No. 23-1453

IN THE 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
Case No. 1:20-cv-03132-RDB, Hon. Richard D. Bennett

BRIEF OF NAPA INSTITUTE LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT BALTIMORE LUTHERAN HIGH SCHOOL ASSOCIATION AND REVERSAL OF THE ORDER BELOW

Roman Martinez
G. Charles Beller
Alexander G. Siemers
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

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Counsel for Amicus Curiae *Napa Institute Legal Foundation*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Napa Institute Legal Foundation states that it has no parent corporation and that no corporation or publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Napa Institute Legal Foundation, doing business as Napa Legal Institute ("Napa Legal"), is a non-profit religious corporation organized under California law (Cal. Corp. Code § 9110 et seq.). For federal tax purposes, Napa Legal is a 501(c)(3) tax-exempt public charity. Napa Legal's mission is to provide faith-based non-profits with cost-efficient educational materials to support compliance with federal, state, and local laws. In pursuit of this mission, Napa Legal provides educational materials on corporate governance, tax, philanthropic, and other legal and compliance topics that impact faith-based non-profits. Napa Legal's areas of expertise include compliance with state and federal requirements for tax-exempt organizations and the legal obligations for faith-based organizations that accept federal financial assistance.

Amicus has a strong interest in this case because it concerns whether "federal financial assistance" under Title IX includes tax-exempt status. *Amicus* regularly provides compliance guidance materials to faith-based non-profits, including guidance on what qualifies as "federal financial assistance." Due to the district

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[1] Both parties to this appeal have consented to the filing of this *amicus* brief. *See* Fed. R. App. P. 29(a)(2). This brief was prepared in whole by undersigned counsel in consultation with *amicus curiae*. No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

court's decision, faith-based and other non-profits now have to worry about being subject to Title IX due to their tax-exempt status—even if they have carefully avoided receiving federal funds. The district court's decision flouts the text and the structure of Title IX and disregards nearly six decades of settled practice. *Amicus* urges the Court to reverse the judgment below.

INTRODUCTION

As Spending Clause legislation, Title IX is "much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In Title IX, the government "condition[s] an offer of federal funding on a promise by the recipient not to discriminate" on the basis of sex. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). And like other contracts, there must be a meeting of the minds on terms. So "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst*, 451 U.S. at 17). Doing so allows the recipient to "voluntarily and knowingly" accept the congressional offer. *Id*.

The Supreme Court has repeatedly applied this fundamental principle. Most recently, its decision last year in *Cummings v. Premier Rehab Keller, P.L.L.C.*, determined that emotional distress damages were not available under either the Rehabilitation Act or the Affordable Care Act because there was "no ground" to conclude that federal funding recipients have "clear notice" of such a condition. 142

S. Ct. 1562, 1576 (2022). In *Gebser*, the Court concluded that funding recipients were not clearly on notice that they were liable under Title IX for discrimination of which the recipients were unaware. 524 U.S. at 290-93. And in *Barnes*, the Court held that punitive damages may not be awarded under the Americans with Disabilities Act or the Rehabilitation Act due to the same lack of clear notice. 536 U.S. at 187, 189.

Each of these cases turned on whether some aspect of the "contract" between the funding recipient and the federal government was clear. In those cases, although the agreement's outer contours were fuzzy, there was no dispute as to the contract's central term: Everyone knew that the recipient had accepted federal funds and agreed to comply with the respective statute's nondiscrimination obligations.

Here, though, that most essential term was *never* made clear. Baltimore Lutheran had absolutely no reason to think that it was signing up for burdensome compliance with Title IX when it sought and obtained tax-exempt status under 26 U.S.C. § 501(c)(3). Indeed, its tax-exempt status long predates Title IX's passage. *See* ProPublica, *Nonprofit Explorer: Baltimore Lutheran High School Association Inc.*, https://projects.propublica.org/nonprofits/organizations/526043036 (last visited June 12, 2023) (noting Baltimore Lutheran's tax-exempt status since 1959). In these circumstances, the Supreme Court's concerns about "unambiguous" conditions in Spending Clause legislation take on added weight.

For the reasons laid out already in Baltimore Lutheran's brief, this Court should hold that accepting tax-exempt status does not create a contract between independent schools and the federal government binding the schools to Title IX. Indeed, close examination of Title IX's text and structure establishes that such a contract has never existed—both (1) because "Federal financial assistance" was well understood to mean monetary aid such as grants or loans given by the federal government to individuals or organizations and (2) because finding that "Federal financial assistance" does encompass tax exemptions contorts several other provisions in Title IX. Moreover, nearly sixty years of history also show that no one in Congress, in the Executive Branch, or on the Supreme Court thought that Title IX reached educational organizations solely on the basis of their tax-exempt status. The legislative history is silent on tax exemptions and assumes that funding was at issue. More than twenty federal agencies have comprehensively defined what "Federal financial assistance means" without reference to tax exemptions. And multiple Supreme Court decisions make little sense if tax exemptions qualify as such assistance. The decision below should be reversed.

ARGUMENT

I. TITLE IX'S TEXT AND STRUCTURE DEMONSTRATE THAT TAX-EXEMPT STATUS IS NOT "FEDERAL FINANCIAL ASSISTANCE"

The district court's opinion requires accepting the idea that Congress, by using the term "Federal financial assistance" (and without mentioning tax-exempt status at all), subjected every independent school—and every tax-exempt organization with educational programs or activities—to Title IX. That is a "wafer-thin reed" to support such a radical reading, given "the sheer scope" of claimed authority and its "unprecedented nature." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). The district court took the term "Federal financial assistance," stretched it beyond all recognition, and then wrenched it out of its statutory context. It thereby ignored the fundamental precept that Congress does not "alter the fundamental details of a regulatory scheme in vague terms" or hide elephants in mouseholes. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And it also disregarded the Spending Clause's "clear notice" requirement. *See, e.g.*, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (2022).

This Court should be skeptical of the district court's "claim[] to discover in a long-extant statute" an "unheralded" meaning that effects a "transformative expansion" of the legal landscape. *West Virginia*, 142 S. Ct. at 2610 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). If Congress actually wanted

to impose Title IX obligations on an educational entity just because that entity has tax-exempt status, it would have said so clearly.

A. The Ordinary Meaning Of "Federal Financial Assistance" In 20 U.S.C. § 1681(a) Does Not Include Tax-Exempt Status Under 26 U.S.C § 501

Title IX prohibits discrimination on the basis of sex in "any education program or activity receiving *Federal financial assistance*." 20 U.S.C. § 1681(a) (emphasis added). Because Title IX does not define the phrase "Federal financial assistance," "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). That ordinary meaning shows that "Federal financial assistance" refers to funding or active support affirmatively provided by the federal government—not to an entity's tax-exempt status.

When Title IX became law in 1972, at least one dictionary definition of "assistance" connoted a financial grant. *Webster's Third New International Dictionary of the English Language* 132 (1961) ("*Webster's Third*") ("the help supplied or given; support (economic assistance to several countries)"; "aid (often financial) to the needy (a program of public assistance)"). Others simply referred to "help" or "aid." *See Assist*, *Black's Law Dictionary* 155 (4th ed., rev. 1968) ("*Black's*"); *American Heritage of the English Language* 43 (paperback ed. 1970) ("*American Heritage*"). Dictionary definitions also indicated that "financial" related

to funding. *Webster's Third*, *supra*, at 851 ("in good standing as to payment of dues; paying dues"); *Oxford English Dictionary* 223 (1933 ed., rev. 1961) ("[o]f, pertaining, or relating to finance or money matters" and "[o]f a member in a society: that pays"); *Financial*, *Black's*, *supra*, at 758 ("[d]ealing in money"). Related definitions suggested the same. *See Finances*, *Black's*, *supra*, at 758 ("The cash he has on hand, and that which he expects to receive, as compared with the engagements he has made to pay."); *American Heritage*, *supra*, at 267 ("finance" means "[t]o supply the funds or capital for").

Taken together, "financial assistance" thus means monetary aid or help which is given by one party to another. And "Federal financial assistance" meant such aid—that is, grants or loans—given by the federal government to individuals or organizations. Not one of these definitions mentions a tax exemption or naturally stretches that far.

For good reason. A tax exemption was well-understood to be a "[f]reedom from a general duty or service" or an "immunity from a general burden, tax, or charge." *Exemption*, *Black's*, *supra*, at 681. Tax exemptions have "roots reaching back to the British Statute of Charitable Uses of 1601 and to earlier state constitutional provisions, and most of today's exemptions from income taxation date from the Revenue Act of 1894." Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Income Tax*, 85 Yale L.J. 299, 301

(1976) (footnotes omitted). And while there is some debate about whether charitable institutions have been "given preferential treatment because they provide a benefit to society," *Bob Jones Univ. v. United States*, 461 U.S. 574, 589 (1983), or whether such exemptions are "an organic acknowledgement of the appropriate boundaries of income tax itself," Bitker & Rahdert, 85 Yale L.J. at 333, the end result is a "freedom from" or an "immunity"—*not* an affirmative transfer of funds, *see Exemption*, *Black's*, *supra*, at 681.

In *Walz v. Tax Commission*, Justice Brennan highlighted the "fundamentally different" natures of tax exemptions and general subsidies: "A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer," simply "relieving a privately funded venture of the burden of paying taxes." 397 U.S. 664, 690 (1970) (Brennan, J., concurring). That subsidies and exemptions are "fundamentally different" makes intuitive sense. As everyone understands, the government affirmatively giving you money is different than the government passively allowing you to keep your own money. Only the former is reasonably understood to count as "Federal financial assistance."[2]

[2] Perhaps for this reason, the Supreme Court has consistently used the term "funding" as a shorthand way of describing "federal financial assistance." *See, e.g.*, *Gebser*, 524 U.S. at 291-92; *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*,

At a bare minimum, the recipient of a tax exemption lacks "clear notice" that the exemption qualifies as such assistance and triggers Title IX obligations. *Cummings*, 142 S. Ct. at 1576.[3]

B. The Broader Statutory Context Reinforces That Tax-Exempt Status Is Not "Federal Financial Assistance"

Statutory text "cannot be construed in a vacuum"; the "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). Here, language in Section 1681 and other nearby Title IX provisions confirm that tax-exempt status is not "Federal financial assistance." 20 U.S.C. § 1681(a).

Start with 20 U.S.C. § 1686, a provision of Title IX which makes little sense if the district court is right. Section 1686 states that "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act[] from maintaining separate living facilities for the different sexes." A tax exemption

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496 U.S. 226, 241 (1990); *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 609-10 (1986).

[3] The district court concluded otherwise based on the Supreme Court's statement in *Regan v. Taxation with Representation* that a "tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." 461 U.S. 540, 544 (1983). But *Regan* was careful to note 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 (citing *Walz*, 397 U.S. at 690-91 (Brennan, J., concurring)). In fact, it found the comparison apt only "[f]or the purposes of this case." *Id.* at 549. Nothing in *Regan* implies that tax exemptions qualify as "Federal financial assistance" for purposes of imposing obligations under Title IX.

obviously does not count as "receiving funds." But if a tax exemption qualifies as federal financial assistance, then Section 1686 creates a bizarre dichotomy: Institutions receiving funds *can* have separate living facilities, but institutions with tax-exempt status that do not receive funds *cannot*. In that upside-down world, 501(c)(3) colleges that do not accept federal funding (for example, Hillsdale College in Michigan or Patrick Henry College in Virginia), could be sued for "maintaining separate living facilities for the different sexes"—while *no one else* could be sued on the same grounds. *See* Patrick Henry College, *Scholarships*, https://www.phc.edu/scholarship (last visited June 12, 2023) ("[W]e do not accept or participate in government funding."); ProPublica, *Nonprofit Explorer: Patrick Henry College*, https://projects.propublica.org/nonprofits/organizations/541919810 (last visited June 12, 2023) (describing Patrick Henry College as "tax-exempt since Feb. 2000"). That is a truly absurd result which wholly undercuts the district court's holding.

Section 1682 illustrates the same point. That provision of Title IX creates the agency enforcement mechanisms necessary to secure compliance with the substantive anti-discrimination requirements of Section 1681. Specifically, it states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, *by way of grant, loan, or contract* other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall

> be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

20 U.S.C. § 1682 (emphasis added). The provision then states that such agencies may penalize a recipient's non-compliance with agency requirements "by the termination of or refusal to grant or to continue [the agency's] assistance under such program or activity to any recipient." *Id.*

As the italicized language in the block quote shows, Section 1682's grant of enforcement authority is limited to agencies authorized to provide federal financial assistance "by way of grant, loan, or contract." *Id.* But tax-exempt status is not a "grant, loan, or contract." Interpreting such status to constitute a form of "Federal financial assistance" thus creates another bizarre dichotomy under which (1) Section 1681's substantive requirements can be enforced only by agencies providing certain types of such assistance (grants, loans, and contracts, but not tax exemptions); and (2) only those same types of assistance can be terminated for failure to comply with regulatory requirements. This makes no sense: Why would Congress treat an entity's tax-exempt status as a form of "Federal financial assistance" triggering Section 1681, but then not provide agency enforcement mechanisms against such entities in Section 1682?

Turn next to Section 1681(a)(6), which shows that Congress knew how to reference tax exemptions when it wanted to. That provision declares that Title IX

"shall not apply to membership practices" of "a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26" if the active membership "consists primarily of students in attendance at an institution of higher education," or to the membership practices of the YMCA, YWCA, Girl Scouts, Boy Scouts, and "voluntary youth service organizations which are so exempt . . . ." 20 U.S.C. § 1681(a)(6). This exception references 26 U.S.C. § 501(a), which in turn says that an organization described under 26 U.S.C. § 501(c)(3) shall be exempt from taxation.

So Section 1681(a)(6) creates an exception to Title IX for tax-exempt single-sex organizations like the Girl Scouts. On the other hand, single-sex organizations that are not tax-exempt *are* liable under Title IX. But if Congress really thought that tax-exempt status was equivalent to receiving money in the form of a grant—which is the premise of the district court's analysis—why would it have given special treatment to tax-exempt organizations in Section 1681(a)(6)?

Finally, other Title IX provisions talk about federal financial assistance in ways that seem to clearly assume that Congress had direct aid in mind. And nowhere is there language that seems to encompass tax exemptions. *First*, Section 1681(a)(9) refers to "any scholarship or other financial assistance awarded"—showing that scholarships (that is, active transfers of money) are paradigmatic examples of

"financial assistance." 20 U.S.C. § 1681(a)(9).[4] *Second*, Section 1681(b) speaks about "any federally supported program or activity," and "federal support" typically means "federal funds." *See, e.g.*, *City of Fairfax v. Wash. Metro. Area Transit Auth.*, 582 F.2d 1321, 1324 (4th Cir. 1978). *Third*, Section 1682 refers to the "termination" of financial assistance—an ill-fitting way to describe tax-exempt status. *See* 26 U.S.C. § 7428(c)(1)-(2) ("revocation" of tax-exempt status); *id.* § 6033(j)(1)(B) (similar).[5] And *fourth*, Section 1687 mentions "the entity of such State or local government that distributes such assistance." 20 U.S.C. § 1687(1)(B). But tax-exempt status is not "distributed" in the way that money clearly is. *See Distribute*, *Oxford English Dictionary* (1896 ed., online 2023) ("to deal out or bestow in portions or shares among a number of recipients"). These provisions each fit nicely if tax-exempt status is not federal financial assistance, but the district court did not analyze any of them.

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[4] Relatedly, "awarded" is an odd verb to refer to a tax exemption. *See, e.g.*, 26 U.S.C. § 501(p)(1) ("recognition of exemption under subsection (a)"); *id.* § 508(a)(1) ("applying for recognition of section 501(c)(3) status"); *id.* § 6104(c)(1)-(2) (similar).

[5] On the other hand, it is natural to speak of "terminating" federal funding, and the Supreme Court has done so repeatedly. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005) (describing § 1682 as allowing a federal agency to "terminate funding"); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 638-639 (1999) (§ 1682 provides for "the termination of funding to give effect to the statute's restrictions"); *NCAA v. Smith*, 525 U.S. 459, 467 n.5 (1999) (describing § 1682 as "authorizing federal administrative enforcement by terminating the federal funding of any noncomplying recipient").

II. OTHER INDICIA OF STATUTORY MEANING CONFIRM THAT TAX-EXEMPT STATUS DOES NOT QUALIFY AS "FEDERAL FINANCIAL ASSISTANCE"

Text and structure are more than sufficient to resolve this case. But that is not all that Baltimore Lutheran has in its favor. For almost six decades, key actors have universally understood that "Federal financial assistance" does not include tax-exempt status. Congress said nothing at all about tax exemptions qualifying as financial assistance when passing either Title VI (which introduced the "Federal financial assistance" phrase into federal law) or Title IX. Later, over twenty Executive Branch agencies enacted Title IX regulations defining "Federal financial assistance" in a way that plainly excludes tax exemptions. And at least one Supreme Court decision would have come out the other way if tax-exempt status counted as "Federal financial assistance"—along with at least two others which make little sense if the district court's opinion is correct.

In short, all three branches of government have long sung in harmony: Tax-exempt status does not qualify as "Federal financial assistance" under Title IX. This longstanding consensus refutes any argument that Baltimore Lutheran would have had "clear notice" that it was signing up for Title IX obligations simply by obtaining 501(c)(3) status.

A. The History of Title VI and Title IX Confirms That Tax-Exempt Status Is Not "Federal Financial Assistance"

Title IX was "patterned after Title VI of the Civil Rights Act of 1964." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979). Both statutes state that "[n]o person . . . shall . . . be denied the benefits of, or be subject to discrimination under any program or activity receiving *Federal financial assistance*." 42 U.S.C. § 2000d (Title VI); 20 U.S.C. § 1681(a) (Title IX) (emphasis added). Title IX simply substitutes "sex" for "race, color, or national origin" and tacks on the adjective "educational" to the nouns "program or activity." *See* 20 U.S.C. § 1681(a). And Title IX's drafters both acknowledged that they were drawing on Title VI's "identical language" and "explicitly assumed that it would be interpreted and applied as Title VI had been." *Cannon*, 441 U.S. at 694-95 & nn.16-19.

Yet nothing in Title VI's text suggests that federal financial assistance includes tax exemptions. And during Title VI's passage, no one broached the possibility that tax exemptions counted as federal financial assistance. On the contrary, there is substantial evidence that members of Congress "clearly assumed that 'federal financial assistance' referred to grants of funds and loans by federal agencies." Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L.J. 51, 83 (1972); *see id.* at 83-85 (summarizing evidence). To give just two examples: a list of covered programs prepared for a Congressman by the Deputy Attorney General "made no

mention of tax allowances, though it embraced such minor items as payments to three counties in Minnesota." *Id.* at 83. And in the floor debate, one Senator stated that Title VI "would eliminate all the confusion and discussion that arises every time a *grant* bill comes before the Senate." *Id.* at 84. By contrast, *no one* thought to mention that tax-exempt status came within Title VI—because, of course, it did not.

Title IX itself was enacted in 1972, eight years after Title VI. But to counsel's knowledge there is no legislative history intimating that Congress thought tax-exempt status a trigger for Title IX obligations. That "silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). In fact, legislative history shows the contrary: Congress was concerned with federal funding, not tax-exempt status. *See Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390, 1395-98 (11th Cir. 1997) (summarizing evidence), *reversed*, 526 U.S. 629 (1999).

Again, two examples are illustrative. Representative Edith Green, the author of Title IX, put it nicely: "If we are writing the law, I would say that any institution could be all men or all women, but my own feeling is that *they do it with their own funds and not taxpayers' funds*." *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, H.R. 5193, and H.R. 7248 Before the H. Special Subcomm. on Education of the Comm. on Education and Labor*, 92nd Cong., 1st

Sess. 581 (1971) (emphasis added). And Senator McGovern "urge[d]" his colleagues "to take every opportunity to prohibit *Federal funding* of sex discrimination." 117 Cong. Rec. at 30,158 (Aug. 5, 1971) (emphasis added). These references to funding underscore that Congress did not consider tax exemptions to generate Title IX obligations.

B. Regulations Promulgated By The Department Of Education And More Than Twenty Other Executive Agencies Confirm That Tax-Exempt Status Is Not "Federal Financial Assistance"

Executive branch action confirms that tax-exempt status does not amount to federal financial assistance. For almost fifty years, governing regulations have defined what "Federal financial assistance means" without ever mentioning tax-exempt status. That is true whether one looks to the Department of Health, Education, and Welfare's original 1975 rule, the Department of Education's current rule, or the governing regulations of more than twenty other federal agencies. And regulatory history, recent regulatory action related to the Paycheck Protection Program, and the Department of Justice's compliance manuals are all in accord. Such a mountain of evidence ought not be ignored.

In 1975, the Department of Health, Education, and Welfare issued implementing regulations for Title IX which for the first time interpreted "Federal financial assistance." *See* 40 Fed. Reg. 24,128 (June 4, 1975). That regulation

offered a comprehensive definition of what "Federal financial assistance means," and it contains no mention of tax exemptions. *Id.* at 24,137.

The Department of Education's current regulation is *identical* to that original regulation. *Compare* 34 C.F.R. § 106.2(g), *with* 40 Fed. Reg. at 24,137.[6] Again, the current regulation defines what "Federal financial assistance means," and again, tax exemptions are nowhere to be found. In full, the Department's rule reads:

> (g) *Federal financial assistance means any of the following*, when authorized or extended under a law administered by the Department:
>
> (1) A *grant or loan* of Federal financial assistance, including funds made available for:
>
> > (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
> >
> > (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
>
> (2) A *grant of Federal real or personal property or any interest therein*, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

[6] Shortly after the Department of Education was established in 1979, the original regulation migrated to its current home at 34 C.F.R. § 106.2(g), where it has remained (unchanged) to the present day. *See* 45 Fed. Reg. 30,802 (May 9, 1980); 45 Fed. Reg. 37,426 (June 3, 1980). The original regulation also remains in the same place in the Code of Federal Regulations, but under the Department of Health and Human Services. *See* 45 C.F.R. § 86.2.

> (3) *Provision of the services of Federal personnel*.
>
> (4) *Sale or lease of Federal property or any interest therein* at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
>
> (5) Any other *contract, agreement, or arrangement* which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

34 C.F.R. § 106.2(g) (emphases added).

It should be decisive that the authoritative regulation interpreting what "Federal financial assistance means" contains no mention of tax exemptions. "'As a rule, [a] definition which declares what a term "*means*" . . . excludes any meaning that is not stated.'" *Burgess v. United States*, 553 U.S. 124, 130 (2008) (alterations in original) (emphasis added) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979)). In fact, "means" shines especial light here because comparable Title VI regulations state that "Federal financial assistance *includes*" a similar list with five categories. *See* 34 C.F.R. § 100.13(f) (emphasis added). The use of "means" rather than "includes" is thus an "important textual clue[]" that the definition is comprehensive. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012). Whereas the word "includes" signals "that the examples enumerated in the text are intended to be illustrative, not exhaustive," the "narrower word 'means'" serves "to cabin a definition to a specific list of enumerated items." *Id.* That Title

IX regulations have always stated what "Federal financial assistance means" without reference to tax exemptions further confirms Baltimore Lutheran's position.[7]

The Department of Education's regulation does not stand alone. In 2000, the Department of Justice and twenty other agencies issued a "final common rule" to "promote consistent and adequate enforcement of Title IX" across federal agencies. *See* 65 Fed. Reg. 52,858, 52,858 (Aug. 30, 2000). That common rule defines "Federal financial assistance" in virtually identical terms as both the original 1975 rule and the Department of Education's current rule.[8] And these regulations are codified today in unchanged form.[9] None of these regulations defining what "Federal financial assistance means" include tax-exempt status.

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[7] Surrounding regulations bolster the conclusion that tax-exempt status is not "Federal financial assistance." 34 C.F.R. § 106.5 refers to "property financed in whole or in part with Federal financial assistance"; 34 C.F.R. § 106.31(c) singles out "scholarships, fellowships, or other awards"; and 34 C.F.R. § 106.37, entitled "Financial assistance," refers to "scholarships, fellowships, or other forms of financial assistance," *id.* § 106.37(b)(1), and mentions making an "award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds," *id.* § 106.37(b)(2)(i). All of these provisions are consistent with Baltimore Lutheran's position that federal financial assistance involves *funds* and not tax exemptions.

[8] The only difference between the common rule and the Department of Education rule is that the introductory phrase "when . . . administered by the Department" is slightly altered to "when . . . administered by the Federal agency that awards such assistance." *Compare* 40 Fed. Reg. at 24,137, *and* 34 C.F.R. § 106.2(g), *with* 65 Fed. Reg. at 52,866. That merely captures the fact that a number of the agencies issuing the common rule were not "Departments."

[9] *See, e.g.*, 6 C.F.R. § 17.105 (Department of Homeland Security); 7 C.F.R. § 15a.105 (Department of Agriculture); 10 C.F.R. § 1042.105 (Department of

Also in 2000, the Department of Education made revisions to its Title IX regulations. None of that regulatory history mentions tax exemptions. *See* 65 Fed. Reg. 68,050, (Nov. 13, 2000). In fact, the Department there again treats "Federal financial assistance" as synonymous with "*fund[ing]* a recipient"—a formulation that plainly excludes tax exemptions. *Id.* at 68,052 (emphasis added).

Just a few years ago, the Department of Education again made changes to its Title IX regulations, but it did not alter the definition of "Federal financial assistance." *See* 85 Fed. Reg. 30,026 (May 19, 2020). The only mention of tax status in the 2020 regulatory history is in a description of a comment that compared religious exemptions to tax-exempt status. *Id.* at 30,479. Elsewhere, the Department again used the terms "Federal financial assistance" and "Federal funds" synonymously, *id.* at 30,378, or employed language ill-suited to tax exemptions, *e.g.*, *id.* at 30,032 ("administrative agencies that disburse Federal financial assistance to recipients").

Energy); 13 C.F.R. § 113.105 (Small Business Administration); 14 C.F.R. § 1253.105 (National Aeronautics and Space Administration); 15 C.F.R. § 8a.105 (Department of Commerce); 18 C.F.R. § 1317.105 (Tennessee Valley Authority); 22 C.F.R. § 146.105 (Department of State); 22 C.F.R. § 229.105 (Agency for International Development); 24 C.F.R. § 3.105 (Department of Housing and Urban Development); 28 C.F.R. § 54.105 (Department of Justice); 29 C.F.R. § 36.105 (Department of Labor); 31 C.F.R. § 28.105 (Department of the Treasury); 32 C.F.R. § 196.105 (Department of Defense); 38 C.F.R. § 23.105 (Department of Veterans Affairs); 40 C.F.R. § 5.105 (Environmental Protection Agency); 43 C.F.R. § 41.105 (Department of the Interior); 49 C.F.R. § 25.105 (Department of Transportation).

Agency action relating to the Paycheck Protection Program (PPP) also shows that tax exemptions are not federal financial assistance. In 2020 and as part of the CARES Act, Congress passed PPP, a loan program backed by the Small Business Administration (SBA) to help organizations keep their workers employed during COVID-19. *See* U.S. Small Business Administration, *Paycheck Protection Program*, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program (last visited June 12, 2023); Stacy Cowley, *F.A.Q. on Coronavirus Relief for Small Businesses, Freelancers, and More*, N.Y. Times (June 2, 2020), https://www.nytimes.com/article/small-business-loans-stimulus-grants-freelancers-coronavirus.html. The SBA's guidance to organizations made clear that tax-exempt status and federal financial assistance were different kettles of fish. Specifically, the SBA made clear that while receipt of a PPP loan "constitute[d] Federal financial assistance and carrie[d] with it the application of certain nondiscrimination obligations," the SBA assured tax-exempt entities that "[a]ny legal obligations that you incur through your receipt of this loan are not permanent, and *once the loan is paid or forgiven, those nondiscrimination obligations will no longer apply*." JA101 (emphasis added). That assurance makes no sense if tax-exempt organizations were *already* subject to nondiscrimination obligations because of their tax exemption.

Finally, the consensus agency view that tax exemptions do not qualify as "Federal financial assistance" has also been embraced by the Department of Justice in the Title VI and Title IX Legal Manuals published by the Civil Rights Division. The Title VI Manual expressly concludes that "[t]ypical tax benefits—tax exemptions, tax deductions, and most tax credits—are not considered federal financial assistance. Unlike grants, most typical tax benefits are not included in the statutory or regulatory definitions of federal financial assistance because they are not contractual in nature." JA176 (citing in support the statute, implementing regulations, and "[m]ost courts that have considered the issue"). In addition, the Title IX Legal Manual contains no mention of tax benefits qualifying as federal financial assistance. *See* U.S. Dep't of Justice, Title IX Legal Manual, https://www.justice.gov/crt/title-ix (updated Aug. 12, 2021). And as far as counsel is aware, there has *never* been an enforcement action in which the government claimed that tax-exempt status alone brought an organization within Title IX.

C. Supreme Court Decisions Assume That Tax-Exempt Status Is Not "Federal Financial Assistance"

Last but not least, look to the Supreme Court. Though the Court has never squarely addressed the issue of whether tax-exempt status qualifies as "Federal financial assistance," it has assumed as much in at least three cases. In *Bob Jones University v. United States*, no one thought to mention that the university was subject to Title VI because of its tax exemption. In *Grove City College v. Bell*, the Court's

analysis was only necessary because the Justices assumed that tax-exempt colleges and universities were not already subject to Title VI or Title IX. And *NCAA v. Smith* would have come out the other way if tax-exempt status qualified as federal financial assistance.

Consider *Bob Jones* first. The issue in that case was whether Bob Jones University, which "enforce[d] racially discriminatory admissions standards on the basis of religious doctrine," qualified as a tax-exempt organization under 501(c)(3). *Bob Jones*, 461 U.S. at 577. There, the Court upheld an IRS decision to revoke the university's 501(c)(3) status because "private schools that prescribe and enforce racially discriminatory admissions standards" do not confer a public benefit. *See id.* at 577, 595-96.

No one asserted at the time that Bob Jones was subject to Title VI's ban on racial discrimination by virtue of its tax-exempt status. In fact, it was understood that "[s]ince its inception, Bob Jones ha[d] consistently refused to accept funds or grants from any government, state, federal or local, because it believe[d] such acceptance would cause the surrender of its religious principles and infringe upon its right to operate the school in harmony with such principles." *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 600 (D.S.C. 1974), *aff'd without op.*, 529 F.2d 514 (4th Cir. 1975). That is, Bob Jones shunned federal funds precisely so it could avoid Title VI's strictures. And everyone thought it had succeeded in doing so. No one

thought that this maneuver was unsuccessful because Bob Jones was already subject to Title VI as a tax-exempt entity.[10]

In fact, that is why the IRS went out of its way to put a new spin on the word "charitable" instead of simply using Title VI's enforcement mechanism to terminate the tax exemption: it did not think the latter was a possibility. So while the Supreme Court referenced Title VI to show Congress's "agreement that racial discrimination in education violates a fundamental public policy," *see Bob Jones*, 461 U.S. at 594, there is no hint in the opinion that the university was subject to Title VI.

The Supreme Court's decision in *Grove City College v. Bell* shows the significance of that silence and confirms that the Court did not think that Title IX reached tax-exempt status. 465 U.S. 555 (1984). There, the Court considered whether Grove City—a tax-exempt, private liberal arts college—was subject to Title IX by virtue of the fact that its students accepted educational grants and then used those grants to pay tuition and fees to the college. *Id.* at 559, 563; *see* ProPublica, *Nonprofit Explorer: Grove City College*, https://projects.propublica.org/nonprofits/

[10] In *Johnson*, the district court held that Bob Jones was subject to Title VI *not* because of its tax-exempt status, but because some of its students were veterans who received VA funds and then enrolled at Bob Jones using those funds. 396 F. Supp. at 600-02. That was based on the meaning of the term "recipient," and parallels the Supreme Court's decision in *Grove City*. As in *Grove City*, the district court's analysis would have been unnecessary if tax-exempt status itself brought the institution within Title VI.

organizations/251065148 (last visited June 12, 2023) (describing Grove City College as "tax-exempt since Oct. 1942"). The Court plainly did not believe that Grove City's tax-exempt status triggered Title IX. On the contrary, it described Grove City as "a private, coeducational, liberal arts college that has sought to preserve its institutional autonomy by *consistently refusing state and federal financial assistance*." 465 U.S. at 559 (emphasis added). The Court ultimately held that education grants given to students rendered Grove City a "recipient" of federal financial assistance. But of course this analysis would have been totally superfluous if merely being tax-exempt qualified as federal financial assistance.

Finally, in *NCAA v. Smith*, the Supreme Court decided whether the NCAA—a tax-exempt nonprofit overseeing college athletics—was subject to Title IX because it received dues payments from member colleges and universities who had received federal funds. 525 U.S. 459, 462 (1999); *see* ProPublica, *Nonprofit Explorer: National Collegiate Athletic Association*, https://projects.propublica.org/nonprofits/organizations/440567264 (last visited June 12, 2023) (describing NCAA as "tax-exempt since Feb. 1956"). The Court held that the NCAA was *not* a recipient of federal financial assistance because "dues payments from recipients of federal funds" do not "suffice to subject [an entity] to suit under Title IX." 525 U.S. at 470.

Under the district court's logic, *Smith* should have come out the other way. After all, the NCAA is a tax-exempt organization, and if that status counted as

"Federal financial assistance," it *would* suffice to subject the NCAA to suit. But that is not the law.

* * *

If Congress really meant to subject all tax-exempt entities to Title IX's requirements, surely it would have said so clearly. Indeed, because Title IX is Spending Clause legislation, it was *obligated* to do so. But it never did. Text, structure, and history all agree: Tax-exempt status is not "Federal financial assistance" under Title IX. This Court should not adopt a new interpretation of Title IX that multiplies the burdens on tens of thousands of independent schools serving millions of students nationwide without clear textual or historical justification.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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Respectfully submitted,

s/ Roman Martinez

Roman Martinez
G. Charles Beller
Alexander G. Siemers
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Amicus Curiae
Napa Institute Legal Foundation

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Counsel for *Amicus Curiae* Napa Institute Legal Foundation hereby certifies that:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B). The brief contains 6,499 words (as calculated by the word processing system used to prepare this brief), excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The Brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font.

Dated: June 12, 2023

s/ Roman Martinez
Roman Martinez

Counsel for Amicus Curiae
Napa Institute Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, I electronically filed the foregoing 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 this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 12, 2023

s/ Roman Martinez
Roman Martinez

Counsel for Amicus Curiae
Napa Institute Legal Foundation