

RECORD NUMBER: 15-2056

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 AT NEWPORT NEWS

**AMICI CURIAE BRIEF OF SECRETARY OF EDUCATION
ARNE DUNCAN, SECRETARY OF EDUCATION JOHN B.
KING, JR., AND OTHER FORMER OFFICIALS FROM THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
DEPARTMENTS OF EDUCATION, JUSTICE, LABOR AND
HEALTH AND HUMAN SERVICES IN SUPPORT OF
APPELLANT**

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INTEREST OF *AMICI CURIAE*¹

This brief is submitted by the following *amici curiae*:

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- **John B. King, Jr.**, United States Secretary of Education (2016-2017);
- **Catherine E. Lhamon**, Assistant Secretary for Civil Rights, United States Department of Education (2013-2017);
- **James Cole, Jr.**, General Counsel, United States Department of Education (2014-2017);
- **Mathew S. Nosanchuk**, Senior Counselor to the Assistant Attorney General, Civil Rights Division, United States Department of Justice (2009-2012);
- **Patricia Shiu**, Director of Office of Federal Contract Compliance Programs, United States Department of Labor (2009-2016);
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¹ Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

- **M. Patricia Smith**, Solicitor, United States Department of Labor (2010-2017);
- **David Lopez**, General Counsel, United States Equal Employment Opportunity Commission (“EEOC”) (2010-2016); and
- **Jocelyn Samuels**, Senior Counselor to the Assistant Attorney General for Civil Rights, United States Department of Justice (2009-2011); Principal Deputy Assistant Attorney General for Civil Rights, United States Department of Justice (2011-2013); Acting Assistant Attorney General for Civil Rights, United States Department of Justice (2013-2014); Director, Office for Civil Rights, United States Department of Health and Human Services (2014-2017).

Amici have an interest in this matter because each served as a cabinet secretary or other senior official responsible for the interpretation and application of federal laws that prohibit discrimination on the basis of sex, including Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (“Title IX”), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (“Title VII”), and Section 1557 of the Patient Protection and Affordable Care Act, 49 U.S.C. § 18116 (“Section 1557”).

As Executive Branch members, each *amici* undertook an extensive administrative process to ensure that his or her Department fully considered

statutory law, legal precedent, regulatory guidance, scientific analysis, and the factual record in reaching their conclusions concerning the scope of federal anti-discrimination statutes. In so doing, each amici reached the conclusion. The Departments of Education and Justice determined that discrimination on the basis of gender identity constitutes sex discrimination under Title IX. Similar care attended the interpretations adopted by other Departments, including the Departments of Labor and Health and Human Services, that analogous prohibitions against sex discrimination include prohibitions on discrimination based on gender identity. *Amici* therefore urge this Court to adopt a similar interpretation of Title IX and its implementing regulations.

ARGUMENT

The Supreme Court made clear in its 1989 *Price Waterhouse v. Hopkins* decision that the prohibition against sex discrimination, as interpreted under federal statute, includes a prohibition against discrimination based on “sex-based considerations[,]” including taking “gender into account[.]” 490 U.S. 228, 242, 244 (1989). In 2012, the EEOC endorsed this common sense principle in *Macy v. Holder* and recognized that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on sex’” under Title VII.² *Macy v. Holder*, No. AGCYATF-2011-00751,

² Courts regularly rely on Title VII precedent to analyze discrimination “on the

EEOC Doc. No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012). Accordingly, in 2015, the EEOC stated in *Lusardi v. McHugh* that Title VII's prohibition against sex discrimination includes prohibition against employers restricting a transgender employee from using the restroom that corresponds with his or her gender identity.³ *Lusardi v. McHugh*, No. AGCYARREDSTON11SEP0, EEOC Doc. No. 0120133395, 2015 WL 1607756, at *7-8 (Apr. 1, 2015).

Following the first two of these decisions, and as early as 2013, the Departments of Education and Justice concurrently interpreted Title IX's prohibition against sex discrimination to include a prohibition against gender identity discrimination. This interpretation was reflected in the Department of Education's January 7, 2015 letter, authored by former Office for Civil Rights ("OCR") Acting Deputy Assistant Secretary for Policy, Mr. James A. Ferg-Cadima (JA-54-56), as well as the Department of Education's May 13, 2016 Dear

basis of sex" under Title IX. *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); *Murray v. N.Y. Univ. Coll. Of Dentistry*, 57 F.3d 243, 249 (2nd Cir. 1995).

³ Several lower courts have followed the EEOC's approach, and have held that Title VII's prohibition against sex discrimination includes a prohibition against restricting a transgender employee from using the restroom that corresponds with his or her gender identity. See, e.g., *Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark County Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016).

Colleague letter, which was deemed “significant guidance”⁴ and was issued jointly with the Department of Justice. U.S. Dep’t of Just., Civ. Rts. Division & U.S. Dep’t of Educ., Off. for Civ. Rts., *Dear Colleague Letter* (May 13, 2016), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. This Court previously granted the January 2015 letter substantial and controlling deference under the authority of *Auer v. Robbins*, 519 U.S. 452 (1997).⁵ *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 719-24 (2016).

The new Administration has rescinded both the January 2015 letter and May 2016 joint guidance. But it has not rescinded, or reversed, the practice and history of the Departments of Education and Justice interpreting Title IX’s prohibition against sex discrimination to include protections against gender identity discrimination. Moreover, the new Administration’s rationale for withdrawing the

⁴ The document was deemed “significant guidance” pursuant to the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). This means the document underwent interagency review and invited public comment. See U.S. Dep’t of Educ., *Significant Guidance at the Department of Education*, available at <https://ed.gov/policy/gen/guid/significant-guidance.html>.

⁵ A number of district courts also granted the Department of Education’s interpretation of 34 C.F.R. § 106.33 substantial and controlling deference under *Auer*. See *Carcaño v. Patrick McCrory*, 203 F. Supp. 3d 613, 639 (M.D.N.C. Aug. 26, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-CV-943-PP, 2016 WL 5239829, at *3-4 (E.D. Wisc. Sept. 22, 2016); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 867-68 (S.D. Ohio 2016); *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *17-18 (N.D. Ill. Oct. 18, 2016).

January 2015 letter and May 2016 joint guidance was based on the misplaced contention that neither document contained “extensive legal analysis” or “explain[ed] how the position is consistent with the express language of Title IX[.]” U.S. Dep’t of Just., Civ. Rts. Division & U.S. Dep’t of Educ., Off. for Civ. Rts., *Dear Colleague Letter* at 1 (Feb. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>. In fact, both documents reflected a careful consideration of the text of Title IX, related precedents, and public administrative proceedings. Similar care attended the interpretations adopted by other Departments, including the Departments of Labor and Health and Human Services, in interpreting analogous prohibitions on sex discrimination to include a prohibition on gender identity discrimination.

Amici therefore submit this explanation of their review process to inform this Court’s analysis of Title IX, and to illustrate how the care taken by *amici*’s Departments ensured fidelity to Title IX and reached the correct result. Based on the full record, *amici* respectfully request that this Court likewise determine that Title IX’s prohibition against sex discrimination includes a prohibition against gender identity discrimination.

I. The Departments Of Education And Justice Are Independently Responsible For Enforcing Title IX And Its Implementing Regulations, And Thus Investigate And Resolve Mixed Questions Of Law And Fact When Violations Occur

Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Title IX was signed into law on June 23, 1972. Act of June 23, 1972, Pub. L. No. 92-318, §§ 901-907, 8 Stat. 235, 373-75. Pursuant to Congress’s delegation of authority, the Department of Health, Education and Welfare promulgated Title IX’s implementing regulations in 1975, which were later adopted by the Department of Education upon its creation in 1980. See 40 Fed. Reg. 24,128 (June 4, 1975); see also 65 Fed. Reg. 52,858-01 (Aug. 30, 2000).

Title IX’s implementing regulations provide that a recipient of Title IX funding may not, on the basis of sex, “provide aid, benefits, or services in a different manner” or “[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment.” 34 C.F.R. § 106.31(b). Recipients may, however, “provide separate toilet, locker room, and shower facilities on the basis of sex” so long as the “facilities provided for students of one sex” are “comparable to such facilities provided for students of the other sex.” 28 C.F.R. § 54.410 (Department of Justice); 34 C.F.R. § 106.33 (Department of Education).

Following a series of reviews arising from claims of discrimination, and based on a thorough review and analysis of the law and facts, a substantial record of jurisprudence and agency decision making, and scientific studies, the Departments of Education and Justice both determined, as early as 2013, that discrimination on the basis of sex under Title IX includes discrimination based on gender identity.

II. The Departments of Education And Justice Interpreted Title IX And Its Implementing Regulations To Include Protections Against Gender Identity Discrimination Consistent With Decades Of Jurisprudence And Administrative Decision Making

A. The Supreme Court's 1989 *Price Waterhouse v. Hopkins* Decision And Its Progeny Established The Framework For The Departments Of Education And Justice To Interpret Title IX And Its Implementing Regulations To Include Protections Against Gender Identity Discrimination

In 1989, the Supreme Court rightly “eviscerated” a prior line of cases⁶ that largely construed federal statutory prohibitions against “sex” discrimination to prohibit discrimination only on the basis of biological status as male or female. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (recognizing disapproval). The Court held that Title VII’s prohibition against “sex” discrimination not only prohibits discrimination based on biological status, but it

⁶ See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977).

also prohibits employers from taking “gender in account” when making employment decisions. 490 U.S. at 244. The accounting firm at issue was therefore found to have violated Title VII when it denied a female senior manager partnership because she was considered “macho” and was not exhibiting characteristics traditionally associated with female employees. 490 U.S. at 235, 244. According to the Court, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”” *Id.* at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

Circuit courts, including the Ninth, Sixth and Eleventh Circuits, have adopted the *Price Waterhouse* reasoning in cases involving discrimination against transgender persons. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Smith*, 378 F.3d at 571-72; *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). District Courts have likewise applied the *Price Waterhouse* reasoning in Title IX cases. See e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011); *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 250 (S.D.N.Y. 1997); *Bd. Of Educ. Of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 867-68.

In separate written guidance issued in 2001 and 2010, the Department of Education also endorsed the *Price Waterhouse* principle when interpreting Title IX's prohibition against sex discrimination. See U.S. Dep't of Educ., Off. For Civ. Rts., *Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, Or Third Parties Title IX* (Jan. 19 2001), available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref161; U.S. Dep't of Educ. Off. for Civ. Rts., *Dear Colleague Letter* at 7 (Oct. 26, 2010), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

The Departments of Education and Justice also began investigating complaints about, and holding listening sessions concerning discrimination based on gender stereotypes and gender identity in schools as early as 2010. *State of Texas v. United States of America*, Case No. 7:16-cv-54-0, Dkt. No. 95-1, Declaration of Catherine E. Lhamon (Nov. 7, 2016) at ¶ 12. Through these engagements, the Departments of Education and Justice learned about the challenges transgender students face in schools, and the Department of Education received many inquiries from educators, state education agencies, students, families, legislators, and the public about the application of Title IX to transgender and gender non-conforming students. *Id.*

On October 28, 2010, the Department of Education's OCR received a complaint about the Tehachapi Unified School District following the suicide of a 13 year old boy amidst allegations of gender-based harassment. U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Richard L. Swanson*, OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11 E-38 at 1 (June 30, 2011), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiletter.pdf>. The Departments of Education and Justice responded to the complaint, and made clear that Title IX prohibits "gender-based harassment" against a student "either for exhibiting what is perceived as a stereotypical characteristic of the student's sex, or for not conforming to stereotypical notions of masculinity and femininity." *Id.* at 2. The District agreed to voluntarily settle the matter and take "effective steps designed to prevent harassment in its education programs, including, and in particular, sexual and gender-based harassment" based on a person's nonconformity with gender stereotypes. Tehachapi Unified Sch. Dist., U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off. for Civ. Rts., *Resolution Agreement*, OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38 at 2 (June 30, 2011), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiagreeme nt.pdf>.

The Departments of Education and Justice also investigated claims of sex-based harassment against gender-nonconforming students in the Anoka-Hennepin School District in 2010. U.S. Dep't of Educ., Off. for Civ. Rts., *Letter to Dennis Carlson*, OCR Case No. 05-11-5901 (Mar. 15, 2012), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901-a.pdf>.

The Departments of Education and Justice jointly concluded their investigation there in 2012, and determined that students in the District had been harassed, some almost every day for years, because of their failure to conform to gender stereotypes. The Departments found that female students were reportedly called “manly” or “he-she,” and male students were reportedly called “girl” and were told “you’re a guy, act like it.” *Id.* at p. 3. A female student also reported being told to go “kill herself,” and other students reported being threatened and being “subjected to physical assaults because of their nonconformity to gender stereotypes.” *Id.* The investigation resulted in a consent decree, filed in court by the Department of Justice. *Doe v. United States*, Nos. 11-cv-01999-JNE-SER, 11-cv-02282-JNE-SER, Dkt. No. 79, Consent Decree (D. Minn. March 5, 2012).

B. Beginning In 2013, And Based On *Price Waterhouse* And The EEOC's Decision In *Macy*, The Departments Of Education And Justice Concluded That Title IX And Its Implementing Regulations Require That Transgender Students Have Access To Programs And Facilities That Match Their Gender Identity

In 2012, the EEOC issued its decision in *Macy v. Holder* and stated that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on sex’” in violation of Title VII. *Macy*, 2012 WL 1435995 at *11. According to the EEOC, the term “sex” within the framework of Title VII “encompasses both sex — that is, the biological differences between men and women — and gender.” *Id.* at *5. The EEOC further noted that the terms “gender” and “sex” are often interchangeably used by courts when examining Title VII, and limiting Title VII’s protections to biological sex considerations only would be detrimental to the fundamental principles underpinning the statute’s purpose:

If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term “gender” encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.

Id. at *5-6. A number of District Courts agree. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *Fabian v. Hosp. of Cent. Connecticut*,

172 F. Supp. 3d 509, 525 (D. Conn. 2016); *Baker v. Aetna Life Ins. Co.*, No. 3:15-CV-3679-D, 2017 WL 131658, at *5 (N.D. Tex. Jan. 13, 2017). The Seventh Circuit also recently applied the same theory as it relates to sexual orientation and sex discrimination under Title VII.⁷

The Departments of Education and Justice began adopting this legal guidance, and interpreting Title IX's prohibition against sex discrimination to include a prohibition against gender identity discrimination as early as 2013. In 2013, the Departments of Education and Justice concluded a two-year investigation into allegations that the Arcadia Unified School District in Southern California restricted a transgender boy from using the boys' restrooms, locker rooms, and other sex-segregated facilities. Both Departments made clear that Title IX prohibits a school from restricting a transgender student's access to a bathroom consistent with his or her gender identity. U.S. Dep't of Just., Civ. Rts. Division & U.S. Dep't of Educ., Off.

⁷ The Seventh Circuit recently held that sexual orientation discrimination is, *per se*, sex discrimination under Title VII. See *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017). In his concurrence, Judge Posner noted: "I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963-1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught." *Id.* at 357 (Posner, J., concurring).

for Civ. Rts., *Letter to Dr. Joel Shawn*, DOJ Case No. DJ169-12C-79, OCR Case No. 09-12-1020 (July 24, 2013), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>. The District voluntarily settled the matter, and agreed to “permit the Student to use male-designated facilities at school and on school-sponsored trips and to otherwise treat the Student as a boy in all respects.” Arcadia Unified Sch. Dist., U.S. Dep’t of Just., Civ. Rts. Division & U.S. Dep’t of Educ., Off. for Civ. Rts., *Resolution Agreement*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.⁸

The Department of Education issued additional guidance in April 2014, and expressly stated that Title IX protects against discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. U.S. Dep’t of Educ., Off. for Civ. Rts., *Questions and Answers on Title IX and Sexual Violence* at B-2 (April 2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. The Department designated this document as a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg.

⁸ The Department of Justice further endorsed this interpretation of Title IX in an amicus brief filed in *Carmichael v. Galbraith*, No. 12-11074 (5th Cir. 2013), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/04/17/carmichaelbrf.pdf>.

3432 (Jan. 25, 2007), meaning it underwent interagency review and invited public comment. See U.S. Dep't of Educ., *Significant Guidance at the Department of Education*, available at <https://ed.gov/policy/gen/guid/significant-guidance.html>.

The Department of Education issued additional “significant guidance” in December 2014, stating that a funding recipient under Title IX must generally “treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.” U.S. Dep't of Educ., Off. for Civ. Rts., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* at 25 (Dec. 1, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

The Department of Education's OCR also issued a “Title IX Resource Guide” in April 2015, further making clear that Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, “including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.” U.S. Dep't of Educ., Off. for Civ. Rts., *Title IX Resource Guide* (Apr. 2015), available at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

Based on this guidance, the Department of Education entered into three separate agreements in 2015 to resolve allegations of discrimination against transgender students, including claims that students were denied access to facilities and programs consistent with their gender identity. See Central Piedmont Community College & U.S. Dep't of Educ., Off. for Civ. Rts., *Voluntary Resolution Agreement*, OCR No. 11-14-2265 (Aug. 13, 2015), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142265-b.pdf>; Township High School District 211 & U.S. Dep't of Educ., Off. for Civ. Rts., *Agreement to Resolve*, OCR No. 05-14-1055 (Dec. 2, 2015), available at <https://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>; Broadalbin-Perth Central Sch. Dist. & U.S. Dep't of Educ., Off. for Civ. Rts., *Resolution Agreement*, OCR No. 02-13-1220 (Dec. 22, 2015), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02131220-b.pdf>.

The Departments of Education and Justice further expressed their shared interpretation of Title IX to include protections against gender identity discrimination in court briefings filed throughout 2015 and 2016. See *G.G. v. Gloucester County Sch. Bd.*, No. 4:15cv54, Statement of Interest of the United States (E.D. Va., June 29, 2015); *G.G. v. Gloucester County Sch. Bd.*, No. 15-2056, Brief for the United States as Amicus Supporting Plaintiff-Appellant and

Urging Reversal (4th Cir. Oct. 28, 2015); *United States v. State of North Carolina*, No. 1:16-cv-425, Dkt. No. 1, Complaint (M.D.N.C. May 9, 2016).

On May 13, 2016, the Departments of Justice and Education issued further joint “significant” guidance, stating that when a “school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.” U.S. Dep’t of Educ., Off. for Civ. Rts. & U.S. Dep’t of Just., Civ. Rts. Division, *Dear Colleague Letter on Transgender Students* (May 13, 2016), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. The Departments of Education and Justice specifically stated that “[h]arassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.” *Id.* at 2. Shortly thereafter, the Department of Education published *Examples of Policies and Emerging Practices for Supporting Transgender Students*. U.S. Department of Education, Office of Elementary and Secondary Education & Office of Safe and Healthy Students, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 2016), available at <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

Notwithstanding this extensive and well considered history, the new Administration summarily rescinded both the Department of Education’s January

2015 opinion letter and the May 2016 joint guidance on the purported grounds that neither document was supported by extensive legal analysis. U.S. Dep't of Justice, Civ. Rts. Div. & U.S. Dep't of Educ., Off. for Civ. Rts., *Dear Colleague Letter* at 2 (Feb. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>. Not only does this assertion ignore the myriad court and agency decisions relied upon by the Departments of Justice and Education in reaching their joint interpretation of Title IX, it also fails to consider the federal Departments that have reached the same interpretation of similar federal anti-discrimination statutory provisions, including the Departments of Justice, Labor, and Health and Human Services.

III. The Departments Of Education And Justice Have Interpreted Title IX And Its Implementing Regulations Consistent With Other Department Interpretations Under Federal Law

A. The Department Of Justice Interprets And Enforces Title VII To Include Protections Against Discrimination Based On Gender Identity

The Department of Justice has interpreted Title VII's prohibition against sex discrimination to include a prohibition against gender identity discrimination since 2014. In April 2014, for example, the Department of Justice filed a statement of interest in support of a transgender woman alleging sex discrimination under Title VII. *Burnett v. City of Philadelphia—Free Library*, No. 2:09-04348-LAS, Dkt.

No. 85, Statement of Interest of the United States of America (E.D. Pa. April 4, 2014).

The Department of Justice announced later that year that, “considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, . . . the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.” Office of the Attorney General, *Memorandum: Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* at 2 (Dec. 15, 2014) (“Holder Memorandum”), available at <https://www.justice.gov/file/188671/download>. The Department further noted that even if Congress may not have had such claims in mind when it enacted Title VII, the “Supreme Court has made clear that Title VII must be interpreted according to its plain text, noting that ‘statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.’” *Id.* (quoting Justice Scalia’s opinion in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998)).

In March 2015, the Department of Justice filed a complaint on behalf of Rachel Tudor, a transgender woman, and alleged her university employer denied her tenured professor application because of her gender identity, gender transition,

and nonconformance with gender stereotypes. *United States v. Southeastern Okla. State Univ.*, No. 5:15-cv-00324-C, Dkt. No. 1, Complaint at ¶ 71 (W.D. Okla. March 30, 2015). On May 9, 2016, the Department of Justice also sued the State of North Carolina, the University of North Carolina, and the North Carolina Department of Public Safety alleging the state’s “bathroom bill” discriminated against transgender individuals. *United States v. State of North Carolina*, Case No. 1:16-cv-425, Dkt. No. 1, Complaint (M.D.N.C. May 9, 2016).

In sum, the Department of Justice for years prior to this dispute exercised its enforcement authority to prohibit discrimination “because of . . . sex” based on its determination that the term “sex” within Title VII encompasses gender identity.

B. The Department Of Justice’s Guidance On The 2013 VAWA Amendment Requires Transgender Persons Have Access To Sex-Segregated Facilities Corresponding To Their Gender Identity

The Violence Against Women Reauthorization Act of 2013 amended the Violence Against Women Act (“VAWA”), and conditioned receipt of Department of Justice grant funds on prohibiting discrimination, including discrimination based on gender identity. Pub. L. No. 113-4, § 3, 127 Stat. 56, 61-62 (2013) (codified as amended at 42 U.S.C. § 13925(b)(13)). An exception to this condition provided that where “sex segregation or sex-specific programming is necessary to the essential operation of a program, nothing in this paragraph shall prevent any such

program or activity from consideration of an individual's sex." 42 U.S.C. § 13925(b)(13)(B).

The Department of Justice's guidance on the nondiscrimination condition advised VAWA grant recipients that the need for victims to "share bedrooms and bathrooms" could be "a significant consideration supporting" the need "to segregate beneficiaries of the opposite sex by bedroom and bathroom." U.S. Dep't of Just., Off. for Civ. Rts., *Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, at 7 (Apr. 9, 2014), available at www.justice.gov/ovw/docs/faqs-ngc-vawa.pdf. The Department also explained how a recipient could permissibly consider a transgender person's "sex" to segregate facilities within the meaning of 42 U.S.C. § 13925(b)(13)(B).⁹ It advised that "[a] recipient that operates a sex-segregated or sex-specific program should assign a beneficiary to the group or service which corresponds to the gender with which the beneficiary identifies." *Id.* at 8. The Department further advised that a recipient should give "serious consideration" to "[a] victim's own views with respect to personal safety" and "ensure that its

⁹ The Department of Justice has taken the position that "[t]he term 'sex' carries the same meaning in VAWA that it does in Title IX and Title VII." *United States v. State of North Carolina*, No. 1:16-cv-425, Dkt. No. 74, Memorandum at 35 (M.D.N.C. July 5, 2016) (citing *Schwenk*, 204 F.3d at 1202).

services do not isolate or segregate victims based upon actual or perceived gender identity.” *Id.* at 8-9.

C. The Department Of Labor Has Interpreted Federal Law Within Its Purview Consistent With Title VII To Provide Protections Against Gender Identity Discrimination

The Department of Labor has also interpreted the federal laws barring sex discrimination within its interpretive authority to include protections against gender identity discrimination, consistent with Title VII.

On June 30, 2014, the Department of Labor announced it would update its enforcement protocols and anti-discrimination guidance to “reflect current law” and clarify that the Department provides “the full protection of the federal non-discrimination laws that” it enforces for “transgender individuals.” U.S. Dep’t of Labor, Secretary Thomas Perez, *Justice and Identity* (June 30, 2014), available at <https://obamawhitehouse.archives.gov/blog/2014/07/01/justice-and-identity>. The Department also announced its Office of Federal Contract Compliance Programs (“OFCCP”), Civil Rights Center (“CRC”), and Office of Safety and Health Administration (“OSHA”) would issue “guidance to make clear that discrimination on the basis of transgender status is discrimination based on sex.” *Id.*

The OFCCP is a civil rights and worker protection agency, and is charged with enforcing anti-discrimination provisions set forth in Executive Order 11246,

as amended, including those that protect against sex discrimination.¹⁰ 79 Fed. Reg. 72,985, 72,985 (Dec. 9, 2014). In August 2014, the OFCCP issued Directive 2014-02 and stated that “existing agency guidance on discrimination on the basis of sex under Executive Order 11246, as amended, includes discrimination on the basis of gender identity and transgender status.” Dep’t of Labor, Off. of Fed. Cont. Compliance Programs, *Directive (DIR) 2014-02* (Aug. 19, 2014), available at https://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

Approximately one year later, and after receiving over 500 public comments, the OFCCP published a separate Final Rule, updating its regulations at 41 CFR Part 60-20 to include within the prohibition against sex discrimination protection against discrimination on the basis of gender identity. 81 Fed. Reg. 39,108, 39,118-39,119 (June 15, 2016). The Final Rule states that denying “transgender employees access to the restrooms, changing rooms, showers, or similar facilities designated for use by the gender with which they identify” is considered an “unlawful sex-

¹⁰ Prior to the issuance of Executive Order 13672, Executive Order 11246 only prohibited employment discrimination by companies doing business with the Federal Government on the bases of race, color, religion, sex, and national origin. 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965). On July 21, 2014, President Obama issued Executive Order 13672, adding sexual orientation and gender identity to the prohibited bases of discrimination under Executive Order 11246. 79 Fed. Reg. at 72,985. The OFCCP revised its implementing regulations implementing the same at 41 C.F.R. Parts 60-1, 60-2, 60-4, and 60-50 on December 9, 2014. 79 Fed. Reg. at 72,993-72,995.

based discriminatory practice” within the meaning of the OFCCP’s regulations. 41 C.F.R. § 60-20.2(b)(13).

The Department’s CRC likewise interpreted the anti-sex discrimination provisions within Section 188 of the Workforce Innovation and Opportunity Act (“WIOA”) to include protections against discrimination on the basis of gender identity. Section 188 of WIOA, among other things, prohibits discrimination on the basis of sex in the administration of, or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA. Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, § 188, 128 Stat. 1425, 1597-99 (2014). The CRC interprets the nondiscrimination provisions of the WIOA consistent with the principles of Title VII. 81 Fed. Reg. 87,130-01, 87,130 (Dec. 2, 2016). On December 2, 2016, the CRC issued a Final Rule, subject to public comment and review, stating that “complaints of discrimination based on sex stereotyping, transgender status, or gender identity will be recognized as complaints of sex discrimination” under Section 188 of WIOA. 81 Fed. Reg. at 87,135.

In 2015, OSHA also issued guidance relating to transgender persons’ access to bathroom facilities corresponding with their gender identity. U.S. Dep’t of Labor, Occupational Safety and Health Admin., *Guidance to Employers: Best Practices A Guide to Restroom Access for Transgender Workers*, OSHA

Publication 3795 (2015), available at <https://www.osha.gov/Publications/OSHA3795.pdf>. According to OSHA, gender identity “is an intrinsic part of each person’s identity and everyday life[,]” and it is “essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity.” *Id.* at 1. OSHA accordingly recommends employers avoid restricting employees from using restrooms consistent with their gender identity by using single-occupancy gender-neutral (unisex) facilities and multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls. *Id.*

D. The Department Of Health And Human Services Interpreted Section 1557 To Include Protections Against Discrimination On The Basis Of Gender Identity

Like the Departments of Education, Justice and Labor, the Department of Health and Human Services also interpreted Section 1557 of the Patient Protection and Affordable Care Act to include protections against discrimination on the basis of gender identity.

Section 1557 governs health programs or activities receiving federal financial assistance or administered by an Executive Agency or any entity established under Title I of the Patient Protection and Affordable Care Act or its amendments. 42 U.S.C. § 18116(a). Section 1557 provides that individuals in such programs or activities shall not be excluded from participation in, denied the

benefits of, or be subjected to discrimination on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (race, color, national origin), Title IX (sex), the Age Discrimination Act (age), and Section 504 of the Rehabilitation Act of 1973 (disability). The Department of Health and Human Services is authorized under Section 1557(c) to promulgate regulations to implement the nondiscrimination requirements of Section 1557. 5 U.S.C. § 301.

As early as 2012, the Department of Health and Human Services interpreted Section 1557's prohibition against sex discrimination to include a prohibition against gender identity discrimination. In a response to the National Center for Lesbian Rights in 2012, for example, the Department's OCR stated it would interpret "Section 1557's sex discrimination prohibition [to extend] to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and will accept such complaints for investigation." U.S. Dep't of Health and Human Services, *Letter to Maya Rupert*, OCR Transaction No. 12-000800 at 1 (July 12, 2012), available at <http://www.nachc.org/wp-content/uploads/2015/06/OCRLetterJuly2012.pdf>. The Department also reached a voluntary resolution with Brooklyn Hospital Center around the same time following allegations that hospital staff members had created a hostile environment for a transgender woman because she was transgender, including forcing her to share a room with a male patient. Brooklyn Hospital Ctr.

& U.S. Dep't Health and Human Servs., *Voluntary Resolution Agreement*, Transaction No. 12-147291 (July 2015), available at <https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf>.

To further inform its rulemaking under Section 1557, the Department's OCR solicited information from the public in August 2013 through a Request for Information published in the Federal Register and requested information on issues relating to the non-discrimination provisions of Section 1557. 81 Fed. Reg. 31,376, 31,376 (May 18, 2016). After receiving and considering hundreds of comments over the course of two years, the Department issued a proposed rule on September 8, 2015 entitled "Nondiscrimination in Health Programs and Activities" and invited comment by all interested parties. 80 Fed. Reg. 54,172-01 (Sept. 8, 2015). The comment period ended on November 9, 2015, at which time the Department had received 24,875 comments. 81 Fed. Reg. 31,376, 31,376 (May 18, 2016). The Department issued its Final Rule on May 18, 2016. 81 Fed. Reg. at 31,376; 45 C.F.R. Part 92. Citing the decisions of other federal agencies, including those mentioned above, the Department of Health and Human Services defined discrimination "on the basis of sex" to include discrimination on the basis of gender identity. 45 C.F.R. § 92.101. The Final Rule also made clear that each covered entity must provide individuals "equal access to its health programs or activities without discrimination on the basis of sex; and a covered entity shall treat

individuals consistent with their gender identity[.]” 45 C.F.R. § 92.206.¹¹ The Final Rule also prohibited discrimination on the basis of gender identity in the provision or administration of health-related insurance. 45 C.F.R. § 92.207.¹²

CONCLUSION

The Departments of Education and Justice have interpreted Title IX to include a prohibition against gender identity discrimination based on a substantial body of case law and administrative decision making. Their respective interpretations were also consistent with the duly developed interpretations of Title VII, VAWA and Section 1557 by the Departments of Justice, Labor, and Health

¹¹ The Final Rule also notes that covered entities must provide individuals equal access to health programs or activities without discrimination on the basis of sex, and must treat individuals consistent with their gender identity “except that a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual’s sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.” 45 C.F.R. § 92.206.

¹² The District Court for the Northern District of Texas issued a nationwide injunction against certain portions of the Department’s Section 1557 rule in December 2016. *Franciscan Alliance, Inc. v. Thomas E. Price, M.D.*, No. 7:16-cv-00108, Dkt. No. 62 Order (N.D. Tex. Dec. 31, 2016). Two other challenges to the Department’s rule are pending in the United States District Court for the District of North Dakota (*North Dakota v. Burwell*, No. 3:16-cv-386 (D.N.D. filed Nov. 7, 2016); *Catholic Benefits Ass’n v. Burwell*, No. 3:16-cv-432 (D.N.D. filed Dec. 28, 2016). The new Administration has further indicated its opposition to the prior Administration’s rule in the Northern District of Texas. See *Franciscan Alliance, Inc. v. Thomas E. Price, M.D.*, No. 7:16-cv-00108, Dkt. Nos. 92-3, Motion for Voluntary Remand and Stay, Motion for Extension of Time (N.D. Tex. May 2, 2017).

and Human Services. *Amici* therefore urge this Court to draw upon the extensive record developed by their respective Departments in performing their independent duty to faithfully interpret federal statutory law, and interpret Title IX in the same manner. *Amici* respectfully request that, consistent with the foregoing, the Court hold that Title IX's prohibition against sex discrimination includes a prohibition against gender identity discrimination.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 15-2056 Caption: G.G. v. Gloucester County School Board

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(s) Jeffrey Bleich

Party Name Arne Duncan, et al.

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