Nos. 17-1618, 17-1623, 18-107

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*
v.
CLAYTON COUNTY, *Respondent*

ALTITUDE EXPRESS, INC., *et al., Petitioners*
v.
MELISSA ZARDA, *et al.*, *Respondents*

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner*
v.
EQUAL EMPLOYMENT OPP. COMM'N*, et al., Respondents*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SECOND, SIXTH, AND ELEVENTH CIRCUITS

BRIEF OF *AMICUS CURIAE* NATIONAL ORGANIZATION FOR MARRIAGE AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENT IN NO. 17-1618 AND PETITIONERS IN NOS. 17-1623, 18-107

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QUESTION PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., can be expanded by executive agencies or the courts to include classifications based on "sexual orientation" or "gender identity," when the relevant statutory language prohibits discrimination "because of sex" and efforts in Congress to amend the statute to include "sexual orientation" and "gender identity" have been unsuccessful.

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INTEREST OF AMICI CURIAE[1]

The National Organization for Marriage ("NOM") is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM's leading role in those efforts has necessarily meant that the organization has been involved in many public debates about what constitutes being male and being female and the state of the law dealing with sexual preference. In addition, NOM has been involved in a variety of efforts to overturn regulatory and legislative actions seeking to substitute "gender identity" for biological sex in determining who may access gender-specific facilities such as restrooms, showers and locker rooms. For example, NOM urged its members to support a referendum in California and a ballot initiative in Washington State on these very matters. Because of its advocacy and public education activities surrounding sexual preference and gender-identity issues, NOM has been the recipient of scientific reports on sexuality and gender, as well as scores of anecdotal examples of threats to privacy and safety that have occurred in the wake of the adoption of policies that eliminate gender-specific access to intimate facilities such as restrooms, showers, and locker rooms. NOM believes that such evidence should be of concern to this Court.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute,

[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental *separation of powers* principles implicated by these cases. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *Gloucester County v. G.G. ex rel. Grimm*, 137 S.Ct. 1239 (2017); *United States v. Texas*, 136 S.Ct. 2271 (2016); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016); *U.S. Dep't of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015); and *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1213 (2015).

SUMMARY OF ARGUMENT

The extraordinary number of briefs filed in these three consolidated cases indicates that the issues involved are at the front lines of an increasingly vitriolic culture war. It is particularly important, therefore, that we not let the third-rail nature of the subject matter cloud the key *constitutional* issue at stake, which is at its core a separation of powers issue. Because anti-discrimination laws necessarily infringe on individual liberty, on freedom of association, on freedom of contract, and even, as these cases demonstrate, freedom of speech, freedom of religion, and privacy rights, the basic policy determination to expand such laws to new contexts and new classifications is a power our Constitution assigns to the Congress, not to unelected and largely unaccountable bureaucrats and not even to the courts.

Congress has declined to expand `Title VII to include classifications based on sexual orientation or gender identity, despite numerous efforts over decades to amend the law in just the manner plaintiffs in

these cases have sought to accomplish by judicial ruling. That should be the end of the matter.

Worse, at least with respect to the transgender claims at issue in Case Number 18-107, the complainant below seeks to have this Court adopt a distorted interpretation of the anti-discrimination laws that would actually place them in direct conflict with specific privacy rights protected in some of the very same laws as well as with workplace regulations properly adopted by the Occupational Safety and Health Administration. Reversal of the lower court decisions in case numbers 17-1623 and 18-107, and affirmance in case number 17-1618, is therefore warranted.

ARGUMENT

I. Title VII of the Civil Rights Act of 1964 Does Not Include "Sexual Orientation" or "Gender Identity" in its List of Grounds for Which Employment-Based Classifications are Prohibited.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to "discriminate against any individual" with respect to employment "because of such individual's race, color, religion, *sex*, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The ban on sex discrimination is comparable to that found in a number of other federal civil rights statutes, including: Title IX of the Education Amendments of 1972 ("Title IX"), which provides that "[n]o person . . . shall, *on the basis of sex*, be excluded from participation in" educational programs, 20 U.S.C. § 1681(a) (emphasis added); the Equal Credit Opportunity Act, which outlaws discrimination in credit transactions "on the basis of race,

color, religion, national origin, *sex* or marital status, or age," 15 U.S.C. § 1691(a)(1) (emphasis added); the Fair Housing Act, which outlaws in the sale or rental of housing "because of race, color, religion, *sex*, familial status, or national origin," 42 U.S.C. § 3604(b); and the Equal Pay Act of 1963, which prohibits discrimination "on the basis of sex" in pay rates for equal work, 29 U.S.C. § 206 (d)(1).

None of these statutes includes "sexual orientation" or "gender identity" in their list of prohibited classifications and, as numerous courts over the years have recognized, prohibitions on the basis of sexual orientation or gender identity cannot be inferred from the explicit textual prohibition "on the basis of sex." *See, e.g., Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 260-61 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000), overruled by the case *sub judice*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

Moreover, frequent attempts over several decades to amend one or another of these civil rights statutes to include "sexual orientation" and/or "gender identity" have been unsuccessful. *See, e.g.*, H.R. 13019, 94th Cong. (2d. Sess. 1976); H.R. 10389, 94th Cong. (1st Sess. 1975); H.R.2667, 94th Cong. (1st Sess. 1975); S. 2056, 104th Cong. (2d Sess. 1996); H.R. 2015, 110th Cong., 1st Sess. (2007); H.R. 3017, 111th Cong., 1st Sess. (2009); H.R. 1397, 112th Cong., 1st Sess. (2011); H.R. 1755, 113th Cong., 1st Sess. (2013); H.R. 3185, 114th Cong., 1st Sess. (2015); H.R. 2282, 115th Cong., 1st Sess. (2017); H.R. 5, 116th Cong., 1st Sess. (2019).

Other federal civil rights statutes do include (or have been amended to include) such terms, indicating that Congress is perfectly capable of adding those terms to other civil rights statutes should it choose to do so. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, for example, makes it a sentence-enhancing hate crime to cause bodily injury to any person "because of the actual or perceived religion, national origin, gender, *sexual orientation, gender identity*, or disability of any person." 18 U.S.C. § 249(a)(2)(A) (emphasis added). The Violent Crime Control and Law Enforcement Act of 1994 provides for sentencing enhancements more broadly for hate crimes committed "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or *sexual orientation* of any person." PL 103–322, September 13, 1994, 108 Stat 1796. The Violence Against Women Act was amended in 2013 to prohibit discrimination in certain federally funded programs "on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity*…, *sexual orientation*, or disability." 34 U.S.C. 12291(b)(13)(A) (emphasis added). Significantly, the phrases "gender identity" and "sexual orientation" in these statutes is in *addition* to the word "sex" or "gender," indicating Congress's understanding that the phrases are not synonymous with the word "sex."

II. Neither the Unelected Bureaucracy Nor the Judiciary Has Authority to Create Additions to the Statutory Text.

Despite the clear, and apparently deliberate, determination by Congress *not* to add "sexual orientation" and "gender identity" to Title VII (or the several other civil rights statutes that do not include those

terms), and the long-standing position of the Department of Justice that Title VII did not cover transgender status or gender identity, *see, e.g.*, Memorandum in Support of Mot. to Dismiss, *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008), the Department of Justice, the Equal Employment Opportunity Commission, and other federal agencies in the executive branch took it upon themselves over the past decade to supply the very prohibition that Congress has declined to provide.

The EEOC, for example, determined in 2012 that "that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition." *Macy v. Holder*, Appeal No. 0120120821, pp. 5-6 (EEOC April 20, 2012).[2] Similarly, the Office for Civil Rights at the U.S. Department of Health & Human Services announced in a 2012 opinion letter that Section 1557 of the Affordable Care Act, which incorporates Title IX's prohibition on *sex* discrimination, "extends to claims of discrimination based on gender identity." Letter to Maya Rupert, Esq., Transaction No. 12-0008000 (July 12, 2012).[3] And in 2014, both the Department of Justice and the Department of Labor also imposed this significant change in the law by fiat. *See* U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Gender Identity and Sex Discrimination, Di-

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[2] Available at https://www.hivlawandpolicy.org/sites/default/files/Macy%20v.%20Holder.pdf.

[3] Available at http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services.

rective 2014-02 (Aug. 14, 2014) (directing that for purposes of Executive Order 11246, which prohibits employment discrimination by federal contractors on the basis of sex, "discrimination based on gender identity or transgender status ... is discrimination based on sex");[4] Memorandum from Attorney General Eric Holder to United States Attorneys, p. 1 (Dec. 15, 2014) (determining that "Title VII' s prohibition of sex discrimination … encompasses discrimination based on gender identity, including transgender status").[5]

The Department of Justice and the Department of Education also advanced these *ultra vires* efforts to alter the civil rights laws by way of threatened litigation and "voluntary" resolution agreements. *See, e.g.*, OCR Case No. 09-12-1020 (July 24, 2013);[6] OCR Case No. 09-12-1095 (October 14, 2014).[7]

These memos and settlement agreements were then relied upon by James A. Ferg-Cadima, working deep in the bowels of the bureaucracy as the *Acting* Deputy Assistant Secretary for Policy in the Office of Civil Rights at the Department of Education, to issue

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[4] Available at http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[5] Available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf.

[6] Available at http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf (resolution letter) and http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf (resolution agreement).

[7] Available at http://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf (resolution letter) and http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (resolution agreement).

a "guidance" directive to public school districts across the nation that, if they chose to maintain single-sex locker rooms, shower, and housing facilities as Title IX and its implementing regulations expressly allow, they "must treat transgender students consistent with their gender identity," which is to say, allow biological boys in the girls showers and vice versa. Letter from James A. Ferg-Cadima (Jan. 7, 2015).[8] That guidance memo was then given deference by the lower courts pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997). *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709, 723 (4th Cir. 2016). This Court granted the petition for writ of certiorari, but the case became moot before it could be heard when the new administration revoked the guidance memo. *See Gloucester County v. G.G. ex rel. Grimm*, 137 S.Ct. 1239 (2017).

None of these alterations to the long-standing statutory language complied with the bicameralism and presentment requirements of the Constitution. U.S. Const. Art. I, § 7. And although this Court has allowed vast swaths of lawmaking power to be delegated to executive agencies when (unlike here) the statute is itself ambiguous, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), even then the formal notice and comment rulemaking process mandated by the Administrative Procedures Act must be undertaken before the "law" can be changed. That did not happen here either. In short, there is no basis for the executive branch to have re-written Title VII and other civil rights laws to add "sexual orientation" and

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[8] Available at http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf.

"gender identify" classifications to the litany of classifications that Congress has determined to include in those laws.

Happily, the Department of Justice has, in these very cases, returned to its prior recognition that Title VII does *not* include sexual orientation and gender identity. *See* Brief for the Federal Respondent Supporting Reversal, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, *et. al.*, No. 18-107 (filed Aug. 16, 2019). But the EEOC—the "federal respondent" represented by the Department of Justice on that brief—continues to this very day to assert the contrary, namely, that "Title VII … prohibits employment discrimination based on race, color, national origin, religion, and sex (including pregnancy, *gender identity, and sexual orientation*)." U.S. Equal Employment Opportunity Commission, Bathroom/Facility Access and Transgender Employees.[9] This Court should enforce the statute as written and direct the EEOC to do so as well.

III. The Constitutional Requirement that Legislative Powers are Vested in Congress, and the Accountability to the People That Follows, Is Particularly Important on Controversial Matters That Can Infringe Important Fundamental Rights.

It has long been recognized that the application of anti-discrimination laws to private individuals and organizations (rather than government itself) intrudes on the liberty of those individuals and organizations. *See, e.g.*, Richard A. Epstein, Forbidden Grounds: The

[9] At https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm (emphasis added, last visited Aug. 22, 2019).

Case Against Employment Discrimination Laws (1995). Such laws implicate Freedom of Association and Freedom of Speech, *see, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); Freedom of Contract, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989) (noting that 42 U.S.C. § 1981 "prohibits, when based on race, the refusal to enter into a contract with someone"); and even in some contexts the Free Exercise of Religion and Privacy. Nevertheless, our society, acting through its elected representatives, has determined that some measure of that individual liberty must give way to societal efforts to counter discrimination based on such immutable characteristics as race, national origin, and sex. But our society, acting through those same representatives, has also declined to intrude further on individual liberty by expanding the list of prohibited classifications to include less immutable, more fluid classifications such as those grounded in claims of sexual orientation or gender identity. Whether that is good policy or not, it is a policy judgment for Congress to make, not for unelected bureaucrats or the courts. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (administrative interpretations that raise constitutional questions regarding the statute should be rejected without "a clear indication that Congress intended the result").

The Title VII issue in case number 18-107 (and its Title IX analogue in the prior *Gloucester County* case) highlights with particular acuteness the competing policy concerns at stake. At the time and for nearly a half century since those laws were adopted, no one understood them to prohibit single-sex bathrooms, show-

ers, locker rooms and other intimate facilities. Indeed, Title IX expressly provides that "nothing contained [in it] shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department of Education's implementing regulations confirmed this common-sense understanding of what that statute and its express exception required and did not require: "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 for students of the other sex." 34 C.F.R. §106.33 (emphasis added).

Title VII's similar prohibition on sex discrimination has likewise never been understood as preventing employers from operating sex-segregated intimate facilities such as bathrooms and showers. Indeed, current workplace regulations imposed by the Occupational Safety and Health Administration *mandate* that employers maintain separate bathroom facilities for men and women. *See* 29 C.F.R. § 1910.141 ("toilet facilities, in toilet rooms separate for each sex, shall be provided in all places of employment").

Interpreting the prohibition on "sex" discrimination (with these privacy exceptions) as including "gender identity" claims negates the privacy exceptions, for it is impossible to maintain a single-sex bathroom or shower facility when biological males identifying as females (or vice versa) seek equal access not to the facility of their biological sex but to the facility of their self-proclaimed gender identity.

As should be obvious, the gender identity claimants are therefore seeking not just a minor adjustment to the civil rights laws, but a fundamental shift

in policy and rejection of "common sense [and] decency" that is inherent in the judicially-recognized fundamental right to bodily privacy from observation by persons of the opposite sex. *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992).

In its decision in the *Gloucester County* case, the Fourth Circuit stated:

> In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns—fundamentally questions of policy—is a task committed to the agency, not to the courts.

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017). While the Fourth Circuit was certainly correct in noting that such fundamental questions of policy are not tasks committed to the courts, it was only half right. Neither are they committed to the Chief Executive, much less to an executive agency. After all, the President's constitutional duty is to "take care that the laws"—the policy judgments of Congress—"be faithfully executed," Art. II, § 3, not to re-write those policy judgments to pursue their opposite.

These cases are therefore perfect examples of why our nation's Founders determined to vest the legislative power in Congress, not in unaccountable executive agencies. It is *Congress*, not unelected bureaucrats in various agencies, which is directly accountable to the people, and it is members of Congress who have to face the people's wrath at the next election if they enact a policy that fails to give due regard to the

significant privacy and safety concerns triggered by "interpretations" of various civil rights laws that move them into areas never envisioned by the elected representatives who adopted them. Those concerns are real, not imaginary, and they are already playing out in schools and public facilities across the country.

A few years ago in Seattle, for example, a man citing transgender bathroom laws was able to gain access to the women's locker room at a public swimming pool where little girls were changing for swim practice. Mariana Barillas, *Man Allowed to Use Women's Locker Room at Swimming Pool Without Citing Gender Identity*, The Daily Signal (Feb. 26, 2016).[10] Not only did the man begin to undress in front of the girls, but when asked to leave by staff, he replied: "the law has changed and I have a right to be here." *Id.*

In November of 2015, a Virginia man was arrested and charged with three counts of peeping after filming two women and a minor. *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say*, NBC Washington (Nov. 18, 2015).[11] The man had dressed as a woman to gain access to the women's restroom within the mall. *Id.*

These are not isolated incidents, but are happening across the country wherever transgender policies are put in place that allow men claiming to be women

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[10] Available at http://dailysignal.com/2016/02/23/man-allowed-to-use-womens-locker-room-at-swimming-pool-without-citing-gender-identity/.

[11] Available at http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041.html.

to access women's restrooms and showers. In Washington State, a woman who had suffered sexual abuse as a child was fired from her job for declining to go along with the YMCA's recent policy mandating that women's locker rooms and showers be open to men. The fact that the policy re-awakened her old trauma was of no moment. C. Mitchell Shaw, *Rape Victim: Transgender Agenda Creates "Rape Culture,"* The New American (July 1, 2016);[12] *see also, e.g.,* Warner T. Huston, *Top Twenty-Five Stories Proving Target's Pro-Transgender Bathroom Policy is Dangerous to Women and Children*, Breitbart News Networks (Apr. 23, 20116) (illustrating a multitude of instances confirming the privacy and safety concerns of many individuals are valid).[13] Similar incidents are also happening in parts of neighboring Canada that have reinterpreted "sex" to include "gender identity." Shortly after Ontario, Canada passed its "gender identity" bill, for example, a man claiming to be transgender gained access to women's shelters where he sexually assaulted several women. Peter Baklinski, *Sexual Predator Jailed After Claiming to be 'Transgender' to Assault Women in Shelter*, Life Site (Mar. 4, 2014). [14]

As noted above, members of Congress, as the directly-elected representatives of the people, are undoubtedly much more sensitive to these privacy and

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[12] Available at http://www.thenewamerican.com/culture/faith-and-morals/item/23541-rape-victim-transgender-agenda-creates-rape-culture.

[13] Available at http://www.breitbart.com/big-government/2016/04/23/twenty-stories-proving-targets-pro-transgender-bathroom-policy-danger-women-children/.

[14] Available at http://linkis.com/www.lifesitenews.com/12D80.

safety concerns than are unelected bureaucrats in various executive agencies. Legislative proposals to expand bans on sex discrimination to encompass "sexual orientation" and/or "gender identity" issues have been introduced with some regularity over the past several decades, *see e.g.* Equality Act of 1974, H.R. 14752, 93rd Cong. (1974); Equality Act, S. 1858, 114th Cong. (1st Sess. 2015); Real Education for Healthy Youth Act of 2015, H.R. 1706, 114th Cong. (1st Sess. 2015); Tyler Clementi Higher Education Anti-Harassment Act of 2015, S. 773, 1114th Cong. (1st Sess. 2015), but rarely have such proposals even made it to a hearing, much less to a floor vote. *See* Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong., (2013). Not one has been enacted. This Court should reject efforts to have *it* make that significant policy shift by judicial fiat instead.

CONCLUSION

The radical expansion of basic civil rights laws requested in these cases is a policy judgment that our Constitution assigns to Congress, not to unelected bureaucrats in executive agencies and not to the courts. The decision below in case number 17-1618 should be affirmed, and the decisions in case numbers 17-1623 and 18-107 should be reversed.

Respectfully submitted,

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