RECORD NO. 19-1952

In The
United States Court of Appeals
For The Fourth Circuit

GAVIN GRIMM,

Plaintiff – Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellant.

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

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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RULE 35(B)(1) STATEMENT

Plaintiff Gavin Grimm is a former student at Gloucester High School ("GHS") in Gloucester County, Virginia. Grimm was born a biological female and enrolled in high school as a girl. After his ninth-grade year, Grimm began identifying as a male. Grimm, however, remained biologically female through graduation.

Despite a long procedural history, this remains a case of first impression in this Circuit. The issue of exceptional importance for review *en banc* is whether separating student restrooms on the basis of biological sex, while also providing single-stall, unisex restrooms for all students to use, including transgender students, violates Title IX and the Equal Protection Clause. And for several additional reasons, this appeal is of exceptional importance:

1. The panel majority erroneously determined that the School Board violated Title IX by relying, in the context of school restrooms and similar facilities, on the biological and anatomical differences between male and female. The panel majority's decision will compel courts in this Circuit to find that sex classifications grounded in the biological distinctions between men and women are *per se* unlawful and would extend to school locker rooms, sports, and showering and living facilities. That result plainly is inconsistent with Title IX and its implementing regulations.

2. The panel majority improperly found that the School Board's policy violates the Equal Protection Clause even though the policy relies on biological

distinctions, treats all students equally, and is substantially related to the important objective of protecting student privacy. The panel's opinion thus undermines Supreme Court precedent that a sex-based classification does *not* violate the Equal Protection Clause when it is based on the real differences between men and women and the right to—and need for—bodily privacy.

3. This decision is only the third decision issued by a United States Court of Appeals on this subject and potentially will impact educational institutions nationally. At a minimum, the majority's decision will have a substantial impact on thousands of schools throughout this Circuit and on the students who attend them.

STATEMENT

Grimm is a former student at GHS. Grimm is a biological female, but now identifies as a male. JA 108. He enrolled at GHS as a girl and started ninth grade as a girl. JA 985-990.

At the beginning of Grimm's sophomore year, he and his mother met with the school principal and guidance counselor and explained that Grimm was transgender and wanted to attend school as boy. JA 113.

Grimm and his mother provided a letter from Grimm's psychologist stating that Grimm was receiving treatment for gender dysphoria and should be treated as a boy in all respects, including when using the restroom. JA 112, 123.

Although Grimm initially used the restroom in the nurse's office, on October 20, 2014, he began using the boys' restroom. JA 78, 97, 817, 879-880. Grimm also was granted permission to complete his physical-education requirements at home, and, as a result, never needed to use school's locker rooms. JA 876-877. Within two days, parents learned that a transgender boy was using the boys' restrooms and complained on behalf of their children. JA 378. Additionally, a student complained about the lack of restroom privacy. JA 378, 762-767.

The Board considered the issue and adopted the following resolution after two public meetings in late 2014:

> Whereas the GCPS [Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> 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.

JA 775, 978.

The Board also installed three single-stall, unisex restrooms in the high school. These restrooms were open to all students—including Grimm—who, for whatever reason, desired greater privacy. JA 486-87, 983. There are no published standards of care related to the use of restrooms in schools by transgender students. JA 1085-90. Grimm claimed that the unisex restrooms made him feel stigmatized and isolated, and he refused to use them. JA 132.

In June 2016, before Grimm's senior year of high school, Grimm underwent chest-reconstruction (double mastectomy) surgery. JA 120. This procedure did not create any fundamental biological changes in Grimm; he remained anatomically female. JA 1100. Surgical gender reassignment procedures cannot be completed until the transgender individual is at least 18 years of age. JA 309, 331, 1099-1101.

In November 2016, Grimm provided a new Virginia birth certificate listing his sex as male. JA 120, 127. Neither Grimm's gender identity nor the language on his birth certificate, however, changed his biological sex to male. As his own expert testified, choosing a gender identity has no effect on the body's chromosomes; not even a person's innate sense of belonging to a particular gender causes biological changes. JA 1073.

Grimm filed suit asserting violations of the Equal Protection Clause and Title IX. In the Second Amended Complaint, Grimm claimed (1) that the School Board's policy violated his rights on the day the policy was first issued and throughout his time as Gloucester High School student; (2) that the School Board's refusal to update the official school transcript to match the "male" designation on his updated birth certificate violated his rights; and (3) that he was entitled to nominal damages and injunctive relief. JA 70-87. The School Board contends that its restroom policy and decision not to update Grimm's official school transcript do not discriminate on the basis of sex and comply with Title IX and the Equal Protection Clause.

On March 26, 2019, the parties each filed motions for summary judgment. (ECF Doc. 191 and 196; ECF Doc. 184 and 185). On August 9, 2019, the District Court denied the School Board's motion and granted Grimm's motion. (ECF Doc. 229). The District Court also entered judgment in favor of Grimm and against the School Board. (ECF Doc. 230). The School Board timely filed this appeal on August 30, 2019. (ECF Doc. 235).

On August 26, 2020, a divided panel held that the School Board violated Grimm's rights under Title IX and the Equal Protection clause because Grimm is a boy "similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth." Op. 39. Judge Niemeyer dissented, finding that the School Board "reasonably provided separate restrooms for its male and female students and accommodated transgender students by also providing unisex restrooms that any student could use" and that "[t]he law requires no more of it." Op. 77.

REASONS FOR GRANTING REHEARING *EN BANC*

The panel majority found that, "[a]t the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender." Op. 5. The panel majority is wrong. Chief Judge William Pryor's dissent in *Adams v. School Board of St. Johns County, FL* properly frames the issue, consistent with Judge Niemeyer's dissent in this case:

> Not long ago, a suit challenging the lawfulness of separating bathrooms on the basis of sex would have been unthinkable. This practice has long been the common-sense example of an acceptable classification on the basis of sex. And for good reason: it protects well-established privacy interests in using the bathroom away from the opposite sex.

--- F.3d ---, 2020 WL 4561817 at * 13 (11th Cir. 2020). The School Board's policy —like many similar policies throughout this Circuit—does not violate either Title IX or the Equal Protection Clause.

I. Title IX and its regulations explicitly authorize sex classifications grounded in the biological distinctions between male and female.

Title IX and its implementing regulations recognize that student privacy rights are paramount. Accordingly, Title IX states that "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. The implementing regulations clarify that institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

Grimm does not challenge the constitutionality of these provisions, and the School Board followed them precisely. Instead, Grimm contends, and the panel majority agreed, that he was discriminated against on the basis of sex in violation of Title IX:

> Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender. Unlike the other boys, he had to use either the girls restroom or a single-stall option. In that sense, he was treated worse than similarly situated students.

Op. 55. In other words, notwithstanding that Grimm is biologically female and has not completed a surgical transition, the panel majority found that Title IX requires the Board to treat Grimm's gender identity as dispositive, and to treat him as a boy "similarly situated" to other boys.

That is inconsistent with Title IX, which relies on the same biological distinctions that the panel majority rejected. Both Title IX's plain text, which acknowledges the "different sexes," 20 U.S.C. § 1686, and its implementing regulations, which require comparable facilities for both "one sex" and the "other," incorporate the male/female binary view of sex. 34 C.F.R. § 106.33.

Courts are required to give statutory language its ordinary meaning at the time of enactment. *See New Prime Inc. v. Oliveira*, —— U.S. ——, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019). "Sex" did not mean "gender identity" in 1972. *See, e.g.*, *Sex*, *The American Heritage Dictionary of the English Language* (1979) ("The property or quality by which organisms are classified according to their reproductive functions."); *Sex*, *The Random House College Dictionary* (1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *see also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("This chapter employs constructs and terms as they are widely used by clinicians from various disciplines with specialization in this area. In this chapter, *sex* and *sexual* refer to the biological indicators of male and female understood in the context of reproductive capacity) ...."). JA 1075. Thus, whatever may be true in other contexts, "sex" as used in Title IX and its implementing regulations is an unambiguous classification on the basis of reproductive function.[1]

[1] If sex was intended to encompass gender identity, the intent is ambiguous and violates Congress's Spending Clause Power under Article I, § 8 of the Constitution. Although the Spending Clause allows Congress to "attach conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Because Title IX permits separate restrooms on the basis of sex, the School Board could only be held liable if the meaning of "sex" unambiguously did *not* turn on reproductive function.

The Supreme Court's recent decision in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), does not undermine that conclusion, but reinforces it. The *Bostock* Court proceeded "on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female"[2] and declined to decide whether Title VII allows for sex-separated restrooms. *Id.* at 1753. If references to "sex" in Title VII are based "only [on] biological differences," *id.*, there is no reason to construe Title IX differently, especially considering that Title IX expressly *permits* schools to act on the basis of biological distinctions between male and female through sex-separated restrooms. *See* 20 U.S.C. § 1686; 34 C.F.R. § 106.33.

Yet Grimm argues that he must be allowed to use the male restrooms because he identifies as male. As Judge Niemeyer states in his dissent, "[R]equiring the school to allow [Grimm], a biological female who identifies as male, to use the male restroom compromises the separation as explicitly authorized by Title IX." Op. 89.

In an effort to avoid this logical conclusion, the panel majority emphasized Title IX's ban on "discrimination" without regard to the text of the statute, which expressly allows distinctions based on sex in some circumstances. Judge Niemeyer's dissent shows the fallacy of the panel majority's opinion:

> [S]trikingly, this overlooks the fact that Congress expressly provided *in the statute* that nothing in its prohibition against discrimination

[2] The Supreme Court determined that its resolution of the parties' dispute did not require it to determine definitely the meaning of the term. *See Bostock*, 140 S. Ct. at 1739.

> "shall be construed to prohibit" schools "from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The majority's oversight can only be taken as a way to reach conclusions on how schools *should* treat transgender students, rather than a determination of what the statute requires of them.

Op. 90.

By treating Grimm as a boy "similarly situated" to other boys, the panel majority rewrites the statute, treating Title IX as forbidding the biological distinctions that it expressly permits. Indeed, neither Grimm nor the majority dispute that Title IX authorizes separate restrooms. Op. 56, n.17. The School Board did not deny Grimm restrooms comparable to the restrooms of the "other sex." It created three single-stall, unisex restrooms for any student to use privately. Because the School Board's policy is valid under Title IX, Title IX permits schools to require all students, including Grimm, to follow it.

In short, the majority's decision ignores the plain language of Title IX and its regulations. And the panel's reasoning will now logically extend to the propriety of separate locker rooms, living facilities, showers, and sports. The foreseeable consequences of this decision call for the resolution of the en banc court.

II. The majority's Equal Protection analysis undermines the privacy rights of other students and contradicts precedent.

The panel's Equal Protection holding similarly calls for the full court's immediate resolution. Just as in its Title IX analysis, the panel majority held that Grimm is a boy "similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth." Op. 39. Applying intermediate scrutiny, the majority then held that "the Board's policy as applied to Grimm is not substantially related to the important objective of protecting student privacy." Op. 33.

Assuming *arguendo* that intermediate scrutiny applies, the Board's policy is in fact substantially related to protecting student privacy rights. While the majority acknowledged that "students have a privacy interest in their body when they go to the bathroom," Op. 46, it nonetheless held the Board's concerns for the privacy rights of its students are "insubstantial." Op. 47. The panel majority's decision is both wrong and directly at odds with longstanding precedent.

This Court, for example, has long recognized a right to bodily privacy. *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981); accord *U.S. v. Virginia*, 518 U.S. 515, 551 (1996); *Doe v. Luzerne Cty.,* 660 F.3d 169, 177 (3rd Cir. 2011); *Brannum v. Overton Cty. Sch. Bd.,* 516 F.3d 489, 498 (6th Cir. 2008). Public schools are required to protect this right on behalf of their students. Indeed, the School Board has a responsibility, particularly where children are still developing emotionally and physically, to ensure students' privacy. *See, e.g., Burns v. Gagnon*, 283 Va. 657, 671 (2012); *Davis v. Monroe County Board of Education*, 526 U.S. 629, 646-47 (1999).

Further, the Supreme Court has long recognized that schools have a "custodial and tutelary" power over minor students, "permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). To that end, the Supreme Court has deferred—in a variety of contexts—to public schools exercising that custodial and tutelary responsibility. *See e.g. Vernonia Sch. Dist. 47J*, 515 U.S. at 656 (Fourth Amendment searches); *Morse v. Frederick*, 551 U.S. 393, 403–06 (2007) (First Amendment speech); *Ingraham v. Wright*, 430 U.S. 651, 681–82 (1977) (Eighth Amendment punishment).

Because of the School Board's obligations, Grimm's equal-protection challenge should be easily rejected. As Chief Judge William Pryor's dissent in *Adams* rightly puts it, "the relevant question is whether excluding students of one sex from the bathroom of the other sex substantially advances the schools' privacy objectives. The question is not . . . whether excluding *transgender students* from the bathroom of their choice furthers important privacy objectives." *Adams,* --- F.3d --- (11th Cir. 2020) (J. Pryor dissenting at * 21) (emphasis added). As Judge Pryor emphasized, a school board's policy restricting *all* students, not only transgender students, from the restroom of the opposite biological sex is substantially related to protecting the privacy interests of *all* students:

> Although the school policy classifies on the basis of sex, it serves the important objectives of protecting the interests of children in using the

> bathroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex. The policy also fits tightly with both interests in privacy. By requiring students to use the bathroom away from the opposite sex, the policy directly protects the first interest and eliminates one of the most likely opportunities for a violation of the second interest. In short, it easily satisfies intermediate scrutiny[.]

Adams, --- F.3d --- (2020) (J. Pryor dissenting at * 17)

Still more fundamentally, the majority's view that Grimm is a boy "similarly situated to other boys" for Equal Protection purposes—despite his biological differences from every other boy at his school—conflicts with precedent. Grimm does not assert that the School Board violated the Equal Protection Clause by separating restroom facilities by sex. Indeed, the Supreme Court has recognized that in intimate settings, men and women may be separated "to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. at 550 n.19. As Judge Niemeyer pointed out in his dissent, the inescapable conclusion is that "a public school may lawfully establish, consistent with the Constitution, separate restrooms for its male and female students in order to protect privacy concerns that arise from the anatomical differences between the two sexes." Op. 91. Because of those differences, Grimm is not similarly situated to boys for purposes of restroom access. Here again Judge Niemeyer correctly resolved the issue: "Grimm cannot claim that he was discriminated against when he was denied access to the male restrooms because he was not, in fact, similarly situated to the biologically male students who used those restrooms . . . at all times relevant to the events in this case, [Grimm] remained anatomically different from males." Op. 93.

In short, the School Board's policy does not unconstitutionally discriminate between similarly situated individuals by excluding transgender students from the restroom of their choice. Rather, the policy protects the privacy of all students based on their physical differences and treats all students equally. *See e.g., Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (recognizing "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns.").

III. The majority's decision will have a significant effect on thousands of schools and millions of school children within this circuit.

The effect of the panel's legal errors on the students and schools of the Fourth Circuit reinforces the need for en banc review. By effectively invalidating separate-restroom policies throughout this Circuit, the decision will have a significant effect on roughly 8,155 operating public schools in this circuit, along with many thousands of administrators.[3] And the decision will have an equal if not more substantial effect on more than 4.7 million public-school children, compromising their privacy interest in single-sex restrooms.

[3] National Center for Education Statistics. Selected Statistics From the Public Elementary and Secondary Education Universe: School Year 2014–15, at 7 t.2 (2016), https://nces.ed.gov/pubs2016/2016076.pdf.

The majority's decision to subject schools and their students to these risks ignores the Supreme Court's warning that the "fail[ure] to acknowledge even [the] most basic biological differences" between men and women "risks making the guarantee of equal protection superficial." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001). Despite this warning, the panel's decision disregards those "most basic" differences. In the process, it forces schools within this Circuit either to ignore those differences whenever there is a transgender student involved, or face costly litigation spanning years. Such a dilemma is untenable.

The majority's decision to invalidate schools' separate-restroom policies likewise raises important separation of powers issues. First, the majority overlooks Congress' express direction in Title IX that the statute does not forbid "separate living spaces for the different sexes." 20 U.S.C. § 1686. Second, the majority's decision effectively nullifies the Department of Education's long-standing decision—interpreting Congress' language—to allow separate bathroom and locker facilities. The panel's logic will likely not be limited to simply restrooms. The pertinent regulation, 34 C.F.R. § 106.33, applies to other spaces posing a need for privacy even greater than restrooms, such as showers and locker rooms.

Regardless, the law recognizes men and women have traditionally been free to undress without the risk of being exposed to a member of the opposite biological sex. And rightly so: If the Equal Protection Clause and Title IX fail to ensure protections based on key biological differences, then their promises are "superficial." *Nguyen*, 533 U.S. at 73.

As Judge Niemeyer emphasized, this Court has long recognized a "special sense of privacy" in a person's genitals. Op. 88-89 (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)). The harm from exposure of a person's genitalia "in the presence of people of the other sex" does not require members of the other sex to engage in any untoward actions. *Lee,* 641 F.2d at 1119. Judge Niemeyer was correct—the mere *presence* of a member of the opposite sex in those intimate spaces is itself a harm. Yet the panel's decision allows "people of the other sex" to freely enter these sensitive spaces—if they are transgender.

Like its effects on school administrators, the significant practical effects of the panel's holdings on the day-to-day privacy rights of students in this Circuit—and the risk that those holdings will render the rights of all cisgender students "superficial"—are powerful reasons for this Court to grant the petition.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing *en banc*.

GLOUCESTER COUNTY SCHOOL BOARD

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Dated: September 9, 2020

/s/ David P. Corrigan
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of September, 2020, I caused this Petition for Rehearing *En Banc* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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