No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

—v.—

G.G., by his next friend and mother, DEIRDRE GRIMM,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Gloucester County School Board's policy, which prohibits school administrators from allowing boys and girls who are transgender to use the restrooms that other boys and girls use, constitutes "discrimination" "on the basis of sex" under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)?

2. Whether the Department of Education's conclusion that 34 C.F.R. § 106.33 does not authorize schools to exclude boys and girls who are transgender from the restrooms that other boys and girls use—as set forth in an opinion letter, statement of interest, and amicus brief—is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997)?

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INTRODUCTION

Gavin Grimm ("Gavin") is a 17-year-old boy who is a senior at Gloucester High School in Gloucester, Virginia. He is transgender and has been formally diagnosed with gender dysphoria. In accordance with his prescribed medical treatment, Gavin has received testosterone hormone therapy and undergone chest reconstruction surgery. He has legally changed his name, and he has a Virginia ID card and an amended birth certificate stating that he is male. He appears no different from any other boy his age and uses the men's restrooms at restaurants, shopping malls, the doctor's office, the library, movie theaters, and government buildings.

When Gavin came out as a boy, administrators at his school agreed he should use the boys' restrooms, just as he does outside of school. With their support, Gavin did so for almost two months without incident. But in response to complaints from some adults in the community, the Gloucester County School Board (the "Board") overruled its own administrators and enacted a new policy targeting students it deemed to have "gender identity issues." The policy's purpose, design, and inevitable effect was to treat Gavin differently from other boys and exclude him from the restrooms that all other boys use. JA 69.

Under the Board's policy, Gavin is excluded from the common restrooms and publicly stigmatized as unfit to use the same restrooms as all other students. That discriminatory treatment has far-reaching consequences for Gavin, interfering with his ability to access the educational opportunities of high school more generally. At school, at work, or in

society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community.

Title IX and its regulations allow schools to provide restroom facilities "on the basis of sex," 34 C.F.R. § 106.33, but those restrooms must be equally available to all boys and all girls, including boys and girls who are transgender. The only way Gavin can access those restrooms is if he uses the same common restrooms as other boys. That is the only option that provides restrooms on the basis of sex without "subject[ing]" Gavin "to discrimination." 20 U.S.C. § 1681(a). It is, therefore, the only option that complies with Title IX.

STATEMENT OF THE CASE

A. Factual Background.[1]

When Gavin was born, the hospital staff identified him as female, but from a young age, Gavin knew that he was a boy. JA 65. Like other boys, Gavin has a male gender identity. JA 61.

Everyone has a gender identity. JA 86. It is an established medical concept, referring to "a person's deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female." *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862

[1] The uncontroverted facts alleged in the Complaint and declarations must be taken as true on both a motion to dismiss and a motion for preliminary injunction. *See Schindler Elev. Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 n.2 (2011); *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976).

(Dec. 2015) ("APA Guidelines"), https://goo.gl/JJ98l3. Most people have a gender identity that matches the sex they are identified as at birth. But people who are transgender have a gender identity that differs from the sex they are identified as at birth.[2]

Like many transgender students, Gavin succeeded at school until the onset of puberty, when he began to suffer debilitating levels of distress. JA 65. By the end of his freshman year of high school, Gavin's distress became so great that he was unable to attend class. *Id.* Gavin came out to his parents as a boy and, at his request, began seeing a psychologist with experience counseling transgender youth. *Id.*

The psychologist diagnosed Gavin with gender dysphoria, a condition marked by the persistent and clinically significant distress caused by incongruence between an individual's gender identity and sex identified at birth. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 5th edition (302.85) (5th ed. 2013). Although gender

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[2] Guidelines from the American Psychological Association no longer use the term "biological sex" when referring to sex identified at birth, usually based on a cursory examination of external anatomy. *See* APA Guidelines at 861-62. "Biological sex" is an inaccurate description of a person's sex identified at birth because there are many biological components of sex "including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual." *Radtke v. Misc. Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund,* 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012). In addition, research indicates that gender identity has a biological component. *See* AAP Amicus. When the components of sex do not all align as typically male or typically female, individuals live their lives according to gender identity. *See* interACT Amicus.

dysphoria is a serious medical condition, it "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender & Gender Variant Individuals* (2012), at https://goo.gl/iXBM0S.

There is a medical and scientific consensus that the proper treatment for gender dysphoria is for boys who are transgender to live as boys and for girls who are transgender to live as girls.[3] That includes using names and pronouns consistent with one's identity, and grooming and dressing in a manner typically associated with that gender. When medically appropriate, treatment also includes hormone therapy and surgery. JA 88.[4] The goal of

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[3] *See, e.g.*, Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198 (July 2013) ("AAP Policy"), https://goo.gl/Fk3fZ5; Am. Med. Ass'n, *Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients* (2016), https://goo.gl/lG50xS; Am. Psychiatric Ass'n, *Position Statement on Access to Care for Transgender and Gender Variant Individuals* (2012), https://goo.gl/U0fyfv; Am. Psychological Ass'n, *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, 64 Am. Psychologist 372-453 (2008), https://goo.gl/8idKBP; Wylie C. Hembree, et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94(9) J. Clinical Endocrinology & Metabolism 3132-54 (Sept. 2009) ("Endocrine Society Guidelines"), https://goo.gl/lOroQj.

[4] Under widely accepted standards of care, chest reconstruction surgery is authorized for 16-year-olds but genital surgeries are generally not recommended for minors. *See* World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 21 (7th ed. 2012), https://goo.gl/WiHTmz.

treatment is to eliminate the debilitating distress. *Id*. If left untreated, gender dysphoria can lead to anxiety, depression, self-harm, and even suicide. JA 93. When gender dysphoria is properly treated, transgender individuals experience profound relief and can go on to lead healthy, happy, and successful lives. *See* Am. Acad. of Pediatrics Amicus ("AAP Amicus"); Dr. Ben Barnes Amicus (describing life experiences of transgender Americans).

The ability of transgender individuals to live consistently with their identity is critical to their health and well-being. JA 89-90; Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198, 201 (July 2013)("AAP Policy"); APA Guidelines at 846-47. Because so much of their daily lives takes place at school, transgender students' activities at school have a particularly significant impact on their ability to thrive. *See* Am. Psychological Ass'n & Nat'l Ass'n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015) ("APA & NASP Resolution"), https://goo.gl/AcXES2.

As part of treatment for Gavin's gender dysphoria, Gavin's psychologist helped him begin living as a boy and referred him to an endocrinologist to be evaluated for hormone therapy. JA 66-67. The psychologist also gave Gavin a "treatment documentation letter" confirming that he was receiving treatment for gender dysphoria and stating that he should be treated as a boy in all respects, including when using the restroom. JA 66. Based on his treatment protocol, Gavin legally changed his

name to Gavin and began using male pronouns. JA 67. He wore his clothing and hairstyles in a manner typical of other boys and began using the men's restrooms in public venues, including restaurants, libraries, and shopping centers, without encountering any problems. *Id.*

In August 2014, before beginning his sophomore year, Gavin and his mother met with the high school principal and guidance counselor to explain that Gavin is transgender and, consistent with his identity and medical treatment, would be attending school as a boy. JA 67-68. At that time, the Board did not have policies addressing transgender students. *See* App. 2a. Gavin initially requested to use a restroom in the nurse's office, but soon felt stigmatized and isolated using a different restroom from everyone else. JA 68.

After a few weeks of using the restroom in the nurse's office, Gavin sought permission to use the boys' restrooms. On October 20, 2014, with the principal's support, Gavin began using the boys' restrooms, and he did so for seven weeks without incident. *Id.* The principal and superintendent informed the Board but otherwise kept the matter confidential. *Id.*; App. 3a.[5]

Some adults in the community, however, learned that a boy who is transgender was using the boys' restrooms at school. JA 68. They contacted the Board to demand that the student (who was not publicly identified as Gavin until later) be barred

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[5] Gavin uses a home-bound program for physical education and, therefore, does not use the school locker rooms. JA 68.

from the boys' restrooms. JA 68-69. The Board has not disclosed the nature or source of the complaints.

The Board considered the matter at a private meeting and took no action for several weeks. App. 3a-4a. Apparently unsatisfied with the results of the private meeting, one Board member alerted the broader community by proposing a policy for public debate at the Board's meeting on November 11, 2014. JA 69. The policy's operative language stated:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. The policy categorically prohibits administrators from allowing any boy who is transgender to use any boys' restroom (or allowing any girl who is transgender to use any girls' restroom). The policy does not define "biological gender."[6]

The school gave Gavin and his parents no notice that the Board would discuss his restroom use at its meeting. JA 70. After learning about the meeting through social media, Gavin and his parents decided to speak against the proposed policy. JA 69-70. Gavin told the Board:

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[6] Petitioner sometimes refers to genital characteristics, Pet. Br. 11, sometimes to chromosomes, *id.* at 28, sometimes to reproductive organs, *id.*, and sometimes to characteristics that "subserve biparental reproduction," *id.* at 32.

> I use the restroom, the men's public restroom, in every public space in Gloucester County and others. I have never once had any sort of confrontation of any kind.
>
> . . .
>
> All I want to do is be a normal child and use the restroom in peace, and I have had no problems from students to do that—only from adults.
>
> . . .
>
> I did not ask to be this way, and it's one of the most difficult things anyone can face.
>
> . . .
>
> I am just a human. I am just a boy.

Recorded Minutes of the Gloucester Cty. Sch. Bd., Nov. 11, 2014, at 25:00 – 27:22 ("Nov. 11 Minutes"), https://goo.gl/dXLRg7. The Board deferred voting on the policy until its next meeting. JA 71.

Before its next meeting, the Board issued a press release announcing plans for "adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms." App. 3a. In addition, the press release announced "plans to designate single stall, unisex restrooms . . . to give all students the option for even greater privacy." *Id.* The Board also acknowledged that it had reviewed guidance from the Department of Education advising schools that transgender students should generally be treated consistently with their gender identity. App. 1a-2a.

Speakers at the December Board meeting nonetheless demanded that Gavin be excluded from the boys' restrooms, and they threatened to vote Board members out of office if they refused to pass the new policy. JA 72. With Gavin in attendance, several speakers pointedly referred to Gavin as a "young lady." *Id.* One speaker called Gavin a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* "Put him in a separate bathroom if that's what it's going to take," said another. Recorded Minutes of the Gloucester Cty. Sch. Bd., Dec. 9, 2014, at 58:56 ("Dec. 9 Minutes"), https://goo.gl/63Vi4Q.

The Board passed the policy by a 6-1 vote. JA 72. The dissenting Board member warned that the policy conflicted with guidance and consent agreements from the Department of Justice and the Department of Education. *See* Dec. 9 Minutes at 2:07:02.

The Board subsequently converted a faculty restroom and two utility closets into single-user restrooms. JA 73. Although any student is allowed to use those restrooms, no one actually does so. JA 73-74; Pet. App. 151a. Everyone knows they were created for Gavin. JA 74; Pet. App. 151a. The converted single-user restrooms are located far away from Gavin's classes and the restrooms used by his classmates. JA 73; Pet. App. 150a-151a.

Using the single-stall restrooms would also be demeaning and stigmatizing. They signal to Gavin and the world that he is different, and they send a public message to all his peers that he is not fit to be treated like everyone else. JA 74, 91-92; Pet. App. 151a. In the words of one of the policy's supporters,

the separate restrooms divide the students into "a thousand students versus one freak." Dec. 9 Minutes at 1:22:53.

Of course, the prospect of using the girls' restrooms is unimaginable for Gavin. JA 73-74. It would not only be humiliating; it would also conflict with Gavin's treatment for gender dysphoria, placing his health and well-being at risk. JA 73-74, 90. The girls' restrooms are just as untenable for Gavin as they would be for any other boy.

Gavin does everything he can to avoid using the restroom at school. JA 74. As a result, he has developed painful urinary tract infections and is distracted and uncomfortable in class. *Id.* If Gavin has to use the restroom, he uses the nurse's restroom, but he feels ashamed doing so. *Id.* Everyone who sees Gavin enter the nurse's office knows he is there because he has been barred from the restrooms other boys use. *Id.*; Pet. App. 151a-152a. It makes him feel "like a walking freak show" and "a public spectacle" before the entire community. Pet. App. 150a-151a.

Any teenager, whether transgender or not, would be harmed by being singled out and shamed in front of his peers. JA 90-93; AAP Amicus. But transgender students are particularly vulnerable. JA 90-91. Preventing transgender students from living in a manner that is consistent with their gender identity puts them at increased risk of debilitating depression and suicide. *See id.*; AAP Amicus. According to a nationally recognized expert in the treatment of gender dysphoria who evaluated Gavin, the policy "places him at extreme risk for

immediate and long-term psychological harm." JA 74-75, 94.[7]

The Board's policy has been in place since December of Gavin's sophomore year; he is now a senior, scheduled to graduate in June 2017.[8] During that time, Gavin has continued to receive treatment for gender dysphoria. In December 2014, Gavin began hormone therapy, which has altered his physical appearance and deepened his voice. JA 67. In June 2015, Gavin received an ID card from the Virginia Department of Motor Vehicles identifying him as male. JA 80-82. In June 2016, Gavin had chest reconstruction surgery. Following that surgery, the Virginia courts issued an order legally changing his gender under state law, and the Virginia Department of Health issued an amended birth certificate listing Gavin's sex as male.[9]

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[7] The preliminary injunction record was compiled in July 2015, after Gavin's sophomore year. On remand, Gavin will present evidence of the continued harm he has endured under the policy. For example, Gavin's distress under the policy was so severe that he spent several months taking online courses at an off-site facility so as to avoid being stigmatized in front of his classmates at school. Gavin has also been unable to attend school events where there are no accessible single-user restrooms for him to use.

[8] After graduation, Gavin will remain subject to the policy for purposes of any alumni activities or attendance at school events.

[9] On review of a motion to dismiss, this Court may take judicial notice of these documents as public records. *See Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986); Wright & Miller, *et al.*, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004). On January 28, 2017, respondent filed a request to lodge these documents with the Court.

Despite all this, the Board continues to exclude Gavin from the common boys' restrooms.[10]

B. Experience of Other Transgender Students.

Boys and girls who are transgender are attending schools across the country. While transgender students have long been part of school communities, it is only in the last couple decades that there has been more widespread access to the medical and psychological support that they need. *See* AAP Amicus. Beginning in the early 2000s, as a result of advances in medical and psychological care, transgender youth finally began to receive the treatment necessary to alleviate the devastating pain of gender dysphoria and live their lives in accordance with who they really are. *See* Endocrine Society Guidelines at 3139-40.

With hormone blockers and hormone therapy, transgender students develop "physical sexual attributes," Pet. Br. 20, typical of their gender identity—not the sex they were identified as at birth. Hormone therapy affects bone and muscle structure,

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[10] The Board's position is even more extreme than the controversial North Carolina statute challenged in *Carcaño v. McCrory*, No. 1:16-CV-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016), which establishes a concept of "biological sex" defined as the sex "stated on a person's birth certificate." N.C. Gen. Stat. Ann. § 143-760. Under the North Carolina statute, "transgender individuals may use facilities consistent with their gender identity—notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery—as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States." *Carcaño*, 2016 WL 4508192, at *6 n.13.

alters the appearance of a person's genitals, and produces secondary sex characteristics such as facial and body hair in boys and breasts in girls. *See* Endocrine Society Guidelines at 3139-40. Transgender children who receive hormone blockers never go through puberty as their birth-designated sex. *Id.* at 3140-43. For example, a boy who is transgender and receives hormone blockers and hormone therapy will develop the height, muscle mass, and bone structure typical of other boys. He will be exposed to the same levels of testosterone as other boys as he goes through puberty. *Id.*

Many transgender students begin school without classmates and peers knowing they are transgender. Many others transfer to a new school after transitioning. Requiring these students to use separate restrooms forces them to reveal their transgender status to peers or to constantly make up excuses for using separate restrooms. *See, e.g.*, *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *2-3 (S.D. Ohio Sept. 26, 2016), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016) (recounting testimony from a girl who is transgender in elementary school that "when other students line up to go to the restroom, she leaves the line to go to a different restroom, and other kids say, 'Why are you going that way? You're supposed to be over here.'" (internal quotation marks and brackets omitted)); *see also* Transgender Student Amicus; School Administrators Amicus.

When excluded from the common restrooms, transgender students often avoid using the restroom entirely, either because it is too stigmatizing or too

difficult to access. They suffer infections and other negative health consequences as a result of avoiding urination. JA 90. The exclusion also increases their risk of depression and self-harm. *Id.*; *Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016), *appeal docketed*, No. 16-3522 (7th Cir. Sept. 26, 2016) (suicidal ideation, depression, migraines, attempts to avoid urination).

In addition to the documented medical harms, limiting transgender students to single-user restrooms has practical consequences. In many schools, the single-user restrooms (if they exist at all) are far away and difficult to access. With only a few minutes between classes, and long distances to travel, transgender students frequently have trouble using the restroom and attending class on time. *See Highland*, 2016 WL 5372349, at *3 (for fourth-grade girl who is transgender to use staff restroom, "a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class"); *Whitaker*, 2016 WL 5239829, at *2 (boy who is transgender could not use single-user restrooms because they "were far from his classes and because using them would draw questions from other students"); *see also* Transgender Student Amicus.

In light of these harms, the American Psychological Association and the National Association of School Psychologists have adopted resolutions calling upon schools to provide transgender students "access to the sex-segregated facilities, activities, and programs that are consistent with their gender identity." APA & NASP Resolution.

The National Association of Secondary School Principals, the National Association of Elementary School Principals, and the American School Counselor Association have taken the same position. *See* Gender Spectrum, Transgender Students and School Bathrooms: Frequently Asked Questions (2016), https://goo.gl/Z4xejp; Nat'l Ass'n of Secondary Sch. Principals, *Position Statement on Transgender Students* (2016) ("NASSP Statement"), https://goo.gl/kcfImn.

Those recommendations are consistent with policies that already exist across the country. Institutions ranging from the Girl Scouts[11] and Boy Scouts[12] to the United States military[13] to the Seven Sisters colleges[14] to the National Collegiate Athletic Association[15] already recognize boys who are transgender as boys and recognize girls who are transgender as girls.

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[11] *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, https://goo.gl/364fXI ("[I]f the child is recognized by the family and school/community as a girl and lives culturally as a girl, then Girl Scouts is an organization that can serve her in a setting that is both emotionally and physically safe.").

[12] *See* Boy Scouts of America, *BSA Addresses Gender Identity* (Jan. 30, 2017), https://goo.gl/WxNoGY.

[13] *See* Dep't of Def. Instruction No. 1300.28: In-Service Transition for Transgender Service Members (June 30, 2016), https://goo.gl/p9xsaB.

[14] *See* Susan Svrluga, *Barnard Will Admit Transgender Students. Now All 'Seven Sisters' Colleges Do.*, Wash. Post (June 4, 2015), https://goo.gl/g0rALA.

[15] Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2.

C. Title IX and 34 C.F.R. § 106.33.

Title IX provides that "[n]o 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).

Pursuant to Congress's delegation of authority, the Department of Health, Education, and Welfare ("HEW") promulgated implementing regulations, which were subsequently adopted by the Department of Education (the "Department"), the agency with primary responsibility for enforcing Title IX.[16] The regulations state, as a general matter, that schools may not, on the basis of sex, "provide aid, benefits, or services in a different manner" or "[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31. In certain narrow circumstances, the regulations permit differential treatment on the basis of sex, but only so long as the differential treatment does not subject anyone to discrimination in violation of the statute. One of those regulations authorizes schools to "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." 34 C.F.R. § 106.33.[17]

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[16] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52858-01.

[17] There is no statutory exception for single-sex restrooms. Petitioner mistakenly asserts that the restroom regulation

The restroom regulation was enacted in 1975. Thereafter, as a growing number of transgender students began to medically and socially transition, schools sought guidance regarding which restrooms these students should use. App. 10a.

In 2010, the Department began soliciting information from schools about the experience of transgender students. App. 10a. In 2013, after several years of study, the Department concluded that the only way to ensure that transgender students are not "subjected to discrimination" prohibited under Title IX is to allow transgender students to use the same common restrooms as other students, in keeping with their gender identity. App. 13a-14a. The Department also concluded that transgender students could be integrated into common restrooms while accommodating the privacy of all students in a non-stigmatizing manner. *Id.*

Since 2013, the Department has advised schools that they may not, consistent with Title IX and 34 C.F.R. § 106.33, discriminate against students who are transgender. In 2013 and 2014, the Department resolved two enforcement actions against school districts to protect transgender

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implements one of Title IX's statutory exceptions, Pub. L. 92-318 § 907 (codified at 20 U.S.C. § 1686), which authorizes schools to provide "separate living facilities." Pet. Br. 8. That statutory provision is implemented by a different regulation, 34 C.F.R. § 106.32, which is titled "Housing" and specifically references Pub. L. 92-318 § 907 as a source of authority. In contrast, the restroom regulation does not reference the statutory exception for living facilities.

students' access to common restrooms that match their identity. Pet. App. 124a. In 2014, the Department also advised schools in a guidance document that "a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Pet. App. 100a-101a.

After the Board adopted its new policy, the Department issued an opinion letter—which petitioner refers to as the "Ferg-Cadima letter"—reaffirming the Department's position that the restroom regulation does not authorize schools to exclude boys who are transgender from the boys' restrooms or girls who are transgender from the girls' restrooms. Pet. App. 121a-125a. The next month, the United States filed a statement of interest elaborating on its interpretation of Title IX in *Tooley v. Van Buren Pub. Sch.*, No. 2:14-CV-13466 (E.D. Mich. Feb. 20, 2015). App. 62a. The United States filed an additional statement of interest before the district court in this case, Pet. App. 160a-82a, and an amicus brief before the Fourth Circuit, App. 40a-67a.

The Department's interpretation of the statute and regulation is consistent with the interpretations of other agencies that enforce statutory protections against sex discrimination, including interpretations promulgated after extensive notice-and-comment rulemaking. Pet. App. 24a.[18]

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[18] *See* Discrimination on the Basis of Sex, Final Rule, RIN 1250-AA05, 81 Fed. Reg. 39,108-01 (June 15, 2016) (to be codified at

D. Proceedings Below.

The day after the 2014-15 school year ended, Gavin filed a complaint and motion for preliminary injunction against the Board, arguing that the Board's new policy discriminates against him on the basis of sex, in violation of Title IX and the Equal Protection Clause. JA 1, 61-79. The Complaint seeks injunctive relief and damages for both claims. JA 78.

The district court denied Gavin's motion for a preliminary injunction and granted the Board's cross-motion to dismiss the Title IX claim. Pet. App. 82a-117a. The Board's cross-motion to dismiss the Equal Protection claim is still pending. Pet. App. 13a n.3.

Gavin appealed the denial of a preliminary injunction and asked the Fourth Circuit to exercise pendent appellate jurisdiction over the dismissal of his Title IX claim. Pl.'s C.A. Br. 1. The Fourth Circuit reversed the dismissal of the Title IX claim and vacated the denial of a preliminary injunction. Pet. App. 7a.

Applying *Auer v. Robbins*, 519 U.S. 452 (1997), the court determined that the Department's

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41 C.F.R. pt. 60-20); Family Violence Prevention and Services Programs, Final Rule, 81 Fed. Reg. 76,446 (Nov. 2, 2016) (to be codified at 45 C.F.R. pt. 1370); Nondiscrimination in Health Programs and Activities, Final Rule, RIN 0945–AA02, 81 Fed. Reg. 31,376 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Final Rule, 81 Fed. Reg. 64,763, 64,779 (Sept. 21, 2016) (to be codified at 22 C.F.R. pt. 5).

interpretation of 34 C.F.R. § 106.33 was not plainly erroneous or inconsistent with the regulation's text. Pet. App. 13a-24a. The court also concluded that the Department's interpretation reflected its fair and reasoned judgment and was not a post-hoc litigating position. Pet. App. 23-24a.

The court noted that privacy interests of other students regarding nudity would not be implicated by "[Gavin's] use—or for that matter any individual's appropriate use—of a restroom." Pet. App. 25a-26a n.10. Students who want even greater privacy, the court noted, may also use one of the new single-stall restrooms. Pet. App. 37a-38a (Davis, J., concurring).

Senior Judge Davis concurred and emphasized that "[t]he uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, [Gavin] experiences daily psychological harm that puts him at risk for long-term psychological harm." Pet. App. 37a.

Judge Niemeyer dissented. Pet. App. 40a-60a. He did not identify any privacy concerns raised by the facts of this case and acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a. Judge Niemeyer instead focused on transgender students' use of locker rooms and potential exposure to "private body parts" in that setting. Pet. App. 52a.

After the Fourth Circuit's ruling, the Department of Education and Department of Justice issued a "Dear Colleague letter" providing guidance to school districts on how to provide transgender students equal access to school resources, as required by Title IX. Pet. App. 126a-142a. The Department

also provided examples of school policies from across the country that integrate transgender students into single-sex programming and facilities.[19]

On remand, the district court entered a preliminary injunction allowing Gavin to use the boys' restrooms at school, Pet. App. 71a-72a, and the district court and Fourth Circuit denied the Board's request to stay the injunction pending appeal, Pet. App. 73a-81a.

On August 3, 2016, this Court granted the Board's application to stay and recall the mandate and stay the preliminary injunction pending disposition of the Board's petition for certiorari. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).[20]

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[19] U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2, 7-8 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM.

[20] Following this Court's stay, an additional five district courts have evaluated whether the Department's interpretation of 34 C.F.R. § 106.33 is entitled to deference. All but one agreed with the Fourth Circuit. *See Whitaker*, 2016 WL 5239829, at *3; *Highland*, 2016 WL 5372349, at *18; *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *see also Carcaño*, 2016 WL 4508192, at *13 (following *G.G.* as binding precedent). *But see Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), *appeal docketed*, No. 16-11534 (5th Cir. Oct. 21, 2016).

Two of those courts issued preliminary injunctions to transgender students based both on *Auer* deference and the courts' independent interpretation of Title IX and the Equal Protection Clause. *See Highland*, 2016 WL 5372349, at *8-19;

SUMMARY OF ARGUMENT

I. Under the plain text of Title IX, Gavin has stated a claim on which relief can be granted. Under the Board's policy, Gavin is "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a). Gavin simply asks the Court to apply the statute as written.

A. The Board's policy discriminates against Gavin by excluding him from the common boys' restrooms. Gavin cannot use the girls' restrooms. To do so would be deeply stigmatizing, impossible as a practical matter, and it would be directly contrary to his medical treatment for gender dysphoria. His only other option is to use the nurse's office or separate single-user restrooms that no other student is required to use.

Whitaker, 2016 WL 5239829, at *3-4. The Sixth and Seventh Circuits denied the school districts' motions to stay those injunctions pending appeal. *See Dodds v. U.S. Dep't of Educ.*, No. 16-4117, 2016 WL 7241402, at *2 (6th Cir. Dec. 15, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, ECF 19 (7th Cir. Nov. 10, 2016).

Lower courts have also held that excluding men who are transgender from men's restrooms and women who are transgender from women's restrooms violates Title VII. *See Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016).

By forcing Gavin, and Gavin alone, to use these separate facilities, the Board's policy humiliates and stigmatizes Gavin in front of his peers and marks him as unfit to use the same restrooms as everyone else. This discriminatory treatment has far-reaching consequences. According to experts in child health and welfare, singling out transgender students and excluding them from common restroom facilities has a devastating impact on their physical and mental well-being and their ability to thrive in school.

B. The Board's discriminatory treatment of Gavin is "on the basis of sex." The policy uses the undefined criterion of "biological *gender*" to target students who are transgender and exclude them from common restrooms. The sole purpose and effect of the policy is to single out Gavin for different treatment from other boys. By targeting Gavin in this manner, the policy discriminates against him because of the sex-based characteristics that make him transgender. And the policy treats him differently because his transgender status contravenes sex-based stereotypes and assumptions, a long-recognized form of sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[21] Accordingly, the Board's discriminatory treatment of Gavin as a boy who is transgender is "on the basis of sex."

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[21] This Court looks to its Title VII precedents when interpreting Title IX. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). To the extent there are differences between the two statutes, Title IX is broader. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

C. Petitioner argues that Title IX provides no relief to Gavin because the legislators who passed the statute were "principally motivated to end discrimination against women," Pet. Br. 6, not sex discrimination against transgender individuals. But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Although Congress may not have had a boy like Gavin in mind, the statute's literal terms protect all persons from all sex-based discrimination.

D. The restroom regulation, 34 C.F.R. § 106.33, does not authorize the Board's discriminatory policy. While the regulation authorizes *differential* treatment on the basis of sex, it cannot—and does not purport to—authorize *discrimination*. Accordingly, the regulation authorizes schools to provide separate restrooms for boys and girls, but it does not allow schools to use additional sex-based criteria to exclude transgender students from those common restrooms. By singling out transgender students and excluding them from the common restrooms, the Board's policy does what the statute forbids.

II. Petitioner seeks to justify its discriminatory policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But administrative concerns cannot justify discrimination forbidden by the statute. And, in any event, the actual experience of schools, colleges, athletic organizations, and other institutions across the country shows that schools can integrate transgender individuals without any of these

speculative concerns arising. Petitioner's allegedly intractable problems have simple solutions, and none of them is actually relevant to Gavin and his use of the restroom.

A. Gavin has never argued that the Board should accept his "mere assertion" that he is transgender. He has provided ample corroboration from his doctors, his parents, and his state identification documents. He is following a treatment protocol from his healthcare providers in accordance with widely accepted standards of care for treating gender dysphoria. If school administrators have legitimate concerns that a person is pretending to be transgender, a letter from the student's doctor or parent can easily provide corroboration.

B. Schools need not—and cannot—discriminate in order to protect the privacy interests of students. Gavin's use of the restrooms does not implicate any privacy concerns related to nudity, especially in light of the simple urinal dividers and privacy strips the Board installed. Difference can be discomfiting, but it cannot justify discrimination based on "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

C. Petitioner's speculation about locker rooms and sports teams is similarly unfounded. School districts across the country have addressed these issues without categorically banning transgender students. Indeed, school athletic associations—including the National Collegiate Athletic Association and the Virginia High School

League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams.

III. The Department agrees that its regulation does not authorize the Board's discriminatory policy, and its interpretation provides an additional reason for rejecting the Board's argument. None of petitioner's arguments for withholding *Auer* deference withstands scrutiny.

IV. Finally, the doctrine of constitutional avoidance cannot support the Board's interpretation of Title IX and the restroom regulation. *Pennhurst* does not apply to Gavin's claims for injunctive relief, and the Board has long been on notice that it is potentially liable for any form of intentional discrimination under the statute.

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

ARGUMENT

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). Even if the Department's guidance documents are withdrawn by the new administration, *see* Pet. Br. 25, the meaning of Title IX and 34 C.F.R. § 106.33 will remain the same. Respondent agrees with petitioner that this Court can—and should—resolve the underlying question of whether the Board's policy violates Title IX.

I. THE BOARD'S POLICY VIOLATES THE PLAIN TEXT OF TITLE IX.

The "starting point in determining the scope of Title IX is, of course, the statutory language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Under the plain text of the statute, Gavin has stated a claim on which relief can be granted: He has been "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a).

A. The Board's Policy Subjects Gavin To Discrimination.

Before the Board adopted its new policy, Gavin was treated the same as other boys. But because he is transgender, the Board's new policy singles Gavin out for different treatment and bars him from using the common restrooms for boys. Instead, he is relegated to single-stall facilities that no other student uses. He, and only he, must use restrooms that humiliate him in front of his peers and stigmatize him as unfit to use the same restrooms as others. He, and only he, is "subjected to discrimination" "on the basis of sex" under the policy. 20 U.S.C. § 1681(a).

1. Forcing Gavin to use the girls' restrooms subjects him to discriminatory treatment.

Gavin is recognized as a boy by his family, his medical providers, the Virginia Department of Health, and the world at large. He has medically and socially transitioned, and he interacts with his teachers and peers as the boy that he is.

Additionally, he is receiving hormone therapy, has had chest reconstruction surgery, and changed his sex to male both on his state-issued identification card and his birth certificate. To confirm his medical care, he also supplied school administrators with a "treatment documentation letter" from his psychologist.

Although petitioner asserts that Gavin is permitted to use the girls' restrooms, Pet. Br. 39, petitioner does not explain how Gavin could actually do so. He can no more use a girls' restroom than could any other boy at Gloucester High School. If Gavin attempted to enter the girls' restrooms, he would create a disturbance and possibly a confrontation with other students or staff who would (accurately) perceive him as a boy intruding upon the girls' restrooms. Additionally, sending Gavin to the girls' restrooms would contravene his medical treatment and stigmatize him as unfit to use the common restrooms all other boys use.

By excluding Gavin from the boys' restrooms, the Board's policy therefore excludes Gavin from using *any* common restrooms. And the Board's policy recognizes this fact. It is premised on the understanding that students "with gender identity issues" will be provided "an alternative . . . facility," JA 69—not that boys who are transgender would use the girls' restrooms. Placing Gavin in the girls' restrooms would undermine the very privacy expectations regarding single-sex restrooms that the Board claims to be protecting.

2. Forcing Gavin to use single-stall restrooms subjects him to discriminatory treatment.

Forcing Gavin into the single-stall restrooms stigmatizes him as unfit to use the same restrooms as others and undermines his medical treatment. No other student is required to use the separate restrooms, and no other student does so. JA 73-74.

The single-stall restrooms are not an accommodation for Gavin as petitioner suggests. Pet. Br. 21. Rather, they were designed to "[p]ut him in a separate bathroom," away from other students. Dec. 9 Minutes at 58:56. The Board's policy sends a message to Gavin and the entire school community that Gavin is unacceptable and not fit to use the same restrooms as others. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on sex "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that refusal to recognize marriages of same-sex couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition"). Using separate restrooms makes Gavin feel like "a public spectacle" and "a walking freak show." Pet. App. 150a-151a.

Our laws have long recognized the "daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625

(1984). "[D]iscrimination itself, . . . by stigmatizing members of the disfavored group[,] . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

Title IX, which protects the equal dignity of all students, regardless of sex, requires courts to take these social realities into account. *Compare Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (claiming that assumption that racial segregation "stamps the colored race with a badge of inferiority" exists "solely because the colored race chooses to put that construction upon it"); *with Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (recognizing that racial segregation of students "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"). *See also* NAACP LDF Amicus. By any objective measure, the Board's policy subjects Gavin to discrimination.

3. The Board's policy deprives Gavin of equal educational opportunity.

Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of'" educational programs and activities on the basis of sex. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)). These specific prohibitions "help give content to the term 'discrimination' in [the educational] context." *Id.* Here, as elsewhere, "discriminatory treatment exerts a pervasive

influence on the entire educational process." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

"The most obvious example" of a Title IX violation is "the overt, physical deprivation of access to school resources." *Davis*, 526 U.S. at 650. At work or at school, access to a restroom is a basic necessity of life. The Occupational Health and Safety Administration has long recognized that "adverse health effects . . . can result if toilets are not available when employees need them."[22]

When boys who are transgender are not allowed to use the boys' restrooms and girls who are transgender are not allowed to use the girls' restrooms, they often avoid using restrooms altogether because the restrooms they are allowed to use are either too stigmatizing or too difficult to access. This can lead to significant health problems and interfere with a student's ability to learn and focus in class. *See* School Administrators Amicus; Transgender Student Amicus. It is also common for the exclusions to increase students' risk of depression and self-harm. *See Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker*, 2016 WL 5239829, at *1 (depression, migraines, suicidal ideation, attempts to avoid urination).

According to experts in mental health, education, and child welfare, the humiliation of being forced to use separate restrooms significantly interferes with transgender students' ability to participate and thrive in school. It disrupts their

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[22] Memorandum on the Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), https://goo.gl/86s5IC.

course of medical treatment; it can compromise their privacy and "out" them as transgender to community members and peers; and it impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. *See* JA 91-92; AAP Amicus. Developing these skills is a fundamental part of the educational process for all adolescents. *See* GLSEN Amicus.

In addition to the policy's harmful stigma, the limited number of single-stall restrooms at Gloucester High School also has practical consequences for Gavin's access to the school's educational benefits. Because the single-stall restrooms and the nurse's office are located far from Gavin's classes, being forced to use separate restrooms means that he is physically unable to take a restroom break between classes without being late and unable to take a restroom break during class without missing a significant amount of class time. Pet. App. 150a-151a. Transgender students in other cases have encountered similar problems. *See Highland*, 2016 WL 5372349, at *3; *Whitaker*, 2016 WL 5239829, at *2.[23]

These harms have been recognized before. "For more than a decade the women of Harvard Law had to sprint across campus to a hastily converted basement janitors' closet." Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*,

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[23] Although forcing Gavin to use separate facilities would stigmatize him and undermine his medical treatment no matter how many facilities were installed, this is not a case in which every set of boys' and girls' restrooms is accompanied by an equally accessible single-user facility. Pet. App. 150a-51a.

53 J. Legal Educ. 475, 479 (2003). Similarly, women entering previously all-male work environments "often discover[ed] that the facilities for women [were] inadequate, distant, or missing altogether." *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (Rovner, J., dissenting). This disparity could "affect their ability to do their jobs in concrete and material ways," even if it sometimes struck men as "of secondary, if not trivial, importance." *Id.* *See also* Justice Sandra Day O'Connor, "'Out Of Order' At The Court: O'Connor On Being The First Female Justice," NPR (March 5, 2013), https://goo.gl/4llXNV ("In the early days of when I got to the court, there wasn't a restroom I could use that was anywhere near that courtroom.").

At school, at work, or in society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community. *See* Transgender Student Amicus; Dr. Ben Barnes Amicus.

B. The Board's Discrimination Is "On The Basis of Sex."

The Board's discriminatory treatment of Gavin is explicitly "on the basis of sex." The Board's policy states that restrooms "shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility." JA 69. The policy adopts an undefined criterion of "biological gender"—a facially sex-based term—for the purpose of excluding transgender students from the restrooms that everyone else uses.

The express purpose and sole effect of the Board's policy is to target Gavin because he is transgender. The preface to the policy recites that "some students question their gender identities," and the only function of the policy is to move those students out of the common restrooms and into "an alternative . . . facility." JA 69. The policy was passed as a direct response to Gavin's use of the boys' restrooms, and the goal of the policy was to "[p]ut him in a separate bathroom." Dec. 9 Minutes at 58:56.

The change in policy had no effect on other students, all of whom continue to use the same restrooms they used before. Transgender students are the only students who are affected. *Cf. City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("The proper focus of the . . . inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[24]

By targeting Gavin for different treatment because he is transgender, the policy impermissibly discriminates "on the basis of sex."[25]

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[24] As discussed *infra* II.A., the Board does not have any generally applicable "objective physiological criteria" for defining what it calls "biological gender," Pet. Br. 39, and cannot explain how the term applies to people who are not transgender.

[25] The vast majority of lower courts have already recognized that discrimination against transgender individuals is discrimination "on the basis of sex." As Senior Judge Davis noted in his concurrence, "[t]he First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination

A person's transgender status is an inherently sex-based characteristic. Gavin is being treated differently because he is a boy who was identified as female at birth. The incongruence between his gender identity and his sex identified at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination "on the basis of sex." *Cf.* interACT Amicus (describing intersex conditions).

Similarly, discrimination against people because they have undergone a gender transition is inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes not just discrimination against boys and girls, but also discrimination against boys who have undergone a gender transition from the sex identified for them at birth. *Cf. Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy).

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against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Pet App. 78a (Davis, J., concurring). *See* App. 52a (collecting cases); Impact Fund Amicus.

In addition, discrimination against transgender people is sex discrimination because it rests on sex stereotypes and gender-based assumptions. By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed, "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Unlike other boys, Gavin had a different sex identified for him at birth. He therefore upsets traditional assumptions about boys, and the Board has singled him out precisely because of that discomfort.

Discriminating against Gavin for upsetting those expectations is sex discrimination. As this Court recognized in *Price Waterhouse*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. at 251 (plurality).[26] Sex discrimination is prohibited by Title IX and other statutes precisely because "[p]ractices that classify [students] in terms of . . . sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

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[26] *Price Waterhouse* thus "eviscerated" earlier lower court decisions that wrongly limited sex discrimination to discrimination based on biological characteristics. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (discussing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984)).

These protections are not limited to "myths and purely habitual assumptions," but also apply to generalizations that are "unquestionably true." *Id*. at 707. To be sure, most boys are identified as boys at birth. It is only a small group of boys for whom this is not true. But generalizations that are accurate for most boys cannot justify discrimination against boys who "fall outside the average description." *Cf. United States v. Virginia*, 518 U.S. 515, 550 (1996). "Even a true generalization about the class is an insufficient reason" to discriminate against "an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708.

Thus, discriminating against Gavin because he is a boy who is transgender discriminates against him on the basis of sex. The fact that the sex discrimination is targeted exclusively at students who are transgender does not change it from discrimination on the basis of sex to a distinct form of discrimination on the basis of being transgender. This Court's precedents make clear that sex discrimination does not have to affect *all* boys or *all* girls the same way in order to be "on the basis of sex." *See Price Waterhouse*, 490 U.S. at 257-58 (discrimination against women who are "macho" and "abrasive" is based on sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against women with children is based on sex); *cf. Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (Title VII does "not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her . . . sex were [not injured].").

The same is true here. The Board's discrimination against Gavin because he is a boy who is transgender is discrimination on the basis of sex, even if no other boy is affected.

C. Title IX's Broad Text Cannot Be Narrowed By Assumptions About Legislative Intent.

Relying heavily on assumptions about legislative intent, petitioner argues that Gavin's claim falls outside the scope of Title IX because the legislators who passed the statute were "principally motivated to end discrimination against women." Pet. Br. 6. But this Court long ago rejected that approach to statutory interpretation. As Justice Scalia explained on behalf of a unanimous Court in *Oncale*: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79.

Here, too, the legislators who passed Title IX may have been "principally motivated to end discrimination against women," Pet. Br. 6, but they wrote a broad statute that protects all "person[s]" from discrimination "on the basis of sex." 20 U.S.C. § 1681(a). The statute is not limited to discrimination against women and extends to sex discrimination "of whatever kind." *Oncale*, 523 U.S. at 80. Indeed, this Court has repeatedly instructed courts to construe Title IX broadly to encompass "a wide range of intentional unequal treatment." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Sex-based discrimination that harms transgender individuals is a "reasonably comparable evil" that

falls squarely within the statute's plain text. *Oncale*, 523 U.S. at 79; s*ee* Impact Fund Amicus; Nat'l Women's Law Ctr. Amicus.

There is no question that our understanding of transgender people has grown since Congress passed Title IX. But "changes, in law or in world" may "require [a statute's] application to new instances," *West v. Gibson*, 527 U.S. 212, 218 (1999), and a broadly written statute "embraces all such persons or things as subsequently fall within its scope," *De Lima v. Bidwell*, 182 U.S. 1, 217 (1901). *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980); *Browder v. United States*, 312 U.S. 335, 339 (1941).

For example, Title IX protects students from sexual harassment even though, when Congress enacted the statute, "the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis*, 526 U.S. at 664 (Kennedy, J., dissenting). "If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945).

Petitioner argues that sex discrimination against transgender people is implicitly excluded from Title IX because Congress passed unrelated statutes in 2009 and 2013 that explicitly protect individuals based on "gender identity." *See* Pet. Br. 34 (citing 18 U.S.C. § 249(a)(2) and 42 U.S.C. § 13925(b)(13)(A)). This "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*

LLC, 562 U.S. 223, 242 (2011). Congress's use of the term "gender identity" in 2009 and 2013 says little about what Congress intended in 1972. "When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (internal quotation marks and ellipses omitted).

Failed proposals to add language explicitly to protect transgender individuals are even less probative. *See United States v. Craft*, 535 U.S. 274, 287 (2002). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). *Cf. Massachusetts*, 549 U.S. at 529-30 ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant . . . in 1970 and 1977.").

By 2010, when Congress first considered the Student Non-Discrimination Act, which included express protection for gender identity, lower courts had already held that transgender individuals are protected by existing statutes prohibiting sex discrimination. *See Glenn*, 663 F.3d at 1317-19 (collecting cases). In this context, "another reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer*, 577 F. Supp. at 308. *See* Members of Congress Amicus.

D. The Restroom Regulation Does Not Authorize The Board's Discriminatory Policy.

Petitioner argues that its discriminatory policy is authorized by 34 C.F.R. § 106.33. Pet. Br. 21. The Board assumes that as long as it can show that its new policy assigns restrooms based on "sex," the policy is authorized no matter how discriminatory or harmful it may be.

But a regulation cannot authorize what the statute it implements prohibits. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 62 (2011). The restroom regulation must be read "with a view to [its] place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (internal citation and quotation marks omitted). Unlike the statutory exemptions in 20 U.S.C. § 1681(a), the restroom regulation does not state that the statute's ban on sex-based discrimination "shall not apply" to restrooms. To the contrary, the regulation specifically states that single-sex restrooms may be provided *only* if the facilities are "comparable" for all students. 34 C.F.R. § 106.33. Interpreting the regulation to authorize sex-based distinctions that are discriminatory, as petitioner suggests, would go beyond the regulation's plain text and bring the regulation into conflict with Title IX.

As the Department explained in its amicus brief below, the regulation authorizes schools to provide separate restrooms for boys and girls because it is a social practice that "does not disadvantage or stigmatize any student." App. 60a n.8. This *differential* treatment is authorized as long as it is truly comparable; *discriminatory* practices that deny

equal treatment to all students are not. Gavin does not challenge the provision of separate restrooms. It is not the existence of sex-separated restrooms that harms Gavin, but the Board's new policy that is designed solely to prevent him from using those restrooms.

Before it passed its new policy, the Board provided access to common restrooms in a manner that was consistent with the statute. The Board then abandoned that nondiscriminatory practice and adopted a new policy designed to exclude transgender students from restrooms used by other students. That new policy does what the statute forbids. It "subject[s] [Gavin] to discrimination," "exclude[s] [him] from participation," and "denie[s] [him] the benefits" of school. 20 U.S.C. § 1681(a).

Petitioner wrongly asserts that the regulation permits schools to adopt any restroom policies they wish so long as the criteria are based on sex in any way. But the Board makes a concession that underscores the flaw in its argument. The Board admits that if it created a policy that limited access to restrooms based on "behavioral peculiarities" related to sex—that is, admitting only boys who behaved in stereotypically masculine ways to the boys' restrooms and only girls who behaved in stereotypically feminine ways to the girls' restrooms—that would violate Title IX's statutory language under *Price Waterhouse*. See Pet. Br. 31-32 n.11.

This concession illustrates the error in petitioner's argument that it can create any policy for restroom access as long as it uses some dictionary's definition of the word sex. As petitioner

acknowledges, a policy assigning restrooms based on sex stereotypes would impermissibly discriminate on the basis of sex by denying certain students access to the common single-sex restrooms, thereby violating Title IX. Similarly, by singling out Gavin for different treatment because he is a boy who is transgender, the Board's policy provides restrooms on the basis of sex in a discriminatory manner.

Accordingly, petitioner's focus on various dictionary definitions of "sex" is beside the point. The regulation does not authorize schools to discriminate against a group of students on the basis of sex, regardless of which dictionary definition the school chooses.

Even if the scope of "sex" in the regulation were relevant here, petitioner's argument about the meaning of "sex" in 1972, Pet. Br. 20, misapprehends history, this Court's precedents, and how the Board's own policy operates.

First, the plain meaning of sex in 1972 extended beyond physical characteristics such as anatomy or chromosomes. The term "sex" referred to men and women in general, including both physical differences and cultural ones. *See* "sex, n., 4a," OED Online, Oxford University Press (defining sex as "a social or cultural phenomenon, and its manifestations" and collecting definitions dating back to 1651).[27]

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[27] In 1972 there was no common distinction between "sex" and "gender." At the time, the term "gender" was used primarily as a grammatical classification, not as a term to describe people. *See* "gender, n., 3a," OED Online, Oxford University Press; *see also* Am. Heritage Dictionary 1187 (1973) (defining sex to

Second, this Court has made clear that the statutory term "sex" is not limited to physical traits, but extends to behavioral and social characteristics. *See Price Waterhouse*, 490 U.S. at 251; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing "mutually reinforcing" stereotypes about the roles of men and women). Petitioner offers no explanation for why the term "sex" should be interpreted more narrowly in the regulation than in the statute. Indeed, petitioner argues that the two terms should be interpreted identically. Pet. Br. 47.

Third, as a factual matter, the Board's policy does not assign restrooms based on "physiological sex." Pet. Br. 27. Many transgender individuals, including Gavin, have physiological and anatomical characteristics typically associated with their identity, not the sex identified for them at birth. *See* Endocrine Society Guidelines at 3140-43. Due to his medical treatment, Gavin has a typically male chest, facial hair, and testosterone circulating in his body. Petitioner assumes that HEW would have wanted Gavin to use the girls' restrooms, but that is hardly self-evident.

Gavin is recognized by his family, his medical providers, the Virginia Department of Health, and the world at large as a boy. Allowing him to use the

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include "psychological differences that distinguish the male and the female"); Webster's Seventh New Collegiate Dictionary 795 (1970) (defining sex to include "behavioral peculiarities" that "distinguish males and females"); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (collecting definitions).

same restrooms as other boys is the only way to provide him single-sex restrooms without discrimination. It is, therefore, the only way to do so that is consistent with the regulation and the underlying requirements of Title IX.

II. PETITIONER'S POLICY ARGUMENTS DO NOT JUSTIFY ITS DISCRIMINATION AGAINST GAVIN.

Petitioner justifies its sweeping policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But policy arguments and administrative convenience cannot override Title IX's unqualified prohibition of sex-based discrimination. In any event, petitioner's speculations conflict with the reality that school districts, women's colleges, the military, and the Boy Scouts and Girl Scouts already treat boys and girls who are transgender the same as other boys and girls. *See supra* nn.11-15. Petitioner's "intractable problems" have simple solutions, and in any event, are not applicable to Gavin and his use of restrooms.

A. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Require The Board To Accept A Student's "Mere Assertion" Of Gender Identity.

Petitioner asserts that allowing Gavin to use the boys' restrooms would mean that any student could gain access to a restroom "simply by announcing their gender identity." Pet. Br. 37. Gavin has never asked the Board to allow him to use the restrooms based on a "mere assertion" that he is a boy. Gavin supplied school administrators a

"treatment documentation letter" from his psychologist. He has legally changed his name, is undergoing hormone therapy, had chest reconstruction surgery, and received a state ID card and birth certificate stating that he is male. His status as a transgender boy is not in dispute.

Petitioner's speculation about "obvious and intractable problems" caused by individuals falsely claiming to be transgender "for less worthy reasons," Pet. Br. 37, is unfounded, and, indeed, contradicted by the actual experiences of school districts across the country. *See* School Administrators Amicus; *Cf. Carcaño*, 2016 WL 4508192, at *5 (evidence shows that "transgender individuals have been quietly using facilities corresponding with their gender identity"); *Students & Parents for Privacy*, 2016 WL 6134121, at *39 (evidence shows that transgender students used restrooms for three years without other students noticing or complaining).

Transgender students do not gain access to the restrooms for the day by "simply announcing their gender identity." Pet. Br. 37. Usually, students and their parents meet with school administrators to discuss the student's transgender status and plan a smooth social transition, just as Gavin and his mother did here. *See* School Administrators Amicus; NASSP Statement, *supra*. Allowing Gavin to use the same restrooms as other boys does not mean "that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion." *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014); *accord Students & Parents for Privacy*, 2016 WL 6134121, at *26 (rejecting same argument).

Nor does allowing Gavin to use the same restrooms as other boys require school administrators to guess a student's gender identity based on sex stereotypes. Pet. Br. 39. If a school has a legitimate concern that a student is falsely claiming to be transgender, a letter from a doctor or parent can easily provide corroboration. *See* School Administrators Amicus; U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM (discussing additional ways to confirm a person's transgender status).[28]

In truth, it is the Board's policy that raises intractable administrative problems. *See* interACT Amicus. How will the policy apply if a student is not known to be transgender in the school community, either because he transitioned before entering school or because he moved from another district? As the Fourth Circuit noted, without "mandatory verification of the 'correct' genitalia before admittance to a restroom," the Board must "assume 'biological sex' based on appearances, social expectations, or explicit declarations." Pet. App. 24a n.8 (internal quotation marks omitted).[29]

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[28] Although Gavin was able to amend his birth certificate, that is not possible for transgender youth in states that require genital surgery or provide no mechanism for changing the gender listed on a birth certificate. *See Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015) (discussing "onerous and in some cases insurmountable obstacles" for some transgender individuals seeking to amend their birth certificates).

[29] In support of its assertions regarding "practical problems," petitioner cites to an amicus brief from McHugh & Mayer. Pet.

Nor does the Board appear to have "objective physiological criteria" for defining what it calls "biological gender." Pet. Br. 39; *see Carcaño*, 2016 WL 4508192, at *15 (agreeing that "the Board policy in *G.G.* did not include any criteria for determining the 'biological gender' of particular students"). Petitioner continues to equivocate about how it would define the "biological gender" of a person who has had genital surgery. Pet. Br. 30-31 n.9. Petitioner also cannot say how it would define the "biological gender" of individuals with intersex traits who may have genital characteristics, chromosomes or internal reproductive organs that are neither typically male nor typically female. Pet. Br. 30-31 n.9; *see* interACT Amicus. To be sure, such circumstances are rare, but so is being transgender. *See* Williams Institute Amicus.

B. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Violate The Privacy Of Other Students.

There are no privacy concerns related to nudity implicated by the facts of this case. As the Fourth Circuit explained, Gavin's "use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in cases involving nudity. Pet. App. 25a n.10. Even the dissent below acknowledged that "the

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Br. 41 n.17. The assertions in that amicus brief have been rejected by the mainstream medical community as reflected in the AAP amicus brief. To the extent that there is any dispute about these facts, they must be resolved in favor of respondent.

risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a (Niemeyer, J., dissenting). *Accord Highland*, 2016 WL 5372349, at *17 (rejecting argument that transgender student's use of restrooms would violate privacy of others); *Whitaker*, 2016 WL 5239829, at *6 (same); *cf. Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing woman who is transgender to use women's restrooms created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present").

The Board has also taken steps "to give all students the option for even greater privacy." App. 3a. It has installed partitions between urinals and privacy strips for stall doors. All students who want greater privacy for any reason may also use one of the new single-stall restrooms. Pet. App. 11a; *accord* Pet. App. 37-38a (Davis, J., concurring).[30]

Petitioner attempts to draw support from *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), but the case only undermines petitioner's argument. The parties in *Virginia* agreed that including women in the Virginia Military Institute would require adjustments such as "locked doors and coverings on windows." *Id.* at 588. This Court

[30] Excluding transgender students from the common restrooms instead of making these sorts of minor adjustments would be "unreasonable and discriminatory." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412-13 (1979) (interpreting similar language in Rehabilitation Act of 1973); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 612 (1999) (Kennedy, J., concurring in the judgment).

concluded that these minor changes to provide "privacy from the other sex" would not disrupt the essential nature of the program and could not justify excluding women from admission. *Id.* at 550 n.19. The teaching of the case is not that privacy justifies discrimination. It is that privacy interests, where actually implicated, must be accommodated in a manner that does not exclude individuals from equal educational opportunity. *See id.* at 555 n.20. The same is true here.

Moreover, if the goal of the policy is to promote privacy, that goal is not advanced by placing Gavin in the girls' restrooms. As noted above, many students transition before entering a particular school and are not known to be transgender. And even when they are known by their friends to be transgender, students at large high schools, colleges, or universities will often use restrooms in which no one else knows them, much less their transgender status. A boy who is transgender will be far more disruptive to expectations of privacy if he is forced to use the girls' restrooms than if he uses the same restrooms as other boys.

Difference can be discomfiting, but there are ways to respond to that discomfort without discrimination. Gloucester High School has installed additional privacy protections and provides a private restroom for anyone uncomfortable using the same restroom as Gavin (or any other student). Schools have many ways to accommodate privacy, but Title IX does not permit them to categorically exclude transgender students from common restrooms based on "some instinctive mechanism to guard against people who appear to be different in some respects

from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). *Cf. Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 283 n.9 (1987) (recounting how students with disabilities were excluded from school because their appearance allegedly "produced a nauseating effect" on classmates); *see also* NAACP LDF Amicus.[31]

C. The Board's Speculation About Other "Intractable Problems" Is Unfounded.

1. Locker rooms.

The dissent below focused primarily on the specter of nudity in locker rooms, Pet. App. 53a, but this case involves only access to restrooms, which do not implicate such concerns. Even in the context of locker rooms, the dissent's speculations about inevitable exposure to nudity do not reflect the actual experience of students in many school districts. *See* School Administrators Amicus. In many schools, students preparing for gym class change into t-shirts and gym shorts without fully undressing. They often do not shower; at Gloucester High School, there are

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[31] Religiously affiliated schools may exempt themselves from Title IX. 20 U.S.C. § 1681(a)(3). Petitioner's *amici* raise concerns that students at secular schools may have religious objections to sharing restroom facilities with transgender students. Those objections can be accommodated by providing additional privacy options, but "when that sincere, personal opposition becomes" official school policy, "the necessary consequence is to put the imprimatur of the [school] itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

no functional showers at all. *See* Dec. 9 Minutes at 2:12:37; *see also Students & Parents for Privacy*, 2016 WL 6134121, at *28 (transgender students and non-transgender students used same locker rooms without ever seeing "intimate parts" of one another's bodies); Transgender Student Amicus.[32]

In any event, schools across the country already include transgender students in locker rooms while accommodating the privacy of all students in a non-stigmatizing manner. *See* School Administrators Amicus; *Examples of Policies* at 7-8. Experience has shown that there are many ways to address privacy concerns without a "blanket ban that forecloses any form of accommodation for transgender students other than separate facilities." *Carcaño*, 2016 WL 4508192, at *15. *See Students & Parents for Privacy*, 2016 WL 6134121, at *29 (privacy accommodations prevented any risk of "involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth").

Moreover, although petitioner argues that it would be absurd for a girl who is transgender to use the girls' locker room, petitioner does not attempt to argue it would be appropriate for such a girl—who may have undergone puberty as a girl, developed breasts and be indistinguishable from any other girl—to use the boys' locker room. The only logical conclusion from petitioner's arguments is that transgender students are inherently incompatible

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[32] Transgender students have their own sense of modesty and often go to great lengths to prevent exposure of any anatomical differences between themselves and other students. *See* GLSEN Amicus; School Administrators Amicus.

with common facilities and must be excluded from those facilities entirely. Indeed, the policy is premised on the understanding that transgender students will use "an alternative . . . facility," away from everyone else. JA 69.

2. Athletic teams.

Petitioner also asserts that transgender students could not plausibly participate on sports teams consistent with their gender identity because doing so would give them a competitive advantage. But athletic associations—including the NCAA and the Virginia High School League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams without requiring genital surgery. *See* Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2; Va. High Sch. League, Criteria for VHSL Transgender Rule Appeals, https://goo.gl/fgQe2l.

III. THE DEPARTMENT'S INTERPRETATION OF 34 C.F.R. § 106.33 SHOULD RECEIVE *AUER* DEFERENCE.

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). In any event, none of the Board's arguments for withholding deference withstands scrutiny.

A. The Department's Interpretation Includes More Than The "Ferg-Cadima Letter."

Petitioner argues that deference is unwarranted when an agency interpretation comes from a low-level official or is issued in response to ongoing litigation. Pet. Br. 60-61. It is true that *Auer* deference is not warranted when an opinion letter does not reflect the fair and reasoned judgment of the agency or is a post hoc rationalization to defend past agency action under attack. *Auer*, 519 U.S. at 462.

But this is not a case about a lone opinion letter, and the Department's view was not developed in the context of a challenge to agency action. The Ferg-Cadima letter was neither the first time, nor the last time, that the Department explained its interpretation of 34 C.F.R. § 106.33. *See* App. 14a-23a (summarizing enforcement actions and guidance). It also thoroughly explained its interpretation in two statements of interest and in an amicus brief before the Fourth Circuit. Pet. App. 160a-82a; App. 40a-67a. The Fourth Circuit specifically relied upon the amicus brief as a basis for its decision. Pet. App. 16a-19a, 23a-24a. And these amicus briefs are independently entitled to deference under *Auer*. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 214 (2011). Thus, petitioner's assertion that the Department's interpretation was "issued for the first time in an effort to affect the outcome of a specific judicial proceeding" is inaccurate. Pet. Br. 60.

B. The Restroom Regulation Is Not A "Parroting" Regulation.

The mere fact that the regulation and the statute both use the term "sex" does not turn the regulation into a "parroting regulation" that "does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). *See* Pet. Br. 46-49. There is no statutory analog to 34 C.F.R. § 106.33. The decision to permit differential treatment in the context of restrooms is "a creature of the Secretary's own regulations." *Gonzales*, 546 U.S. at 256.

Moreover, the Fourth Circuit did not allow the Department to define "sex" as gender identity throughout the statute, as petitioner suggests. *See* Pet. Br. 48-49. Rather, it deferred to the Department's judgment that, in the context of providing access to common restrooms, the only way to provide restrooms on the basis of sex in a nondiscriminatory manner is to let transgender students use restrooms that match their gender identity.

C. The Department Appropriately Interpreted The Regulation In Light Of Changed Circumstances.

Petitioner discounts the Department's interpretation as a newfound position. Pet. Br. 53. But this is not a situation in which "an agency's interpretation of a . . . regulation . . . conflicts with a prior interpretation" and is thus "entitled to considerably less deference." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). The Department has not reversed earlier guidance

indicating that the exclusion of transgender students is permitted. Instead, the "issue in these cases did not arise until recently," once transgender students became able to medically and socially transition at school. *Talk Am.*, 564 U.S. at 64. The agency's position has been consistent from the outset.

Petitioner argues that *Auer* deference should extend only to interpretations that "would have been foreseeable at the time the regulation was promulgated." Pet. Br. 53. But the purpose of regulatory guidance is to interpret regulations in light of new circumstances. For example, in *Talk America*, this Court deferred to the FCC's "novel interpretation of its longstanding interconnection regulations," explaining that "novelty alone is not a reason to refuse deference." 564 U.S. at 64. It was appropriate for the FCC to interpret the regulations to address an issue "that did not arise until recently." *Id.* The same is true here.

Nor is this a situation in which the Department's interpretation would "impose potentially massive liability on [a party] for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). There is no risk of "massive liability" because, under *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), the Department lacks power to seek disgorgement of funds disbursed before it issued its interpretation. And under *Barnes v. Gorman*, 536 U.S. 181 (2002), private parties may not seek punitive damages. Moreover, even if there were insufficient notice for damages, lack of notice does not relieve parties of their prospective obligation to

"conform their conduct to an agency's interpretations once the agency announces them." *Christopher*, 132 S. Ct. at 2168.[33]

D. Petitioner's Procedural Arguments Are Foreclosed By *Perez*.

In arguing that the Department failed to follow proper procedures, petitioner repeats the same arguments that this Court rejected in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). *See* Pet. Br. 55-63. Like petitioner here, the respondent in *Perez* argued that "because an agency's interpretation of its own regulations may be entitled to deference under *Auer*," those interpretations "have the force of law" and should require notice-and-comment rulemaking. *Perez*, 135 S. Ct. at 1208 n.4. This Court rejected that argument, explaining that "[e]ven in cases where an agency's interpretation receives *Auer* deference . . . it is the court that ultimately decides whether a given regulation means what the agency says." *Id.* at 1208. *Auer* deference does not transform an agency's informal interpretation of its regulations into binding law.

Petitioner also argues that "members of the public would have wanted to comment on this 'novel' question." Pet. Br. 53. Again, *Perez* rejected the same argument: "Beyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are

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[33] As explained in respondent's opposition to the motion for divided argument, West Virginia's arguments based on *Nat'l Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2601 (2012), have never been briefed by the parties or addressed by any court.

best or most likely to further some vague, undefined public good." *Perez*, 135 S. Ct. at 1207 (internal quotation marks and brackets omitted).

IV. PETITIONER HAS NOT BEEN DEPRIVED OF FAIR NOTICE UNDER *PENNHURST*.

Finally, the Board cannot bolster its interpretation by resorting to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and the doctrine of constitutional avoidance. Pet. Br. 41-43. For Title IX's private cause of action, *Pennhurst* affects only the availability of "money damages," not "the scope of the behavior Title IX proscribes." *Davis*, 526 U.S. at 639; *accord Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("Our central concern . . . is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." (internal quotation marks and brackets omitted)).

Pennhurst thus provides no defense to Gavin's claim for injunctive relief or subsequent enforcement actions by the Department to terminate future funding. "[A] court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money," and then "the recipient has the option of withdrawing and hence terminating the prospective force of the injunction."

Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y., 463 U.S. 582, 596 (1983) (White, J.).[34]

Moreover, even with respect to money damages, the plain terms of Title IX put funding recipients on notice that the statute covers all forms of intentional discrimination, including in the context of restrooms. Any reader of the statute and regulations can see that restrooms are not included in the list of statutory exceptions to Title IX's prohibition on "discrimination." Consistent with that statutory prohibition, the regulation authorizes certain differential treatment for purposes of restrooms but does not override the statute's prohibition on discrimination.

But even if the regulation were ambiguous on that point, there is no inconsistency between requiring Congress to speak with a clear statement under *Pennhurst* and deferring to an agency's interpretation of its own regulations under *Auer*. In *Bennett v. Kentucky Department of Education* this Court made clear that *Pennhurst* does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications of the requirements." 470 U.S. at 669. Rather, in the context of an ongoing program, notice is provided "by the statutory provisions, regulations, and other guidelines provided by the Department at t[he] time" each disbursement of funds is received. *Id.* at 670. The recipient is not required to disgorge funds

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[34] Gavin's claims for injunctive relief will not become moot when he graduates in June 2017 because he will remain subject to the Board's policy when attending alumni events or school events.

already received, but agency guidelines can clarify ambiguities for any future disbursements. *Id.*

That distinction is critical. As alleged in the Complaint, the Board was made aware of the Department's interpretation of the regulation before it enacted the policy at issue in this case. JA 71. When it chose to disregard that interpretation, the Board proceeded at its own risk.

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006), did not overturn these settled principles. In *Arlington*, the Court interpreted the scope of remedies available under the Individuals with Disabilities in Education Act, which allows prevailing plaintiffs to recover "reasonable attorneys' fees as part of the costs" of a lawsuit. 20 U.S.C. § 1415(i)(3)(B). *Arlington* held that the terms "costs" and "attorneys' fees" did not put recipients on notice that they would be liable for expert fees. 548 U.S. at 297.

Arlington thus applied *Pennhurst* in the context of assessing particular financial penalties. It did not apply *Pennhurst* to narrow the scope of the underlying statute. For that question, the controlling precedent is *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)—a decision that *Arlington* did not limit or overrule.

Jackson reaffirmed a long line of cases holding that recipients of Title IX funding have been put on notice that they are subject to money damages for all forms of intentional discrimination. *Id.* at 181-83. Even though Title IX does not explicitly mention retaliation, *Jackson* held that the statutory text prohibits retaliation because it is a form of

intentional sex discrimination and therefore prohibited. *See id.* The Board has thus been put on notice that it may be liable for damages if found to have engaged in intentional discrimination that violates the statute. Because the discrimination here is indisputably intentional and violates the statute's plain terms, *Pennhurst* poses no barrier.

CONCLUSION

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

Respectfully Submitted,

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Dated: February 23, 2017

APPENDIX

Gloucester (Va.) County School Board

PRESS RELEASE

FOR IMMEDIATE RELEASE ON DECEMBER 3, 2014

CONTACT: George R. (Randy) Burak, Chairperson
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Gloucester School Board prepares to discuss, likely vote at Dec. 9 meeting on restroom/locker room use for transgender students

Gloucester, Va. -- As the Gloucester County School Board members prepare to discuss and likely vote on how to handle the use of school restrooms and locker rooms by transgender students, they continue to seek guidance and input from many sources around the county, state and nation.

"Issues around transgender students are facing schools districts across the country, and we are seeking to learn from the best resources available," said School Board Chair George (Randy) Burak. "This issue is not about one student; rather, it's about all our students. We as a Board are seeking to do what's best for our district in an open, transparent manner."

Process and Perspectives

The Gloucester School Board has received legal guidance from several sources, both locally and around the state. It has reviewed guidance from the U.S. Department of Education's Office for Civil

Rights, along with a variety of literature from interested organizations around the country.

The Board has received a great deal of input from the local public through emails, phone calls, comments at the Nov. 11 School Board meeting, and community meetings. Several Board members and Superintendent Walter Clemons recently attended the Virginia School Boards Association's annual conference in Williamsburg, which had an entire working session, "Transgender Protections in Public Schools: Recent Developments," presented by a law firm.

Burak said: "Our Gloucester School Board has undergone a very detailed, professional, and deliberative process, examining many differing opinions and guidance viewpoints. I believe that our district will become stronger for all our students as a result of the research we've done, the discussions we've had, and the ultimate conclusions we'll reach."

Current Situation and Options

While the Gloucester County Public School district adheres to general non-discrimination principles similar to most U.S. school districts, it currently does not have guidelines specifically addressing gender identity and the use of restrooms and locker rooms.

That means that the School Board could decide to adopt specific guidelines to address these issues; or the Board could further define what fully accommodating transgender students would look like and how it would operate on a daily basis.

Good news for all students

One positive outcome of all the discussion is that the District is planning to increase the privacy options for all students using school restrooms, according to Superintendent Dr. Walter Clemons.

Plans include adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms. The District also plans to designate single- stall, unisex restrooms, similar to what's in many other public spaces, to give all students the option for even greater privacy.

"This situation has created the opportunity for us to make things better for all our students and to make our school buildings more accommodating to a wide variety of needs," said Dr. Clemons. **"We have listened to what our parents, students, and other constituents have told us, and we are working to act on their suggestions for the benefit of everyone."**

Background

This issue of restroom use consistent with gender identity first came to the attention of Gloucester schools in October when a transgender student asked campus leaders to use the bathroom of that student's gender identity. Due to student privacy concerns, the issue was initially handled confidentially, and the School Board was informed immediately afterward. While the Board is not legally required to act on the matter, the Board is taking the opportunity to consider developing new guidelines, or further defining the current general practice of non-discrimination.

Since that time, the Board has been reviewing the various options and determining how to best meet the needs of all students in Gloucester schools.

Next Steps

The Board will discuss and likely make a decision at their upcoming monthly meeting at **7 p.m. Tuesday, Dec. 9, at the T.C. Walker Auditorium**. As always, the public is invited to attend.

Anyone interested in expressing views on this or other matters to School Board members can email SchoolBoard@gc.k12.va.us, or call (804) 693-1424 to leave a message.

About the Gloucester (Va.) School Board

The Gloucester School Board is the official policy-making body for Gloucester County Public Schools. The elected Board is composed of seven members representing the five magisterial districts, along with two who serve at large. The 2014 School Board members are Randy Burak, chair; Kevin Smith, vice-chair; Troy Andersen; Kimberly Hensley; Carla Hook; Anita Parker; and Charles Records.

More information about the Gloucester School Board and the Gloucester County Schools may be found at http://gets.gc.k12.va.us/.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS WICHITA FALLS DIVISION

STATE OF TEXAS, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 7:16-cv-54-O
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	
	)	

DECLARATION OF CATHERINE E. LHAMON

I, Catherine E. Lhamon, hereby make the following declaration with respect to the above-captioned matter:

1. I am the Assistant Secretary for Civil Rights in the U.S. Department of Education (ED or the Department), Office for Civil Rights (OCR), in Washington, D.C. I have held this position since August 2013. My current work address is 400 Maryland Avenue, SW, Washington, D.C.

2. In my current capacity as Assistant Secretary for Civil Rights, I am the principal advisor to the Secretary of Education on civil rights matters. I oversee a full-time staff of nearly 600 employees in OCR's headquarters in Washington, D.C., and OCR's 12 regional enforcement offices around the country.

3. I make this declaration on the basis of personal knowledge and information made

available to me in the course of my official duties.

The Department's Mission and Title IX Enforcement

4. The Department's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. Congress created the Department to strengthen the federal commitment to equal educational opportunity for every individual.[1] In support of the Department's mission, OCR's core purpose is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.[2]

5. OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination is prohibited by Title IX of the Education Amendments of 1972 (Title IX); discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and age discrimination is prohibited by the Age Discrimination Act of 1975. These civil

[1] U.S. Department of Education Organization Act, 20 U.S.C. § 3402(1).

[2] *See* U.S. Department of Education, About OCR, www.ed.gov/ocr/aboutocr.html.

rights laws enforced by OCR extend to all state educational agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive ED funds (recipients). Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination by public entities, whether or not they receive federal financial assistance). In addition, as of January 8, 2002, OCR enforces the Boy Scouts of America Equal Access Act (Section 9525 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001).

6. OCR's core activities include: (i) responding to civil rights complaints filed by the public and conducting proactive investigations, typically called compliance reviews; (ii) monitoring recipients' adherence to resolution agreements reached with OCR; (iii) answering stakeholder inquiries and issuing policy guidance to increase recipients' understanding of their civil rights obligations and students' awareness of their civil rights; (iv) responding to requests for information from and providing technical assistance to the public; and (v)

administering and disseminating the Civil Rights Data Collection (data on key education and civil rights issues in U.S. public schools, including student enrollment and educational programs and services).

7. Virtually all of the civil rights violations that OCR finds are resolved through voluntary agreements, known as "resolution agreements." It is the strong preference of OCR, consistent with the statute, to seek voluntary compliance by recipients. Under a resolution agreement, a recipient of federal funds who is the subject of a complaint (such as a school district) voluntarily agrees to take remedial actions that, when fully and effectively implemented, will address all of OCR's compliance concerns and any identified violations.

8. If OCR determines that a fund recipient is not complying with its civil rights obligations, including its Title IX obligations, OCR can initiate administrative proceedings to withhold further funds; or it can refer the matter to the U .S. Department of Justice (DOJ) to file a civil action to enjoin further violations. See 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a).

9. Resolution agreements are effective to the extent that they are implemented. To ensure that parties follow through with their commitments, OCR actively monitors cases that have resolution agreements until the recipient meets all provisions. When a case is in monitoring, OCR's role is to assess the

recipient's implementation of the resolution agreement to ensure that the institution effectively implements its commitments and that the recipient is in compliance with the statute(s) and regulation(s) at issue. This monitoring function is a significant and important tool in OCR's overall enforcement scheme and is essential to OCR's mission of ensuring compliance with civil rights laws and ensuring equal access to educational excellence for all students.

10. OCR also provides technical assistance in the form of presentations to educators, students, families, and other stakeholders, as well as answering individual questions about the laws that OCR enforces. Providing technical assistance is a core part of OCR's enforcement of federal civil rights laws and helps to better inform recipients, students, and others, about what the law is and how OCR interprets these laws.

ED's Interpretation of Discrimination on the Basis of Sex and Issuance of the May 2016 Dear Colleague Letter

11. ED has proactively sought to better understand the educational experiences and challenges facing a diverse range of students, including transgender students. "Transgender" is a term describing those individuals whose gender identity is different from the sex they were assigned at birth. For instance, a transgender male is someone who identifies as male, but was assigned the sex of female at

birth.

12. As part of its examination of the application of civil rights laws to transgender students, OCR and other ED representatives, including then-Secretary Arne Duncan, held listening sessions beginning in 2010 with various stakeholders, including transgender students and parents or guardians of both transgender and non-transgender students, as well as representatives from school board organizations, school administrators, faith leaders, athletics associations, educators, and institutions of higher education. Through these numerous engagements, ED chiefly learned about the issues transgender students and their peers face at school, the concerns of parents or guardians of transgender students as well as of parents or guardians of students who are not transgender, and the various ways that school administrators have ensured equal treatment of and created supportive environments for transgender students, and all students, in their schools.

13. ED also received many inquiries from educators, state education agencies, students, families, legislators, and the public about the application of Title IX to transgender students. In addition, many stakeholders wrote letters documenting the challenges transgender students face and urging the Department to issue guidance clarifying recipients' obligations under Title IX. For example, in May 2014, "a diverse group of advocates in the education, civil rights, youth development and

mental health communities, including educators and school-based professionals, parents, and consumers of educational and mental health services" signed a letter urging the Department "to release guidance clearly outlining the appropriate treatment of transgender and gender non-conforming students under Title IX." *See* Exhibit 1, Letter to Catherine Lhamon, Assistant Secretary for Civil Rights (May 15, 2014). The letter laments that "[w]ithout explicit guidance on this issue, transgender students must attend school in an unwelcoming, or harmful, school environment while school administrators and parents attempt to negotiate a solution." The letter cites the 2011 School Climate Survey conducted by the Gay, Lesbian and Straight Education Network (GLSEN), which found that "[a]mong the more than 700 transgender students in grades 6 through 12 who responded to the survey, 80% reported feeling unsafe at school, 75.4% reported being verbally harassed, and 16.8% reported being physically assaulted. This and other surveys have found that this victimization contributes to a host of negative outcomes for transgender youth, including decreased educational aspirations, academic achievement, self-esteem, and sense of belonging in school, and increased absenteeism and depression. Transgender youth experience serious negative mental health outcomes as the result of factors such as discrimination and victimization; nearly half of young transgender people have seriously thought about taking

their lives and one quarter report having made a suicide attempt. Without proper guidance, school policies can often contribute to negative outcomes for transgender youth in schools."

14. ED analyzed current medical and scientific information regarding gender identity, gender dysphoria, and gender transition. For example, OCR consulted the American Psychological Association's *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression*, www.apa.org/topics/lgbt/transgender.aspx ("Transgender people experience their transgender identity in a variety of ways and may become aware of their transgender identity at any age." ... "It is not helpful to force the child to act in a more gender-conforming way."), and the World Professional Association for Transgender Health's *Standards of Care*, www.wpath.org/site_page.cfm?pk_association_webpage_menu=l351&pk_association_webpage=3926 ("Children as young as two may show features that could indicate gender dysphoria" ... "Changing gender role can have profound personal and social consequences, and the decision to do so should include an awareness of what the familial, interpersonal, educational, vocational, economic, and legal challenges are likely to be, so that people can function successfully in their gender role.").

15. ED also reviewed relevant decisions from numerous federal courts as well as federal agency decisions related to sex discrimination under laws such as Title VII of the Civil

Rights Act of 1964 and under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

16. Finally, ED met with employees of DOJ and other federal agencies in developing its interpretation of Title IX's application to transgender students.

17. Under ED's Title IX implementing regulations, which were originally promulgated by ED's predecessor agency in 1975, a recipient may provide separate facilities - e.g,, toilet, locker room, and shower facilities - on the basis of sex, provided that any facilities provided for students of one sex are comparable to such facilities provided for students of the other sex. *See* 34 C.F.R. § 106.33. Nonetheless, ED's regulations do not define "one sex" and "the other sex," nor do they state whether transgender students must be provided access to sex-segregated facilities consistent with their gender identity.

18. After multiple years of studying this issue in consultation with school administrators, educators, transgender students and students who are not transgender, other federal agencies, among others, and after consulting existing case law and scientific research, ED concluded that preserving transgender students' equal access to sex-segregated facilities required that they have access to the facilities that match their gender identity. ED also reviewed and considered the accommodations provided by recipients to transgender students and other students who

may wish additional privacy, and found that recipients have been able to accommodate the privacy concerns of transgender and non-transgender students alike while still allowing transgender students to access sex-segregated facilities consistent with their gender identity. ED has indicated that schools may make individual-user options available to all students who voluntarily seek additional privacy.

19. Thus, for the first time, in 2013, after a two-year investigation, OCR jointly with DOJ, resolved a Title IX complaint against Arcadia Unified School District in California. In that case, a transgender boy alleged that he had been denied access to the boys' restroom and locker room, and instead was required to use the private restroom in the school health office as both a restroom and a changing area for physical education class. The Student reported that:

    - Because the school health office was located some distance away from the school gym and the location of the Student's classes, the Student regularly missed class time.
    - On several occasions, the Student missed instructions not to change into gym clothes because the Student was not in the locker room, which attracted unwanted attention.
    - Because he was required to store his gym clothes in a bin under the cot used by

students who were not feeling well, when retrieving his gym clothes the Student sometimes faced questions from other students in the health office.

- To use the restroom during class time, the Student was required to walk across campus, missing class time and facing questions from classmates about the length of time he was away.
- The Student occasionally found the health office locked, requiring him to find an employee to unlock it for him.

The Student also reported that similar difficulties occurred on other occasions, such as during an evening dance, when the Student was unwilling to ask for special permission to leave the dance area and look for an employee to unlock the health office for him. Eventually, the Student reported that he avoided using the restroom altogether. The Student also alleged that he was not allowed to stay with other boys during a class trip, and instead was required to stay in a separate cabin with his parent. Before the trip, the Student was very upset by the District's decision to require him to stay in his own cabin and became very distracted from his school work. Until several days before the camp, the Student told OCR he considered not participating in the trip at all. He told OCR that during the trip, he was sad and upset. The Student reported that he faced questions from other students about his cabin arrangement and that because the Student was not comfortable being truthful about his

circumstances, the Student felt that this dishonesty created a distance between him and his peers. Among other measures, the resolution agreement[3] provided the transgender boy with access to sex- segregated facilities designated for male students consistent with his gender identity, ensured that he would be treated the same as other male students in all respects in the education programs and activities offered by the District, and ensured that any school records containing the Student's birth name or reflecting the Student's assigned sex would be treated as confidential and maintained separately from the Student's records, and would not be disclosed without written consent. The resolution agreement also included District-wide measures, including revised policies, procedures, regulations, and documents and materials related specifically to discrimination based on a student's gender identity, gender expression, gender transition, transgender status, or gender nonconformity. In addition, the District agreed to revise existing policies to ensure that all students are provided with equal access to its programs and activities, modify current policies or develop a comprehensive gender-based non-discrimination policy, and develop an implementation guide addressing the

[3] OCR Case No. 09-12-1020, *Arcadia Unified Sch. Dist., CA* (July 24, 2013), www.justice.gov/crt/about/edu/documents/arcadialetter.pdf (closure letter); and www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf (resolution agreement).

application of the District's gender-based discrimination policy. I also read the *amicus curiae* brief filed by several school administrators in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056), in which the Superintendent of Arcadia Unified School District, David Vannasdall, is quoted as saying that, "If [students are] worrying about the restroom, they're not fully there to learn, but instead just trying to navigate their day. Give students the opportunity to just be a kid, to use the bathroom, and know that it's not a disruption, it just makes sense."

20. Consistent with the majority of recent judicial decisions and agency determinations described above, in April 2014, OCR issued policy guidance explicitly articulating the broad notion that-just like other federal sex discrimination laws-Title IX protects against discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.[4] This policy guidance, as with all of OCR's significant guidance documents,[5] underwent interagency review.

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[4] OCR, Questions and Answers on Title IX and Sexual Violence (2014), www.ed.goyv/ocr/docs/qa-201404-title-ix.pdf.

[5] Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.a,ov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

21. The number of complaints filed with OCR that allege discrimination against transgender students has increased significantly in the time since OCR opened its investigation of Arcadia Unified School District in 2011, and clarified its interpretation of Title IX and its implementing regulations with respect to discrimination based on gender identity. OCR received two such complaints in 2011, three such complaints in 2012, nine such complaints in 2013, seven such complaints in 2014, 46 such complaints in 2015, and 84 such complaints in 2016 (as of October 20, 2016). This may result from an increase in students' willingness to acknowledge to school officials that they are transgender, and that they seek being treated consistent with their gender identity, including being given access to facilities consistent with their gender identity.

22. Between 2013 and June 2016, OCR entered into nine other resolution agreements with recipients to resolve allegations of discrimination against transgender students. Six of those cases involved allegations that transgender students were denied access to sex-segregated facilities consistent with gender identity and suffered harm as a result. All of the schools involved in those resolutions are located in non-plaintiff states. For example:

    a. In August 2015, after an investigation that lasted over a year, OCR settled with Central Piedmont Community College in

North Carolina.[6] The complaint alleged that the College discriminated against the Student based on her gender when College personnel asked her to provide identification and medical documentation to verify her sex and suspended her as a result of her failure to do so. Because of this incident, the Student told OCR that she failed all of her classes that semester, would be required to retake them, and had to attend regular psychotherapy. Under the resolution agreement, the College has voluntarily agreed to notify all students of their right to use the restroom corresponding with their gender identity, ensure personnel honor requests by students wishing to be referred to by a different name and/or gender, and establish a policy for students requesting to change the name and gender in their official school records. As a result of the agreement, students at the College, including transgender students, are permitted to use sex-segregated facilities and their chosen names and pronouns without presenting medical records or identification documents and without fear of reprisal.

b. In December 2015, after a two-year investigation, OCR settled with Township

[6] OCR Case No. 11-14-2265, *Cent. Piedmont Cmty. Coll., SC* (Aug. 14, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-a.pdf (letter of findings); and www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (resolution agreement).

> High School District 211 in Illinois.[7] OCR determined that the District denied a 14-year-old transgender girl access to the girls' locker room and instead required her to use separate facilities to change clothes for her mandatory physical education classes. As result of the District's denial of access for the Student to its girls' locker rooms, the Student not only received an unequal opportunity to benefit from the District's educational program, but also experienced an ongoing sense of isolation and ostracism throughout her high school enrollment. In addition, the Student missed receiving information and access to rental gym uniforms provided to other students in the locker rooms and missed opportunities for bonding with her teammates in the locker rooms. In the resolution agreement, the District agreed to provide the Student with access to female locker room facilities consistent with her gender identity, and to take steps to protect the privacy of all its students by installing and maintaining sufficient privacy curtains within the girls' locker rooms to accommodate the Student and any other student who wishes to be assured of privacy while

[7] OCR Case No. 05-14-1055, *Township High School Dist. 211, IL* (Dec. 3, 2015). www.ed.gov/ocr/docs/investigations/more/05141055-a.pdf (closure letter); and www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (resolution agreement).

changing.

c. In December 2015, after a two-year investigation, OCR resolved a complaint against Broadalbin-Perth Central School District in New York. In that case a 9-year-old transgender girl alleged that she was required to use a gender-neutral restroom in the nurse's office or a family restroom. As OCR noted in its letter of findings in this case, "The Student was reluctant to use the nurse's office or the family restroom because the student felt stigmatized and 'like a freak.'" In addition, the Student's mother reported that the Student had limited trips to the restroom and on some school days did not even visit the restroom at all, in order to avoid feelings of isolation. This case was resolved on December 22, 2015. Under the resolution agreement, the District voluntarily agreed to adopt and publish revised grievance procedures and notices of nondiscrimination in all relevant policies, and to provide assurance that the District will take steps that will prevent the recurrence of discrimination and harassment and will remedy the effects of discriminatory actions.

d. In June 2016, after a nine-month investigation, OCR settled with Dorchester County School District in South Carolina.[8] ln that case, parents of a

[8] OCR Case No. 11-15-1348, *Dorchester Cnty. Sch. Dist., SC* (June 21, 2016). www.ed.gov/ocr/docs/investigations/more

transgender girl filed a complaint with OCR because their daughter was denied access to the sex-segregated restrooms in the third grade, and instead was required to use the private restroom in the nurse's office, which was located in a different wing of the school, or the private restroom in the assistant principal's office, which was at the end of the hallway from where the Student's classroom was located. During group restroom breaks on their way to or from lunch or recess, the Student was required to leave her female friends and to use the private restroom in the assistant principal's office. This embarrassed the Student because she was forced to separate from her friends, who would often request to accompany her to the restroom, and because it required the Student to address questions from her classmates about why she was using a different restroom. The resolution agreement provided that the District would allow the Student access to sex-segregated facilities designed for female students and equal access to other programs and activities, as well as District-wide measures: to include gender-based discrimination in its nondiscrimination notice, revise and ensure all policies, procedures and

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/11151348-a.pdf (letter of findings); and www.ed.gov/ocr/docs/investigations/more/11151348-b.pdf (resolution agreement).

regulations provide equal access to transgender and gender-nonconforming students, provide training on gender-based discrimination, and include gender-based discrimination in student bullying prevention materials.

23. During that same time period, resolution agreements were reached in eight complaints involving transgender students through OCR's Early Complaint Resolution process (ECR). ECR facilitates the resolution of complaints by providing an early opportunity for the parties involved to voluntarily resolve the complaint allegations. Unlike other resolution agreements with recipients, OCR does not sign, approve, endorse, or monitor any agreement reached between the parties.

24. On May 13, 2016, OCR and DOJ jointly issued a Dear Colleague Letter (DCL) on transgender students' rights under Tide IX. In the DCL, OCR and DOJ articulated our interpretation that Title IX and its implementing regulations require recipients to allow a transgender student access to restrooms and other sex-separate facilities that match the student's gender identity.[9]

25. Also in May 2016, in conjunction with the DCL, the Department' s Office of Elementary and Secondary Education released a document, entitled *Examples of Policies and Emerging Practices for Supporting*

[9] OCR, DCL on Transgender Students (2016), www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf.

Transgender Students, that is a compilation of policies and practices that schools across the country were already using to support transgender students.[10] The policies and practices highlighted in that document include examples of state and local efforts to support transgender students in the context of sex-segregated facilities. For example:

a. In Washington State, guidelines provide: "School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school." In addition, no student "should be required to use an alternative restroom because they are transgender or gender nonconforming." These guidelines further provide that any student who wants increased privacy should be provided access to an alternative restroom or changing area.

b. A regulation issued by Nevada's Washoe County School District provides: "Students shall have access to use facilities that correspond to their gender identity as expressed by the student and asserted at school, irrespective of the gender listed on the student's records, including but not limited to locker rooms."

c. In Alaska, the Anchorage School District's Administrative Guidelines emphasize the

[10] Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 20 16), www.ed.gov/oese/oshs/emergingpractices.pdf.

following provision: "However, staff should not require a transgender or gender nonconforming student/employee to use a separate, nonintegrated space unless requested by the individual student/employee."

d. The New York State Department of Education guidance gives an example of accommodating all students' interest in privacy: "In one high school, a transgender female student was given access to the female changing facility, but the student was uncomfortable using the female changing facility with other female students because there were no private changing areas within the facility. The principal examined the changing facility and determined that curtains could easily be put up along one side of a row of benches near the group lockers, providing private changing areas for any students who wished to use them. After the school put up the curtains, the student was comfortable using the changing facility."

Effect of the Injunction on OCR's Title IX Enforcement

26. Before the October 18, 2016, clarification, OCR had suspended investigations and monitoring of resolution agreements for 73 pending matters involving transgender students to comply with the Court's August 21, 2016, preliminary injunction, including 37 pending

complaints filed from states that are not involved in this litigation as Plaintiffs.

27. In light of the October 18, 2016, clarification, OCR has continued to suspend investigation and monitoring of 21 pending matters in full and 14 pending matters in part because they involve allegations related to access to sex-segregated facilities. Of those pending matters that continue to be suspended, there are 25 pending complaints suspended in whole (13) or in part (12) that were filed from states that are not involved in this litigation as Plaintiffs.

28. Despite the August 21, 2016, preliminary injunction, OCR continues to receive Title IX complaints alleging discrimination against transgender students, including six complaints since August 21, 2016. Many of those complaints allege harms similar to the harms that have been remedied in the resolution agreements OCR negotiated before the preliminary injunction was issued. Those allegations related to access to sex-segregated facilities cannot be investigated in light of the preliminary injunction and the clarification order.

29. Because OCR has not opened any of these complaints for investigation, OCR has been unable to assist any of the affected recipients (i.e., schools or school districts) in reaching the kinds of resolution agreements that have proven successful in the past, such as in the cases described above. Therefore, as a result of the preliminary injunction, even recipients who would be entirely willing to work with

OCR to find ways to accommodate the needs of their transgender students consistent with federal law are unable to obtain OCR 's assistance in doing so. The preliminary injunction thus frustrates OCR's ability to apply its resources and expertise to assist schools in achieving these cooperative outcomes, even in states that are not plaintiffs to this litigation (and, indeed, even in those states that have participated as amicus curiae in this litigation to emphasize their agreement with OCR's interpretation of federal law).

30. OCR has received and continues to receive many requests for technical assistance from schools, state education agencies, students, and parents-including many from entities or individuals in non-plaintiff states-regarding the Title IX rights and obligations related to transgender students. OCR has declined to answer these requests, including hundreds of letters and emails, because of the uncertainty created by the preliminary injunction.

31. The scope of the preliminary injunction prevents OCR from satisfying our regulatory charge to enforce, and ensure recipients' compliance with, Title IX. OCR's regulatory charge is to take action "whenever" we have evidence that a student's rights may be being violated.[11] Because OCR now operates

[11] *See* 34 C.F.R. *§* 100.7 ("The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part.") and 34 C.F.R. § 106.71 ("The procedural provisions

pursuant to the August 21, 2016, injunction as clarified by the October 18, 2016, Order, OCR cannot provide Title IX anti-discrimination protection to a discrete group of students, setting them apart from all other students.

32. In addition, the August 21, 2016, injunction imposes particular harm on transgender elementary and secondary students because, by law, they must attend school every day but, because of the injunction, they no longer enjoy the federal civil rights protection to which all other students are entitled. For these students, there is no time to wait and determine how to treat them equitably; their state laws mandate their school attendance now and every school day.

33. Facts from OCR investigations confirm the concrete harms daily experienced by transgender students who are denied access to sex-segregated facilities consistent with their gender identity. Our investigations have confirmed, for example, elementary school students have been required to line up by gender before a teacher grants permission for the students to go to restrooms. Today, and every school day, transgender students in this situation must either line up consistent with their sex assigned at birth or, if a specific teacher so decides, line up consistent with their gender identity. That daily choice of

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applicable to title VI of the. Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR l 00.6-100.11 and 34 CFR, part 101.").

course, as OCR investigations confirm, leaves a student subject to commentary and questions from peers if the student joins a line that is inconsistent with the student's apparent gender identity, or if the transgender student does not join a line at all. Students and their families have reported to OCR, during investigations, that the students feel shame, humiliation, and experience depression resulting from these harms. In addition, students as young as elementary school students as well as high school and college students, and their families have reported to OCR that the students have attempted death by suicide, among other self-injurious expressions and consequences of these harms. Furthermore, through OCR's investigations and ED's analysis of reports and medical and scientific literature—including material from the APA and WPATH—ED is aware that transgender students who are denied access to restrooms and other sex-segregated facilities that match their gender identity, and who are otherwise not treated consistent with their gender identity, may suffer significant dignitary, psychological, medical, and other harms. By being prohibited from working on these cases, we are unable to fulfill the Department's mission and OCR's core purpose because we cannot protect the civil rights of all students at school, including those students who must face such discriminatory environments daily. Given that practical reality, the August 21, 2016, injunction imposes harm on all students in schools

because it sends them a message that discrimination against an identifiable group is permissible and without federal redress. That discriminatory message conflicts directly with the equality principle in Title IX.

4 November 2016

Date

Catherine E. Lhamon

Exhibit 1

Letter to Catherine Lhamon,
Assistant Secretary for Civil Rights
(May 15, 2014)

May 15, 2014

Assistant Secretary Catherine Lhamon
Office for Civil Rights
U.S. Department of Education
Lyndon Baines Johnson Department of Education Bldg.
400 Maryland Avenue, SW
Washington, DC 20202-1100

Dear Assistant Secretary Lhamon,

The undersigned organizations represent a diverse group of advocates in the education, civil rights, youth development and mental health communities, including educators and school-based professionals, parents, and consumers of educational and mental health services. We thank you for the Department of Education Office for Civil Rights' (OCR) continuing work to ensure that all students have equal access to education, regardless of background, circumstances, or identity. We write you today to express our gratitude for your recent clarification that Title IX protections against sex-based discrimination extend to discrimination based on gender identity and failure to conform to sex stereotypes. This clarification is an important step towards ensuring that transgender and gender non-conforming students have access to a safe and equal education. We urge you to take the next step and release guidance clearly outlining the appropriate treatment of transgender and gender non-conforming students under Title IX of the Education Amendments of 1972.

Transgender youth and young adults are increasingly visible in our schools, with an estimated 225,000 of our pre-K through postsecondary students identifying as transgender. As you are aware, the legal landscape reflecting the treatment of transgender and gender non-conforming people under federal non-discrimination law has changed significantly in recent years. Many courts, along with the EEOC, have recognized that discrimination on the basis of a person's gender identity, gender transition, or transgender status constitutes sex discrimination under statutes such as Title VII of the Civil Rights Act of 1964.[i] Courts and state and federal agencies, including the Department of Justice's Office on Violence against Women, are also consistently taking the view that gender identity nondiscrimination requires equal access to programs and facilities that are consistent with a person's gender identity.[ii]

Many states (such as Massachusetts, Colorado, Connecticut, Maine, and Washington), universities, colleges, and school districts (including Los Angeles Unified School District, one of the nation's largest school districts) have already adopted clear policies to protect transgender students. Unfortunately, many school districts continue to ignore this vulnerable student population due to uncertainty about whether Title IX extends to transgender students. Without explicit guidance on this issue, transgender students must attend school in an unwelcoming, or harmful, school environment while school administrators and parents attempt to negotiate a

solution. Our collective constituents would all benefit from guidance in this area from OCR.

We ask you to clarify the scope of Title IX's prohibition on discrimination based on a student's gender identity, transgender status, or gender transition, specifically the extent to which the law:

- Requires schools to respect students' gender identity for all purposes;
- Protects the private nature of a student's transgender status;
- Requires existing dress code policies to be enforced based on a student's gender identity and gender expression;
- Ensures access to all school programs, activities, and facilities based on gender identity; and
- Obligates schools to offer participation on athletic teams based on gender identity.

The Department of Education has already been confronted with these issues. For example, this past July, the Office of Civil Rights announced an historic resolution agreement in *Student v. Arcadia Unified School District*, which has resulted in that district developing and implementing comprehensive board policies and administrative regulations that provide transgender students the opportunity to succeed in school. Providing guidance and clarification in this regard would be more efficient and cost-effective for all parties than continued costly litigation under Title IX. Beyond the practical

and financial benefits of such guidance, clarification of these rights is critical to protect the health and wellbeing of transgender and gender non-conforming youth in schools, and is consistent with accepted medical and mental health standards. Discrimination against transgender and gender non-conforming students often leads to lower academic achievement, poor psychological outcomes, and school push out.

GLSEN's 2011 School Climate Survey found that while LGBT students often faced hostile school climates, transgender students face the most hostile climates. Among the more than 700 transgender students in grades 6 through 12 who responded to the survey, 80% reported feeling unsafe at school, 75.4% reported being verbally harassed, and 16.8% reported being physically assaulted. This and other surveys have found that this victimization contributes to a host of negative outcomes for transgender youth, including decreased educational aspirations, academic achievement, self-esteem, and sense of belonging in school, and increased absenteeism and depression.[iii] Transgender youth experience serious negative mental health outcomes as the result of factors such as discrimination and victimization; nearly half of young transgender people have seriously thought about taking their lives and one quarter report having made a suicide attempt.[iv]

Without proper guidance, school policies can often contribute to negative outcomes for transgender youth in schools. Dress codes, access to sex-

segregated spaces, use of proper names and pronouns, and participation on athletics teams are all school policy issues that have the potential to either powerfully affirm or stigmatize a transgender student.

Based on case law development of Title VII and Title IX, it is clear that transgender and gender non-conforming youth are protected from discrimination and harassment, but many school districts do not have a clear understanding about how these legal protections should translate to non-discriminatory school policies. As a result, transgender and gender non-conforming youth are experiencing significant health and educational disparities. Schools, parents, professionals, and most importantly, students, would benefit significantly if schools nation-wide were informed and equipped to accommodate these students in a safe, appropriate, and non-discriminatory way.

All transgender and gender non-confirming students deserve an education free from discrimination and harassment. We strongly urge you to stand by this principle and issue guidance clarifying the application of Title IX to gender identity and expression.

Respectfully,

Advocates for Youth
African American Ministers In Action-Equal Justice Task Force
American Civil Liberties Union

American Foundation for Suicide Prevention/SPAN USA
American Group Psychotherapy Association
American Psychiatric Association
American School Counselor Association
Anti-Defamation League
CenterLink: The Community of LGBT Centers
Disability Rights Education & Defense Fund
Equality Federation
Families United Against Hate (FUAH)
Family Equality Council
Gay-Straight Alliance Network
GLMA: Health Professionals Advancing LGBT Equality
GLSEN (Gay, Lesbian and Straight Education Network)
Human Rights Campaign
Ithaca LGBT Task Force
Jewish Council for Public Affairs
Keshet
League of United Latin American Citizens
NAADAC, the Association for Addiction Professionals
National Association for Children's Behavioral Health
National Association for Multicultural Education
National Association for the Education of Homeless Children and Youth
National Association of County Behavioral Health and Developmental Disability
National Association of School Psychologists
National Association of Secondary School Principals
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women

National Disability Rights Network
National Education Association
National Gay and Lesbian Task Force
National Queer Asian Pacific Islander Alliance
PFLAG National
Safe Schools Coalition (SSC)
School Social Work Association of America
Sexuality Information and Education Council of the U.S. (SIECUS)
Sikh American Legal Defense and Education Fund (SALDEF)
Southeast Asia Resource Action Center (SEARAC)
The International Foundation for Gender Education
The Trevor Project
TransActive Gender Center
Transgender Law Center
Youth Guardian Services

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[i] See, e.g., Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem; 378 F.3d 566 (6th Cir. 2004); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001); Rentos v. OCE-Office Systems, No. 95 Civ. 7908, 1996 WL 737215, *8 (S.D.N.Y. Dec. 24, 1996); Maffei v. Kolaeton Industry, Inc., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995); Macy v. Holder, E.E.O.C. Appeal No. 0120120821 (Apr. 23, 2012).

[ii] See, e.g., U.S. Dept. of Justice, Office on Violence Against

Women, *Frequently Asked Questions: Nondiscrimination Grant Condition of the Violence Against Women Reauthorization Act of 2013* (Apr. 9, 2014), available at: http://www.ovw.usdoj.gov/docs/faqs-ngc-vawa.pdf; Doe v. Regional School Unit 26, 86 A.3d 600 (Me. 2014); Dept. of Fair Employment & Housing v. Amer. Pacific Corp., Case No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. Mar. 13, 2014); Mathis v. Fountain-Fort Carson Sch. Dist. 8, Charge No. P20130034X (Col. Div. Civ. Rts. Jun. 17, 2013); Jones v. Johnson County Sheriff's Department, CP # 12-11-61830, Finding of Probable Cause (Iowa Ct. Rts. Comm'n Feb. 11, 2013).

[iii] Greytak, E. A., Kosciw, J. G., and Diaz, E. M. (2009). Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools. New York: GLSEN.

[iv] Arnold H. Grossman & Anthony R. D'Augelli, *Transgender Youth and Life-Threatening Behaviors*, 37(5) SUICIDE LIFE THREAT BEHAV. 527 (2007).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056

G.G., by his next friend and mother DEIRDRE GRIMM,

Plaintiff-Appellant

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

INTEREST OF THE UNITED STATES

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, prohibits sex discrimination in educational programs and activities receiving federal financial assistance. The

United States Department of Education (ED) provides federal funding to many educational programs and activities and oversees their compliance with Title IX. 20 U.S.C. 1682. Through its Office for Civil Rights (OCR), ED investigates complaints and conducts compliance reviews; it also promulgates regulations effectuating Title IX, 34 C.F.R. 106, and guidance to help recipients understand their Title IX obligations. See, *e.g.*, OCR, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014) (OCR Single-Sex Q&A), www.ed.gov/ocr/docs/faqs-title-ix-single-sex-201412.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

The Department of Justice (DOJ) coordinates ED's and other agencies' implementation and enforcement of Title IX. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 0.51. DOJ may file federal actions in Title IX cases where DOJ provides financial assistance to recipients or where ED refers a matter to DOJ. 42 U.S.C. 2000d-1. Pursuant to 28 U.S.C. 517, the United States filed a Statement of Interest in the district court in this case to protect its interest in the proper interpretation of Title IX and its implementing regulations. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

We address the following question:

Whether a school district violates Title IX's prohibition on discrimination "on the basis of sex"

when it bars a student from accessing the restrooms that correspond to his gender identity because he is transgender.

STATEMENT OF THE CASE

1. Background

A transgender person is someone whose gender identity (*i.e.*, internal sense of being male or female) differs from the sex assigned to that person at birth. Someone who was designated male at birth but identifies as female is a transgender girl or woman; someone who was designated female at birth but identifies as male is a transgender boy or man. Gender dysphoria is a medical diagnosis given to individuals who experience an ongoing "marked difference between" their "expressed/experienced gender and the gender others would assign" them. American Psychiatric Association, *Gender Dysphoria*, at 1 (2013), http://dsm5.org/documents/gender dysphoria fact sheet.pdf.

To alleviate the psychological stress that this disconnect creates, transgender individuals often undertake some level of gender transition to bring external manifestations of gender into conformity with internal gender identity. The clinical basis for gender transition, and the protocol for transitioning, are well-established. Since the 1970s, the World Professional Association for Transgender Health (WPATH), an internationally recognized organization devoted to the study and treatment of gender-identity-related issues, has published "Standards of Care," which set forth recommendations for the treatment of gender dysphoria and the research supporting those recommendations. WPATH,

Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People (7th ed. 2012) (WPATH Standards), http://www.wpath.org/uploaded_files/140/files/Standards Of Care, V7 Full Book.pdf.

A critical stage of gender transition is the "real-life experience," during which a transgender person experiences living full-time as the gender to which he or she is transitioning. See *O'Donnabhain* v. *Commissioner*, 134 T.C. 34, 38 (2010). This experience necessarily includes using the sex-segregated facilities (*e.g.*, restrooms) corresponding with that gender. See WPATH Standards, at 61 ("During this time, patients should present consistently, on a day-to-day basis and across all settings of life, in their desired gender role.").

For individuals for whom genital surgery is appropriate, the WPATH Standards require that they live full-time in their new gender for at least one year. WPATH Standards at 21, 58, 60-61. Contrary to popular misconception, however, the majority of transgender people do not have genital surgery. See Jaime M. Grant *et al.*, *Injustice At Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, at 2, 26 (2011), http://www.thetaskforce.org/downloads/reports/ntds_full.pdf (NCTE Survey) (survey of 6450 transgender and gender non-conforming adults revealed that just 33% of respondents had surgically transitioned). Determinations about medical care must be made by physicians and their patients on an individualized basis. WPATH Standards at 5, 8-9, 58, 97. For some, health-related conditions make

invasive surgical procedures too risky; for others, the high cost of surgical procedures, which are often excluded from insurance coverage, poses an insurmountable barrier. See *id.* at 58. Moreover, and of special salience to the operation of Title IX, sex reassignment surgery is generally unavailable to transgender children under age 18. See WPATH Standards at 21, 104-106.

2. Statement Of Facts

G.G., a 16-year-old transgender boy, is a junior at Gloucester High School in Gloucester County, Virginia. Although G.G. was designated female at birth, in April 2014, a psychologist diagnosed him with gender dysphoria and started him on a course of treatment, which included a full social gender transition. JA29. As part of that transition, G.G. legally changed his name to a traditionally male name, changed the gender marker on his driver's license to male, is referred to by male pronouns, uses men's restrooms when not at school, and began hormone treatment, which has deepened his voice, increased his facial hair, and given him a more masculine appearance. JA29-30, 60.

In August 2014, at the start of his sophomore year, G.G. and his mother informed Gloucester High School officials about his gender transition and name change. JA30. School officials changed his name in his school records and instructed G.G. to email his teachers to explain his transition and request that they refer to him by his new name and male pronouns. JA30. Although G.G. initially agreed to use a separate restroom in the nurse's office, he soon found this option stigmatizing and inconvenient, as well as unnecessary, as his teachers and peers

generally respected that he is a boy. JA30-31. Accordingly, upon G.G.'s request, the school permitted him to begin using the boys' restrooms, which he did for seven weeks without incident. JA31.

In November 2014, however, some adults in the community learned that G.G. was using the boys' restroom and demanded that the Gloucester County School Board (GCSB) bar him from doing so. JA15. On December 9, 2014, after two public meetings, GCSB enacted a policy limiting students to restrooms corresponding to their "biological genders" and requiring students with "gender identity issues" to use "an alternative appropriate private facility." JA16.

The next day, G.G.'s principal informed him that, due to GCSB's new policy, he could no longer use the boys' restroom and would be disciplined if he attempted to do so. JA32. Although the school subsequently installed three unisex, single-stall restrooms,[1] G.G. found using these restrooms even more stigmatizing than using the nurse's restroom. JA32. Therefore, for the rest of his sophomore year, G.G. tried to avoid using the restroom altogether while at school, leading him to develop painful urinary tract infections. JA32-33.

3. Procedural History

On June 11, 2015, G.G. sued GCSB alleging that its policy violated Title IX and the Equal Protection Clause. JA9-24. G.G. also filed a motion

[1] The school also made several privacy-related improvements to its communal restrooms, including raising the doors and walls around the stalls and installing partitions between the urinals in the boys' restrooms. JA17, 143-144.

for a preliminary injunction to enjoin GCSB from enforcing the policy and thereby permit him to resume using the boys' restrooms when school started in September. JA25-27. The United States filed a Statement of Interest in support of G.G.'s preliminary injunction motion. JA4-5. On July 7, 2015, GCSB filed a motion to dismiss G.G.'s complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). JA5.

At a July 27, 2015, hearing to address both motions, the court announced that it was dismissing G.G.'s Title IX claim based solely on the fact that ED's Title IX regulations permit schools to provide separate boys' and girls' restrooms. JA114-116. The court stated that it would allow G.G.'s equal protection claim to proceed but postponed ruling on his preliminary injunction motion. JA129-131.

On September 4, 2015, the district court denied G.G.'s preliminary injunction motion (JA137-138), and on September 17, 2015, it issued its memorandum opinion (JA139-164). As to Title IX, the court stated that it need not decide whether Title IX's prohibition on sex discrimination includes transgender discrimination because, in its view, G.G.'s Title IX claim "is precluded by" 34 C.F.R. 106.33, ED's regulation authorizing sex-segregated restrooms. JA149.

ARGUMENT

WHERE A SCHOOL PROVIDES SEPARATE RESTROOMS FOR BOYS AND GIRLS, BARRING A STUDENT FROM THE RESTROOMS THAT CORRESPOND TO HIS OR HER GENDER IDENTITY BECAUSE THE STUDENT IS TRANSGENDER CONSTITUTES UNLAWFUL SEX DISCRIMINATION UNDER TITLE IX

A. GCSB's Restroom Policy Violates Title IX

Title IX provides that no person shall "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 "on the basis of sex." 20 U.S.C. 1681(a). Since the Supreme Court's decision in *Price Waterhouse* v. *Hopkins*, it is well-established that discrimination on the basis of "sex" is not limited to preferring males over females (or vice versa) but includes differential treatment based on any "sex-based consideration[]." 490 U.S. 228, 242 (1989) (plurality).

Here, GCSB's restroom policy denies G.G. a benefit that all of his peers enjoy—access to restrooms consistent with their gender identity—because, unlike them, his birth-assigned sex does not align with his gender identity. The policy subjects G.G. to differential treatment, and the basis for that treatment—the divergence between his gender identity and what GCSB deemed his "biological gender"—is unquestionably a "sex-based consideration[]." *Price Waterhouse*, 490 U.S. at 242 (plurality). GCSB's generalized assertions of safety

and privacy cannot override Title IX's guarantee of equal educational opportunity. Accordingly, G.G. established a likelihood of success on his claim that GCSB's policy violates Title IX.

1. Treating A Transgender Student Differently From Other Students Because He Is Transgender Constitutes Differential Treatment On The Basis Of Sex

GCSB's restroom policy denies G.G. a benefit that every other student at his school enjoys: access to restrooms that are consistent with his or her gender identity. Whereas the policy permits non-transgender students to use the restrooms that correspond to their gender identity (because their gender identity and "biological gender" are aligned), it prohibits G.G. from doing so because, although he identifies and presents as male, the school deems his "biological gender" to be female. Indeed, prohibiting G.G. from using the boys' restrooms was precisely GCSB's purpose in enacting the policy.

Treating a student differently from other students because his birth-assigned sex diverges from his gender identity constitutes differential treatment "on the basis of sex" under Title IX. Although federal courts initially construed prohibitions on sex discrimination narrowly—as prohibiting only discrimination based on one's biological status as male or female, see, *e.g.*, *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-1085 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985)—the Supreme Court "eviscerated" that approach in *Price Waterhouse*. *Smith* v. *City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). There, the Court held that an

accounting firm violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when it denied a female senior manager partnership because she was considered "macho," "aggressive," and not "feminine[]" enough. *Price Waterhouse*, 490 U.S. at 235 (plurality) (citations omitted). In doing so, *Price Waterhouse* rejected the notion that "sex" discrimination occurs only in situations in which an employer prefers a man over a woman (or vice versa); rather, a prohibition on sex discrimination encompasses any differential treatment based on a consideration "related to the sex of" the individual.[2] *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

A transgender person's transgender status is unquestionably related to his sex: indeed, the very definition of being "transgender" is that one's gender identity does not match one's "biological" or birth-assigned sex. See *Glenn* v. *Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (recognizing "a congruence between discriminating against transgender * * * individuals and discrimination on the basis of gender-based behavioral norms"); see also *Finkle* v. *Howard Cnty.*, 12 F.Supp. 3d 780, 788 (D. Md. 2014); *Rumble* v. *Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015). Thus, discrimination against a transgender person based on the divergence between his gender identity and birth-assigned sex denies that person an

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[2] Although *Price Waterhouse* arose under Title VII, this court and others "look to case law interpreting Title VII * * * for guidance in evaluating a claim brought under Title IX." *Jennings v. University of N.C.*, 482 F.3d 686, 695 (4th Cir.), cert. denied, 552 U.S. 887 (2007); see also JA146.

opportunity or benefit based on a consideration "related to" sex. *Schwenk*, 204 F.3d at 1202.

Whether viewed as discrimination based on the divergence between G.G.'s gender identity and "biological" sex or discrimination due to gender transition, GCSB's policy "*literally* discriminat[es] 'because of . . . sex.'" *Schroer* v. *Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008). As the *Schroer* court explained, firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion,'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts,'" because "[n]o court would take seriously the notion that 'converts' are not covered by the statute." *Id.* at 306. By the same logic, the court concluded, discrimination against a person because he has "changed" his sex, *i.e.*, he is presenting as a different sex from the one he was assigned at birth, would be "a clear case" of discrimination because of sex. *Ibid.*

Following the reasoning of *Price Waterhouse*, *Glenn*, and *Schroer*, the Equal Employment Opportunity Commission (EEOC) has concluded that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex'" in violation of Title VII. *Macy* v. *Department of Justice*, No. 0120120821, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012). Although *Macy* involved an employer's refusal to hire a transgender individual, in *Lusardi*, the EEOC applied *Macy*'s holding to a claim involving a restriction on a transgender employee's restroom access akin to the restriction GCSB placed on G.G. As here, it was undisputed that

Lusardi's transgender status "was *the* motivation for [the employer's] decision to prevent [her] from using the common women's restroom." *Lusardi* v. *Department of the Army*, No. 0120133395, 2015 WL 1607756, at *7 (EEOC Apr. 1, 2015). Thus, the EEOC held, because discrimination against a person because she is transgender "is, by definition, discrimination 'based on . . . sex,'" *ibid.*, the employer violated Title VII when it barred Lusardi from using the women's restroom—a resource "that other persons of her gender were freely permitted to use," *id.* at *9—because she is transgender.

To be sure, a few courts have held, largely based on assumptions about what Congress must have intended when it enacted Title VII in 1964, that the prohibition against sex discrimination does not apply to discrimination against transgender individuals. See, *e.g.*, *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1221-1222 (10th Cir. 2007) (relying on *Ulane*, 742 F.2d at 1084-1087). But as *Schroer* observed, those decisions "represent an elevation of 'judge-supposed legislative intent over clear statutory text.'" 577 F. Supp. 2d at 307 (quoting *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting)). It may well be that the Congresses that enacted Title VII in 1964 and Title IX in 1972 did not have transgender individuals in mind. But the same can be said for other conduct that is now recognized as prohibited sex discrimination under those statutes. See, *e.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). As the Supreme Court explained in *Oncale*, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79.

Nonetheless, the Court emphasized that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.* Excluding from the statute's purview conduct that falls within its plain text simply because Congress may not have contemplated it "is no longer a tenable approach to statutory construction." *Schroer*, 577 F. Supp. 2d at 307.

In the wake of *Oncale* and *Price Waterhouse*, numerous courts now recognize that prohibitions against sex discrimination protect transgender individuals from discrimination. See, *e.g.*, *Glenn*, 663 F.3d at 1317; *Smith*, 378 F.3d at 573; *Schwenk*, 204 F.3d at 1201; *Finkle*, 12 F. Supp. 3d at 788; *Lewis* v. *High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 589-590 (E.D.N.C. 2015); *Schroer*, 577 F. Supp. 2d at 308; *United States* v. *Southeastern Okla. State Univ.*, No. 5:15-CV-324, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015); *Rumble*, 2015 WL 1197415, at *2. This Court should too. Treating a student adversely because the sex assigned to him at birth does not match his gender identity is literally discrimination "on the basis of sex." 20 U.S.C. 1681.

2. Where A School Provides Sex-Segregated Restrooms, Denying A Student Access To The Restrooms Consistent With His Or Her Gender Identity Denies That Student Equal Educational Opportunity

Just as "[e]qual access to restrooms is a significant, basic condition of employment," *Lusardi*, 2015 WL 1607756, at *9, so too is it a basic condition of full and equal participation in a school's

educational programs and activities. See 20 U.S.C. 1687(2)(B) (defining "program[s] or activit[ies]" to mean "all of the operations" of a school). Prohibiting a transgender male student from using boys' restrooms, when other non-transgender male students face no such restriction, deprives him not only of equal educational opportunity but also "of equal status, respect, and dignity." *Lusardi*, 2015 WL 1607756, at *10.

Under GCSB's policy, G.G. may only use either the girls' restroom or a separate "unisex" restroom. That other students may choose to use the unisex restroom does not change the fact that this policy, which was directed at G.G., not only denies G.G.'s "very identity" as a boy, *Lusardi*, 2015 WL 1607756, at *10, but also singles him out in a way that is humiliating and stigmatizing. For example, even when there is a boys' restroom next to his classroom or locker, G.G. must seek out a unisex restroom in a different part of the school. See JA32. In placing this restriction on G.G., GCSB essentially labels him as "other."

The only other "option" made available to G.G.—using the girls' restroom—is illusory. It is unrealistic to suggest that a student like G.G., who identifies and presents as a boy and whom the school treats as a boy in every other respect, could walk into a girls' restroom without creating a situation that is disruptive to his female classmates and humiliating to him.[3] Not surprisingly, students put in such an

[3] Indeed, even before he began masculinizing hormone treatment, G.G.'s female classmates, perceiving him to be a boy, reacted negatively to his presence in the girls' restroom. JA32

untenable position often try to avoid using the restroom all day—putting them at risk for urinary tract infections and other health problems (see JA33)—rather than use a facility that either conflicts with their gender identity or physically and symbolically marks them "as some type of 'other.'" JA32. In other words, denying a transgender boy access to the boys' restroom is often much more than a mere inconvenience or limitation on his ability to use the restroom—it can be an effective denial of a restroom altogether.

As a result of such a policy, transgender students like G.G. are denied the ability to participate fully in and take advantage of their school's educational programs. No one could reasonably expect a student to make it through an entire school day without access to a restroom; any student who attempted to do so would likely experience discomfort and anxiety affecting his ability to concentrate during class, further diminishing his educational experience. See JA32-33. And even if a student could avoid using the restroom during regular school hours, such a restriction would still limit his ability to participate in after-school extracurricular activities that are important to a child's intellectual, social, and emotional development.[4]

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[4] And even if a transgender student were willing to use a unisex restroom, the number and location of such restroom(s) may be such that a transgender student at a large school would have difficulty reaching the "authorized" restroom in the allotted time between classes. See, *e.g.*, JA32 (G.G.'s affidavit stating that only one of the unisex restrooms is "located anywhere near the restrooms used by other students" and that none of the unisex restrooms is "located near [his] classes"). A student in

Just as an employee is denied equal employment opportunity if he is denied access to an on-site restroom that co-workers of his same gender may use, see *Lusardi*, 2015 WL 1607756, at *9,[5] so too is a student denied equal educational opportunity when restrictions of these kinds are placed on his ability to use the restroom. It is for this reason that the Department of Education—the agency with primary enforcement authority over Title IX—has concluded that, although recipients may provide separate restrooms for boys and girls, when a school does so, it must treat transgender students consistent with their gender identity. Doing so is the only way to ensure that the school's provision of sex-segregated restrooms complies with Title IX's

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such situation may feel as though he needed to limit his movement over the course of the day to ensure proximity to an "authorized" restroom, to avoid being late to class or, even worse, having an accident that would humiliate and stigmatize him further.

[5] The Department of Labor's Occupational Safety and Health Administration (OSHA) guidelines require agencies to provide employees access to adequate sanitary facilities. See Memorandum to Regional Administrators and State Designees from John B. Miles, Jr., Director of Compliance Programs, Regarding OSHA's Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932. To that end, OSHA has issued guidance clarifying that employees "should be permitted to use the facilities that correspond with their gender identity" and that "[t]he employee," not the employer, "should determine the most appropriate and safest option for him- or herself." OSHA, *A Guide to Restroom Access for Transgender Workers*, at 2 (June 1, 2015) (OSHA Transgender Guidance), http://www.osha.gov/Publications/OSHA3795.pdf.

mandate not to subject any student to discrimination on the basis of sex.[6]

3. General Invocations Of Privacy And Safety Do Not Override Title IX's Prohibition Against Sex Discrimination

Although GCSB claims that its policy "seeks to provide a safe learning environment for all students and to protect the privacy of all students" (JA142), such asserted concerns do not justify barring G.G. from accessing the restrooms consistent with his gender identity. While a school certainly may take steps designed to ensure the safety of its students, general invocations of "safety" provide no basis for denying a student access to the gender-identity appropriate restroom. To the extent GCSB claims to

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[6] ED's view is consistent with that of numerous other federal agencies, including the EEOC, the Department of Housing and Urban Development (HUD), the Office of Personnel Management (OPM), and OSHA, which have all concluded that, in situations in which a distinction based on sex is permissible under the law, a transgender person's "sex" must be determined by his or her gender identity, not by the sex assigned at birth. See *Lusardi*, 2015 WL 1607756, at *8; HUD, *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities*, at 3 (Feb. 20, 2015), https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf; OPM, *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, http://www.opm.gov/policydata-oversight/diversity-and-inclusion/reference-materials/gender-identity guidance (last visited Oct. 27, 2015); OSHA Transgender Guidance, *supra* note 5; cf. DOJ, Office for Civil Rights, Office of Justice Programs, *FAQ: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, at 8-9 (Apr. 9, 2014), www.justice.gov/ovw/docs/faqs-ngc-vawa.pdf.

be concerned about *other students*' safety, it has not provided any factual basis for concluding that G.G.'s use of the boys' restroom poses a safety risk to any student. A school cannot deny a transgender boy educational opportunities based on a blanket and unfounded assumption that all transgender boys pose a danger to other boys in the restroom just by virtue of being transgender.

To the extent GCSB claims to be concerned about *transgender students'* safety, such a claim is belied by the fact that the policy it enacted makes it *more likely* that transgender students will be subject to harassment (or worse). In many cases, a transgender student's classmates do not even know he is transgender; requiring him to use either a restroom contrary to his gender identity or a separate unisex restroom thus functions to "out" him, putting the student at increased risk of harm. See NCTE Survey at 154, p. 4, *supra* (noting that "outing" a person as transgender "presents the possibility for disrespect, harassment, discrimination or violence"). Where the student is already "out" publicly—as G.G. was here, largely due to the public hearings putting his transgender status front-and-center—the school can, and should, monitor other students' treatment of him and put measures in place to ensure that he not suffer sex-based harassment in the restroom or anywhere else. See *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (school violates Title IX when it is deliberately indifferent to known student-on student sexual harassment). The appropriate solution, in other words, is to monitor, prevent, and punish the students *doing* the harassing, not to deny the

vulnerable student an equal educational opportunity in the name of protecting him.[7]

Likewise, however commendable an interest in student privacy may be in the abstract, general appeals to "privacy" cannot justify denying transgender students the right to use gender-identity appropriate restrooms. With regard to its existing restrooms, a school can take—and, in fact, Gloucester High School has taken—measures to enhance privacy, such as "adding or expanding partitions between urinals in male restrooms," and "adding privacy strips to the doors of stalls in all restrooms." JA17. If a school wishes to accommodate students who are particularly modest, it may create—and, in fact, Gloucester High School has created—additional single-user restroom options. JA19. What it cannot do in the name of "privacy" is exclude a male student from the boys' restroom and require him to use a separate restroom because he was assigned a different sex at birth than other boys. The desire to accommodate other students' (or their parents') discomfort cannot justify a policy that singles out and disadvantages one class of students on the basis of sex. *Macy*, 2012 WL 1435995, at *10 & n.15; cf. *Cruzan* v. *Special Sch. Dist. No. 1*, 294 F.3d 981, 983-984 (8th Cir. 2002) (dismissing female employee's claim alleging that transgender female co-worker's use of women's restroom created hostile work environment).

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[7] It goes without saying that if a student is being harassed in the restroom because of his religion or his disability, the appropriate solution is to restrict and punish the harasser, not to single out the victim of harassment and require *him* to use a separate bathroom.

GCSB's claim that it has "had a long-standing practice" of restricting restroom use by "biological sex" to "respect the safety and privacy of all students" (Doc. 32, at 6 (brief in support of motion to dismiss); see also Doc. 46, at 3 (reply to appellant's response to motion to dismiss)), is belied by the fact that it needed to enact a formal policy establishing such a restriction. Indeed, the reality is that, in the context of restrooms outside the home, people generally use the facilities that are appropriate for them based on their gender identity and expression; nobody is stationed at the door asking for a birth certificate or the results of a chromosome test, or checking to see what genitals the people entering the facility have. It is only in response to transgender people gaining more visibility that schools and other entities have begun to depart from that practice and demand that restroom access be based on "birth" or "biological" sex. And even then, as this case suggests, employers and educational institutions appear to enforce such bathroom policies predicated on "birth" or "biological" sex against only those individuals who have self-identified as transgender or been outed by others.

In short, although promoting safety and privacy are legitimate goals in the abstract, neither of these rationales can justify a policy that denies G.G.—and other students like him—not just access to the gender-appropriate restroom but, more fundamentally, an equal opportunity at an education.

B. The Department Of Education's Title IX Regulations Do Not Permit Schools To Enact Discriminatory Restroom Policies Like GCSB's

Contrary to the district court's conclusion, ED's Title IX regulations do not "preclude[]" G.G.'s Title IX claim. JA149. The regulation in question states only that a school "may provide separate toilet * * * facilities on the basis of sex" under Title IX, as long as the "facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 34 C.F.R. 106.33. It is silent on the question at issue here: whether, once a school has provided separate boys' and girls' restrooms pursuant to Section 106.33, it may prohibit a male student from accessing the boys' restrooms because he is transgender.[8]

The district court's conclusion that Section 106.33 "clearly" permits GCSB's restroom policy (JA152) directly contradicts the interpretation of the Department of Education—the agency that promulgated the regulation. ED interprets Section 106.33 to mean that recipients may provide separate restrooms for boys and girls. Section 106.33 does not, in ED's view, give schools the authority to decide that only those males who were assigned the male

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[8] G.G. does not challenge the existence of male and female restrooms, Appellant's Br. 31, and for good reason. ED has concluded that the mere act of providing separate restroom facilities for males and females does not violate Title IX (as long as the facilities are comparable), see 34 C.F.R. 106.33, which is reasonable because such segregation does not disadvantage or stigmatize any student but simply comports with a historical practice when using multi-user restroom facilities outside the home. See also Appellant's Br. 36-37.

sex at birth can use the boys' restroom. To the contrary, ED has stated explicitly that although "[t]he Department's Title IX regulations permit schools to provide sex-segregated restrooms," when a school elects to do so, it "generally must treat transgender students consistent with their gender identity" so as not to violate Title IX. JA55 (Letter from James A. Ferg-Cadima, OCR Acting Deputy Assistant Secretary of Policy (Jan. 7, 2015)); see also OCR Single-Sex Q&A at 25 (same guidance for classes and activities).[9]

That interpretation is consistent with how ED has enforced Title IX in this context. ED has reached voluntary resolution with two school districts that had imposed restrictions on transgender students' restroom access similar to GCSB's policy; the agreements provide that those districts will treat transgender students consistent with their gender identity in all aspects of their education, including their restroom access.[10] ED has also, in conjunction with DOJ's Civil Rights Division, filed two Statements of Interest and the instant *amicus* brief asserting that, although recipients may provide

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[9] ED's guidance does not limit a school's ability to accommodate a transitioning student's voluntary request to phase in his access to restrooms of his new gender, as was done here. Absent such a request, however, schools must treat a transitioning student consistent with his gender identity.

[10] Resolution Agreement Between the United States and Downey Unified School District (Oct. 8, 2014), http://www2.ed.gov/documents/pressreleases/downey-school-district-agreement.pdf; Resolution Agreement Between the United States and Arcadia Unified School District (July 24, 2013), http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.

separate boys' and girls' restrooms pursuant to Section 106.33, a recipient violates Title IX when it prohibits transgender students from using restrooms consistent with their gender identity. See Doc. 38; Statement of Interest of the United States, *Tooley* v. *Van Buren Pub. Sch.*, No. 2:14-CV-13466 (E.D. Mich. Feb. 20, 2015). Thus, ED plainly does not interpret Section 106.33 to permit schools to enact policies like GCSB's.

Where there is dispute about the meaning of a regulation, the agency's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotation marks omitted). That "deferential standard," *ibid.*, is certainly met here.[11] ED interprets its regulation as clarifying that schools may provide separate restrooms for boys and girls without running afoul of Title IX. That is the most natural reading of the regulatory language. See 34 C.F.R. 106.33 ("A recipient *may provide* separate toilet * * * 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*.") (emphasis added). Because the regulation is silent on what the phrases "students of one sex" and "students of the other sex" mean in the context of transgender

[11] *Auer* deference is owed to agency interpretations expressed in *amicus* briefs and Statements of Interest filed pursuant to 28 U.S.C. 517, see *Auer*, 519 U.S. at 462 (*amicus* brief); *M.R.* v. *Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2011) (Statement of Interest), as well as those issued "through an informal process" like an "opinion letter," *D.L.* v. *Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256, 259 (4th Cir. 2013).

students, ED has provided guidance on that question. ED interprets the regulation as requiring schools to treat students consistent with their gender identity because doing so ensures that transgender students are not denied equal educational opportunity for the reasons described above. ED's interpretation is a reasonable one, and is thus entitled to deference. See *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 207 (2011) (where regulation is silent as to the "crucial interpretive question," court must look to the agency's "own interpretation of the regulation"); *Humanoids Group* v. *Rogan*, 375 F.3d 301, 306 (4th Cir. 2004) (deferring to agency interpretation of how its trademark regulation should apply in situation not explicitly addressed by regulation's language).

Section 106.33 is comparable to a Maine statute requiring that restrooms in school buildings be "[s]eparated according to sex." Me. Rev. Stat. Ann. Tit. 20-a, § 6501 (2013). In *Doe* v. *Regional School Unit 26*, 86 A.3d 600 (Me. 2014), the Maine Supreme Court concluded that this statute "does not mandate, or even suggest, the manner in which transgender students should be permitted to use sex-separated facilities." *Id.* at 605-606. Thus, the court concluded, an elementary school could not rely on the statute to justify its decision to bar a transgender girl from the girls' restroom. *Id.* at 606. As the court explained, although the statute requires schools to provide "separate bathrooms for each sex," it "does not—and school officials cannot—dictate the use of the bathrooms in a way that discriminates against students in violation of" the State's nondiscrimination law. *Ibid.* ED reasonably reached the same conclusion with regard to 34 C.F.R. 106.33.

The district court's conclusion that Section 106.33's plain language supports *only* the court's interpretation and therefore "is not ambiguous" (JA152), does not withstand scrutiny.[12] The district court's strained reading—that by using the term "on the basis of sex," Section 106.33 authorizes schools to use whatever sex-based criterion they wish to determine who qualifies as a boy or girl for restroom use—divorces the phrase from the context in which it appears. In contrast to Title IX's statutory language banning sex-based discrimination, the phrase "on the basis of sex" in the context of Section 106.33 most naturally refers to the commonplace, and long-accepted, practice of providing separate male and female restrooms. It would be incongruous for the Department of Education, in a regulation implementing Title IX's antidiscrimination provision, to have given schools free rein to use whatever sex-based criterion they want in determining who gets to use each restroom. Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom. To do so would engage in precisely the sort of sex stereotyping that *Price Waterhouse* forbids. Yet, the district court's interpretation of Section 106.33 would seem to allow just that. That is not a sensible reading.

But even if the district court's interpretation of Section 106.33 were plausible, that does not render

[12] Whether a regulation is ambiguous is a legal question that this Court determines de novo. Humanoids, 375 F.3d at 306.

ED's reading incorrect; at most it would mean that the regulation is ambiguous. This is not a case like *Christensen* v. *Harris County*, which involved a regulation whose plain language precluded the agency's interpretation. 529 U.S. 576, 587-588 (2000) (regulation's use of "may" instead of "must" made regulation permissive, thus foreclosing agency's interpretation setting forth a mandatory requirement). Here, Section 106.33's language does not "clearly preclude[]" ED's interpretation; indeed, as explained, ED's interpretation is the best reading of its own regulation. *Humanoids*, 375 F.3d at 306. But to the extent there is any ambiguity, this Court must give "binding deference" to ED's reasonable interpretation of its own regulation. *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003).

The district court's suggestion that ED arrived at its interpretation "for the purposes of litigation" is inaccurate. JA153. ED is "not a party to this case"; it advances its interpretation of Section 106.33, both below and on appeal, as an *amicus curiae*, just as the Department of Labor did in *Auer*. *Chase Bank*, 562 U.S. at 209. Thus, its position "is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462 (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)). To the contrary, the interpretation of Section 106.33 that ED advances here "is entirely consistent with its past views," as expressed in the agreements it has reached with school districts, in its guidance on single-sex activities, in OCR's 2014 letter, and in its Statement of Interest in *Tooley*. *Chase Bank*, 562 U.S. at 210.

The district court's characterization of ED's interpretation as "newfound" (JA153) is also misplaced. Section 106.33's application to the context of transgender students' restroom access "did not arise until recently." *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011) (according *Auer* deference to agency's new interpretation of its "longstanding" regulations). For most of its existence, there was no dispute about Section 106.33's meaning; it was understood simply to mean what it says, *i.e.*, that Title IX recipients can provide separate boys' and girls' facilities. It is only in recent years, as schools have confronted the reality that some students' gender identities do not align with their birth-assigned sex, that schools have begun citing Section 106.33 as justification for enacting new policies restricting transgender students to facilities based on their "birth" or "biological" sex. It is to those "newfound" policies that ED's interpretation of the regulation responds. Providing guidance on how its regulations apply in new contexts is precisely the role of a federal agency.

ED has reasonably concluded that, although Section 106.33 permits schools to provide separate boys' and girls' restrooms, when a school elects to do so, it must permit students to use the restrooms that are consistent with their gender identity. Because ED's interpretation of its own regulation controls, the district court erred in dismissing G.G.'s Title IX claim on the ground that Section 106.33 authorizes GCSB's restroom policy.

CONCLUSION

GCSB's restroom policy singles G.G. out and treats him differently from all other students because the sex he was assigned at birth does not align with his gender identity. Because that policy is "*literally* discrimination 'because of . . . sex,'" *Schroer*, 577 F. Supp. 2d at 308, G.G. established a likelihood of success on his Title IX claim, and the district court thus erred in dismissing it.

Respectfully Submitted,

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