No. 20-1163

# In the Supreme Court of the United States

**GLOUCESTER COUNTY SCHOOL BOARD,**

*Petitioner*,

**v.**

**GAVIN GRIMM,**

*Respondent*.

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

## BRIEF *AMICI CURIAE* OF THE PACIFIC JUSTICE INSTITUTE, THE FAMILY FOUNDATION, NEBRASKA FAMILY ALLIANCE, ILLINOIS FAMILY INSTITUTE, HAWAII FAMILY FORUM, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, AND THE NATIONAL LEGAL FOUNDATION

*in Support of Petitioner*


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## INTERESTS OF THE *AMICI CURIAE*[1]

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its 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 family rights. As such, PJI has a strong interest in the development of the law in this area.

**The Family Foundation** ("TFF") is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

**Nebraska Family Alliance** ("NFA") is a non-profit policy, research, and education organization that advocates for strong family values, the sanctity

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[1] The parties were provided appropriate notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

of human life, and religious freedom. The diverse, statewide network of NFA is composed of thousands of individuals, families, and faith-leaders who seek to advance a culture in which the religious freedom and conscience rights of all citizens are protected and preserved. NFA's public policy efforts focus on protecting unborn children, supporting pregnant women, defending religious freedom, and ensuring fair and equitable treatment for all foster home agencies.

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. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

**Hawaii Family Forum** (HFF) was established in 1998 to protect, preserve, and strengthen Hawaii's ohana (family). We are a non-profit, pro-family research and education organization that provides resources that equip citizens to make their voices heard on critical social policy issues involving the sanctity of human life, the preservation of religious liberties, and the well-being of the ohana as the building block of society.

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 **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Virginia, seek to ensure that First Amendment and family freedoms are protected in all places.

## SUMMARY OF ARGUMENT

The reasoning of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), drove the panel majority's decision, but *Bostock* should be reconsidered, rather than extended. Title IX is pregnant with the fact that biological males and biological females have distinct attributes relevant to privacy interests, and that difference cannot be eliminated or made into an equal protection violation by someone asking to be treated as if they were of the opposite sex.

## ARGUMENT

### I. The Petition Should Be Granted for This Court to Reconsider *Bostock*

This case presents the question of whether this Court's reasoning in *Bostock* should be extended to Title IX. In addition to the points of distinction made by the Petitioners and by Judge Niemeyer in dissent

below, 972 F.3d at 632-35, *Bostock* should not be extended for the additional reason that it was not properly reasoned. Rather, this Court should take the opportunity presented by this case to reconsider and overrule *Bostock*.

The opinion in *Bostock* rested on the proposition that, when an employer fires someone for being transgender, it necessarily does so "for traits or actions it would not have questioned in members of a different sex." 140 S. Ct. at 1737. This Court reasoned 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.* at 1741-42.

Bringing the example closer to the case at hand demonstrates its illogic. 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 the *Bostock* opinion, 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.

And taking the *Bostock* rationale further, it does no good for the employer to argue that it also fired Hanna, 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 Hanna invading the men's

room would each have been disciplined because of their sex. 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, because, as *Bostock* instructs, Title VII protects an individual. *Id.* at 1741. "Instead of avoiding Title VII exposure, this employer doubles it." *Id.*

While the bathroom and locker room situation sketched above results from a logical extension of the *Bostock* reasoning, the opinion itself did not stretch its examples that far. But the Fourth Circuit majority did. *See* 972 F.3d at 616-17. And it did so when privacy interests in bodily integrity are at their greatest, because this case involves minor children in varying stages of puberty.

Under the Fourth Circuit majority's reasoning, tracking that of *Bostock*, of what is meant by sex discrimination under Title IX, what now prevents a boy who still exhibits as male from entering a girls' restroom or locker room? If he is stopped from doing so, even though he prefers to see girls undressed rather than boys, it necessarily is because of his biological sex, which, per *Bostock*, violates Title IX's prohibition against sex discrimination.

Although this Court has ample tools to distinguish Title VII from Title IX, as discussed by Petitioner,[2] it should take this opportunity, before

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[2] The General Counsel of the Department of Education in his guidance letter of January 8, 2021, explaining why *Bostock*'s interpretation of *sex* in Title VII does not apply in Title IX lists many relevant distinctions as well. *See* https://www2.ed.gov/about/offices/list/ocr/correspondence/o

further mischief is done, to overrule *Bostock*. It would not be the first time this Court had made a prompt about face. *See, e.g.*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling Minersville Sch. Dist.* v. *Gobitis,* 310 U.S. 586 (1940).

"Unexpected consequences" flow as readily from a mistaken interpretation of a statute as from the text of the statute itself. *See Bostock*, 140 S. Ct. at 1737. The unintended applications sanctioned in this case by the Fourth Circuit come not from what Congress did, but from what this Court did in *Bostock*. It is up to this Court to correct the problem of its own making.

## II. The Petition Should Be Granted for This Court to Correct the Circuit Court's Erroneous Equal Protection Holding

The panel majority also found an equal protection violation where none exists. *See* 972 F.3d at 606-15. This Court should also grant the petition to correct this error.

Transgender advocates base their claim on the assertion that to present as the opposite of their birth gender *makes* them that opposite gender. This, of course, runs directly contrary to scientific facts: a person can never "escape" his or her birth sex; it is stamped in every cell of the person's body, and it always will be. *See United States v. Va.*, 518 U.S. 515, 533 (1996) (describing sexual differences as "enduring"). Surely, we are not at the point where a

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person whose DNA is that of a man can refute his criminal culpability by saying he presents as a woman.

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, as is true of Respondent here, 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 "transgender" 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.*

Trans and non-trans individuals cannot properly be equated constitutionally, especially when that very difference forms the basis for the conflicting interests involved. *See United States v. Va.*, 518 U.S. at 550 n.19 (recognizing that schools may segregate the sexes for privacy purposes). Biological males and females are "not fungible." *Id.* at 533 (quoting *Ballard v. United States,* 329 U.S. 187, 193 (1946)). Neither are females and biological males presenting as females.

## CONCLUSION

The petition should be granted and the decision of the Fourth Circuit reversed.

Respectfully submitted
this 26th day of March 2021,

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