

No. 20-1163

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER,

v.

GAVIN GRIMM

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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As the petition (at 13) predicted, the Department of Education has now concluded that Title IX extends to discrimination based on gender identity and, by clear implication, has adopted the Fourth Circuit's position on the application of Title IX to bathrooms. Citing the decision below and this Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), on June 16, 2021, the Department issued a Notice of Interpretation of Title IX. In so doing, the Department promised to “*fully enforce* Title IX to prohibit discrimination based on *** gender identity in education programs and activities that receive Federal assistance from the Department.”¹ This new development reinforces both the importance of the question presented and the necessity (and urgency) of this Court's review.

1. The petition explained that the President's January 20, 2021, executive order left “no room for doubt” on how the Department of Education would interpret Title IX, including its application to bathrooms and other “living facilities.” Pet.13 n.6. As the Board predicted it would, the Department has now joined every circuit to address whether Title IX's interpretation of “sex” included “gender identity” by holding that Title IX prohibits distinctions based on gender identity. Interpretation at 11. That

¹ *Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County* 11 (June 16, 2021), <https://tinyurl.com/TitleIXInterpretation> (“Interpretation”) (emphasis added).

interpretation now effectively governs nationwide. Pet.17-23; Reply.4-8.

To be sure, the Department's Interpretation does not directly reference the restroom issue. Nor does it alter the fact that, in providing Grimm and every other student access to a single-user restroom, the Board did not discriminate against Grimm and, therefore, did not violate Title IX or the Equal Protection Clause.

But the clear implication of the Department's new guidance is that it intends to enforce the Fourth Circuit's interpretation of Title IX as applied to bathrooms and other "living facilities": The Department's citations to the Fourth Circuit's decision in this case—which directly addressed Title IX's application to restrooms—and the earlier executive order expressly addressing restrooms and locker rooms are the writing on the wall.²

The fact that an erroneous interpretation of Title IX is now the "nationwide policy of the United States" provides more reason for this Court to quickly decide the question presented. Pet.13. Until it does, schools and school boards around the country will remain at great risk of losing federal funding and will therefore be practically unable to exercise their best judgment about how to address the individualized needs of their students in this sensitive context.

² See The White House, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (Jan. 20, 2021), <https://tinyurl.com/Jan20EO>.

2. The Interpretation changes the legal landscape in undecided circuits but does nothing to undermine this case as an excellent vehicle for resolving the question presented. See Pet.35-37; Reply 10-11. The fact remains that the Board and similarly situated school boards around the country will effectively remain “unable to decide for themselves” how best to respond to accommodation requests from transgender students until this Court provides a proper interpretation of Title IX and the Equal Protection Clause. Reply 9. That is because, for most school districts, the threat of losing federal education funds effectively requires compliance with the Department’s will. See, *e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 582 (2012) (“The threatened loss” of large portions of a State’s budget is “economic dragooning that leaves the States with no real option but to acquiesce[.]”).

In short, for the Board and hundreds of other school boards across the country, this Court’s resolution of the question presented is urgently needed. The petition should be granted.

Respectfully submitted.

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