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 Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT AS AMICUS CURIAE SUPPORTING THE PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

To that end, ACR Project attorneys have developed expertise and experience both in drafting and interpreting legislation and in litigating discrimination claims under America's core civil rights laws, both constitutional and statutory, with particular focus on the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1981, 42 U.S.C. § 1983, Title VI of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.

This case interests the ACR Project because intermediate appellate courts' aggressive rewriting of the Equal Protection Clause, America's most fundamental civil rights enactment, threatens the survival of fundamental civil rights statutes.

INTRODUCTION & SUMMARY

This case asks whether the Equal Protection Clause of the Fourteenth Amendment requires the Americans who pay for their public employees' medical insurance to spring for coverage of elective surgery, in order for the

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[1] No counsel for a party authored any part of this brief. No one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief. Amicus curiae sent counsel of record timely notice under Rule 37.2 of its intent to file this brief.

public employees so electing to more effectively mimic the phenotype of a different sex.

The Fourth Circuit said yes: the Constitution *does* impose a duty on the states to pay for healthy-bodied but dysphoric government workers to obtain artificial phalluses and vaginas *before* it allows the states to fund luxuries like chemotherapy, prioritizing coverage of other medical needs over such surgeries. The Fourth Circuit deems such prudential prioritization "sex discrimination."

The Court must intervene not because that's shocking, even if it should be shocking. To the contrary, intervention is urgent because the Fourth Circuit's aggressive nominal application of precedent to whole areas of Constitutional law, text be damned, claims to be a straight-forward extension of this Court's decision in *Bostock v. Clayton Co.*, 140 S. Ct. 1731 (2020), which (in the Fourth Circuit's view) doesn't even warrant current discussion, because that extension is already settled law. Thus *Bostock*, a *purely* textual, statutory decision, has become—in the Fourth Circuit—a license to *rewrite* Constitutional text in order to impose an incoherent gender-essentialist ideology invented (rhetorically speaking) yesterday.

The Court of Appeals' discovery of constitutional mandates for public insurance to cover elective surgery is simply the latest *reductio ad absurdum* in a series of Fourth Circuit Court of Appeals decisions redefining "sex" to mean "not sex."[2] Together these decisions model

[2] They are unfortunately not alone, with at least the Seventh and Ninth Circuits having followed the Fourth off this cliff. See, e.g., *Metropolitan Sch. Dist. of Martinsville v. A.C.*, 75 F.4th 760, 770

the inevitably-incoherent outcomes of the court's misreading of *Bostock*, which it takes to be a license for an arbitrary and freewheeling replacement of "sex" with "gender" wherever it suits judges across the legal system.

This brief explores how the courts below have gotten *Bostock* so wrong, in the following steps:

(1) It outlines *Bostock*'s own account of its internal logic (Section I).

(2) It uses the unique provisions of Title IX, which contain exceptions absent from Title VII, to show that *Bostock*'s logic in at least some in particular, specified contexts (including both the provision of separate facilities and maintenance of separate sports programs) *forbids*, rather than requires, reading the term "sex" in a way that bans all distinctions between the two biological sexes (Section II).

(3) It shows that if the Fourth Circuit *were* right that the protects gender identity instead of sex, even

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(7th Cir. 2023); *Hecox v. Little*, No. 20-35813, 2023 WL 11804896, at *6-18 (9th Cir. Aug. 17, 2023), as amended June 7, 2024. Thankfully, the Courts of Appeals are not uniform in this approach, as the Eleventh Circuit has charted a different, better course in reading *Bostock* to mean what it says and no more. *Lange v. Houston Cnty.*, 2024 U.S. App. LEXIS 20702 (11th Cir. 2024) (vacating panel decision misreading Bostock as the Fourth, Seventh, and Ninth Circuits have, by accepting petition for *en banc* review); *Adams v. Sch. Bd. of St. John's Cty.*, 57 F.4th 791 (11th Cir. 2022).

Title IX itself would likely be unconstitutional (Section III).

(4) It observes the linguistic impossibility and impracticability of the Fourth Circuit's revised edition of the Equal Protection Clause (Section IV). This bizarro Equal Protection not only bars what has long been practiced and celebrated, it compels policies that cannot be described as "equal" anything. More, it would replace the clear rules of this Court's Equal Protection jurisprudence with a requirement to equalize treatment across an unmeasurable, ever-shifting quantum.

We conclude that federalism, which here as elsewhere *does* find support in the Constitutional text, offers a coherent and more flexible alternative (Section V).

This Court should grant the petition in order to resolve the deepening circuit splits on the proper reading of *Bostock* in a way that assures the federal courts will follow this Court's directions. That's become urgently necessary in order to preserve the Equal Protection Clause and the central civil rights enactments of Congress from a wholly manufactured and spurious Constitutional quandary. That sadly necessary step will ensure that our law continues to present workable standards for the lower courts

and the sovereign states to apply in assuring the fair treatment of Americans of all sexes.

ARGUMENT

I. *BOSTOCK* IS COHERENT, BUT THE UNREASONED EXTENSION OF ITS HOLDING TO OTHER CONTEXTS IS NOT, AS THE CASE OF TITLE IX DEMONSTRATES.

After this Court issued its *Bostock* decision, renegade Courts of Appeals quickly ran not in the direction in which *Bostock*'s reasoning pointed, but in the preferred direction they thought its holding gave them cover to pursue. They took the position that *Bostock* held that "gender identity discrimination" is, and must be treated as, sex discrimination—anywhere and everywhere.[3] But that's *not* always so.

A. *Bostock* was About Sex Discrimination, Not "Gender Identity" Discrimination.

Bostock held that when someone is the subject of adverse action by an employer based on gender non-conforming behavior, that action was taken because of sex for purposes of Title VII, because the person's sex is a but-for cause of the adverse action.

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[3] *See, e.g.*, *Metropolitan Sch. Dist. of Martinsville*, 75 F.4th at 770; *Grimm v. Gloucester Co. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020); *Hecox*, 2023 WL at *6-18, as amended June 7, 2024.

Bostock explicitly declines to reach beyond the Title VII (employment) context.[4] Moreover, it does not find a new protected class in Title VII 56 years after its passage. Instead, it assesses the treatment of employees exhibiting the same behavior and correctly notes that Title VII bans ***sex*** discrimination: if an employer would allow a biological woman to wear a dress, then it must not differently treat an otherwise comparable biological man. Whatever its weaknesses, this approach is perfectly coherent and provides a clear rule for evaluating employer decisions for *sex* discrimination.

B. *Bostock*'s Reasoning Doesn't Extend to Title IX, Let Alone the Equal Protection Clause.

What happens when *Bostock*'s logic is ignored by extending the short-hand version of its holding to another source of law, like Title IX? That statute, whose carveouts distinguish it from Title VII, and in which the Fourth Circuit *also* recently held "sex" to mean "not-sex, but instead gender identity," illustrates the jurisprudential-Calvinball that inevitably results when appellate judges invoke precedent not for its logic, but as a talisman for a set of results they find desirable as a matter of policy.

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[4] *Id.* at 1753 (of "other federal or state laws prohibit[ing] sex discrimination" and "sex-segregated bathrooms, locker rooms, and dress codes[,]" noting that "none of these other laws are before us;" "we do not purport to address bathrooms, locker rooms, or anything else of the kind[;]" and concluding that "[w]hether other policies and practices might not qualify as unlawful discrimination or find justifications under other provisions of [even] Title VII are questions for future cases, not these.").

Title IX generally forbids federally funded education programs or activities from engaging in sex discrimination. Its key provision states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…." 20 U.S.C. § 1681(a). There is no other section of Title IX that forbids other kinds of discrimination. *If it isn't sex discrimination, it isn't forbidden by Title IX.*

Title IX contains an important exception to its sweeping rule against sex discrimination. "[N]othing contained herein shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Congress expressly directs that, even if a recipient's policies of maintaining separate living facilities for the different sexes would otherwise qualify as sex discrimination, Title IX "shall [not] be construed to prohibit" that policy.

Without § 1686, *any* boarding-school boy (not just one who identifies as a girl) would be able to point to a girls' dorm and say, "if I were a girl, I would be allowed to sleep there. But since I am a boy, my school bars me from doing so. That's sex discrimination!" He would be right; *it would be* sex discrimination. Indeed, it *is* sex discrimination. But given § 1686, it is *lawful* sex discrimination.[5]

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[5] Exactly the same would be true if the sexes and genders were reversed, with a biological girl identifying as a boy.

Soon after the passage of Title IX, in 1975, President Ford approved a related regulation, clarifying § 1686.[6] That regulation was codified as 34 C.F.R. § 106.33 (the "1975 Bathroom Regulation").[7] The 1975 Bathroom Regulation, which demonstrates how the original interpretive community understood § 1686 at its enactment, reads: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

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[6] 20 U.S.C. § 1682 requires that regulations promulgated under Title IX receive direct Presidential approval in order to take effect.

[7] The current administration amended Title IX's regulations effective as of August 1, 2024. The impact of those alterations, including their impact on the 1975 Bathroom Regulation, is subject to voluminous litigation across the federal courts at this time. That litigation has seen at least eight preliminary injunctions or stays pending appeal, which have cumulatively blocked the alteration from taking effect in more than half of the states. See *Dep't of Educ. v. Louisiana*, Nos. 24A78, 24A79, 2024 U.S. LEXIS 2983, at *3 (Aug. 16, 2024); *Louisiana v. United States Dep't of Educ.*, No. 3:24-CV-00563, 2024 U.S. Dist. LEXIS 105645, at *56 (W.D. La. June 13, 2024); *Alabama v. United States Sec'y of Educ.*, No. 24-12444, 2024 U.S. App. LEXIS 21358, at *23 (11th Cir. Aug. 22, 2024); *Arkansas v. United States Dep't of Educ.*, No. 4:24 CV 636 RWS, 2024 U.S. Dist. LEXIS 130849, at *66 (E.D. Mo. July 24, 2024); *Tennessee v. Cardona*, Civil Action No. 2: 24-072-DCR, 2024 U.S. Dist. LEXIS 106559, at *131 (E.D. Ky. June 17, 2024); *State v. Cardona*, No. CIV-24-00461-JD, 2024 U.S. Dist. LEXIS 135314, at *33 (W.D. Okla. July 31, 2024); *Texas v. U.S.*, N.D. Tex. Case No. 2:24-cv-86; and *Kansas v. United States Dep't of Educ.*, No. 24-4041-JWB, 2024 U.S. Dist. LEXIS 116479, at *73 (D. Kan. July 2, 2024).

The 1975 Bathroom Regulation is simply an interpretation of § 1686. It clarifies, (though no clarification was needed) that "living facilities" includes "toilet, locker room, and shower facilities." This was not controversial in 1975 and has never been controversial since. We have searched and have found no examples of anyone: (a) interpreting § 1686 between Congress's passage of Title IX and President Ford's approval of the 1975 Bathroom Regulation as requiring the abolition of single-sex bathrooms, locker rooms, and showers;[8] or (b) contending in the years since that President Ford overstepped his regulatory authority or misinterpreted § 1686 in issuing the 1975 Bathroom Regulation.[9]

Similarly, in 1974 Congress passed the Javits Amendment. Education Amendments of 1974, § 844. Some, including the U.S. Department of Education, read the Javits Amendment to have enacted an additional exception to Title IX, specifically for athletics. Notice of Proposed Rulemaking Concerning Nondiscrimination on the Basis of Sex in Education Programs or Activities

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[8] Indeed, we have been unable to identify : (a) any court case whatsoever referencing § 1686 prior to 1995; (b) any article or treatise referencing § 1686 at all, published prior to 1985; or (c) any article or treatise referencing § 1686 in conjunction with bathrooms, locker rooms, or showers prior to 1995.

[9] Even when the Fourth and Seventh Circuit Courts of Appeals recently applied what they wrongly described as *Bostock*'s reasoning to find that sex-specific restrooms violate Title IX, they did so by side-stepping the 1975 Bathroom Regulation, rather than by contending that the 1975 Bathroom Regulation was arbitrary or capricious. *See Metropolitan Sch. Dist. of Martinsville v. A.C.*, 75 F.4th 760, 770 (7th Cir. 2023); *Grimm*, 972 F.3d at 618.

Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams (the "NPRM") (34 CFR 106, Docket ID ED -2022-OCR-0143) [Fed. Reg. Vol 88, No. 71, pp. 22860-22891] [RIN 1870-AA19], pp. 22863 ("Congress indicated in the Javits Amendment that a different approach to athletics was appropriate and that the Title IX regulations should include 'reasonable' provisions governing intercollegiate athletic activities in light of the 'nature of particular sports.'").

In 1975, the Education Department followed through on the Javits Amendment, promulgating 34 C.F.R. § 106.41 (the "1975 Sports Regulation"), which President Ford promptly approved. § 106.41(b) expressly authorized funding recipients "[n]otwithstanding the" general prohibition on sex separation to "operate or sponsor separate teams for members of each sex, where selection for such teams is based upon competitive skill or the activity involved is a contact sport;" §106.41(c) added the condition that such separation was permissible only where the "recipient … operates or sponsors … equal athletic opportunity for members of both sexes."

If that contention is right, then the Javits Amendment and the 1975 Sports Regulation created a parallel to § 1686 and the 1975 Bathroom Regulation for sports, specifically carving out the maintenance of equal men's and women's sports programs from the otherwise applicable general prohibition on separation of the sexes.

Meanwhile, *Bostock* was of course a Title VII case, not a Title IX case. It did not hold that when Title VII says "sex," it really means "sex or sexual orientation or gender identity." To the contrary, it held that Congress's

prohibition on sex discrimination prohibited discrimination based on sex—"an employer who fires a transgender person who was identified as a male at birth but who now identifies as female" while "retain[ing] an otherwise identical employee who was identified as female at birth … penalizes" the fired employee "for traits or actions that it tolerates in an employee identified as female at birth. [That] employee's sex plays an unmistakable and impermissible role in the discharge decision." *Bostock*, 140 S.Ct. at 1742.

The transgender plaintiff prevailed in *Bostock* ***precisely because***, however the plaintiff "identified," the plaintiff's sex had not changed. Title VII only applied because an employer who fires a biological *male* employee who identifies as a woman, but would not have fired a biological *female* employee identifying as a woman, definitionally makes the fired employee's sex a "but-for cause" of the termination. *Bostock*, 140 S.Ct. at 1741-42. The plaintiff's gender identification was relevant only as a behavior the employer accepted from a woman, but not from a man, not as an additional form of discrimination whose prohibition had been newly discovered in Title VII's 56-year-old text. *Id.* at 1739 (noting that "[t]he *only* statutorily protected characteristic at issue in today's cases is '*sex*,'" and stipulating that "sex" in Title VII "refer[s] *only* to biological distinctions between male and female" (emphasis added)).

Bostock's logic is entirely consistent with the analysis above. Like the hypothetical boarding-school student, a

hypothetical transgender boy[10] would be entirely right to say: "I am a biological boy who identifies as a girl, but am not allowed to use the showers, locker rooms, and bathrooms my school provides for girls. If I were a biological girl who identified as a girl, I would be able to use them. That is sex discrimination!" That student would be correct. It is sex discrimination. But it is precisely the kind of sex discrimination expressly authorized by Congress in § 1686 and by President Ford in the 1975 Bathroom Regulation, and that type of sex discrimination does not violate Title IX.

Precisely the same would remain true if the same boarding school student declared a preference for competing on that school's girls' basketball team—were the student to say: "I am a biological boy who identifies as a girl and plays basketball. My school does not allow me to compete on the girls' team. If I were a biological girl, I would be able to play on that team. That's sex discrimination!" Again, that assertion would clearly be right. But so long as the school maintained both boys' and girls' teams, and provided them with equal facilities and support, it would be precisely the kind of sex discrimination that Congress and the Ford Administration protected in law in the 1970s.

In both cases, the actions of Congress distinguish our boarding school hypothetical from *Bostock*.

It would be no answer for that hypothetical transgender boy to insist that "I really *am* a girl," either

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[10] Again, this example would work precisely the same with all roles reversed.

in arguing that, as such, the student "should have access to my school's single-sex girls' showers, locker rooms, and bathrooms" or that the student should be allowed onto the girls' basketball team. *Title IX prohibits sex discrimination, not discrimination between different kinds of girls (or different kinds of boys).* Whatever one chooses to call this kind of discrimination, it can't be called *sex* discrimination, because—even accepting the hypothetical transgender individual's assertion—it would remain discrimination between individuals stipulated to share the same sex. It cannot, then, violate Title IX, because it would not differentiate the treatment of anyone because of their sex, as *Bostock* would require to undergird an instance of sex discrimination.

C. The Fourth Circuit's Swap-Out of "Sex" for "Gender Identity and Not 'Sex'" Is Irreconcilable with the Court's Reasoning in *Bostock*.

The Fourth Circuit reversed all of this reasoning in nominal reliance on this Court's work in *Bostock*. The core of the Fourth Circuit's recent Equal Protection / Title IX decision banning female-only sports chided West Virginia for

> …insisting the Act does not discriminate based on gender identity because it treats all "biological males"—that is, cisgender boys and transgender girls—the same. . . . But that is just another way of saying the Act treats transgender girls differently from cisgender girls, which is—literally—

> the definition of gender identity discrimination."

B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 556 (4th Cir. 2024).

This completely ignores the text of Title IX (and of the Equal Protection Clause). It utterly fails to apply *Bostock*'s reasoning. It rejects *Bostock*'s search for differences in treatment of men and women as they are because of their categorical sex difference. It replaces *Bostock*'s application of an enacted prohibition on the differential treatment of men and women behaving the same with a categorical prohibition on the recognition of men and women as legal categories.

In nominally applying *Bostock*, the Fourth Circuit would render *Bostock*'s analysis unconstitutional.

II. THE FOURTH CIRCUIT'S INTERPRETATION OF THE EQUAL PROTECTION CLAUSE PROVES TOO MUCH; IT WOULD EVEN RENDER TITLE IX UNCONSTITUTIONAL.

If—as the Fourth Circuit and other lower courts contend—the Equal Protection Clause prohibits as "sex discrimination" the exclusion of a biological boy (who identifies as a girl) from the girls' facilities or from the girls' basketball team (much less *compels as an entitlement* the coverage of elective surgery for dysphoric welfare beneficiaries and government employees), then it follows that *all* boys must be allowed to use the girls' facilities and to play on the "girls'" team. The Equal Protection Clause

would then prohibit the maintenance of single-sex facilities *entirely* and *require* that all facilities and sports programs be unisex.

Bearing in mind that the Constitution imposes precisely the same constraints on the federal government that the Fourteenth Amendment's Equal Protection Clause imposes on the states,[11] the Court of Appeal's analysis *cannot* remain localized only to invalidate state statutes or to compel actions by the state goverments. What

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[11] At least seven (7) of the current Justices have recognized this parallelism. The Chief Justice did so, at least, in *Sessions v. Morales-Santana*, 198 L.Ed.2d 150, 159 n. 1 (2017), and—with Justice Alito—in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Justices Sotomayor and Kagan have done so repeatedly, including in *Sessions*. In *U.S. v. Madero*, 142 S.Ct. 1439, 1544 (2022), Justice Thomas agreed, anchoring this constraint in the Fourteenth Amendment's citizenship clause, but continuing to find it subject to the same limits. Justice Gorsuch's concurrence in *Madero*, slightly less explicitly, recognizes the same contours. *Madero*, 142 S.Ct., at 1556 (noting that the majority, on the theory that the relevant Constitutional provision of the Fifth Amendment was "fundamental," had applied Fourteenth Amendment jurisprudence, and had held it to have been satisfied, and writing separately only to object to any analysis of what portions of the Constitution are sufficiently "fundamental" to apply). In 2021, Justice Kavanaugh joined a concurrence to a denial of certiorari, which agreed (by citation to *Sessions* and other authorities) that the "Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating" in terms paralleling the Court's application of the Equal Protection Clause of the Fourteenth Amendment. *Nat'l Coal. for Men v. Selective Srv. Sys.*, 141 S.Ct. 1815, 1815 (2021). The remaining Justices appear to have not yet taken a position since their investitures.

is bad for the state-goose will be bad for the federal-gander.

If *Bostock* means that the Constitution bans single-sex athletic teams, bans single-sex bathrooms, locker-rooms and showers, and compels states to cover the elective surgeries sought by their dysphoric employees it would equally dictate that the Constitution bans Title IX, which together with its implementing regulations explicitly permits single-sex facilities such as locker rooms and "separate teams for members of each sex [that provide] equal athletic opportunity for members of both sexes." Unless, that is, Title IX *also* bans the same carved-out programs that Congress specifically acted to protect. Title IX doesn't do that. But Equal Protection must be equal, and there is simply no way to square a reading of the Fourteenth Amendment that imposes such consequences that with Title IX, one of Congress's most foundational Civil Rights protections of Americans.

III. SUCH BIZZARO "EQUAL PROTECTION" WOULD BE BOTH LINGUISTICALLY UNTENABLE AND COMPLETELY IMPRACTICABLE.

Decisions like those below inevitably leave the thoughtful reader with the sense that he is being gaslit. He might ask incredulously:

> The Supreme Court has said that women—in the only coherent sense of the word: adult human females—are protected by the Fourteenth Amendment from discrimination on the basis of their sex.

> Yet now the Fourth Circuit says not only that "sex" means "gender" and dictates that women—that is, adult human females—don't exist for Equal Protection purposes, but also that the Equal Protection Clause both requires the admission of men—adult human males—into their spaces and compels their government to use their taxes to fund the elective procedures such men seek to further the ruse.
>
> How can it be that this body of civil rights law that until five minutes ago protected women's right to female-only spaces now *bans* single-sex spaces, and *requires* that such spaces instead be segregated on the basis of how men feel?

Such a reader would not be mad or unsophisticated. The emperor really does have no clothes.

The road away from *Bostock*'s logical textualism and toward the Fourth, Seventh, and Ninth Circuits' linguistic shell-game doesn't choose the lesser of two evils or accept inevitable tradeoffs. Instead, it declares that "x" does not equal "x," because "x." That "rule" could be drawn straight from the pages of Lewis Carroll or Hans Christian Anderson, if not Kafka.

Consider just two independently disqualifying features of the lower courts' general move to redefine "sex" as "not sex, but gender identity": (i) internal incoherence; and (ii) the impossibility of citizens, states, or courts

applying the resulting rules to order their lives, public and private institutions, and future cases.

First, the lower courts' gnostic version of *Bostock* is incoherent on its own terms. The courts assure us that "sex" doesn't denote the human trait denoted by past standard usage of the English word "sex," but instead somehow means both "sex" and "gender identity," a concept that has—since its 1964 invention—always been understood entirely in *dichotomy* with sex.[12]

Incoherence is frankly inevitable here, because the logic of *Bostock* forbids what wayward appellate courts *really* want to say: "the law requires the states to pretend that some members of the male sex are members of the female sex (and vice versa)."

The courts below reject *Bostock*'s *logic* in order to jam its squarely text-based *holding* into an Equal Protection-shaped hole that simply doesn't exist. *Bostock* cannot coherently serve the purposes for which these courts seek to repurpose it, because the tools (words) *Bostock* employs have fixed meanings. The Fourth Circuit, among

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[12] *See* Stoller, Robert J., *The Hermaphroditic Identity of Hermaphrodites*, THE JOURNAL OF NERVOUS AND MENTAL DISEASE, 139(5) November 1964 (originating term and concept) (available at https://journals.lww.com/jonmd/citation/1964/11000/the_hermaphroditic_identity_of_hermaphrodites.5.aspx (last accessed August 15, 2024)). The term would later be popularized by John Money, but the human experiments for which he'd later achieve infamy were hardly underway when Title IX passed in 1972. *See* Burkeman, Oliver and Younge, Gary, *Being Brenda*, The Guardian (12 May 2004) (available at https://www.theguardian.com/books/2004/may/12/scienceandnature.gender (last accessed August 15, 2004)).

others, has dared this Court to raise and address the real issue out loud, and this Court should accept that invitation and announce that: (a) male and female Americans exist and matter; (b) the law may reasonably recognize them as a category for some purposes; and (c) the Constitution does not require states to expend public resources assisting their citizens or employees in obtaining treatments to look more like another sex.

Second, the incoherence of the regime makes it cruelly and uselessly unpredictable. Countless American actors at all levels of public and private life must structure their institutions and lives around the requirements that civil rights law imposes. That law, like all law, best serves its purpose when regulated parties can determine what conduct is and is not required of them or permitted for them by these provisions and the decisions of this Court and those below interpreting them. The lower courts' approaches here fail spectacularly to satisfy law's goal of predictability in every respect.

- How are parents to understand the contours of Equal Protection when courts tell them they aren't sure what "sex" means, except that it definitely doesn't mean "sex"?
- How are governments to establish rules for their employees, much less for their populations, when they can't be sure whether any particular instance of "sex" in civil rights law refers to "sex" or "not-sex"?
- What are the implications as new genders develop and multiply? What is the relationship of

these genders and others yet to come to "sex" in the law when "sex" means "gender identity?"

- How many athletic divisions are states required to create and maintain by the proposed new understanding of Equal Protection? Must they maintain such programs not only for male and female "boys" and "girls" but for intersex, genderfluid, and "two-spirit" students?
- How many scholarships may or must state institutions trying to comply with their legal obligations allot to male, female, intersex, genderfluid, and "two-spirit" students? Will that answer change over the course of a day as the latter two's preferred pronouns shift?
- What word should *legislators* use to refer to a human female when courts tell them the constitution won't let them use "girl" or "women" to refer to that class of people?

These problems are insoluble. If the Court were to leave standing the rule announced below, it would assure that actors cannot safely plan their affairs to comply, that lower courts will have no bright lines to gauge the merits of future lawsuits, and that this Court will face an unending stream of future cases plumbing the unmeasurable depths of this new-found deep.

The Court should grant certiorari to prevent that fate.

IV. THERE IS A BETTER WAY: FEDERALISM.

The Ninth Circuit recently (and perhaps unwittingly) pointed in the more promising direction: federalism. In *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), The court rightly observed that

> just because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity. Nowhere does the statute explicitly state, or even suggest, that schools may not allow transgender students to use the facilities that are most consistent with their gender identity. That is, Title IX does not specifically make actionable a school's decision not to provide facilities segregated by "biological sex[.]"

Id. at 1257.

Let the people of North Carolina make decisions for North Carolina and the people of Virginia make decisions for Virginia.

CONCLUSION

This Court should grant the Petition for Certiorari and clarify that *Bostock* didn't replace the Equal Protection Clause's prohibition of most sex discrimination with a requirement to fund the elective surgeries of dysphoric

public employees, however earnestly those services are desired.

Respectfully submitted,

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