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 U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS,
NO. 4:15-CV-0054, HON. ROBERT C. DOUMAR

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEE IN SUPPORT OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: /s/ Lawrence J. Joseph Date: 5/15/2017

Counsel for: Eagle Forum Educ & Legal Def Fund

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, files this brief with all parties' consent.[1] Founded in 1981, EFELDF has consistently defended federalism and supported autonomy in areas – such as education – of predominantly state and local concern. EFELDF has a longstanding interest in applying Title IX and the Fourteenth Amendment consistent with their anti-discrimination intent, without intruding any further into schools' educational missions. Accordingly, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

This case began when a female high school student (hereinafter, "G.G.") with gender dysphoria sued the Gloucester County School Board ("Board") under Title IX and the Equal Protection Clause for denial of access to the boys' restrooms at the school. The District Court dismissed the Title IX claim and denied interim relief, which G.G. appealed. Relying on sub-regulatory guidance documents from the federal Department of Education ("DOE"), a divided panel of this Court ruled for G.G., *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), *stayed* 136 S.Ct.

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

2442 (2016), *vacated* 137 S.Ct. 1239 (2017), but the Supreme Court vacated that decision, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S.Ct. 1239 (2017), after the new administration withdrew the guidance, recognizing that prior DOE guidance lacked "extensive legal analysis" and "any formal public process" and failed to "explain how [DOE's] position [was] consistent with the express language of Title IX." Feb. 22, 2017 Dear Colleague Letter; Feb. 22, 2017 Ltr. E. Kneedler to S. Harris, *Gloucester Cnty. Sch. Bd. v. G.G.* (S.Ct. No. 16-273) (hereinafter, "2017 DOE Letter"). With the withdrawal of DOE's prior guidance, G.G.'s "novel" claim, 822 F.3d at 722, has become an untenable claim.

Constitutional Background

The Equal Protection Clause prohibits state and local government from "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, §1, cl. 4. Courts evaluate equal-protection injuries under three standards: strict scrutiny for classifications based on factors like race or national origin, intermediate scrutiny for classifications based on sex, and rational basis for everything else. *See U.S. v. Virginia*, 518 U.S. 515, 567-68 (1996) (Scalia, J., dissenting) (collecting cases).

Statutory Background

Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, except that Title IX prohibits sex-based discrimination in federally funded education.

Compare 42 U.S.C. §2000d *with* 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.*, action taken *because* of sex, not merely *in spite of* sex). *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001). Similarly, like Title VI, Title IX authorizes funding agencies to effectuate the statutory prohibition via rules, regulations, and orders of general applicability, which do not take effect until approved by the President, 20 U.S.C. §1682, which authority has been delegated to Attorney General. 45 Fed. Reg. 72,995 (1980).[2]

Regulatory Background

The federal Department of Health, Education & Welfare ("HEW") issued the first Title IX regulations in 1975. *See* 40 Fed. Reg. 24,128 (1975). When it was formed from HEW, DOE copied HEW's regulations, with DOE substituted for HEW as needed. 45 Fed. Reg. 30,802 (1980). The rest of HEW became the federal Department of Health & Human Services ("HHS"). Both agencies retain their own rules for the recipients of their funding, as do all federal funding agencies, but the rules all follow the original HEW language on sex-segregated restrooms: "A recipient may provide separate toilet, locker room, and shower facilities on the basis

[2] *See also* 46 Fed. Reg. 29,704 (1981) (partial sub-delegation by Attorney General); 28 C.F.R. §0.51(a) ("[t]his delegation does not include the function, vested in the Attorney General by sections 1-101 and 1-102 of the Executive order, of approving agency rules, regulations, and orders of general applicability issued under the Civil Rights Act of 1964 and section 902 of the Education Amendments of 1972").

of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." *See* 45 C.F.R. §86.33 (HHS); 34 C.F.R. §106.33 (DOE).

Factual Background

For purposes of this appeal, "G.G.'s birth-assigned sex, or so-called 'biological sex,' is female, but G.G.'s gender identity is male." *G.G.*, 822 F.3d at 715. EFELDF generally adopts the facts as stated in the Board's brief (at 10-13). In summary, neither the complaint nor G.G.'s litigation of this case challenges sex-segregated restrooms *per se*. Instead, G.G. claims the right to use sex-segregated boys' restrooms under 20 U.S.C. §1681(a) and the Equal Protection Clause. The balance of this section notes judicially noticeable information not cited by the Board and disputes two tangential issues in the Board's brief.

EFELDF notes that gender dysphoria's persistence rate over time is as low as 2.2% for males and 12% for females. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 455 (5th ed. 2013). Put differently, up to 88% of females and more than 97% of males with gender dysphoria might resolve to their biological sex. Legal intervention in this psychological and medical context – whether by DOE or federal courts – can delay or derail these favorable results, thus exposing children to unnecessary "treatment" with dangerous hormonal and other therapies. Unfortunately, a "progressive" impulse can lead to pressing civil-rights

claims blindly, even over the intended beneficiaries' physical and mental well-being.

The Board identifies former Sen. Birch Bayh as Title IX's "principal sponsor," Board Br. at 5, but Rep. Edith Green deserves that credit. *See*, *e.g.*, David E. Rosenbaum, *Bill Would Erase Admission Quotas*, N.Y. TIMES, Aug. 13, 1971, at 7. On April 6, 1971, on behalf of herself and Rep. Perkins, Rep. Green introduced the legislation that became Title IX as part of an education bill. 117 CONG. REC. 9821 (1971). *Four months later,* on August 6, 1971, Sen. Bayh attempted to introduce it as a floor amendment, 117 CONG. REC. 30,399 (1971), which was ruled non-germane to a parallel bill then pending in the Senate. 117 CONG. REC. 30,415.[3] In the first sentence of his prepared statement to the 1975 hearings on the Title IX regulations, Sen. Bayh identified himself – correctly – as "Senate sponsor of Title IX." Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., at 168 (1975).

The Board also blurs the boundaries between Title IX and the Higher Education Act of 1965, *see* Board Br. at 6, perhaps because the Education Amendments of 1972 both enacted Title IX and amended the Higher Education Act. The House's section-by-section analysis lists more than 60 amendments to the

[3] On February 28, 1972, Sen. Bayh re-introduced Title IX as a floor amendment to a different Senate bill. 118 CONG. REC. 5802 (1972).

Higher Education Act of 1965, H.R. Rep. No. 92-554, *reprinted at* 1972 U.S.C.C.A.N. 2462, 2548-80, but does not include Title IX among those amendments, *id.* at 2566-67; *compare*, *e.g.*, PUB. L. NO. 92-318, §§901-907, 86 Stat. 235, 373-75 (1972) (Title IX does not mention Higher Education Act of 1965) *with id.* at §1001, 86 Stat. at 375 ("Part A of the Higher Education Act of 1965 is amended …"). Title IX is not part of Higher Education Act of 1965, and this is not a higher-education case.

SUMMARY OF ARGUMENT

This Court should reject the sea change that G.G. proposes to make to Title IX – and to state and local control over education – via sub-regulatory memoranda and private litigation. While EFELDF would prefer to avoid expanding Title IX, leaving these issues for state and local resolution, Congress has the power to amend its Spending Clause statutes or to enact new ones via the Fourteenth Amendment, if Congress considers that course sound. The substantive question of what schools should do with regard to transgender students is important, but the liberty interest that resides in our republican form of government – with separated powers and dual sovereigns – is infinitely more important.

At the outset, G.G.'s damages claim prevents mootness, even if graduation would moot injunctive relief (Section I).

On the Title IX claim, two canons of statutory construction compel a narrow

reading of "sex" as used in Title IX: (a) requiring clear notice of Spending-Clause conditions, and (b) presuming against preemption and significant alterations in the state-federal balance for traditional areas of traditional state and local concern (Section II.A) because Congress would not cavalierly overturn the state-federal balance or displace state sovereigns. On the deference issue that largely controlled the Court's prior decision, DOE's withdrawal of its guidance requires this Court to decide the statutory question without an administrative gloss on what "sex" means vis-à-vis objective biology versus subjective gender identity. That said, this Court should defer to DOE's new conclusion that its prior guidance has substantive and procedural flaws, which precludes relying not only on the expressly withdrawn DOE guidance but also on older DOE guidance cited by the withdrawn guidance (Section II.B). On the Title IX merits, subsequent legislation adding "gender identity" to statutes prohibiting "sex" discrimination, as well as unsuccessful efforts to add "gender identity" to Title IX suggest that the two terms differ, which is consistent with the unanimous appellate judicial decisions contemporaneous with Title IX's enactment, thus excluding "gender identity" from Title IX's ambit (Section II.C).

With respect to a preliminary injunction on the constitutional merits, privacy is a valid governmental concern to balance against the Board's treatment of students in sex-segregated bathrooms (Section III.A), G.G.'s impending graduation makes irreparable harm dubious after mid-June (Section III.B), and the other two prongs

collapse into the merits, .especially for litigation that could impair governmental functions and the public interest (Sections III.C-III.D).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER G.G.'S CLAIMS.

With graduation approaching, injunctive relief might be moot, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), but damage claims do not become moot. *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 639-40 (5th Cir. 2014), *aff'd* 136 S.Ct. 2198 (2016). Indeed, even nominal damage would provide some redress. *Mercer v. Duke Univ.*, 401 F.3d 199, 203 (4th Cir. 2005). By contrast, G.G.'s newly asserted claim to post-graduation injunctive relief, based on "someday" plans to return to school as a visitor might not show an ongoing case or controversy: "'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

In any event, to assert new interests or ones that have arisen subsequent to the complaint, G.G. must seek to amend or supplement the complaint, *compare* FED. R. CIV. P. 15(a) *with id.* 15(d), thus requiring remand to consider not only G.G.'s new claims but also any resulting prejudice to the Board. *Franks v. Ross*, 313 F.3d 184,

198 n.15 (4th Cir. 2002).[4] By not raising these arguments here, pre-*vacatur*, G.G. waived them for this appeal. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 87 n.3 (4th Cir. 2013).

II. THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE TITLE IX CLAIMS.

Although DOE's then-novel transgender guidance provided the only basis for G.G.'s Title IX claims, that guidance is now withdrawn. Because Congress cannot credibly be understood to have codified transgender rights in 1972 when enacting Title IX, G.G.'s Title IX claims lack merit and must be dismissed.[5]

A. The applicable canons of statutory construction require courts to interpret "sex" narrowly under Title IX.

Apart from Title IX's specific legislative history and statutory language, two general tools of statutory construction support a narrow construction of "sex" here: the Spending-Clause basis for Title IX and federalism in light of the historic state and local control over education.

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[4] There is no suggestion that the Board has moved the goalposts or evasively circumvented prior court rulings as part of ongoing, invidious discrimination against transgender students. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 226-27 (1964).

[5] Although "sex" means the same thing in the statute and the regulations, *G.G.*, 822 F.3d at 723, this litigation arises under the statute. As a safe harbor, the regulations *allow* sex-segregated bathrooms, without *prohibiting* anything. 34 C.F.R. §106.33. As such, falling outside the regulatory safe harbor does not *violate* the regulations. Instead, the Board would violate Title IX only if §901(a) statutorily prohibits denying G.G. access to boys' bathrooms (*i.e.*, only if "sex" *statutorily* includes gender identity).

1. Spending Clause legislation requires clear notice to recipients before obligations are imposed.

Courts analogize Spending-Clause programs like Title IX to contracts struck between the government and recipients, with the public as third-party beneficiaries. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). To regulate recipients based on their accepting federal funds, however, Congress must express Spending-Clause conditions unambiguously. *Gorman*, 536 U.S. at 186. Because it remains unclear if Title IX covers subjective gender identity, there is not much of an argument that the Board was – or is – on notice of its liability to G.G. on sex-discrimination grounds.

As the Supreme Court recently clarified, the contract-law analogy is not an open-ended invitation to interpret Spending Clause agreements *broadly*, but rather – consistent with the clear-notice rule – applies "only as a potential *limitation* on liability." *Sossamon v. Texas*, 563 U.S. 277, 290 (2011) (emphasis in original). Given the abundant lack of clear authority establishing transgender rights under Title IX, this Court cannot find such rights consistently with the Spending Clause.

In the context of Title IX and Title VI, unique procedural issues compound the Board's lack of notice, notwithstanding the existence of at least some DOE guidance. *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). Unlike in *Bennett*, DOE acts here under a statute that requires acting only by rule, regulation, and orders of general applicability, which do not take effect until approved by the

President or Attorney General. 20 U.S.C. §1682; *see* note 2, *supra*.[6] Even if Circuit precedent holds otherwise outside the clear-notice area,[7] a policy that an agency is free to change at any time provides recipients no notice. *Compare G.G.*, 822 F.3d at 724 ("subsequent administration [may] choose to implement a different policy") *with Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995) ("general statement of policy … does not establish a binding norm and leaves agency officials free to exercise their discretion"). Indeed, even when an agency acts by notice-and-comment rulemaking, *Federal Register* preambles cannot – without notice – preempt state law, *Wyeth v. Levine*, 555 U.S. 555, 576-81 (2009), especially in areas

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[6] The House bill permissively authorized agencies to proceed by rule, regulation, or order, H.R. 7152, 88th Cong. §602 (1963) ("Such action *may* be taken by… rule regulation or order") (emphasis added), but Sen. Dirksen amended §602 to its current form. 110 CONG. REC. 11,926, 11,930 (1964). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Because the Senate needed that concession to break a filibuster, the revised "language was clearly the result of a compromise" to which courts must "give effect … as enacted." *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-20 (1980); *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 117 (1988) (Civil Rights Act's opponents feared "the steady and deeper intrusion of the Federal power").

[7] In *Equity in Athletics v. Dep't of Educ.*, 639 F.3d 91, 106 (4th Cir. 2011), this Court found §902 inapplicable to guidelines, as distinct from rules or orders, which is an administrative-law *non sequitur*: agencies can act only by rule or by order. 5 U.S.C. §551(4), (6); *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980). Issuing non-rule guidelines *is an order*. 5 U.S.C. §551(6). There is no middle ground. Whether as unapproved *rules* or unapproved *orders*, Title IX guidance cannot take effect until the agency complies with §902.

of traditional state and local concern. The prior administration's shifting policies here are considerably less fixed or concrete than the *Wyeth* preamble.

Consistent with Title IX's analogy to the Equal Protection Clause, courts have interpreted the statutory term "discrimination" broadly to include less-obvious issues such as schools' inaction on known instances of student-on-student harassment and retaliation against male coaches who oppose allegedly discriminatory treatment of girls' sports teams on the basis of sex, *Davis ex rel. LaShonda D., v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005).[8] The constitutional arguments for interpreting "discrimination" broadly are simply inapposite to interpreting "sex."

2. Federalism and the presumption against preemption counsel against an expansive interpretation of "sex" under Title IX.

In addition to the clear-notice rule for Spending Clause legislation, the traditional tools of statutory construction also include federalism-related canons that are relevant to DOE's and Congress's acting here in an area of traditional state and local concern. While the assertion of federal power over local education would be

[8] *Jackson* arguably hinged more on its similarity to a third-party advocacy claim allowed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which went to what the enacting Congress would have understood "discrimination" to include. By contrast, with regard to "sex" the contemporaneous judicial interpretations *excluded* gender identity. *See* Section II.C, *infra*.

troubling enough on general federalism grounds, *U.S. v. Morrison,* 529 U.S. 598, 618-19 (2000), it is even more troubling here because of the historic *local* police power that the federal power would displace. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *cf. Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 175, 409 S.E.2d 446 (1991) (under Virginia law, local government retains the authority to "legislate … unless the General Assembly has expressly preempted the field"). The state and local presence in this field compels this Court to reject G.G.'s expansive interpretation of Title IX.

Specifically, in fields traditionally occupied by state and local government, courts apply a presumption *against* preemption under which courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). This presumption applies "because respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth*, 555 U.S. at 565 n.3 (internal quotations omitted). Thus, this Court must consider whether Congress intended to prohibit discrimination based on gender identity along with the clear and manifest congressional intent to prohibit discrimination based on sex.

In doing so, courts must interpret Title IX to avoid preemption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). While it is fanciful to think that Congress in 1972 intended "sex" to include "gender identity," that is what G.G. must establish as clear and manifest in order for Title IX to regulate gender identity. Although the Board has not conceded that G.G.'s gender-identity reading *is* viable, that is not the test. Instead, G.G. must show that the Board's sex-only reading *is not* viable.

The presumption against preemption applies to federal agencies as well as federal courts, especially when agencies ask courts to defer to administrative interpretations. Put another way, the presumption is one of the "traditional tools of statutory construction" used to determine congressional intent, which is "the final authority." *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984). If that analysis resolves the issue, there is no room for deference: "deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411-12 (1979) (internal quotations omitted). Like the Supreme Court's refusing to presume that Congress cavalierly overrides co-equal state sovereigns, this Court must reject the suggestion that federal agencies can override the states through deference. Quite the contrary, the presumption against preemption is a tool of statutory construction that an agency must (or a reviewing court will) use at "*Chevron* step one" to reject a preemptive reading of a federal statute over the no-preemption reading.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed in pertinent part by the majority, Justice Stevens called into question the entire enterprise of administrative preemption *vis-à-vis* presumptions against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, the *Watters* banking-law context is more preemptive than federal law generally. *Id.* at 12 (majority); *Nat'l City Bank v. Turnbaugh*, 463 F.3d 325, 330-31 (4th Cir. 2006). Where they have addressed the issue, the circuits have adopted similar approaches against finding preemption in these circumstances.[9] Federal agencies – drawing delegated power from Congress – cannot have more authority than Congress itself.

B. <u>Deference has no significant part to play here.</u>

Although this Court's prior decision rested on deference to DOE guidance under *Auer v. Robbins*, 519 U.S. 452 (1997), DOE has withdrawn the underlying

[9] *Nat'l Ass'n of State Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Albany Eng'g Corp. v. F.E.R.C.*, 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996); *Massachusetts Ass'n of Health Maintenance Orgs. v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999).

guidance, prompting the Supreme Court to vacate this Court's decision. *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S.Ct. 1239 (2017). With the absence of a controlling DOE rule or order, this Court therefore must answer the statutory question without deferring to a DOE gloss on the meaning of "sex" for Title IX. To the extent that G.G. would rely on marginally relevant, older DOE guidance that DOE did not expressly withdraw, G.G. Br. at 16 & n.13, this Court's prior decision requires this Court to accept DOE's new guidance that DOE's prior guidance was inadequate – on many levels – to guide policy here. As such, the only role for deference here is for this Court to defer to DOE's 2017 guidance in rejecting G.G.'s resort to DOE's old guidance.

At the outset, this Court has the authority to declare what the law is: "[t]he interpretation of the laws is the proper and peculiar province of the courts." THE FEDERALIST NO. 78, at 467 (C. Rossiter ed. 1961) (Hamilton); 28 U.S.C. §2201(a). Conversely, the Court need not stay its hand to await a new DOE interpretation:

> Nothing in *Chevron* suggests that a court should hesitate to decide a properly presented issue of statutory construction in hopes that the agency will someday offer its own interpretation.

Consolidation Coal Co. v. Fed'l Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1080 n.8 (D.C. Cir. 1987). This Court not only can, but must, answer the statutory question presented here. As Chief Justice Marshall famously put it, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to

usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976). This Court must now decide whether Title IX entitles concededly female students to use the boys' restroom (and *vice versa*) based on gender identity.

Although the now-vacated *Auer* reasoning of this Court's decision appears objectively wrong because DOE's regulations merely parrot Title IX's statutory term "sex" without "using [DOE's] expertise and experience to formulate [the] regulation," *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), that issue is no longer presented. Regardless of whether this Court correctly or incorrectly deferred to DOE before, *Auer* requires this Court to defer to DOE's 2017 rejection of DOE's prior guidance as not only lacking "extensive legal analysis" and "any formal public process" but also failing to "explain how [DOE's] position [was] consistent with the express language of Title IX." 2017 DOE Letter, at 1. In an effort to avoid relying on withdrawn guidance, G.G. now cites older DOE guidance that the 2017 DOE Letter did not expressly withdraw. *See* G.G. Br. at 16 & n.13. This Court should defer to DOE's 2017 conclusion that DOE's expressly withdrawn guidance – which in turn relied on G.G.'s now-recycled old guidance, J.A. 54-55 & nn.1, 4 – rests on infirm legal analysis with insufficient process. This Court should agree with DOE's conclusion that G.G.'s recycled guidance is substantively and procedurally infirm.

C. Title IX does not apply to gender identity.

Given the many bases for interpreting Title IX narrowly here, *see* Section II.A, *supra*, this Court must hold that Title IX prohibits only what Congress enacted: discrimination "on the basis of sex." 20 U.S.C. §1681(a). But the other tools of statutory construction also support the Board, and none of G.G.'s counterarguments credibly suggest otherwise.

Quite simply, the Board does not discriminate on the basis of sex because its policy applies equally to biological females seeking to use boys' restrooms and biological males seeking to use girls' restrooms. Because G.G. does not challenge sex-segregated restrooms *per se*, the discrimination – if any – is against students whose subjective gender identity differs from their objective sex. Differential treatment based on a sex-versus-gender-identity mismatch is not what Title IX prohibits. *See* 20 U.S.C. §1681(a). Because sex is a biological characteristic, and gender identity is not, G.G. cannot prevail on a statutory claim.

In several areas outside of Title IX, federal statutes have used "gender identity" separately from "sex," *see*, *e.g.*, 42 U.S.C. §13925(b)(13)(A), implying that the two phrases mean different things. *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir. 2013). Similarly, efforts to amend Title IX to add "gender identity" have failed, *see* Board Br. at 30-31, which also implies that "sex" does not include "gender identity" under Title IX. *Cardoza-Fonseca*, 480 U.S. at 442-43; *Red Lion*

Broad. Co. v. FCC, 395 U.S. 367, 380-81 (1969). Finally, when Congress enacted Title IX in 1972 and extended the statutory reach in 1988, the then-controlling judicial constructions from the Supreme Court and the unanimous courts of appeals held that the word "sex" did not include gender identity.[10] Under the circumstances, courts must regard the sex-versus-gender-identity dispute as decided by the Congress that enacted Title IX, consistent with that unanimous judicial understanding. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). Congress can amend the law, but until then Title IX hinges on biological sex.

Although these tools of statutory construction – like the narrow construction required here, *see* Section II.A, *supra* – conclusively support the Board, *amicus* EFELDF rebuts five additional arguments that G.G. makes.

First, G.G's "stereotype" argument – based on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny – is wholly irrelevant.[11] *See* G.G. Br. 23-25.

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[10] For example, the Supreme Court recognized that the term "sex" referred to "an immutable characteristic determined solely by the accident of birth" "like race and national origin." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (same, quoting *Frontiero*); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977).

[11] If possible, the other Supreme Court decision on which G.G. relies – *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) – is even less relevant. *Oncale* stands for the modest proposition that sex-based discrimination includes

These "stereotype" cases concern whether a female exhibits masculine traits or dress or whether a male exhibits feminine traits or dress. In *Hopkins*, an accounting firm denied partnership to a female accountant who did not wear makeup or jewelry and instead was "macho." *Id.* For purposes of her doing her job, it did not matter whether Ms. Hopkins wore dresses or men's suits. However she dressed, she still used the women's restroom. Indeed, it would have been sex discrimination to require a mannishly dressed Ms. Hopkins to use the men's restroom, when all other women could use the women's restroom. Setting dress codes for boys and girls (*e.g.*, clothing, jewelry, hair length) differs fundamentally from segregating restrooms by sex. Whatever the respective merits of dress codes versus sex-segregated restrooms, the *Hopkins* line of cases concerns only the former, not the latter. Under *Hopkins* and its progeny, male employees remain male, and female employees remain female, which says nothing about which bathroom they use.

Second, although G.G. would conflate Title IX and Title VII for all purposes, the Supreme Court's use of Title VII standards in sexual-harassment cases does not go that far. *See Davis*, 526 U.S. at 651; *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

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male-on-male harassment just as much as male-on-female harassment, as well as the other two permutations. *Id.* That has nothing to do with G.G.'s "sex" for Title IX purposes or transgender use of sex-segregated restrooms for the opposite sex.

Quite the contrary, where there are differences between the two statutes, the Supreme Court has held precisely the opposite: the Spending-Clause legislation and Title VII "*cannot* be read in *pari materia*." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (first emphasis added). Sensibly enough, like things are alike, except where they are different. For example, Title IX must be read to require clear notice under the Spending Clause, which does not apply to Title VII.

Third, G.G. cites *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008), for the sophistic analogy between a hypothetical law that impermissibly discriminates against religious converts and the discrimination against transgender males and females. *See* G.G. Br. 22-23. The problem with this analogy is that G.G. concedes that schools permissibly may discriminate on the basis of sex in restrooms and G.G. has not *converted* to the male sex. As such, G.G. lacks standing to litigate the rights of transgender students who actually have undergone sex-reassignment surgery; such students may have a better argument that they no longer are their original biological sex, but that argument is not available to G.G. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (litigants must assert their own rights, not the rights of absent third parties); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). Someone in G.G.'s position, by contrast, is a female who *wants to convert* to the male sex; because G.G. has not yet done so, however, the Board's permissible sex-segregation here produces a different result

than the impermissible religious discrimination in *Schroer*.

Fourth, G.G. refers to third-party regulations, such as athletic associations, as a basis for norms for treating transgender students. G.G. Br. at 41. Such provisions do not establish norms for Title IX purposes. *See* 34 C.F.R. §106.6(c).

Fifth, G.G. cites primarily extra-circuit appellate and district court – many, unpublished – decisions, which cannot bind this Court. *Virginia Soc'y for Human Life, Inc. v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001) ("a federal court of appeals's decision is only binding within its circuit"), *abrogated in part on other grounds*, *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012); *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527, 2540 (2011). "A contrary policy would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Virginia Soc'y for Human Life*, 263 F.3d at 393 (internal quotations omitted). *Amicus* EFELDF respectfully submits that this Court would need to decide these important issues for itself, even if G.G.'s extra-circuit, stereotype-based authorities applied here.

III. THIS COURT SHOULD DENY INTERIM RELIEF.

To warrant a preliminary injunctions, plaintiffs must be likely to succeed on the merits and to suffer irreparable harm without relief, with the balance of equities and public interest favoring such relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). G.G. cannot make any of these required showings.

A. G.G. is unlikely to prevail on the merits.

G.G. cannot prevail on Title IX, *see* Section II, *supra*, and the equal-protection claim fares no better. Because all parties agree that sex-segregated restrooms are lawful, the equal-protection question is whether society may exclude females with male gender identity from male restrooms, and *vice versa*. Because the Board's policy applies equally on the basis of biological sex to transgender males and transgender females, there is no *sex-based* discrimination. Consequently, the discrimination – if any – is on the basis of a misalignment between a person's gender identity and that person's sex. Neither Circuit precedent nor the Constitution protects that class from reasonable governmental regulation designed to protect privacy.

Importantly, "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original); *cf. Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (to state an equal-protection claim *vis-à-vis* the government's treatment of another class, the two classes must be "in all relevant respects alike"). Put another way, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*,

531 U.S. 356, 366-67 (2001) (interior quotations omitted).[12] Although G.G. asks this Court to compare the class of biological males with the class of biological females with male gender identities, those classes are not comparable because they "possess[] distinguishing characteristics relevant to interests the [Board] has the authority to implement." *Id.*

Importantly, because gender-dysphoria patients are not a protected class for equal-protection purposes, G.G. must establish that the government action does not "further[] a legitimate state interest" and lacks any "plausible policy reason for the classification" to prevail. *Nordlinger*, 505 U.S. at 11-12. The privacy interest of other students easily satisfies this test. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Virginia*, 518 U.S. at 550 n.19. Indeed, this Court has recognized the "need for privacy" and "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). Moreover, unlike heightened scrutiny, rational-basis review does not

[12] "[A] legislative choice [*e.g.*, the Board's policy here] is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Accordingly, G.G. cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original).

require narrowly tailoring policies to legitimate purposes: "[rational basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *Beach*, 508 U.S. at 313, and a policy "does not offend the Constitution simply because the classification is not made with mathematical nicety or because *in practice it results in some inequality.*" *Id.* at 316 n.7 (interior quotations omitted, emphasis added); *Thomasson v. Perry*, 80 F.3d 915, 928, 930-31 (4th Cir. 1996).

Indeed, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds *wholly irrelevant* to the achievement of the State's objective." *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 462-63 (1988) (interior quotations omitted, emphasis added); *Clover Leaf Creamery,* 449 U.S. at 463-64. Here, the Board has a legitimate interest in students' privacy in restrooms, thus easily satisfying the rational-basis test and denying G.G.'s equal-protection claim.

B. Denying interim relief will not cause G.G. irreparable harm.

Although the parties may dispute the irreparable nature of the harms that G.G. would face without an injunction *during school*, G.G.'s someday interest is returning to visit school after graduation does not appear to meet Article III's immediacy test, *Lujan*, 504 U.S. at 564 (quoted *supra*), much less the higher bar of irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010) (plaintiff can have Article III injury without the immediacy needed for irreparable harm).

C. The equities favor the Board.

Where the merits tilt decidedly to one party, this third criterion collapses into the first. If the Court "conclude[s] that [G.G.] has no likelihood of success on the merits … [the] third prong of the balance of equities weighs against granting an injunction." *Guerra v. Scruggs*, 942 F.2d 270, 280 (4th Cir. 1991).

D. The public interest favors the Board.

Similarly, the final criterion favors the Board not only because G.G. cannot prevail on the merits, *see Pashby v. Delia*, 709 F.3d 307, 330 (4th Cir. 2013), but also because G.G.'s proposed remedy would intrude on public rights that the Board has the governmental authority to balance.

In litigation challenging government action, the last criterion can collapse into the merits, 11A WRIGHT & MILLER, FED. PRAC. & PROC. Civ.2d §2948.4, because "[i]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). In such public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Accordingly, the public-interest component can deny plaintiffs relief that otherwise

might issue in purely private litigation.

CONCLUSION

This Court should affirm the dismissal of G.G.'s Title IX claims and deny interim relief.

Dated: May 15, 2017

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,489 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 15, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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