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 (4:15-cv-00054-RGD-DEM)

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional Provisions and Legislative Materials

TABLE OF AUTHORITIES – cont'd

Page(s)

Books, Articles, and Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring the enforcement of constitutional principles of equality, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

G.G. is a seventeen-year old boy. He has a male name, his state-issued ID identifies him as male, and he has a deep voice and facial hair like other boys his age. In public places, he uses the men's restroom, and for seven weeks, he used the boys' restroom at his school without incident. Despite all this, the Gloucester County School Board (hereafter "the Board") now insists that G.G. may not under any circumstances use the same restrooms that other boys at his school use because he is transgender. The Board's policy was adopted on December 9, 2014, following a Board meeting in which G.G. was called a "freak," repeatedly described as a "young lady" or "girl," and compared to a "dog" that "wants to

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

urinate on fire hydrants." J.A. 18. Proponents of the policy argued that allowing G.G. to use the boys' restroom would lead "boys who are not transgender" to "come to school wearing a dress and demand to use the girls' restroom"—again, despite the fact that G.G. had been using the boys' restroom without incident for seven weeks. *See id.* at 16. The Board's policy, which relegates "students with gender identity issues" to "an alternative appropriate private facility," *id.*, stigmatizes students like G.G., segregating them from the rest of the student body. Denied access to the restrooms used by other students, G.G. avoids using the restroom at school, which has caused him to develop urinary tract infections.

The Board's policy cannot be squared with the guarantees of Title IX of the Education Amendments of 1972, which, in sweeping, universal language, provides that "[no] 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). Enforcing basic constitutional principles that require the government to respect the equal dignity of all persons—women and men alike—Title IX broadly prohibits gender discrimination by governmental and private entities that accept federal financial assistance, and thereby ensures to women and men "full citizenship stature—equal opportunity to aspire, achieve, participate in

and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Transgender individuals, such as G.G., are entitled to invoke these protections. Title IX, like the Constitution's equal protection guarantee it enforces, applies to all persons, and ensures that "'[i]nherent differences' between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* at 533. Under Title IX, all persons regardless of sex must be treated with equal dignity, and given access to an educational environment where they can learn, thrive, and grow free from discrimination. By denying G.G. access to the restroom used by others boys and segregating him from the rest of the student body on the basis of fear, prejudice, and sex-stereotyped judgments, the Board transgressed Title IX's broad mandate of gender equality. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). The Board failed to heed this basic rule.

This Court previously held that the Board violated G.G.'s rights under Title IX, deferring to Department of Education regulations interpreting Title IX's equality mandate. Although the guidance on which this Court relied has recently been withdrawn and this Court's earlier decision has been vacated, this Court's previous conclusion that the Board violated G.G.'s rights under Title IX remains

correct, even without deference to the agency. After all, this Court need not "rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (emphasis in original), and the Executive Branch cannot repeal the protections Title IX affords to all persons.

The Board however, contends that reading Title IX in this manner "was unimaginable at the time Title IX and its regulations were first adopted," Def.-Appellee Suppl. Br. at 45, and that holding the Board accountable for its discriminatory policy based on that construction of the statute would violate the Spending Clause. *Id.* at 45-47. In its view, Title IX offers no protections for transgender persons. The Board's arguments cannot be squared with the text of Title IX, which protects all persons, and they rest on a fundamentally flawed understanding of Title IX's constitutional underpinnings. Moreover, they turn a blind eye to the established role of the courts in vindicating civil rights protected by our nation's antidiscrimination laws. *See Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 79 (1998) ("[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."); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be 'applied in situations not expressly anticipated by

Congress does not demonstrate ambiguity. It demonstrates breadth.'" (quoting *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 499 (1985))). For good reason, the Supreme Court has held that Title IX's sweeping guarantee of equality "covers a wide range of intentional unequal treatment," *Jackson,* 544 U.S. at 175, and the Spending Clause does not give school boards a license to engage in "intentional conduct that violates the clear terms of the statute." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642 (1999).

Moreover, the Board's Spending Clause argument fails here for the additional reason that Title IX, like many of our nation's most cherished federal civil rights laws, is rooted both in Congress's express constitutional powers set out in Article I and in the Fourteenth Amendment's explicit grant of enforcement power, which was designed by its Framers to bring the power to enforce the Fourteenth Amendment's guarantees of liberty and equality "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866). "[W]hatever legislation . . . tends to enforce submission to the prohibitions [of the Fourteenth Amendment], and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws . . . is brought within the domain of congressional power." *Ex Parte Virginia*, 100 U.S. 339, 346 (1880).

The Spending Clause principles invoked by the Board, which seek to ensure that "Spending Clause legislation does not undermine the status of the states as independent sovereigns in our federal system," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012), are at their lowest ebb when, as here, Congress is using its power to enforce the Fourteenth Amendment in order to ensure the Constitution's promise of equality for all. "The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), adding to the Constitution new limits on state governments designed to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess., at xxi (1866), and keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). Title IX does not impinge at all on the sovereign prerogatives of state and local governments but simply requires them to follow a rule of gender equality for all persons similar to that contained in the Constitution.

Acting to end gender discrimination by governmental and private entities that receive federal assistance to educate the American people, Congress mandated a broad rule of gender equality, extending to all persons. The Board's policy de-

nies transgender students the use of the restrooms used by other students, stigmatizing and segregating them based on fear, prejudice, and sex stereotypes in violation of Title IX's broad rule of equality.

ARGUMENT

I. TO HELP REALIZE THE CONSTITUTION'S PROMISE OF EQUALITY FOR ALL, TITLE IX BROADLY PROHIBITS GENDER DISCRIMINATION IN EDUCATION AGAINST ANY PERSON BY RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE.

Title IX, one of the nation's most broadly worded civil rights laws, prohibits all forms of gender discrimination in education by government and private entities that receive federal financial assistance, ensuring that our Constitution's promise of equality does not stop at the school house doors. Its text, subject to narrow exceptions not relevant here, 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).

Enacted in 1972, Title IX closed a gap in the Civil Rights Act of 1964, which permitted governmental and private actors to deny on the basis of gender equal access to educational opportunity, a basic right that lies at the "very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, prohibits employers from discriminating "against any individual with respect to his compensation, terms, condi-

tions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," but no similar prohibition constrained the nation's public and private schools. Title VI, 42 U.S.C. § 2000d, guarantees that "[n]o person in the United States shall, on the ground of race, color, or national origin," be subject to "discrimination under any program or activity receiving Federal financial assistance"—ensuring that federal funds were spent in accordance with the Equal Protection Clause's prohibition on racial discrimination—but left gender discrimination untouched.

Title VI was written with vital Fourteenth Amendment principles of equality in mind, intending to "halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978). In enacting Title IX—one year after *Reed v. Reed*, 404 U.S. 71 (1971), held that a state law that discriminated against women denied them the equal protection of the laws—Congress followed this same approach, requiring public and private schools receiving federal aid to respect constitutional principles of gender equality. As the Supreme Court has observed, "Title IX was patterned after Title VI of the Civil Rights Act of 1964," *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979), using language that "like that of the Equal Protection Clause" is "majestic in its sweep," *Bakke*, 438 U.S. at 284, "to avoid the use of federal resources to support discriminatory practices" and to

"provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). "Title IX is a broadly written general prohibition on discrimination," which "covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Jackson*, 544 U.S. at 175.

The Board correctly observes that Title IX was designed to end the "'corrosive and unjustified discrimination against women,'" Def.-Appellee Suppl. Br. at 5 (quoting 118 Cong. Rec. 5809, 5803 (1972)), "rooted in pernicious stereotypes," *id.* at 6, that all too often prevented women from enjoying what the Supreme Court has called "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Virginia*, 518 U.S. at 532. But Congress's focus in enacting a law does not dictate the outer bounds of its reach. *See Oncale*, 523 U.S. at 79. While Title IX's main aim was to eradicate discrimination designed "to create or perpetuate the legal, social, and economic inferiority of women," *Virginia,* 518 U.S. at 534, its prohibition sweeps more broadly than that. Title IX's text provides that "no person in the United States" may be denied "access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650; *Cannon*, 441 U.S. at 691 (noting Title IX's "unmistakable focus on the benefitted class"); *Elwell v. Oklahoma ex rel. Bd. of Regents*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) ("Title IX does

not limit its coverage at all, outlawing discrimination against any 'person,' broad language the Court has interpreted broadly." (citation omitted)). Title IX's broad language applies to men as well as women, prohibiting all "official action denying rights or opportunities based on sex," *Virginia*, 518 U.S. at 531, by governmental and private recipients of federal aid. In passing Title IX, as with other federal civil rights statutes, "'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

The Board's argument that it has a free hand to discriminate against G.G. would, if accepted, make transgender children "stranger[s] to [the] law," *Romer v. Evans*, 517 U.S. 620, 635 (1996), excluding them from fundamental protections of equality that men and women rely on every day. This exclusion has no basis in the text of Title IX. The broad sweep of Title IX, extending to all persons, plainly covers discrimination against transgender students such as G.G. As a host of federal courts of appeals have held, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination," because a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1317, 1316 (11th Cir. 2011); *Smith v. City of Salem, Oh.*, 378 F.3d 566, 575 (6th Cir. 2004)

("[D]iscrimination against a plaintiff who is a transsexual . . . is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); Pl.-Appellant Suppl. Br. at 21-22. Just as a school discriminates on the basis of religion when it singles out religious converts for adverse treatment, *see id.* at 22-23; *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008), discrimination against transgender students is a form of gender-based discrimination that falls within Title IX's broad prohibition. Transgender students like G.G. may invoke the promise of equal educational opportunity Title IX guarantees to all.

The Board insists that its policy is lawful because it may provide separate restrooms for its male and female students, *see* 34 C.F.R. § 106.33; Def.-Appellee Suppl. Br. at 21-22, but the regulation invoked by the Board requires a school to provide comparable facilities to all students, Pl.-Appellant Suppl. Br at 35-36. Here, the Board segregated G.G. from the rest of the student body, acting in response to fear, prejudice, and sex-stereotyping. The proceedings at which the Board adopted its policy were rife with hostility and animus toward G.G.: name-calling insisting that he was really a "young lady" or "girl," not a boy; claims that segregated restrooms were necessary to maintain a clear divide between "a thou-

sand students versus one freak"; and suggestions that if he were allowed to use the boys' restroom non-transgender boys would end up dressing like girls. *See* Pl.-Appellant Suppl. Br. at 8-9; J.A. 16, 18. The Board's policy cannot be squared with the "equal dignity in the eyes of the law," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), that the Constitution and Title IX guarantee to all regardless of gender.

II. SPENDING CLAUSE CONCERNS DO NOT JUSTIFY READING TRANSGENDER PERSONS OUT OF TITLE IX.

The Board also claims that the Fourth Circuit transgressed the Spending Clause, adopting a reading of Title IX that was "unimaginable at the time Title IX and its regulations were first adopted," and thereby denying the Board "clear notice of the conditions of funding." Def.-Appellee Suppl. Br. at 45. But Spending Clause concerns, which seek to safeguard "the status of the states as independent sovereigns in our federal system," *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602, are at the lowest ebb when, as here, Congress acts to enforce the Fourteenth Amendment, which, by design, altered the federal-state balance and expanded the powers of Congress to ensure that states do not violate the Fourteenth Amendment's broad equality guarantee.

A. Spending Clause Concerns Are at Their Lowest Ebb When Congress Acts To Enforce the Fourteenth Amendment.

The Supreme Court's Spending Clause jurisprudence is rooted in the fact

that the Spending Clause allows Congress "to implement federal policy it could not impose directly under its enumerated powers," *id.* at 2603. Because of this breadth, "the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis*, 526 U.S. at 654-55 (Kennedy, J., dissenting). In run-of-the-mill Spending Clause cases, these concerns may have real force, but here they do not. When, as here, Congress acts pursuant to both the Spending Clause *and* its Fourteenth Amendment enforcement power, Spending Clause concerns present no reason for narrowly reading a statute. After all, "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

The Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald*, 561 U.S. at 754, and "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." *Fitzpatrick*, 427 U.S. at 455. As the Supreme Court observed in one of its first decisions construing the

Amendment, "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty." *Ex Parte Virginia*, 100 U.S. at 346; *see id.* ("[E]very addition of power to the general government involves a corresponding diminution of the governmental power of the States. It is carved out of them."). When Congress acts using its authority under Section 5 of the Fourteenth Amendment to require state and local governments to respect constitutional principles of equality, the federal courts have an unflagging duty to ensure its enactments are enforced as written, preventing state action that "serves to disrespect and subordinate" disfavored persons. *See Obergefell*, 135 S. Ct. at 2604.

History shows that when the Framers of the Fourteenth Amendment drafted the Amendment's broad promise of equal protection of the laws, they wanted to ensure that Congress had the power necessary to make good on that promise. *See* Cong. Globe, 42nd Cong., 2nd Sess. 525 (1872) (noting that "the remedy for the violation" of the Fourteenth Amendment "was expressly not left to the courts"); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 182 (1997) (noting that the Fourteenth Amendment's Framers feared that "the judiciary would frustrate Reconstruction by

a narrow interpretation of congressional power"). To do so, the Framers chose "language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality." Akhil Reed Amar, *America's Constitution: A Biography* 363 (2005). Introducing the Amendment in May 1866, Senator Jacob Howard explained that Section 5 brought the power to enforce the Constitution's guarantees "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866). "Here is a direct affirmative delegation of power to Congress to carry out all the principles of these guarantees, a power not found in the Constitution." *Id.* at 2766. The enforcement provision, Howard said, conferred "authority to pass laws which are appropriate to the attainment of the great object of the amendment." *Id.*; *see id.* at 1124 ("When Congress was clothed with power to enforce . . . by appropriate legislation, it meant . . . that Congress should be the judge of what is necessary for the purpose of securing to [the freemen] those rights.").

Section 5 thus "enlarge[d] . . . the power of Congress," *Ex Parte Virginia*, 100 U.S. at 345, and "authoriz[ed] [it] to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). As the Supreme Court has long recognized, "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional

grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick*, 427 U.S. at 456.

In short, Spending Clause concerns are at their lowest ebb when Congress acts to enforce the Fourteenth Amendment. Although the Supreme Court's cases have recognized that Congress relied on the Spending Clause in enacting Title IX, the Supreme Court has never held that that that was the *only* authority on which Congress relied. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992). Title IX is also grounded in the Fourteenth Amendment's Enforcement Clause, as the next Section demonstrates.

B. Congress Used Both Its Authority Under the Spending Clause and Section 5 of the Fourteenth Amendment in Enacting Title IX's Guarantee of Gender Equality for All Persons.

Title IX's sweeping guarantee of equality, which forbids gender discrimination by state-run entities that receive federal financial assistance, is an exercise of Congress's power to enforce the Fourteenth Amendment. "Congress, in using federal educational funds as the core of Title IX . . . use[d] its Spending Clause powers to reach private actors and its Fourteenth Amendment power to reach the States." *Doe v. Univ. of Ill.,* 138 F.3d 653, 659 (7th Cir. 1998), *vacated and remanded on other grounds*, 526 U.S. 1142 (1999), *reinstated on remand*, 200 F.3d 499 (7th Cir. 1999). This basic feature—the use of Article I powers together with

Section 5 of the Fourteenth Amendment—is exceedingly commonplace among our nation's landmark civil rights statutes.

For example, the prohibition on employment discrimination found in Title VII of the Civil Rights Act was initially enacted pursuant to the Commerce Clause, but subsequently applied to the states using Congress's power to enforce the Fourteenth Amendment. *See Fitzpatrick,* 427 U.S. at 445 (holding that Section 5 permitted Congress to abrogate the states' sovereign immunity and permit damage actions against state and local government employers under Title VII). Other federal statutes, such as the Equal Pay Act, "'follow[] the familiar pattern of . . . grounding prohibitions against private parties in the Commerce Clause, while reaching government conduct by the more direct route of the Fourteenth Amendment.'" *Doe*, 138 F.3d at 659 (quoting *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982)); *see, e.g.*, *Ussery v. Louisiana*, 150 F.3d 431, 435-37 (5th Cir. 1998) (holding that Section 5 permitted abrogation of states' Eleventh Amendment immunity in suits under the Equal Pay Act); *Varner v. Ill. State Univ.*, 150 F.3d 706, 712-17 (7th Cir. 1998) (same); *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833, 837-42 (6th Cir. 1997) (same).

Title IX (as well as Title VI of the Civil Rights Act of 1964 on which it was modeled) follows this same basic pattern, using the Spending Clause together with Section 5 of the Fourteenth Amendment to ensure that all recipients of federal fi-

nancial assistance—whether government actors or not—respect fundamental principles of equality.

It does not matter that Congress did not explicitly invoke Section 5 in enacting Title IX, *see Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2598; *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948), because "[s]ex discrimination by public schools is a subject within the legislative power under § 5 of the fourteenth amendment, and Congress need not catalog the grants of power under which it legislates." *Doe*, 138 F.3d at 678 (Easterbrook, J., respecting the denial of rehearing en banc). "[P]rotecting Americans against 'invidious discrimination of any sort, including that on the basis of sex,' is a central function of the federal government. Prohibiting 'arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Id.* at 660 (citations omitted); *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998) ("Section 5 of the Fourteenth Amendment grants Congress the authority to enforce the Amendment's substantive provisions which proscribe, *inter alia*, gender discrimination in education. Since Title IX also proscribes gender discrimination in education, it follows that Congress had the authority, pursuant to Section 5, to make Title IX applicable to the states."); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) ("[W]e are unable to understand how a statute enacted

specifically to combat [gender] discrimination could fall outside the authority granted to Congress by § 5.").

Indeed, Congress modelled Title IX on Title VI, a statute which, as the Supreme Court has recognized, "enacted constitutional principles," *Bakke*, 438 U.S. at 285, by "halt[ing] federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Id.* at 284; *see Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256-58 (2009) (discussing substantial overlap between Title IX and the Equal Protection Clause). Congress's decision to model Title IX on Title VI confirms Title IX's goal of ensuring that federally-funded public educational institutions respect the constitutional principle of equality contained in the Fourteenth Amendment.

Further, Congress abrogated state sovereign immunity in Title IX cases, using its Fourteenth Amendment authority to do so. The Equalization Act of 1986 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). Congress passed the Act in the wake of the Supreme Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which held that "when acting pursuant to § 5 of the Fourteenth Amend-

ment, Congress can abrogate the Eleventh Amendment without the States' consent," *id.* at 238, but held that the Rehabilitation Act of 1973—a statute that, like Title IX, prohibits discrimination by recipients of federal aid—"does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts." *Id.* at 247. In response, Congress enacted a clear statement to abrogate the states' Eleventh Amendment immunity, using its Fourteenth Amendment enforcement authority to overcome state sovereign immunity in cases arising under Title IX as well as other similar statutes, *see* 131 Cong. Rec. 22346 (1985); 132 Cong. Rec. 28624 (1986); S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). *See also Lane v. Pena*, 518 U.S. 187, 198 (1996) (describing the Equalization Act as "the sort of unequivocal waiver that our precedents demand").

III. THE BOARD'S FAIR NOTICE ARGUMENT CANNOT BE SQUARED WITH THE SUPREME COURT'S PRECEDENTS CONSTRUING TITLE IX.

Consistent with Title IX's Fourteenth Amendment underpinnings, the Supreme Court's Title IX precedents have refused to constrict the statute's broad guarantee of equality, rejecting notice arguments similar to those pressed by the Board here. The Board's own arguments fare no better.

The Board invites this Court to curb the reach of Title IX on the ground that the statute does not provide fair notice that it prohibits discrimination against

transgender students. But Congress chose to write Title IX as an all-encompassing prohibition on discrimination rather than as a list of prohibited practices. As the Supreme Court has held, "Title IX is a broadly written general prohibition on discrimination," a term that "covers a wide range of intentional unequal treatment," followed by "specific, narrow exceptions to that broad prohibition." *Jackson*, 544 U.S. at 175. "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything." *Id.* Indeed, the breadth of Title IX's proscription means that a school district cannot claim that it is being unfairly surprised "where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis*, 526 U.S. at 642; *Jackson*, 544 U.S. at 183.

In *Davis*, for example, the Supreme Court rejected a school board's claim that it could not be held liable for money damages by a student who was sexually harassed by another student while school authorities stood idly by. Given Title IX's sweeping prohibition on all forms of gender discrimination, the Court had little difficulty concluding that "recipients violate Title IX's plain terms when they remain deliberately indifferent to this form of misconduct." *Davis*, 526 U.S. at 643; *Jackson*, 544 U.S. at 174 ("Though the statute does not mention sexual harassment, we have held that sexual harassment is intentional discrimination encompassed by Title IX's private right of action."). That is true even though that

understanding of the statute was "unimaginable at the time Title IX and its regulations were first adopted," Def.-Appellee Suppl. Br. at 45; *cf. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Rather than following such subjective expectations, the Supreme Court applied the plain meaning of the text, observing that "[t]he statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650.

Likewise, in *Jackson*, the Supreme Court rejected the argument that a school board could not be held liable for retaliating against a teacher who complained of sex discrimination by the school board, observing that "our cases . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183. It did not matter that Title IX did not specify retaliation as a proscribed form of discrimination, as Title VII of the Civil Rights Act does, or that the teacher had not been subject to adverse treatment because of his sex. Under the plain meaning of Title IX, "retaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of the statute.'" *Id.* at 183 (quoting *Davis*, 526 U.S. at 642); *id.* at 178 (observing that "the statute *itself* contains the necessary prohibition").

In short, Supreme Court precedent is clear: schools that accept federal financial assistance are on fair notice that their actions must comport with Title IX's sweeping guarantee of equality that protects all persons from gender-based discrimination. The question here, as in *Davis* and *Jackson*, is whether the Board's actions run afoul of Title IX's prohibition on discrimination. The Board's policy, which denies transgender students the use of the restrooms used by other students and stigmatizes them based on fear, prejudice, and sex stereotypes, cannot be squared with the promise of gender equality that Title IX promises to all students, including those, like G.G., who are transgender.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,465 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus curiae* brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Times New Roman font.

Executed this 12th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on May 12, 2017.

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