No. 23-1453

In the United States Court of Appeals for the Fourth Circuit

DONNA BUETTNER-HARTSOE, ET AL.,

Plaintiffs – Appellees,

v.

BALTIMORE LUTHERAN HIGH SCHOOL ASSOCIATION,
d/b/a CONCORDIA PREPARATORY SCHOOL

Defendant – Appellant,

On Appeal from the United States District Court
For the District of Maryland at Baltimore (Bennett, J.)

Civil Action Nos. RDB-20-3132, RDB-20-3214,
RDB-20-3229, RDB-20-3267, RDB-21-0691

AMICUS CURIAE OF THE THOMAS MORE SOCIETY IN SUPPORT OF DEFENDANT-APPELLANT AND SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1, *amicus curiae* Thomas More Society makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2. Does party/amicus have any parent corporations? **NO**

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

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? **NO**

5. Is party a trade association? (amici curiae do not complete this question)? **NOT APPLICABLE**

6. Does this case arise out of a bankruptcy proceeding? **NO**

7. Is this a criminal case in which there was an organizational victim? **NO**

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae Thomas More Society is a non-profit, national public-interest law firm dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society provides legal services to clients free of charge and often represents individuals who cannot afford a legal defense with their own resources. Throughout its history, the Thomas More Society has advocated for the protection of constitutional rights. It has also assisted many 501(c)(3) organizations by representing them in litigation and by providing representation regarding transactional and compliance issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' theory of recovery under Title IX of the Education Amendments Act of 1972 ("Title IX") against Defendant-Appellant Baltimore Lutheran High School Association ("Baltimore Lutheran") is premised not on Baltimore Lutheran ever receiving payments from the federal government but instead on its mere status as a tax-exempt

[1] All parties have consented to the filing of this *amicus* brief. No party's counsel authored the brief in whole or part; no party or party's counsel contributed money intended to fund the brief; and no person other than this *amicus*, its members, or its counsel contributed money intended to fund the brief.

charitable organization under 26 U.S.C. § 501(c)(3). Under the reasoning of the District Court, tax-exempt charitable status is the equivalent of "receiving Federal financial assistance" for purposes of Title IX, specifically 20 U.S.C. § 1681(a).

The District Court's equating of 501(c)(3) status with "receiving Federal financial assistance" is erroneous and should be reversed for several reasons. Accepting this conclusion opens the door to finding that not only 501(c)(3) charitable organizations, but also a host of other organizations and entities exempted from tax under 26 U.S.C. § 501(c) are recipients of federal financial assistance as well, even though they may have never sought out federal contracts or grants.

This conclusion is inconsistent with the history of § 501(c) and the contractual nature of Title IX. The reasoning relied on by Plaintiffs is also not amenable to any limiting principle that would stop all manner of exclusions, exemptions, credits, and deductions in the Internal Revenue Code from transforming an ordinary taxpayer or tax-exempt entity into a recipient of federal assistance, thereby subjecting them to laws (whether Title IX or other federal laws) whose application has never before been contemplated. Prior precedent and administrative

interpretations alike reject this open-ended exertion of federal jurisdiction. If Plaintiffs' interpretation is accepted by the courts, the ultimate result will, of course, be to disincentivize through Title IX (or other statutes) participation in programs and initiatives that the government is simultaneously trying to encourage through federal tax law.

Therefore, the decision of the District Court should be reversed, as urged on appeal by Baltimore Lutheran.

ARGUMENT

I. TAX EXEMPTIONS ARE NOT "FEDERAL FINANCIAL ASSISTANCE" UNDER TITLE IX.

A. The District Court Erred in Adopting a Sweeping and Open-Ended Definition of "Federal Financial Assistance" under Title IX.

The theory advanced by Plaintiffs, and accepted below by the District Court, uses the Internal Revenue Code to conscript the unwitting into a regulatory quagmire. But not even our massive Internal Revue Code can bear the weight placed on it by Plaintiffs. Because the District Court embraced the fundamentally erroneous understanding of tax law advanced by Plaintiffs, the decision below should be reversed.

Plaintiffs contend, and the District Court agreed, that Baltimore Lutheran's status under the Internal Revenue Code as a 501(c)(3) made it a recipient of "federal financial assistance" and thereby rendered it subject to Title IX. The Court reasoned that "501(c)(3) status [is] a form of Congressional subsidy and the equivalent of a cash grant." *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n*, Case Nos. RDB-20-3132, RDB-20-3214, RDB-20-3229, RDB-20-3267, RDB-21-06912022, 2022 WL 2869041, at *4, 2022 U.S. Dist. LEXIS 130429, at *13 (D. Md. July 21, 2022). The fact that an entity has not otherwise participated in a Title IX program is irrelevant, held the Court. The District Court further stated that "an institution still qualifies as a recipient of federal assistance under Title IX *even if it did not apply for the aid* or the aid is indirectly provided." *Id.* (emphasis added).

Such a sweeping invocation of tax code provisions wholly unrelated to Title IX is untenable because it has the potential to transform virtually every tax-exempt organization—and even countless taxpayers—into recipients of "federal financial assistance" for purposes of federal law. There is no limiting principle to the breadth of the District Court's holding, and it should be rejected.

B. Equating Exemption from Tax under § 501(c)(3) with "Federal Financial Assistance" Runs Counter to the Structure and History of § 501(c) and Counter to the Contractual Nature of Title IX.

Under 26 U.S.C. § 501(a), certain "organization[s]" are permitted to be "exempt from taxation" on their income. Section 501(c) then identifies those exempt organizations by listing them. Though the § 501(c)(3) designation for charitable organizations is perhaps the most famous of the exemptions, the statutory list in which it appears is lengthy. Indeed, § 501(c) contains *twenty-nine* discrete categories of organizations, corporations, trusts, and other entities that are exempt from paying taxes on income.

If a 501(c)(3) organization can be deemed to be a recipient of federal funds, then logically so can an organization recognized under § 501(c)(4), which exempts from income tax "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, [and] local associations of employees[.]" 26 U.S.C. § 501(c)(4). Though often similar in nature, a key distinction between a 501(c)(3) organization and a 501(c)(4) is that the donors to a 501(c)(3) are allowed to deduct their contributions on their own taxes, while generally no such

deduction is allowed for those who contribute to a 501(c)(4). *See* 26 U.S.C. § 170(a)(1) & (c).

The opinion below did not rely on the deductibility of donations under 26 U.S.C. § 170 for its conclusion that Baltimore Lutheran received federal assistance. *Cf.* 26 U.S.C. § 170(c)(2)(B). Instead, per that ruling, it is the listing of an entity in § 501(c) that triggers classification as a recipient of "federal financial assistance" and this status of being tax exempt thereby subjects it to Title IX jurisdiction.

Likewise, then, any of the twenty-nine exemptions under § 501(c) should, in Plaintiffs' view, suffice to confer jurisdiction under Title IX if a listed entity is providing an "education program or activity[.]" 20 U.S.C. § 1681(a). As a result, the door swings wide open to encompass potential coverage for a vast array of groups, besides 501(c)(3) and 501(c)(4) organizations, including "[l]abor, agricultural, or horticultural organizations" (§ 501(c)(5)); "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues" (§ 501(c)(6)); "[c]lubs organized for pleasure, recreation, and other nonprofitable purposes" (§ 501(c)(7)); "[f]raternal beneficiary societies, orders, or associations" meeting certain criteria (§ 501(c)(8)); "[v]oluntary

employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to [] members" (§ 501(c)(9)); and "[d]omestic fraternal societies, orders, or associations, operating under the lodge system" (§ 501(c)(10)).

These examples show that equating a 501(c) exemption under the Internal Revenue Code to financial assistance under Title IX is importing one statutory provision into a wholly different statutory scheme without any evidence that Congress ever intended the two concepts to be conflated. Unlike § 501(c), Title IX is contractual in nature and dependent on receiving funds from the government. As the U.S. Department of Justice has explained (albeit in the context of Title VI), "[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." U.S. Dept. of Justice, *Title VI Legal Manual (Updated)*, § 5.C.1.d, *at* https://www.justice.gov/crt/fcs/T6manual5 (last visited June 12, 2023) (citing 42 U.S.C. § 2000d-1; 28 C.F.R. § 42.102(c); and 31 C.F.R. § 28.105).

Moreover, the exemption that is today called § 501(c)(3) has been established in federal tax law for well over a century without a hint from Congress that, by simply availing oneself of the provision, an entity has received federal funds sufficient to bring it within the ambit of regulation by other non-tax statutes. A federal statutory exemption from income tax for charitable organizations existed even before ratification of the Sixteenth Amendment in 1913. "The 1894 federal income tax statute—the first adopted after the Civil War—already had specified . . . that it did not apply to 'corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes." Philip Hamburger, *Liberal Suppression: Section 501(c)(3) and the Taxation of Speech* 93 (2018). The 1916 War Revenue Act and 1917 Revenue Act contained similar language exempting these types of entities. *Id.*

Nor can the deduction provisions of § 170 be used as a backstop to impose some limit to the scope of the District Court's ruling. To the contrary, consideration of § 170 shows how the theory supporting Plaintiffs' claims can metastasize more. To the extent § 170 incentivizes taxpayers to make such contributions, it is no different than any other

provision of the Internal Revenue Code that creates incentives for certain conduct, whether that conduct is purchasing solar panels (*see* 26 U.S.C §§ 25C-25D) or health insurance (*see, e.g., NFIB v. Sebelius*, 567 U.S. 519, 562-63, 570-71 (2012)). Under Plaintiffs' theory, such a benefit is still functionally a form of spending under the tax code and thus would be "federal financial assistance" to the entity providing the good or service to the taxpayer. Yet, the Supreme Court has rejected this kind of link as a basis for application of Title IX to an organization—a fact the District Court acknowledged in its opinion. *See Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999) ("[E]ntities that only benefit economically from federal assistance are not [covered by Title IX]."); *Buettner-Hartsoe*, 2022 WL 2869041, at *4, 2022 U.S. Dist. LEXIS 130429, at *12.

Using tax-exempt status to confer jurisdiction, though, is no less tenuous. Therefore, the District Court erred in permitting a tax emption to qualify as receipt of "federal financial assistance."

II. THE INDIRECT BENEFIT OF A "TAX EXPENDITURE" UNDER THE TAX CODE FUNDAMENTALLY DIFFERS FROM ACTUAL RECEIPT OF GOVERNMENT FUNDS.

Furthermore, equating an exemption from tax under § 501(c) with direct financial payments made by the government to a participant in a federal program runs counter to the definition of making an "expenditure" through the Internal Revenue Code. For purposes of the federal budget, "[t]ax expenditures . . . [are] revenue losses attributable to provisions of Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." U.S. Dept. of the Treasury, *Policy Issues: Tax Policy, Tax Expenditures*, *available at* https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures (last visited June 23, 2023).

In other words, "tax expenditures" are something virtually any taxpayer, even individuals, might take advantage of. And government data bears this out. According to current estimates from the U.S. Treasury Department, the largest tax expenditures for the upcoming ten year fiscal year period from 2023 to 2032 are "[e]xclusion of employer contributions for medical insurance premiums and medical care

($3,366,320 million); [e]xclusion of net imputed rental income ($1,679,550 million); [d]efined contribution employer plans ($1,535,700 million); and [c]apital gains (except agriculture, timber, iron ore, and coal) ($1,492,400 million)." U.S. Treasury Dept., *supra.* Under Plaintiffs' argument, all taxpayers taking advantage of the multitudinous deductions, exclusions, exemptions, and other similar provisions of the tax code would likewise be *recipients* of federal funds, just as much as Baltimore Lutheran. While these taxpayers may not be covered by Title IX because they do not provide the educational activities or programs covered by that specific legislation (*see* 20 U.S.C. §§ 1681(a) & 1687), under the rationale adopted by the District Court, they are subject to being swept up in any statute that depends on receipt of federal funds for its coverage.

Importantly, though, while these provisions are accounted for as "expenditures" under federal budgetary principles, they are not in fact the same as *receiving government funds*. Section 501(c)(3) and other such tax provisions may provide a form of governmental benefit, but they do not provide actual money to the entity. *See, e.g., Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n,* 134 F. Supp. 2d 965, 972 (N.D. Ill. 2001) ("In

short, 'federal financial assistance' encompasses only direct transfers of federal money, property or services from the government to a program. Exemption from taxation just does not equate to such direct transfers[.]") (citation omitted); *Bachman v. American Soc. of Clinical Pathologists*, 577 F. Supp. 1257, 1264 (D.N.J. 1983) ("The term 'assistance' connotes a transfer of government funds by way of subsidy, not merely an exemption from taxation.") (citations omitted). Rather than sending money to the entity, these provisions allow an organization to keep money it has already received as its own income. *See* 26 U.S.C. § 61(a) ("[G]ross income means all income from whatever source derived[.]").

Accepting Plaintiffs' theory would undermine a taxpayer or tax-exempt entity's willingness to avail itself of favorable tax laws. One law, like Title IX, should not be given an overly robust and strained interpretation that would undermine the clear intent of yet other federal laws, like the desire to encourage charitable activity and giving by means of § 501(c)(3). *See* Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 ("[T]here can be no justification for needlessly rendering provisions [of statutes] in conflict if they can be interpreted harmoniously."); *see also Am. Tobacco Co. v. Patterson*, 456

U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid . . . unreasonable results whenever possible."). That, however, is what Plaintiffs' theory portends.

The indirect benefit derived by a taxpayer from § 501(c)(3)—or § 501(c) more generally—simply cannot be considered the equivalent of a direct grant from the government without upending a settled understanding of the Internal Revenue Code and Congressional intent to promote and protect certain activities through tax law. Baltimore Lutheran's 501(c)(3) status is therefore not "federal financial assistance" and not a basis for applying Title IX.

CONCLUSION

The District Court erred in ruling that educational institutions are subject to Title IX due to their 501(c)(3) status. Therefore, this *amicus* respectfully urges reversal of the District Court's decision, as requested by Defendant-Appellant Baltimore Lutheran.

Respectfully submitted,

June 12, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,403 words. This brief complies with the type-style requirements because it was prepared using Microsoft Word 2022 in 14-point Century Schoolbook, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, I served a copy of the foregoing brief of Amicus Curiae Thomas More Society in Support of Defendant-Appellant and Supporting Reversal upon the following counsel of record:

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