the NAIS have an enrollment of 100 students or fewer. Schools with an enrollment at or under 300 students constitute 47% of NAIS's membership and more than 38% of NBOA's. Moreover, according to figures from nearly 1,500 independent schools reporting 2022 data to NAIS and NBOA, 19% had 20 or fewer teachers. The 2022 data set also shows that 24% had fewer than 50 employees. None of the tasks described above can be taken on by a typical teacher or administrator without specialized training and enough available time to draft reports, entertain appeals, and understand and apply legal concepts such as privilege, relevance, legal definitions

of sexual harassment, and standards of proof. How could a school with only a handful of teachers and administrators be expected to satisfy the mandates described above?

Thinking about other nonprofits that, like *Amici*, do not accept any forms of enumerated federal financial assistance helps illustrate the point. For example, consider a community tax-education nonprofit that provides education at local libraries to instruct underserved communities in financial literacy, or an anti-violence-education nonprofit that provides programs in local high schools—did Congress intend that Title IX cover these organizations? Does the statutory text support their coverage? If not, then Congress could not have intended to extend Title IX to entities purely due to their tax-exempt status, as such an extension would apply equally to these education-related nonprofits.

Universities and public school systems often have entire divisions dedicated to the investigation and adjudication of Title IX complaints. Johns Hopkins University, for instance, has a dedicated office for responding to Title IX complaints, the Office of Institutional Equity, with a staff of 15, 11 of whom have law degrees and 7 of whom are full time investigators.[12] A requirement to employ individuals with these specialized skills, if applied to a small or even medium sized independent school with stretched finances and personnel, could force such an institution to

[12] *See* https://oie.jhu.edu/contact-us/oie-staff/index.html

employ staff in sexual harassment investigations that are undertrained in the specialized legal concepts. Hiring, training, and paying these specialists require resources, and the diversion of such resources may impact tuition, financial aid, and salaries, hurting teacher quality and making independent schools less accessible to children of limited means.

Moreover, liability—not for failing to safeguard students and staff, but for failing to meet the intricate standards—would be inevitable. And as has been proven in organizations across many disciplines, there is no one correct path to ensuring safety and equity.

C. *The district court's holding would be unlikely to be limited to just Title IX and could mean that a host of other laws and regulations would apply to independent schools and other nonprofits, threating their ability to operate and, indeed, their very existence.*

Other cumbersome regulatory regimes could be dramatically expanded should the definition of "federal financial assistance" be stretched to include tax exemptions. As just one example, the regulations implementing the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C § 6301, *et seq*.), which authorizes the issuance of federal grants, has a very similar definition of "federal financial assistance" to Title IX and its regulations. *See* 2 C.F.R. § 200.1.11. Those regulations have strict requirements about which costs can be covered by "federal financial assistance." For instance, only "Allowable Costs" are permitted to be covered by funds from a federal award, defined as the federal financial assistance

the recipient receives, which do not include state and local taxes. 2 C.F.R. §§ 200.405; 200.423; 200.470; 200.1. Those costs must also be "Reasonable," a definition that requires, among other things, that those costs be consistent with market prices. 2 C.F.R. § 200.404.

Federal agencies have interpreted these regulations to mean that a federal grant recipient must segregate federal assistance and ensure that the assistance is used only for reasonable and allowed costs.[13] So, if a tax exemption were to be deemed "federal financial assistance," the funds involved would be entity money that the entity would have used to pay its federal taxes but for the exemption. Because no school segregates such funds, the "federal" funds would be comingled with the rest of the school's funds, and thus none of the school's money could be used for unallowed costs such as state and local taxes. Liability under a host of other laws, including those implicated by the Age Discrimination Act, Section 504 of the Rehabilitation Act, and Title VI, are also triggered by receipt of federal financial assistance, the respective definitions of which under those statutes, as noted above, is again very similar to Title IX. If the definition of federal financial assistance is extended to include tax exemption, independent schools and, importantly, other nonprofits could find themselves subject to those rules, and many others, as well.

[13] *See, e.g.*, United States Department of Health and Human Services SF-424 Application Guide at 3.

Moreover, it would not be a viable option for independent schools to convert to a taxable status to avoid the burdensome requirements of these regulatory frameworks. Fundraising, which relies on the ability of the donor to take a tax deduction for his or her donation, would dry up. Schools would not be able to grow and maintain endowments, charitable funds which improve stability and the ability to provide affordable, accessible education. This, in turn, would cause independent schools to cut educational programming (including critical support services such as counseling) and financial aid and raise tuition, reducing the ability of families of limited means to access private education. Finally, taxable status would place roadblocks in schools' efforts to access state funding, financing, meet state regulatory obligations, and receive accreditation. For all of these reasons, the district court's opinion threatens the very existence of independent schools and other nonprofits.

CONCLUSION

For all of these reasons, the *Amici* respectfully submit that the decision of the district court should be reversed.

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Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 23-1453 **Caption:** Donna Buettner-Hartsoe v. Baltimore Lutheran High Sc

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