No. 15-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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
Newport News Division

BRIEF FOR PROFESSORS SAMUEL BAGENSTOS, MICHAEL C. DORF, MARTIN S. LEDERMAN AND LEAH M. LITMAN AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-2056 Caption: G.G. v. Gloucester County School Board

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Samuel Bagnestos, Michael C. Dorf, Martin S. Lederman, and Leah M. Litman
(name of party/amicus)

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Signature: /s/ Kevin K. Russell Date: May 15, 2017

Counsel for: Samuel Bagenstos, et al.

CERTIFICATE OF SERVICE

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I certify that on May 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTEREST OF AMICI CURIAE

Amici are scholars who teach and write on constitutional law and civil rights law. They submit this brief to identify an alternative means of resolving the plaintiff's Title IX claim.[1]

Samuel Bagenstos is Frank G. Millard Professor of Law at the University of Michigan Law School.

Michael C. Dorf is Robert S. Stevens Professor of Law at Cornell Law School.

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[1] No party's counsel authored this brief in whole or in part, and no person other than amici's counsel contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. 29(a)(4)(E). All parties have consented to this brief's filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 provides that no person in a school district receiving federal financial assistance "shall, on the basis of sex, . . . be subjected to discrimination." 20 U.S.C. § 1681(a).

The parties' briefs focus on two questions: (i) whether discrimination *on the basis of transgender status*—for example, treating a transgender boy such as Gavin Grimm (Gavin) differently from other boys—is "discrimination . . . *on the basis of sex*" under § 1681(a); and (ii) whether a Title IX regulation, 34 C.F.R. § 106.33, authorizes a school district receiving federal funds to exclude transgender students from restrooms designated for students of their gender identity.

The Court does not need to resolve either of these questions, however, because there is a more straightforward reason why Title IX prohibits the Gloucester County School Board (the Board) from excluding Gavin from the "male" restrooms at Gloucester High School. The Board acknowledges that its restroom policy segregates students according to their reproductive "physiological or anatomical characteristics." Board Supp. Br. 24. It is undisputed that such a classification differentiates and separates students "on the basis of sex," regardless of whether *other* types of classifications (e.g., differential treatment of transgender students) might also be "sex"-based. And under Title IX, segregation "on the basis

of sex" presumptively subjects students to a form of prohibited "discrimination," even where such separate treatment might ostensibly be "equal."

To be sure, designating particular restrooms on the basis of users' reproductive physiology is one of the rare contexts in which a school can overcome that presumption of proscribed "discrimination," at least as applied to most students. Title IX generally permits such segregation of restrooms, even though it is "on the basis of sex," where the policy advances a school's legitimate interests in preserving traditional expectations of privacy respecting bodily functions, and/or in diminishing the risk of improper student conduct, without promoting any harmful sex stereotypes or otherwise inflicting significant harm on the mine run of students.

Such segregation on the basis of sex, however, *does* subject transgender students to impermissible "discrimination," because the profound and uncontroverted harms it inflicts upon transgender students cannot be justified by the interests that might otherwise support this particular, traditional practice of sex-based segregation—or by any other institutional interests on which the Gloucester policy purports to be predicated. Strikingly, the Board makes no effort to demonstrate that excluding Gavin Grimm from "male" restrooms is necessary to accomplish the stated reasons for its exclusionary policy—*i.e.*, "to provide a safe learning environment for all students and to protect the privacy of all students" J.A. 16 (quoting Gloucester policy). That is no mere oversight: the Board offers

no such showing because relegating transgender students such as Gavin to stigmatizing single-stall restrooms plainly is not necessary to the Board's realization of those goals.

ARGUMENT

I. THE BOARD'S POLICY, WHICH SEGREGATES STUDENTS BASED UPON THEIR EXTERNAL REPRODUCTIVE ORGANS, IS A CLASSIFICATION "ON THE BASIS OF SEX."

The Gloucester School District receives federal funds. Therefore § 1681(a) of Title IX prohibits the defendant from "subject[ing]" any student to "discrimination" "on the basis of sex." The Board's restroom policy is a classification "on the basis of sex" under anyone's definition of "sex."[2] That policy provides:

> 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.

J.A. 16 (emphasis added).

[2] The "broadly written general prohibition on discrimination" in § 1681(a) is "followed by specific, narrow exceptions." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). The eight currently operational exceptions describe certain institutions that may subject students to discrimination "on the basis of sex," *see* 20 U.S.C. §§ 1681(a)(3)-(5), and certain discrete contexts in which covered institutions may do so, id. §§ 1681(a)(1), (6)-(9). The Gloucester School District and the Board's restroom policy do not fall within any of those statutory exceptions, nor does the Board argue otherwise.

As the original panel noted, the meaning of the policy's criterion for classification—"corresponding biological genders"—is unclear. 822 F.3d 709, 720–21 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017). Indeed, the term does not even determine which restrooms Gavin can use. In most "biological" respects, after all, Gavin is—and appears to be—male. He has received testosterone hormone therapy, his voice has deepened, and he has undergone chest reconstruction surgery. J.A. 30; Pl. Supp. Br. 10-11. As far as other students and administrators can discern, then—including in restrooms—Gavin is not materially different from other boys his age.

As the Board interprets its policy, however, Gavin and other transgender boys are treated as female by virtue of what the Board calls their "anatomical" or "objective physiological" characteristics, Board Supp. Br. at 24, 26—by which the Board plainly means students' external reproductive organs (or, in any event, what the Board presumes the students' genitalia must be). *See id.* at 11 (stressing that Gavin "has not undergone any genital surgery and remains anatomically female").[3] As the original panel explained, the Board "determin[es] maleness or femaleness with reference exclusively to genitalia." 822 F.3d at 720.

[3] We assume the Board is not referring to "physiological characteristics" that are not external. Surely, for instance, the Board would not prohibit a woman from using the school's "female" restrooms because she has had a total hysterectomy for medical reasons.

As the Board itself correctly insists throughout its brief, *see*, *e.g.*, Board Supp. Br. at 24–25 & n.9 (citing dictionary definitions), such a classification of students on the basis of their genitalia is unquestionably action taken "on the basis of sex" for purposes of Title IX, regardless of whether distinctions between transgender boys and other boys is *also* discrimination "on the basis of sex."

II. SEGREGATING STUDENTS "ON THE BASIS OF SEX" PRESUMPTIVELY SUBJECTS THEM TO PROHIBITED "DISCRIMINATION" UNDER TITLE IX.

Treating students "on the basis of sex," standing alone, does not necessarily "subject" such students to "discrimination" on the basis of sex, which is what § 1681(a) prohibits. When a funded institution segregates students on the basis of sex, however, that does create a strong presumption of unlawful discrimination.

"[T]he concept of 'discrimination' . . . is susceptible of varying interpretations." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J.). "'[T]he most easily understood type of discrimination'" is what the Supreme Court has called "disparate treatment," *i.e.*, treating someone "'less favorably than others'" because of a protected trait (race, sex, disability, etc.). *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985-86 (1988) (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). The word "discrimination," however, can also mean, more broadly, any distinction or differentiation between two different things—even if both things are, at least

formally, treated equally. *See, e.g.*, 1 *Webster's Third New International Dictionary* 648 (1971) ("the making or perceiving of a distinction or difference").

As used in Title IX—and in Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, on which Title IX was closely modeled—"discrimination" has long been understood to encompass most, but not all, classifications on the basis of the specified criterion or criteria (in Title IX, sex; in Title VI, race, color and national origin). Accordingly, when these statutes prohibit funding recipients from "subjecting" people to "discrimination" on the basis of a specified criterion, they do not merely prohibit facially unequal, or disparate treatment—they also presumptively proscribe the use of the specified criterion to *segregate* persons on an ostensibly "separate but equal" basis.

The language of § 1681(a) of Title IX is "virtually identical" to that of Title VI, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 (1982), except that Title IX substitutes the word "sex" for the words "race, color, or national origin" in Title VI, and Title IX is limited to "education" programs and activities. Moreover, Congress "passed Title IX with the explicit understanding that it would be interpreted as Title VI was." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (citations omitted). That parallelism is important here because one of Congress's principal aims in enacting Title VI was to establish a strong

presumption that recipients of federal funds may not segregate persons on the basis of race.

In the decades before the Civil Rights Act of 1964, Congress frequently prohibited racial "discrimination" in federally funded programs; those statutes, however, beginning with the Hill-Burton Act of 1946, included express exemptions for so-called "separate but equal" facilities. *See* Pub. L. 79-725, § 2, 60 Stat. 1040, 1043–44 (1946) (creating § 622(f) of the Public Health Service Act); *see also Simkins v. Moses H. Cone Mem. Hosp.*, 323 F.2d 959 (4th Cir. 1963). When it enacted Title VI, Congress incorporated the prohibition on subjecting people to racial "discrimination," and applied it to *all* federally funded programs, but deliberately omitted any exception for "separate but equal" facilities. The congressional debates revealed "that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation *or providing them with separate facilities*. Again and again supporters of Title VI emphasized that the purpose of the statute was *to end segregation* in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes." *Bakke*, 438 U.S. at 334 (plurality opinion) (emphasis added). The Congress that enacted Title VI, therefore, specifically understood that segregation on the basis of race, as such,

generally was itself a form of "discrimination" that the law would prohibit within federally funded programs and activities.

During congressional deliberations of Title IX eight years later, the legislation's principal sponsor, Senator Birch Bayh, explained that the bill's prohibition and enforcement provisions "generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972). Moreover, Senator Bayh specifically identified "sex segregation in vocational education" as an example of the problem Title IX was designed to address. *Id.* at 5806. Importantly, he further explained that sex segregation would be permitted under the statute only in "*very unusual* cases where such treatment is *absolutely necessary* to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." *Id.* at 5807 (emphasis added). (Because Senator Bayh's prepared remarks were virtually "the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902," the Supreme Court has treated his views as an "authoritative guide" to the meaning of Title IX. *North Haven*, 456 U.S. at 526–27.)

The structure of Title IX confirms Senator Bayh's understanding that segregating students on the basis of sex presumptively subjects them to prohibited "discrimination." Section 1681(a) not only bans "subjecting" persons to sex-based "discrimination," but also "exclud[ing]" persons "from participation in" the funded

program, and "den[ying]" persons "the benefits of" the program, on the basis of sex. This tripartite formulation demonstrates that Title IX's "discrimination" prong prohibits something more than merely sex-based exclusions and denials—forms of disparate treatment that the other two clauses specifically proscribe.

Congress also included a rule of construction, for one particular application of Title IX, that confirmed Senator Bayh's understanding that § 1681(a) would usually—but not always—prohibit separation of students on the basis of their sex: Section 1686 provides that "[n]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. If § 1681(a) did not generally prohibit separation on the basis of sex, there would have been no need for Congress to include § 1686.

The political branches' subsequent treatment of Title IX further confirmed this understanding of "discrimination" to include most, albeit not quite all, cases in which schools separate students on the basis of sex.

Section 1682 of Title IX directs federal agencies that provide federal assistance to education programs and activities "to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability." *See Gebser v. Lago Vista Indep.*

Sch. Dist., 524 U.S. 274, 292 (1998). The former Department of Health, Education, and Welfare ("HEW") promulgated the first such regulations in 1975. *See* 40 Fed. Reg. 24128 (1975); *see also* 39 Fed. Reg. 22228 (1974) (proposed regulations).

One section of HEW's initial rule, then denominated 45 C.F.R. § 86.31 (1975), reiterated the basic prohibitions stated in § 1681(a) of Title IX. The rule then proceeded to identify "specific prohibitions," which were, in effect, illustrations of the statutory prohibitions. *Id.* § 86.31(b). One of those "specific prohibitions" was that, "[e]xcept as provided in this subpart," a federal funding recipient "shall not, on the basis of sex" . . . "[s]ubject any person *to separate or different rules of behavior or other treatment*." *Id.* § 86.31(b)(4) (emphasis added); *see* 40 Fed. Reg. at 24141. In other words, the rule not only presumptively prohibited "*different*" (disparate or *unfavorable*) treatment on the basis of sex, but also "*separate* . . . treatment" on the basis of sex (except as the regulations elsewhere provided).

Before the effective date of HEW's final rule in July 1975, the House of Representatives held six days of hearings to examine it. *See Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975). In those hearings, witnesses and members of Congress raised numerous objections to

HEW's handiwork. No one, however, questioned § 86.31(b)(4)'s prohibition of "separate . . . treatment" on the basis of sex. Shortly after the hearings, HEW's "separate . . . treatment" prohibition became effective, and it has been in place ever since, without controversy or congressional disapproval; today it appears, in materially identical form, as 34 C.F.R. § 106.31(b)(4).

For more than 40 years, then, the law has expressly and uncontroversially instructed funding recipients that *separating* students on the basis of their sex presumptively "subjects" them to prohibited "discrimination."[4] Accordingly, Title IX's prohibition roughly parallels the "'strong presumption'" the Supreme Court has developed under the Equal Protection Clause of the Fourteenth Amendment—namely, "'that gender classifications are invalid.'" *United States v. Virginia (VMI)*, 518 U.S. 515, 532 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment)); *see also Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (viewing statutes

[4] In 1976, Congress enacted a statutory amendment that further confirmed HEW's construction of § 1681(a)'s prohibition of "discrimination" to include sex-segregation. Pub. L. 94-482, § 412(a), 90 Stat. 2234. The 1976 amendment provides that § 1681 "shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex." 20 U.S.C. § 1681(a)(8). That exception would not have made much sense unless Congress was acting against a background understanding that § 1681(a) presumptively prohibits "separate-but-equal" sex segregation.

prohibiting "discrimination" on the basis of sex as reflecting a congressional "conclu[sion] that classifications based upon sex are inherently invidious").[5]

A strong presumption, however, is not quite an absolute prohibition, as the original panel noted. *See* 822 F.3d at 718 ("Not all distinctions on the basis of sex are impermissible under Title IX."); *cf.* 34 C.F.R. § 106.3(b) ("a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation . . . by persons of a particular sex"). Moreover, a recipient may be able to overcome the presumption that segregation is discrimination a bit more readily under Title IX than under Title VI. Under Title VI, so-called "separate-but-equal" segregation on the basis of race is almost never permissible, because it will virtually always propagate invidious racial stereotypes or otherwise significantly harm racial minorities. By contrast, as Senator Bayh indicated during the legislative consideration of Title IX, there might be "very unusual cases" in which "differential treatment" on the basis of sex would not amount to prohibited "discrimination" under Title IX. 118 Cong. Rec. at 5807. Senator Bayh explained that the relevant federal agencies could, through regulation, identify such

[5] Because the Title IX analysis thus largely tracks the Supreme Court's equal protection jurisprudence, amici also believe that the Board's policy violates Gavin's Fourteenth Amendment rights. In this brief, however, we limit our discussion to his Title IX claim.

circumstances, *id.*, and he mentioned, as one example, differential treatment "in sports facilities or other instances where personal privacy must be preserved," *id.*; *see also* 20 U.S.C. § 1686 (statutory clarification that § 1681(a) does not prohibit maintenance of "separate living facilities for the different sexes").

In the decades since Congress enacted Title IX, the Department of Education (previously HEW) has promulgated several regulations identifying specific circumstances in which "differential treatment" on the basis of sex would not, in the agency's view, subject students to a form of prohibited "discrimination."[6] Those regulations are written against—and appear alongside—the longstanding background rule, discussed above, that "separate . . . treatment" on the basis of sex ordinarily *is* a form of prohibited "discrimination." 34 C.F.R. § 106.31(b)(4)). Accordingly, they properly reflect the understanding that Title IX permits such sex-segregation only in highly circumscribed situations.[7]

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[6] *See* 34 C.F.R. §§ 106.32(b) (implementing § 1686); 106.33, 106.34(a)(1), 106.34(a)(3), 106.34(b), 106.41. These regulations do not establish exemptions from the prohibitions of § 1681(a). Congress has not authorized any agency to permit "discrimination" on the basis of sex or otherwise to waive the conditions of § 1681(a); rather, § 1682 only affords an agency the authority to promulgate rules "to effectuate the provisions of section 1681."

[7] It is not necessary in this case to determine whether all of the existing agency regulations are permissible constructions of § 1681(a). Indeed, amici have doubts about some of them, including § 106.34(b), which permits the use of single-sex classes in particular subjects (*e.g.*, math) for students of one sex but not the other. That regulation not only fails to guarantee comparable treatment for both

For example, Title IX, like the Equal Protection Clause of the Fourteenth Amendment, forbids separation on the basis of sex when its justification "rel[ies] on overbroad generalizations about the different talents, capacities, or preferences of males and females," *VMI*, 518 U.S. at 533, or "demean[s] the ability or social status" of affected individuals, *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 478 (1981) (internal citation omitted). On the other hand, where a policy of sex separation does not rely upon such generalizations, and where it does not demean or stigmatize individuals or otherwise significantly harm them, a school would rebut the presumption of "discrimination"—but generally it can do so only if it provides all students, regardless of sex, with "comparable" facilities and opportunities. *See, e.g.*, 34 C.F.R. § 106.32(b) (sex-segregated student housing must be "comparable in quality and cost" for students of both sexes); *cf.* 20 U.S.C. § 1681(a)(8) (establishing Title IX exception for father-son/mother-daughter activities, but only where "opportunities for reasonably comparable activities shall be provided for students of the other sex"). That is to say, the school must, at a minimum, take all reasonable steps to ensure what the Supreme Court, in the equal

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sexes; it might also be predicated on dubious assumptions that boys and girls learn differently.

protection context, has called "substantial equality" for all students. *VMI*, 518 U.S. at 554.

This minimum requirement of comparable treatment extends to each individual student—not to aggregate groups of all students of a particular sex. The text of the statute, after all, provides that "*no person* in the United States" shall be subjected to sex-based discrimination in a federally funded school. 20 U.S.C. § 1681(a) (emphasis added); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (explaining that the purpose of Title IX is to "provide individual citizens effective protection against [prohibited] practices"); *cf. City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978) (because practices that "classify employees in terms of … sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals," the "basic policy of [Title VII] … requires that we focus on fairness to individuals rather than … classes"); *J.E.B.*, 511 U.S. at 152–53 (Kennedy, J. concurring) (an anti-discrimination provision "extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups").

Thus, even where a school policy of separating persons on the basis of sex—including, as here, on the basis of their reproductive organs—might be broadly permissible because (among other things) it does not harm the vast majority of affected students, the question is very different when a school applies that policy to

students who do suffer significant harm as a result of being segregated in that manner.[8] As applied to *those* students, the policy almost certainly would constitute discrimination on the basis of sex, which § 1681(a) forbids.

The only possible exception to this general rule would be in one of what Senator Bayh called those "very unusual cases" where segregation by sex is "absolutely necessary to the success," 118 Cong. Rec. at 5807, of what the Supreme Court (in the context of the Equal Protection Clause) has called an "'important governmental objective[].'" *VMI*, 518 U.S. at 533 (*quoting Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

III. A SCHOOL'S POLICY OF SEGREGATING RESTROOMS ON THE BASIS OF STUDENTS' SEXUAL ANATOMY ORDINARILY DOES NOT SUBJECT MOST STUDENTS TO IMPERMISSIBLE DISCRIMINATION.

Since 1975, the Title IX regulations have included a provision concerning restrooms and other specified "facilities." *See* 40 Fed. Reg. at 24141 (promulgating 45 C.F.R. § 86.33, which is now 34 C.F.R. § 106.33). It provides that a recipient of federal funding "may provide separate toilet, locker room, and

[8] For example, if a particular accommodation for disabled persons were available only in one particular "male" restroom, and one or two girls in the school could not use restroom facilities without such an accommodation, a rule excluding them from the configured "male" restroom would impermissibly subject them to sex discrimination, not only to disadvantage based on disability.

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."

HEW did not offer any explanation, in 1975 or thereafter, for why Title IX permits segregation on the basis of sex in the listed types of "facilities," especially in light of the baseline Title IX rule prohibiting "separate . . . treatment" on the basis of sex. 34 C.F.R. § 106.31(b)(4). In the cases of "locker room" and "shower" facilities, HEW presumably concluded that it would be reasonable for a school to facilitate certain societal expectations of privacy in contexts involving communal nudity—and that such segregation does not promote sex-based stereotypes nor ordinarily cause significant harms to students. With respect to "toilet . . . facilities," however—that is to say, restrooms—students are rarely, if ever, seen unclothed by their peers. Therefore, as we explain further below, concerns about bodily exposure are inapposite when it comes to restrooms.

Even so, amici agree that if a school chooses to segregate students in separate restrooms on the basis of their sexual anatomy, that policy ordinarily would not subject *most* students to impermissible "discrimination."

We can imagine two legitimate interests that such a restroom policy might aim to advance. First, a school might be able to demonstrate that such segregation decreases the risk of harassment, taunting, or voyeurism that students might

occasionally engage in if all bathrooms were open to all students.[9] Second, a school might wish to respect common privacy expectations associated with students' personal *bodily functions*. *See* Ruth Bader Ginsburg, "The Fear of the Equal Rights Amendment," Wash. Post (Apr. 7, 1975), https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg (explaining that even if the Equal Rights Amendment to the Constitution were ratified, "[s]eparate places to disrobe, sleep, [and] *perform personal bodily functions*" would be "permitted . . . by regard for individual privacy"). To be sure, the privacy concerns and anxieties associated with bodily functions do not necessarily depend upon the sex of others present in the restroom—which explains, in part, why unisex and co-educational restrooms are becoming increasingly common in colleges and other institutions. Nevertheless, it remains the case that some people are less comfortable and less at ease, for whatever reason, when people of the other sex are present in the room while they perform such functions.

Whatever the strength of these rationales might be, what is most salient for present purposes is that the vast majority of students would not suffer any appreciable harm if a school imposed sex-based restrictions in restrooms in order

[9] Amici are not familiar with the evidence, if any, that bears on this question.

to advance them. Indeed, most students and parents have come to expect such separation in schools, and many see it as a welcome convenience. Moreover, although some much older laws *requiring* sex-segregated restrooms in the workplace might have been based upon unjustified generalizations about women's modesty, vulnerability and delicacy, *see* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 Mich. J. Gender & L. 1, 41–51 (2007), today there is considerably less risk that such segregation rests upon "overbroad generalizations about the different talents, capacities, or preferences of males and females," *VMI*, 518 U.S. at 533, or perpetuates unwarranted sex stereotypes. Therefore, as to the mine run of individuals, this is a case of no harm, no foul – and therefore, when a school assigns students to separate but otherwise equal restroom facilities on the basis of their sexual anatomy, that is one of the rare instances in which action taken on the basis of sex does not necessarily subject most students to the "discrimination" Title IX was designed to prohibit.

IV. APPLICATION OF THE BOARD'S OTHERWISE LAWFUL POLICY TO TRANSGENDER STUDENTS SUBJECTS THEM TO PROHIBITED SEX-BASED DISCRIMINATION.

Things are very different, however, when a school, applying that same restroom policy, consigns *transgender* students to restrooms on the basis of their external reproductive organs. Such a practice profoundly harms such students. And, far from being "necessary" to achieve any important school interests, 118

Cong. Rec. 5807 (remarks of Sen. Bayh), such exclusion does not even help to advance such interests. Accordingly, such sex-based segregation subjects transgender students to "discrimination" in violation of Title IX.

A. The Policy Profoundly Harms Transgender Students.

Gavin Grimm alleges that he would suffer "severe psychological distress" if he were to use the restrooms designated "female," and that to do so "would be incompatible with his medically necessary treatment for Gender Dysphoria." J.A. 18-19. Presumably, however, the Board neither expects nor wants Gavin to use the school's "female" restrooms. Gavin, after all, presents himself as, and appears to be, a boy. If he or other transgender boys entered a "female" restroom, many girls would undoubtedly object; confrontations would be likely; and it would undermine the very privacy expectations regarding single-sex restrooms that the Board claims to be honoring.

Accordingly, the Board policy, by design and in practice, effectively excludes Gavin from all common restrooms, and consigns Gavin and other transgender students to use single-stall restrooms—what the Board's policy itself refers to as "alternative appropriate private facilit[ies]." J.A. 16. Gavin uses the nurse's single-stall restroom. Every time he does so, "I am reminded that nearly every person in my community now knows I am transgender and that I have now been publically identified as 'different,'" which "increases my feelings of

dysphoria, anxiety, and distress." J.A. 33. And every time Gavin enters that restroom, it "feels humiliating" because "I am effectively reminding anyone who sees me go to the nurse's office that, even though I am living and interacting with the world in accordance with my gender identity as a boy, my genitals look different." *Id.* By relegating Gavin to single-stall restrooms, the Board sets him apart from all his peers, and does so in an especially humiliating and stigmatizing way (whether or not that is the Board's intent), thereby handicapping him in his educational pursuits. *Cf. McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–41 (1950).

Other students in the Gloucester School District who are likewise already known to be transgender would undoubtedly suffer the same severe harms as Gavin. And things would only be worse for students who were *not* previously known to be transgender, because application of the policy to them would frequently "out" them to their fellow students, after they had otherwise successfully presented themselves to others as being of the sex corresponding to their gender identities.

The Board's rigid, unyielding policy of sex segregation in school restrooms thus undoubtedly inflicts grievous emotional and stigmatic harms on transgender students.

B. The School's Asserted Interests Do Not Justify Preventing Transgender Students from Using Restrooms Corresponding to Their Gender Identity.

Nor does the Board identify any "'important . . . objectives,'" *VMI*, 518 U.S. at 533 (*quoting Hogan*, 458 U.S. at 724), that might conceivably justify inflicting such harms on Gavin and other transgender students.

The challenged restroom policy itself points to two reasonable-sounding institutional objectives, albeit ones that have little bearing on the policy's application to Gavin and other transgender students. The policy states that "GCPS seeks [1] to provide a safe learning environment for all students and [2] to protect the privacy of all students." J.A. 16. The Board has not demonstrated, however, that prohibiting transgender students from using restrooms correlated with their gender identities will even advance any interests in student safety or privacy—let alone that such exclusion is "absolutely necessary" to secure those goals. 118 Cong. Rec. at 5807 (Sen. Bayh); *cf. VMI*, 518 U.S. at 531 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."); *id.* at 533 ("The burden of justification is demanding and it rests entirely with the State.").

1. Safety. In its supplemental brief, the Board offers not a word in support of its policy's stated rationale that excluding Gavin from "male"-designated restrooms is necessary "to provide a safe learning environment for all students"

(J.A. 16). The Board does not, for example, press the groundless notion that Gavin and other transgender students are likely to harm other students in such restrooms—let alone that they pose any different or greater such risks than other students who are present in those same restrooms.[10] There is, then, nothing to the idea, articulated in the Board's policy, that prohibiting transgender students from using restrooms correlated with their gender identities is necessary in order to "provide a safe learning environment for all students."

2. Privacy/"Disrobing". Nor does the Board explain how its exclusion of Gavin and other transgender students from restrooms corresponding to their gender identity might "protect the privacy of all students." J.A. 16. Presumably the Board has in mind something like Judge Niemeyer's argument that "[a]n individual has a legitimate and important interest in bodily privacy *such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex*." 822 F.3d at 734 (Niemeyer, J., dissenting)

[10] The panel dissent referred to "safety concerns . . . [that] could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." 822 F.3d at 735 (Niemeyer, J., dissenting). As the original panel recognized, however, *see* 822 F.3d at 723–24 n.11, neither the dissenting judge nor the Board has cited any reason to believe that some "sexual responses" of transgender students would pose any unique or special risks to student "safety," even in the unlikely event that other students exposed their "private body parts" in school restrooms.

(emphasis added); *see also* Board Supp. Br. 7 (referring to students' interest in not "disrobing in front of the other sex") (citation omitted).

Protecting such student privacy concerns—ensuring that they do not unwillingly expose to others their "nude or partially nude bod[ies], genitalia, and other private parts" while in school—can certainly be an important institutional interest, especially when it comes to adolescents. But it does not follow that a school must exclude transgender students from restrooms in order to advance that interest. For one thing, architecture (rather than law) has effectively eliminated any potential problem associated with this privacy-related interest in restrooms: There is hardly a school restroom in the nation where any student must expose "his or her nude or partially nude body, genitalia, and other private parts" to *anyone*.[11] Indeed, it is fair to assume that future developments in bathroom design will provide even greater such privacy protection—which helps explain

[11] For example, no student is required to use urinals; but if a school wishes to preserve boys' ability to do so without exposing their genitals to others in the restroom, the school can install barriers between urinals. There is also no reason for the school to be concerned about the hypothetical prospect that some transgender students might expose their genitals to other students. In restrooms, virtually no one exposes their reproductive organs to anyone else except at urinals. Transgender boys typically will not use urinals, however; and there will rarely if ever be urinals in the girls' restrooms that transgender students could use even if they wanted to.

why unisex restrooms are becoming increasingly common, and uncontroversial, in other nations and at many U.S. colleges and universities.[12] Moreover, it is not clear why this privacy interest is more acutely or frequently implicated when it comes to the presence of transgender students, in particular, as compared to other students who present as the same sex as those transgender students. After all, most students prefer to avoid such exposure of their bodies to *any* peers, and that concern is not obviously correlated with whether the peers in question have one or another set of external reproductive organs.[13]

When the case was previously before this Court, the Board also referred in passing to another sort of privacy interest, distinct from securing students' ability

[12] This case does not require the Court to decide whether such an institutional interest would be implicated in locker room and shower settings and, if so, whether it would be necessary to exclude transgender students from such a setting in order to advance that interest. At Gloucester High School there are no functional showers; and Gavin Grimm uses a home-bound program for physical education and therefore does not use the school locker rooms. J.A. 30. In any event, we suspect that courts will rarely, if ever, be called upon to address that question. In many, perhaps most, contemporary schools, there are no settings of compelled communal nudity, and thus students are never required to expose their nude bodies to others.

[13] For example, there is no basis for assuming that transgender girls are more likely to be sexually attracted to other girls in a "female" restroom than nontransgender girls will be. It is now widely understood that people's sexual orientation, regardless of whether they are transgender, will not uniformly be directed to persons with different reproductive organs.

to avoid unwelcome "disrobing" or unwanted exposure of nudity to one's peers: "The School Board has a responsibility to its students to ensure their privacy *while engaging in personal bathroom functions*." Brief of Appellee at 28 (emphasis added). This is the same "bodily functions" interest we discussed in Part III, *supra* at 19—an interest that is part of the justification for why schools may choose to insist upon sex-segregated restrooms in the first place, consistent with Title IX.

We question whether advancing this particular variation of a privacy interest would be sufficiently important to justify the substantial, acute harms that a school inflicts upon transgender students by excluding them from restrooms associated with their gender identity. This Court need not resolve that question, however, because the Board has offered no basis for thinking that the presence of *transgender* boys elsewhere in a "male" restroom—or transgender girls elsewhere in a "female" restroom—implicates this privacy concern any more than when other, *non*transgender students are similarly in the vicinity. And there is certainly no material difference on this score in a case where the transgender student is not *known* by his peers to be transgender. But even in a case such as Gavin's, where some other students know he is transgender, the Board has offered no reason to conclude that this privacy concern is implicated more acutely or more frequently when students perform bodily functions while Gavin is present elsewhere in the restroom, in contrast to cases in which other boys, who are in every outward

respect indistinguishable from Gavin, are present. *See also Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 875 (S.D. Ohio 2016) (reporting that there had been no complaints about specific violations of privacy in school districts in 20 states that had adopted policies allowing transgender students to use restrooms corresponding to their gender identity).

* * * *

The Board therefore has not identified any important institutional interests in safety or privacy that would be undermined—and that the Board could not otherwise adequately address—if it permitted Gavin to use the "male" restrooms at Gloucester High School. Therefore, to cause Gavin to suffer the acute and serious harms associated with his exclusion from those restrooms, solely because of the external reproductive organs he happens to have, is to "subject" him to "discrimination . . . on the basis of sex," in violation of Title IX.

CONCLUSION

The Court should reverse the district court's dismissal of plaintiff's Title IX claim.

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CERTIFICATE OF SERVICE

I, Kevin K. Russell, a member of the Bar of this Court, hereby certify that on this 15th day of May, 2017, I electronically filed the foregoing brief with the Court using the CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,495 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman Font.

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