No. 23-477

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioners,

v.

JONATHAN SKRMETTI, *et al.*,
Respondents,

and

L.W., by and through her parents and next friends, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, *et al.*,
Respondents in Support of Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* OF WISCONSIN FAMILY ACTION, ILLINOIS FAMILY INSTITUTE, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, PACIFIC JUSTICE INSTITUTE, AND THE NATIONAL LEGAL FOUNDATION
in Support of Respondents

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnston Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org

Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Counsel for *Amici Curiae*

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STATEMENTS OF INTEREST[1]

Wisconsin Family Action (WFA) is a Wisconsin not-for-profit organization dedicated to strengthening, preserving, and promoting marriage, family life, and religious freedom. WFA has a unique and significant statewide presence with its educational and advocacy work in public policy and the culture. WFA's interest in this case stems directly from its core issues.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment and parental rights. PJI often represents teachers, parents, and their children to vindicate their constitutional rights in public schools, including with respect to children exhibiting as transgender. As such, PJI has a strong interest in the development of the law in this area.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of fundamental parental rights and First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Tennessee, are vitally concerned with the outcome of this case because of its effect on the fundamental rights of parents and their minor children.

SUMMARY OF ARGUMENT

Transgenderism is this generation's phrenology, only it does more immediate harm. It is based on incorrect philosophical assumptions and pseudo-science. This Court's unfortunate opinion in *Bostock v. Clayton County*, 590 U.S. 644 (2020), committed the cardinal logical error of assuming its conclusion. Its reasoning should be cabined, if not disclaimed, and it should certainly not be extended to the Equal Protection Clause. Application to that area would actually undercut the clause's protections established for sex in appropriate circumstances.

Transgenderism is a philosophy at war with itself, and it deserves no special constitutional protection.

ARGUMENT

I. *Bostock* Was Based on a Logical Fallacy, and Its Pernicious Effect Should Be Cabined, Not Extended

The United States' and L.W.'s argument to extend equal protection guarantees to transgender individuals is based on and follows this Court's reasoning in *Bostock*. (Pet. Br. at 21-28; L.W. Br. at 23-32.) *Bostock*, however, committed the fundamental logical error of assuming its conclusion,[2] resulting in an interpretation of Title VII that would have astounded its enactors in 1964. *See* 590 U.S. at 683-99 (Alito, J., dissenting); *id.* at 780-81, 804 (Kavanaugh, J., dissenting). This case affords this Court the opportunity to cabin the error of *Bostock* and to reason logically and in conformity with the adopters of the Fourteenth Amendment.

In contention in this case are two philosophical views of reality. What Justice Blacklock of the Texas Supreme Court called the "Transgender Vision" claims that all of us have a "sex assigned at birth" that may deviate from our inwardly felt "gender identity." When a person's biological sex and gender identity diverge, the Transgender Vision holds that a person

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[2] This logical error is an example of circular reasoning and is also termed "begging the question" and, in Latin, "*petitio principii*."

should normally give "gender identity" priority and, when that person does so, it would be "unfair" and "unjust" not to recognize the person as the gender they have selected, as if they had been born that way. Conversely, what Justice Blacklock termed the "Traditional Vision" sees things quite differently. Sex is not "assigned at birth," but is an innate and immutable characteristic that cannot be altered by a mental desire or inclination. Thus, we as individuals do not decide whether to "identify" as male or female; we *are* male or female, whatever we feel about the matter.[3] The Petitioners refer to this as a difference between subjective and objective visions of reality.

In a key passage in *Bostock*, this Court stated as follows:

> Or take an employer who fires a transgender person who was identified as a *male* at birth but who now identifies as a *female*. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.

590 U.S. at 660. The problem with this reasoning is that it assumes the reality and veracity of the Transgender Vision, i.e., that a *male* who "identifies"

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[3] *State v. Loe*, 67 Tex. Sup. Ct. J. 1421, 2024 WL 3219030 at *15-*16 (June 28, 2024) (Blacklock, J., concurring).

as a woman is "identical" to a *female* who "identifies" as a woman. From this starting point, the *Bostock* majority expanded that, taking two similarly situated employees, one a male at birth now identifying as a female and the other a female at birth who still identifies as female, if the employer fires only the former, biological "sex plays an unmistakable and impermissible role" in the action. *Id.*

If the only thing that mattered was how persons "identify" themselves subjectively, then a male who identifies as female and a female who does the same would be similarly situated. But to charge an employer with discrimination based on *sex* (rather than gender) discrimination because it fired the male who identifies as a female, one has to switch back to that person really being male (his biological *sex*) while presenting as female (his preferred *gender*). For there to be a true correlation, the female similarly situated has to be presenting as the male gender, i.e., as a gender other than her biological sex. If the employer fired males presenting as females but did not fire females presenting as males, then you would have sex discrimination.[4] *See id.* at 697-98 (Alito, J., dissenting) (demonstrating majority's illogical "battle of labels"). The *Bostock* majority's holding that an

[4] Of course, this reflects the underlying philosophical tension in transgenderism. It holds that physical sex is not the "real" person but then defines the "real" person as the other physical sex. And there is no reason that a subjective "gender" feeling cannot change, as detransitioners show. The philosophical tension generated by transgenderism is discussed further in part II, *infra.*

employee proves discrimination simply by showing that an employer took biological sex into account when firing him, *see id.* at 657-58, or that he was fired "for traits or actions [the employer] would not have questioned in members of a different sex [who presented in accord with their sex]," *id.* at 652, simply does not follow.

Logical fallacies often have unintended repercussions, and that is true here. *See id.* at 804 (Kavanaugh, J., dissenting) (prognosticating that the majority decision will "likely reverberate in unpredictable ways for years to come"). A simple example shows the error of the *Bostock* majority's reasoning.

Suppose a male employee, Bob, who does *not* identify as female, is discharged because he repeatedly enters the women's restroom and locker room. Using the reasoning of *Bostock*, his firing violates Title VII: because women are not fired for entering the women's restroom and locker room, but only he as a man, biological "sex plays an unmistakable and impermissible role" in his discharge. *Id.* at 660. And taking the *Bostock* rationale further, it does no good for the employer to argue that it also fired Heather, who is a female who identifies as such, because she repeatedly entered the men's restroom and locker room, as her discharge, too, necessarily made reference to her biological sex. Bob invading the women's room and Heather invading the men's room would each have been disciplined taking into account their sex, or, to use *Bostock*'s formulation, because of "actions [the employer] would not have questioned in members of a different sex."

Id. at 652. That their employer applied a rule forbidding all employees to go into the other sex's restroom and locker room does not cure the problem under *Bostock* because, it instructs, Title VII protects an individual. *Id.* at 659. "Instead of avoiding Title VII exposure, this employer doubles it." *Id.* As this illustration demonstrates, the *Bostock* rationale doesn't work, unless one wants to indulge the preposterous presumption that Congress, whether it knew it at the time or not, was mandating open-sex restrooms and locker rooms by all covered employers.

The proper comparison for "sex" discrimination is between male and female, not between those who present as male (no matter their sex) and those who do not. Thus, *Bostock* was wrong because the employers did not discriminate on the basis of sex: they took action against both men and women equally when they presented as transgender. *See* 590 U.S. at 698-99 (Alito, J., dissenting). "*Bostock*'s logic cannot stand if a person's declaration of a transgender identity is understood as a misguided break from reality, as it was by nearly everyone in 1964—rather than as a revelation of reality, as it is by some people today."[5]

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[5] *State v. Loe*, 2024 WL 3219030 at *19 (Blacklock, J., concurring). The majority opinion in *Loe* refused to extend *Bostock*'s reasoning to the Equal Protection Clause and held that the Texas statute prohibiting certain transgender-related surgeries on minors did not violate the clause. *Id.* at *13-*15 (finding that *transgenderism* was neither the equivalent of *sex* for equal protection purposes nor a protected class).

The issue of whether a male identifying as female is in the same position as a biological female for Equal Protection Clause purposes cannot be answered simply by assuming the accuracy of the Transgender Vision, i.e., that people actually are the sex they subjectively claim they are. Those who adopted the Fourteenth Amendment certainly did not make any such assumption. They unquestionably held to the Traditional Vision, that boys are boys and girls are girls, whatever they might feel, think, or desire. Thus, transgender "girls" and real girls are not in the same class on a physical, philosophical, or logical basis. This Court should not infect its Equal Protection Clause jurisprudence with the misguided, circular reasoning it used in *Bostock*.

II. Granting Transgender Individuals Protected Status Would Erode Equal Protection for Sex, and Particularly for Women

The Transgender Vision as a philosophy is at war with itself, as well as with reality. If sex is fluid, then, at the end of the day, there is no such thing as an immutable sex characteristic and no common ground on which to describe and differentiate the sexes. For this reason, some in the homosexual rights movement have spoken against the transgender movement.

Referring to the common LGBTQ+ acronym, Professor Carl Trueman describes the present cultural phenomenon as "The Triumph of the T." Carl Trueman, *The Rise and Triumph of the Modern Self*

339-78 (2020). He points out that "both transgenderism and queer theory are predicated on a basic denial of the fixed nature of gender, something that the L and the G by contrast assume." *Id.* at 340-41. While those encompassed by LGBTQ+ have forged a political coalition based on victimhood, *id.* at 353-57, Trueman also reports that "the status of transgender people is today a matter of acrimonious dispute among those who have campaigned for women's rights." *Id.* at 357. Trueman summarizes the work of feminist Janice Raymond as follows:

> though what constitutes female identity (gender) in different times and different cultures may vary greatly, these various identities are connected to common forms of bodily experience. To reject that, as transgenderism does, is to move gender entirely into the realm of the psychological and to deny, in a quasi-gnostic fashion, any significance to the body.
>
> . . . . Being a woman is now something that can be produced by a technique—literally prescribed by a doctor. The pain, the struggle, and the history of oppression that shape what it means to be a woman in society are thus trivialized and rendered irrelevant.

Trueman puts the point succinctly: "as soon as biology is discounted as being one decisive factor of significance for identity, the L, the G, and the B are also destabilized as meaningful categories." *Id.* at 362.

And again, "If gender is completely psychologized and severed from biological sex, then categories built on the old male-female binary cease to be relevant . . . ." *Id.* at 365. Taken to its logical extreme, transgenderism makes distinctions based on the binary of male-female sex meaningless.

This Court has recognized that, for many purposes (although not all), the sex of an individual is not of consequence and the government may not distinguish among individuals on the basis of sex without violating the Equal Protection Clause. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("the sex characteristic frequently bears no relation to ability to perform or contribute to society"); *Reed v. Reed*, 404 U.S. 71 (1971). That precedent is based on the (accurate) assumptions that sex is not a personal selection, but immutable. *See id.*; *see also Nguyen v. INS*, 533 U.S. 53, 73 (2001); *United States v. Va.*, 518 U.S. 515, 533 (1996). If the Transgender Vision is correct, that foundational premise about sex is inaccurate, and protection of sex as a classification for equal protection must fall. If there is no immutable version of sex, but only an infinitely modulating sense of gender identity, then there is no fixed sex to protect for Equal Protection Clause purposes and no traits and attributes that can be attributed to one sex versus the other on which to base a claim of discrimination.

The basic inconsistency in transgender philosophy works itself out in cases involving minors as follows: government actors that assist minors transition genders, such as public schools and foster

care agencies, simultaneously insist that (a) minors are mature enough to make this life-changing decision for themselves and (b) these same minors are so sensitive that anyone that doesn't immediately affirm their transgender impulse by using their newly minted names and faux pronouns causes them crushing emotional trauma. This attempt to shut down any expressed disagreement with their "newly discovered self" runs directly counter, of course, to this Court's long-established case law that disagreement with the ideas expressed by others provides no warrant to stifle their speech. *See Matal v. Tam*, 582 U.S. 218, 244 (2017) (Alito, J., plurality op.) (collecting cases). It also demonstrates the philosophy's own weakness, as any theory that must be propped up by having it both ways is intellectually bankrupt and certainly unworthy of constitutional protection.

The fixed star of transgenderism is the individual self, and this turns out to be no star at all. If individuals, simply by thinking about it, are free to change genders once, they are free to do so multiple times, as detransitioners demonstrate. And if the mind may override the physical attributes of the body in this way, why is there any need to try to approximate another gender physically in the first place? If gender is not fixed, but fluid, then it should not matter what body one has. Yet, transgender individuals seek to take on the appearance and even attributes of a body that they say has no fixed reality. Ironically, the attributes of the other sex to which they aspire turn out to be the stereotypical attributes

which this Court has found indicative of unconstitutional sex discrimination. *See, e.g.*, *Va.*, 518 U.S. at 549-51; *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 725 (1982); *Frontiero*, 411 U.S. at 684-85.

A philosophy at war with itself, at war with reality, and at war against the affected individual's own body has no claims on permanency. If this Court were to adopt transgenderism as a dominant cultural and constitutional philosophy, it would necessarily portend the crumbling of the category of physical sex, ultimately emasculating the current protections for that status.

III. Transgenderism Should Not Be Granted Any Type of Protected Status

We leave largely to others to elaborate on the obvious: transgenderism does not qualify for protected status under any test previously used by this Court. Moreover, we will leave to others the battle of the social science studies, while noting that the tide has markedly turned against the efficacy of "gender-affirming" care via pharmaceuticals and surgeries.

We do wish to point out something else that is both obvious and settled biological science: individuals are made either male or female at conception. They have either XY chromosomes in all of the trillions of cells in their mature body (except for red blood cells and reproductive cells), in which case they are male, or XX chromosomes, in which case they

are female. No pharmaceutical or surgical procedure can or will ever change that basic, biological fact.

Transgenderism is just as irrational as "trans-staturism," explained by the following example: I am six feet tall. However, no matter what the tape measure says, I have a deep inner understanding that I am really 6'11", and that's the height that I believe myself to be. I do not believe anyone has a right to tell me what height I am, because I am the one who decides for myself what my inner self is and is meant to be. Thus, I also have a right to have surgery to lengthen my limbs and have my physical body correspond to my mental understanding of who I really am. I also believe I have the right to require others to treat me as 6'11" and to seek legal relief against those who fail to do so.

If I expressed these thoughts widely and sincerely, I would be considered irrational and mentally unfit. That's exactly what I would be. It is no different with respect to transgender individuals.[6]

Finally, the operating assumption of those requiring adolescents to be affirmed in exhibiting as transgender is flawed. We will leave to others the cataloguing of studies and their findings. We note,

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[6] Another example would be "trans-ageism." Even though under 60, could someone rationally claim that they consider themselves to be 65 and entitled immediately to retirement benefits? Or a 16-year-old claim he considers himself 21 and so able to procure and consume alcoholic beverages?

however, what we believe is uncontroverted: that children who express discomfort with their biological sex also present with other symptoms such as anxiety and suicidal ideation. As the United States puts it, "everyone agrees [that gender confusion] is a serious medical condition." (Pet. Br. at 31.) The question that presents itself is whether exhibiting as transgender will cure these children or whether their gender confusion is simply another symptom of their unstable psychological condition. Those who advocate for aggressively treating children as transgender, even when pre-pubescent and even to the extent of taking non-reversible pharmaceutical and surgical steps, adopt the presumption that exhibiting as transgender will cure the other mental ills of the child. That is certainly not something that can be known *a priori*, and it is just as logical to assume that gender confusion is just another symptom of other mental conditions. Indeed, the most recent and reliable studies show that the overall mental health of those who transition, including those upon whom medical procedures are performed, does not improve over time.[7]

Those clamoring for a protected status for those exhibiting as transgender are seeking to have this Court assume this same, faulty predicate that exhibiting as transgender will cure a child's mental problems. But this issue should not be moved from legislative chambers to the courtroom. If this Court

[7] *See, e.g.*, studies collected in *Amicus* Brief of Society for Evidence-Based Gender Medicine.

did so by constitutionalizing the faulty assumption that pharmaceutical and surgical transgender interventions are sometimes medically necessary for minors, as the United States urges (Pet. Br. at 31-49), it would do grave harm to both individuals and our system of government.

For the Equal Protection Clause to operate, the parties have to be "in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The simple, unalterable fact is that a person who presents as male but has female reproductive organs and chromosomes is not "in all relevant respects alike" to a person who presents as male and has the reproductive organs and chromosomes to match. That difference is the *very reason* that the former person is called "*trans*gender" and the latter is not. By definition, those who exhibit as transgender and those who do not are in that very respect not "in all respects alike." *Id.* Biological males and females are "not fungible." *Ballard v. United States,* 329 U.S. 187, 193 (1946). Neither are females fungible with biological males presenting as females. "Gender identity" does not equate to "sex," and it never will.

CONCLUSION

"Transgenderism" and "gender identity" discrimination are not the same as "sex" discrimination, and they have no protected status under the Equal Protection Clause. This Court should affirm the Sixth Circuit.

Respectfully submitted this
15th day of October 2024,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org