No. 24-99

IN THE

# Supreme Court of the United States

DALE FOLWELL, STATE TREASURER OF NORTH CAROLINA, *et al.*,

*Petitioners,*

*v.*

MAXWELL KADEL, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF OF *AMICUS CURIAE* NC VALUES INSTITUTE IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* respectfully urges this Court to reverse the decision of the Fourth Circuit.

NC Values Institute ("NCVI") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the rights to life, religion, and conscience. See https://ncvi.org.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case, along with several other petitions raising issues about transgenderism, should be a clarion call to this Court to avoid the temptation to "constitutionalize" yet another culturally invented "right" that lacks roots in American history, tradition—or biological reality. Americans have the freedom to agree or disagree with transgender ideology and to "self-identify" as they wish. But there are limits as to what may be imposed on others, either in forcing agreement with the ideology or mandating that the state release funds to exercise that liberty. Transgender persons have no affirmative right to force North Carolina, or any other state or government entity, to provide the financial means necessary for their transition from one sex to the other—*even if* the right to transition were ruled to be fundamental.

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1. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission. The parties received timely notice of the intention to file this brief.

*Bostock* has unleashed all manner of mischief in redefining statutory and constitutional rights related to sex. This narrowly crafted opinion must be confined to what this Court *did* decide, not stretched to every other imaginable area of life where sex is mentioned or minimally relevant. "Discrimination" is a broad term in need of a clear definition, not an expandable category that can or should be employed to coerce an ideology by manipulating every conceivable difference in treatment.

## ARGUMENT

### I. THIS COURT SHOULD REFRAIN FROM MANUFACTURING A NOVEL "CONSTITUTIONAL" RIGHT.

"Why the rush to constitutionalize? Why the dash to create a substantive Fourteenth Amendment right to transgender surgery and treatment underwritten by the State?" *Kadel v. Folwell*, 100 F.4th 122, *144 (2024) (Wilkinson, J., dissenting).

This Court should decline to replicate the errors of *Roe v. Wade*, 410 U.S. 113 (1973), overruled in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). "*Roe*'s abuse of judicial authority" (*ibid.*) did not settle the underlying debate surrounding abortion but instead spawned decades of contentious litigation. *Roe*'s "infirmity lay in the courts reserving the weighing and balancing of those heartfelt perspectives for themselves." *Kadel*, 100 F.4th at *144 (Wilkinson, J., dissenting). Courts "assume[d] authority over an area of policy that [was] not theirs to regulate," thereby "impos[ing] a constitutional straightjacket on legislative choices" in a time of "medical

and scientific uncertainty." *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 473 (6th Cir. 2023). States struggled for decades to enact even the most reasonable medical protections for pregnant women, thrusting this Court into the role of "ex officio medical board"—a role for which it is ill-equipped. *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989).

Just as the Constitution neither references abortion nor implicitly protects any such right (*Dobbs*, 597 U.S. at 231), the American people have never agreed to remove debates "over the use of innovative, and potentially irreversible, medical treatments for children"—or for anyone else—from "the conventional place for dealing with new norms, new drugs, and new public health concerns: the democratic process." *Skrmetti*, 83 F.4th at 471. The Sixth Circuit observed the novelty of both "gender dysphoria as a medical condition" and the treatments for it that radically alter a person's sex characteristics. *Skrmetti*, 83 F.4th at 471-472. The Constitution is silent and therefore neutral. Under these circumstances, "skeptical judicial review" is prudent (*id.* at 472), whether the Court is considering a ban on treatments for minor children (*Skrmetti*) or the state's obligation to cover gender dysphoria in its employee health insurance policy (*Kadel*).

Creation of a newfound unenumerated right is neither constitutionally required nor wise. Policy choices should remain with the fifty state legislatures, not usurped by "one judiciary, suddenly delegated with authority to announce just one set of rules." *Skrmetti*, 83 F.4th at 487, citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The judicial fiat that created half a century of legal chaos over abortion should not be employed to manufacture

another "right" that lacks "deep[] root[s] in this Nation's history and tradition" and is not "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721. The Court would be entangling itself in another "unprecedented and transparently political thicket from which extrication [would] prove[] uncommonly hard. . . . And yet here we go again." *Kadel*, 100 F.4th at *145 (Wilkinson, J., dissenting). If this Court does not stop the runaway train, there is no telling "what other statutory dominos will fall" as courts move from the substantive due process of *Roe* to the new frontier of "substantive equal protection" presented by this case. *Ibid.*

### A. This Court should allow the legal issues surrounding transgender rights to be determined by the states, not usurped by federal courts.

States have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), citing *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). There is no better example than in the current cases wrestling with transgender issues. "The gender dysphoria treatments at issue—including puberty blocking drugs, cross-sex hormones, and gender reassignment surgery—are matters of significant scientific debate and uncertainty." *Folwell*, 100 F.4th at 148 (Wilkinson, J., dissenting). Judge Wilkinson wisely suggests that "[t]he right forum" for discussion and resolution "is a legislative hearing,"[2] not a court. *Ibid.* This litigation arises at "an incipient and

2. Here, the decision about health insurance coverage was made by the Board of the State Health Plan, which is not a legislature—but intervention by the federal judiciary would nevertheless violate the separation of powers.

experimental stage" characterized by a "mix of medicine and morality." *Id.* at 148-149. The contentious debates surrounding transgenderism should be continued at the state and local levels, not thrown into federal court.

It is an intrusion on the powers constitutionally reserved for the states, and a "breach of our federal system," for a federal court to "arrogate[] to itself the authority to tell States how to draft insurance policies covering *state* employees on *state* healthcare plans." *Folwell*, 100 F.4th at 151 (Wilkinson, J., dissenting). These are matters for each individual state to decide for itself. "It is one of the happy incidents of the federal system that a single courageous State may, *if its citizens choose*, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added). The citizens of North Carolina, acting through their elected representatives, have chosen not to use their tax dollars to subsidize an experiment with risky gender dysphoria treatments.

The evidentiary record in this case reveals lingering "questions about the medical necessity and efficacy" of the gender dysphoria treatments at issue in this case. *Folwell*, 100 F.4th at 158 (Quattlebaum, J., dissenting). The Fourth Circuit majority excluded expert medical testimony the state sought to introduce on these questions. *Id.* at 158-160. In spite of the uncertainty at the heart of the case, "the majority improperly declares as fact the plaintiffs' position on this debate," specifically, "statements from the WPATH Standards and the DSM-5" (*id.* at 169) and assertions about the alleged parade of horribles if

gender dysphoria is untreated—"debilitating distress, depression, impairment of function, self-mutilation to alter one's genitals or secondary sex characteristics, other self-injurious behaviors, and suicide" (*id.* at 159). The record reveals the presence of "dispute within the medical community," not established facts. *Id.* at 160. The majority evades the record and ongoing dispute in favor of a presumptuous declaration that "the medical community uses generally accepted protocols from the [WPATH Standards]" designed to "bring the body into alignment with one's gender identity." *Id.* at 177. There is no excuse for such deliberate judicial blindness to the ongoing polemics.

### B. Even if there were a true constitutional right at stake, the government has no obligation to fund it.

"The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). There is no "affirmative right" to a government subsidy under the Due Process Clauses, even if aid is necessary to exercise an enumerated constitutional right, let alone a newly minted "right" that rests on shaky ground. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

Just as the government could allocate its funds to prefer childbirth over abortion, a state may allocate its limited funds to express a preference for medical treatments other than those that facilitate sex transitions. "The states have finite and diminishing resources to spend on healthcare" and accordingly "must prioritize those

treatments that they deem cost-effective and medically necessary." *Kadel*, 100 F.4th at 109, 134 (Richardson, J., dissenting). The state is not obligated to provide its employees with health insurance coverage for gender dysphoria or any other novel, risky treatments and may prefer to allocate its limited resources for other conditions, based on cost and efficacy. The state insurance plan does not render the desired treatments illegal, nor does it prevent any state employee from seeking them. The state merely declines to finance the procedures with public funds. What Respondents attempt is "nothing less than to use the Constitution to establish a nationwide mandate that States pay for emerging gender dysphoria treatments." *Kadel*, 100 F.4th at 147 (Wilkinson, J., dissenting).

This Court's decision in *Geduldig v. Aiello* illustrates the point. California's disability insurance program insured against disabilities resulting from numerous "mental or physical illness[es] and mental or physical injur[ies]," but "not every disabling condition . . . triggers the obligation to pay benefits under the program." 417 U.S. 484, 488 (1974). The plan "exclude[d] from coverage certain disabilities that are attributable to pregnancy." *Id.* at 489. This Court noted the state's "legitimate interest in maintaining the self-supporting nature of its insurance program" and "distributing the available resources" so as "to keep benefit payments at an adequate level for disabilities that are covered." *Id.* at 496. Also important was the state's "legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees." *Ibid.*

Respondents here "presume[] to dictate how public officials should prioritize the competing requests of deserving claimants for insurance coverage and financial support." *Kadel*, 100 F.4th at 146 (Wilkinson, J., dissenting). In contrast, this Court's decision in *Roe v. Wade* "was never thought to require public funding of reproductive freedoms." *Kadel*, 100 F.4th at 145-146 (Wilkinson, J., dissenting). Multiple decisions over the years confirm the lack of any right to access public funds, even in the years when abortion was regarded as a constitutional right.

Several years into the heated abortion battles, this Court held that the state may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding state welfare regulation allowing Medicaid payments related to childbirth, but not nontherapeutic abortions). Building on this principle, the state may also express its preference for childbirth "through the allocation of other public resources, such as hospitals and medical staff." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509-510 (1989). Similarly, the State of North Carolina may allocate scarce financial and other public resources to express a preference for treating diseases like cancer over gender dysphoria. Much like the disputes over abortion, "[t]he decision whether to expend state funds for [gender dysphoria treatments] is fraught with judgments of policy and value over which opinions are sharply divided." *Maher v. Roe*, 432 U.S. at 479.

A challenge to the Hyde Amendment to the Medicaid Act, Title XIX of the Social Security Act, on Equal Protection grounds, yielded similar results. This Court

held that states participating in Title XIX were not required to pay for medically necessary abortions for which federal reimbursement was unavailable. In this case, similarly, the state is not required to pay for gender dysphoria treatments, regardless of medical necessity or the availability of other funding. Even if there is a liberty to assert a gender identity that differs from a person's sex at birth, and even if that liberty is protected "against unwarranted government interference," that "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Harris v. McRae*, 448 U.S. 297, 317-318 (1980). North Carolina has not interfered with the personal freedom to seek surgeries or other treatments for gender dysphoria. There is no right for anyone—state employee or otherwise—to demand that the government subsidize such treatments.

In *Rust v. Sullivan*, this Court upheld limitations on the ability of Title X fund recipients to engage in abortion-related activities and affirmed the ability of the government to "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S. at 193. The choice not to fund is neither viewpoint discrimination nor an infringement of any right that is not subsidized. *Ibid.* The government does not "unconstitutionally discriminate[]" in choosing to "fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Id.* at 194. The State of North Carolina has not "unconstitutionally discriminate[d]" against transgender persons by declining to fund insurance coverage for gender dysphoria

treatments, choosing instead to finance coverage for other qualifying medical diagnoses. Even if transgender rights were established as fundamental—which they are not—"a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983).

## II. *BOSTOCK* DOES NOT WARRANT THE FOURTH CIRCUIT'S CONCLUSION THAT THE PLAN VIOLATES THE EQUAL PROTECTION CLAUSE.

This Court's opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) was narrowly crafted to apply solely to employment actions governed by Title VII, 42 U.S.C. § 2000e et seq. *Bostock* began with the correct assumption that "sex" "refer[s] only to biological distinctions between male and female." 140 S. Ct. at 1739. "[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Adams ex rel. Kasper v. Sch. Bd.*, 57 F.4th 791, 807 (11th Cir. 2022), quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). This biological reality, "repeatedly acknowledged" over the years, is "that men and women fall into two distinct groups, most notably distinguishable by their reproductive capacities." Rena M. Lindevaldsen, *Article*: Bostock v. Clayton County: *A Pirate Ship Sailing Under a Textualist Flag*, 33 Regent U.L. Rev. 39, 56 (2020-2021), citing *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 202-08 (1978); *United States v. Virginia*, 518 U.S. 515, 588 (1996).

*Bostock* bears minimal resemblance to *Kadel* because it concerned a different law with materially different

language and factual context. The *Kadel* case concerns health insurance benefits provided to state employees, with coverage for particular treatments based on *diagnosis*—not based on sex. This issue falls far outside the scope of what this Court addressed in *Bostock*.

### A. *Bostock* must be narrowly interpreted and applied.

*Bostock*'s reach should be limited to what this Court *did* decide—not what it *did not* decide. *Bostock* was a startling departure from the understanding of the Congress that enacted Title VII and the courts that interpreted it over several decades of litigation. The majority and dissenting opinions all acknowledged there were many issues the Court did *not* address. Lower courts should not hastily employ *Bostock* as a band-aid to fix every perceived "discrimination" based on sexual orientation or gender identity.

*Bostock*'s implications are staggering. The sole question before this Court was whether an employer discriminated "because of sex" by taking action against an employee "simply for being homosexual or transgender." *Bostock*, 140 S. Ct. at 1753. The employers in that case rightly worried that the Court's decision would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," including private facilities and dress codes. *Bostock*, 140 S. Ct. at 1753. "But none of these other laws are before us," this Court assured them, and "we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Ibid.* Lower courts should have heeded this warning but they have not. "Anything else" is now pounding on this Court's door in several cases.

*Bostock*'s initial reassurance rings hollow as litigants import its rationale and conclusions into other wildly unrelated contexts. Indeed, there are several petitions pending before this Court—the one granted in *United States v. Skrmetti*, No. 23-477 (ban on certain treatments for minor children), two petitions about women's sports (*B.P.J. v. West Virginia State Board of Education*, No. 24-43, and *Hecox v. Little*, No. 24-38), and the petitions from North Carolina and West Virginia raising similar issues about health insurance coverage (*Kadel v. Folwell*, No. 24-99 and *Crouch v. Anderson*, No. 24-90).

*Bostock* is not a one-size-fits-all test that can be blindly applied in every context that happens to mention "sex." There are "[o]ver 100 federal statutes" that "prohibit discrimination because of sex." *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting). Justice Alito warned of a multitude of potential applications, including Equal Protection. "*Healthcare benefits may emerge as an intense battleground under the Court's holding.* Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery." *Id.* at 1781 (emphasis added); *id.* at n. 56, citing *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1028 (D Alaska 2020). *See* Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 74, citing a district court holding that a hospital staff's refusal to use preferred pronouns violated the Affordable Care Act. *Prescott v. Rady Child.'s Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098-1100 (S.D. Cal. 2017). These concerns are very troubling and no longer speculative in view of post-*Bostock* judicial developments.

### B. *Bostock*'s extreme literalism warrants restraint.

"[C]ourts must avoid interpretations that would attribute different meanings to the same phrase or word in all but the most unusual of statutory circumstances." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 814 (11th Cir. 2022) (cleaned up); *see Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000).

Nevertheless, legal activists are using *Bostock* as a springboard to coerce sweeping social engineering in other unrelated contexts. Advocates demand that courts reinterpret a broad swath of anti-discrimination laws to sweep sexual orientation and gender identity within the definition of "sex," stretching that three-letter word like a rubber band. In this troubling game of legal "leap frog," courts have radically reinterpreted the word "sex" through a breathtaking expansion of *Bostock*, leaping from employment policies to bathrooms and ballgames. Respondents now want to add experimental medical procedures to the list. A fair reading of *Bostock* neither requires nor even condones these radical legal maneuvers. A coherent limiting principle is needed to ensure that the word "sex" is not emptied entirely of coherent meaning.

The *Bostock* majority admitted that "homosexuality and transgender status are distinct concepts from sex." 140 S. Ct. at 1746-47. Neither concept is "tied to either of the two biological sexes." *Id.* at 1758 (Alito, J., dissenting). But—whether intentionally or not—*Bostock* essentially treated them as synonymous, and the Fourth Circuit has done the same. In addition to the massive public

policy implications, "the potentially greater concern" with *Bostock*'s approach is "its characterization as a case decided on a plain meaning interpretation." Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 78. The "plain meaning" camouflage obscures this Court's failure to consider dictionary and medical definitions, common understanding, prior judicial rulings, or various statutes and Executive Orders. *Id.* Chaos ensues.

Even in the employment context Title VII covers, the prohibition is "discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, sex." *Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting). North Carolina has crafted its employee health insurance coverage on the basis of medical diagnosis, *not* on the basis of sex. *Bostock*'s extreme literalism should not be exported to an unrelated context and employed to place state officials in a straightjacket.

### C. *Bostock*'s extreme literalism ignores biological reality.

"To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). It does not require a medical degree to understand that "[o]nly women may become pregnant." *Michael M. v. Superior Ct.*, 450 U.S. 464, 471 (1981); *see* Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 56. *Bostock*'s promising initial reassurance now rings hollow as litigants import its ultimate rationale and conclusions into other contexts. The relevance of physiological differences varies from one context to another. For example, separate restrooms for male and

female are reasonable and constitutional (even though courts have given short shrift to the privacy concerns) while separate restrooms for black and white races are not, "because there are biological differences between the two sexes that are relevant with respect to restroom use in a way that a person's skin color is demonstrably not." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 535 (4th Cir. 2020) (Niemeyer, J., dissenting). Similarly, biological differences between the two sexes are relevant with respect to the medical procedures applicable to each sex. *Bostock* is not a one-size-fits-all test that can be blindly applied in every context.

### D. *Bostock*'s approach should not be blindly imported into another context.

One of the problems with cases like *Bostock*, where courts fashion legal rules never contemplated or considered by the original legislative body, is the concerns that arise when the newly minted rule is imported into a much different context. Title VII regulates discrimination in *employment—not* education, *not* access to bathrooms or other private facilities, not sports, and not health insurance coverage. These contexts highlight specific differences between male and female that are not necessarily relevant in every employment relationship. It is even more dangerous to play "leap frog" with a novel judicial fiat—first applying *Bostock*'s rationale to bathrooms with a blind eye to privacy and then leaping to ballgames, where obvious physiological differences have drastic and even dangerous consequences, and then on to mandate state funding of health insurance coverage for sex transition treatments. The results of this "leap frog" game are astonishing and irrational.

Lower courts should not rush to expand *Bostock*'s "novel and creative argument" that "because of sexual orientation" and "because of sex" are "not separate categories of discrimination after all." *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting). *Bostock* upset decades of precedent and expectation. Its holding should be carefully confined and not expanded to new territory.

### E. *Bostock* raised concerns about the Constitution's separation of powers, both horizontally and vertically.

**Horizontally**, *Bostock* did an "end-run around the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes." *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting). Lower courts should not repeat this error and perpetrate an even greater distortion of law, logic, and reality by "[u]surping the constitutional authority of the other branches." *Id.* at 1755 (Alito, J., dissenting). Such joining of judge and legislator is a serious threat to life and liberty: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." The Federalist No. 47, at 326 (citing Montesquieu); see *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting), quoting James Madison.

**Vertically**, *Bostock* raised concerns about democratic accountability and the rule of law. The state employee health insurance programs concern matters entrusted

primarily to state and local governments. Judicial restraint should characterize any sort of federal intervention. Extension of *Bostock* would remove decisions about these matters from the elected representatives closest to the people and most responsive to their concerns, depriving individuals of their liberty to participate in a contentious matter of public concern. "The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself." Stephen Breyer, Active Liberty (Vintage Books 2006), at 3.

Justices Alito and Kavanaugh both recognized this concern. "If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests," but instead "the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution." *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting). Justice Kavanaugh lamented the negative impact on "the rule of law and democratic accountability . . . when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning." *Id.* at 1825 (Kavanaugh, J., dissenting). This extreme literalism "deprives the citizenry of fair notice of what the law is." *Id.* at 1828. Lower courts should not replicate this questionable approach in litigating Title IX.

## III. THE WORD "DISCRIMINATION" BEGS FOR CLARIFICATION.

In *Bostock*, the Court asked and answered its own question: "What did 'discriminate' mean in 1964? As it turns out, it meant then roughly what it means today: 'To make a difference in treatment or favor (of one as compared with others).'" *Bostock*, 140 S. Ct. at 1740. But this quick question-answer only invites further inquiry: Is every "difference in treatment or favor" *unlawful* discrimination? Is every such difference *invidious*, subject to legal prohibition? This question is critical.

In another recent case related to transgender issues, the Fourth Circuit asserted it has "already held that discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX," citing *Grimm*, 972 F.3d at 616. *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024). The court invites further questions with its assertion that discrimination "mean[s] treating [an] individual *worse than* others who are similarly situated." *Ibid.*, quoting *Grimm*, 927 F.3d at 618 (internal quotation marks omitted) (emphasis added) (quoting *Bostock*, 140 S. Ct. at 1740). Is *different* treatment always *worse*? It undermines Title VII to include gender identity in the scope of "sex discrimination," "because the employee would be asking for protection *not* because he or she is a member of one of the two identifiable groups but because he or she desires to *switch from one group to another*." Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 62. This effectively allows an individual to claim

simultaneous membership in both sexes (one according to biology, the other by subjective identification) and then "assert a discrimination claim either as a man or as a woman." *Id.* at 63. Could not such favoritism itself be deemed "discrimination"? Surely we have fallen down the rabbit hole in Alice's Wonderland.

**Stereotypes.** The state does not condition healthcare treatment on the basis of sex stereotypes. "Recognizing biological reality is 'not a stereotype.'" *Folwell*, 100 F.4th at 88 (Richardson, J., dissenting), quoting *Nguyen v. INS*, 533 U.S. 53, 68 (2001). "Physical differences between men and women" are "enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Coverage of treatments based on qualifying diagnoses is based on the "medical judgment of biological reality," not stereotyping. *Folwell*, 100 F.4th at 107 (Richardson, J., dissenting). The insurance policies do not "penalize[] a person identified as male at birth for traits or actions that it tolerates in [a person] identified as female at birth." *Bostock*, 140 S. Ct. at 1741-1742.

Astonishingly, the Fourth Circuit found "textbook sex discrimination" present because "conditioning access to these surgeries based on a patient's sex assigned at birth stems from gender stereotypes about how men or women should present." *Folwell*, 100 F.4th at 56, citing *Bostock*, 140 S. Ct. at 1742-49. The court distorts the meaning of gender "presentation," e.g., labeling as a "gender stereotype . . . the assumption that people who have been assigned female at birth are supposed to have breasts, and that people assigned male at birth are not." *Id.* at 58.

The Fourth Circuit's characterization is nowhere near the impermissible stereotypes examined in *Price Waterhouse v. Hopkins*, e.g., aggressiveness or other personality traits, mannerisms, clothing, hair styles, or jewelry associated with one sex or the other. 490 U.S. 228, 256, 272 (1989). None of these "stereotypes" stem from the inherent physiological differences between men and women. "A sex stereotype is a generalization about the relative capabilities of, or socially acceptable behavior for, members of each sex." *Folwell*, 100 F.4th at 106-107 (Richardson, J., dissenting); see *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (defining a stereotype as "failing to act and appear according to expectations defined by gender"). Behavioral traits and outward appearances (clothing, jewelry, hair) are not the same as the innate biological distinctions between male and female.

**Facial discrimination.** *Bostock*'s extreme literalism leads to a bizarre revision of the legal standard for "facial discrimination." The "central disagreement" in this case, as framed by the Fourth Circuit, is whether the coverage exclusion is based on *diagnosis*, as Petitioners contend, or sex and transgender identity, as Respondents argue. *Kadel v. Folwell*, 100 F.4th 122, 30 (2024). The Fourth Circuit, in a head-spinning leap of logic, held that "gender dysphoria" is "a diagnosis inextricable from transgender status" and therefore "a proxy for transgender identity." Consequently, "coverage exclusions that bar treatments for gender dysphoria bar treatments on the basis of transgender identity by proxy." *Id.* at 47. "[D]iscriminating on the basis of diagnosis is discriminating on the basis of

gender identity *and sex*." *Id.* at 29 (emphasis added). The court characterizes this proxy discrimination as facial discrimination (*id.* at 32), ultimately concluding that "the coverage exclusions *facially* discriminate on the basis of sex and gender identity." *Id.* at 15, 32 (emphasis added); *see id.* at 55 ("[i]n addition to discriminating on the basis of gender identity, the exclusions discriminate on the basis of sex" (emphasis added).

Essentially the court jumps from the diagnosis (gender dysphoria) to the presumption of transgender identity, collapses "sex" and "gender identity," and then concludes there is *facial* discrimination. Merging "sex" and "gender identity" into one category conflicts with *Bostock*'s admission that these concepts are separate and distinct. 140 S. Ct. at 1746-47. The Fourth Circuit's radical departure from reality is evident in its statement that pregnancy "is a condition that can be described entirely separately from a person's sex"—unlike gender dysphoria, which is "inextricably" tied to transgender status, *Kadel*, 100 F.4th 122 at 40.

There are some cases where the text of a statute does not explicitly name a protected class. Sometimes "the law uses different words that mean the same thing." *Kadel*, 100 F.4th 122 at 53. The words "husbands" and "wives" refer to "men" and "women." A classification like this, even though facially neutral, "may warrant heightened scrutiny if it uses a proxy to camouflage intentional discrimination based on a protected trait." *Id.* at 91 (Richardson, J., dissenting). The Fourth Circuit dismissed arguments

based on *Geduldig v. Aiello*, an Equal Protection challenge to California's disability-insurance system, which excluded coverage for "any injury or illness caused by or arising in connection with pregnancy." 417 U.S. 484, 489 (1974). If there were ever a "proxy" for sex, it is pregnancy. Only a biological female has the reproductive capacity to become pregnant, yet the Fourth Circuit reaches the illogical conclusion that "*Geduldig* is best understood as standing for the simple proposition that pregnancy is an insufficiently close proxy for sex." *Kadel*, 100 F.4th 122 at 39. This Court, however, declined to find that California's exclusion of pregnancy-related disabilities constituted invidious discrimination against women. *Geduldig*, 417 U.S. at 494. The same is true of North Carolina's exclusion of treatments for gender dysphoria. There are too many leaps of logic to justify the conclusion that the state *must* revise its coverage policies to finance controversial sex transition treatments. Plaintiffs' position rests on flawed assumptions about risk, efficacy, morality, and the status of transgenderism as a class entitled to special treatment.

**Obvious irrationality.** Many (if not all) laws draw relevant distinctions. What the Equal Protection Clause of the Fourteenth Amendment forbids is denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. The government may not legislate different, unequal treatment by classifying persons "on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

Discriminatory intent may only be presumed "when the law's explicit target is an *irrational* object of disfavor and the law happen[s] to [affect] exclusively or predominantly . . . a particular class of people." *Kadel*, 100 F.4th 122 at 93 (Richardson, J., dissenting) (emphasis added), citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (internal quotation marks omitted). In *Bray*, this Court found that "opposition to voluntary abortion cannot possibly be considered . . . an *irrational surrogate* for opposition to (or paternalism towards) women." *Ibid.* (emphasis added). There are "common and respectable reasons" for opposing abortion "other than hatred of . . . women as a class." *Ibid.* Like abortion, transgender ideology is opposed by many persons for "common and respectable reasons." The science is unsettled, the treatments are novel, and the long-term risks remain unknown. Many people of faith hold moral and religious objections to transgender ideology and conduct. As in *Bray*, Respondents cannot demonstrate that North Carolina's "choice to exclude gender dysphoria from coverage is so irrational that nothing could explain it other than an intent to discriminate against transgender persons." *Kadel*, 100 F.4th 122 at 108 (Richardson, J., dissenting). There are rational, nondiscriminatory reasons for the coverage exclusions.

## CONCLUSION

This Court should grant review and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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