No. 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
Newport News Division

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Forcing a transgender student to use separate restrooms from everyone else interferes with that student's equal access to the resources and educational opportunities of school. G.'s uncontested testimony about his own experience under Defendant's stigmatizing policy is supported by the consensus of medical and mental health experts, *see* WPATH Br. 11-24, the experience of other transgender youth throughout this Circuit, *see* Student Br. 2-24, and the experience of school administrators working with transgender students across the country, *see* Sch. Admin. Br. 21-26. How could it *not* be stigmatizing to tell a child "that there's something so freakish about you, and so many people are uncomfortable with you, that you have to use a completely separate restroom?" *Id.* at 25.

Gloucester County School Board (the "Board") disputes none of this. Instead, it argues that, even if it is denying G. equal educational opportunity, it is doing so based on his "transgender status" and not his "sex." That is not a tenable distinction. The Board's attempt to carve out discrimination against transgender people from all other types of sex-based discrimination conflicts with modern precedent and basic principles of statutory interpretation. And the Board's assertions that allowing a transgender boy to use the boys' restroom would require abolishing sex-segregated restrooms defies common sense and the actual experience of schools, employers, and governments across the county. Far-fetched

hypothetical scenarios, misinformation, and fear of "people who appear to be different in some respects from ourselves," *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring), are not legitimate bases for harming and degrading real human beings.

I. G. Has Established a Likelihood of Success on His Title IX Claim.

A. The Board's Policy Singles Out Transgender Students for Different Treatment.

The Board's new policy was explicitly designed to regulate the restroom use of transgender students. The policy begins: "Whereas the GCPS recognizes that some students question their gender identities." JA 58. The policy then provides that students with "gender identity issues" will go to "an alternative appropriate private facility." *Id.* As the district court recognized, "[t]he School Board Resolution expressly differentiates between students who have a gender identity congruent with their birth sex and those who do not." JA 146.

Despite this explicit text, the Board asserts that the policy is non-discriminatory because it limits restroom access for all students—whether transgender or not—based on the sex assigned to them at birth (or, in the words of the Board, based on their "biological gender"). Def.'s Br. 13-14.[1] For a non-

[1] The Board and its amici use the term "biological sex" to convey the impression that sex assigned at birth "is a biological reality" and gender identity is purely "subjective." SC Br. 2. To the contrary, scientific studies indicate that gender identity also is an immutable characteristic with biological roots. *See*

transgender student, however, a distinction between gender identity and sex assigned at birth is a distinction without a difference. The Board says that non-transgender students are assigned restrooms based on their sex assigned at birth, but it would be equally accurate to say they are assigned restrooms based on their gender identity. *See also* U.S. Br. 21. The only students who are actually affected by a policy distinguishing between gender identity and sex assigned at birth are transgender students. As in other areas of law, "[t]he proper focus of the . . . inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of L.A. v. Patel*, 135 S. Ct. 2443, 2451 (2015); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Ignoring transgender individuals' gender identities treats them "profoundly differently" than everyone else. WPATH Br. 15.

In a similar vein, the Board argues that G. is not actually excluded from using the same restrooms as other students because he remains free to use the girls' restrooms. Def.'s Br. 13-14. That sophistry is reminiscent of the argument that banning same-sex couples from marrying did not discriminate against gay people because everyone, whether gay or straight, could marry someone of the opposite

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Aruna Saraswat, M.D., *et. al.*, *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (2015); Pl's Br. 4 n.3; WPATH Br. 14-15. Gender identity "has an innate component" and "is not simply a reflection of social gender norms and cultural ideas." WPATH Br. 14.

sex. *See In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008) (rejecting this argument); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (explaining that the "immutable nature" of sexual orientation "dictates that same-sex marriage is [the] only real path to this profound commitment" for lesbians and gay men). Even *Etsitty v. Utah Transit Authority* acknowledges that "use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual," and "a prohibition on such use discriminates on the basis of one's status as a transsexual." 502 F.3d 1215, 1224 (10th Cir. 2007). The effect of the policy must be assessed from the perspective of a reasonable transgender boy—not a non-transgender girl. *See also* U.S. Br. 14-16; Student Br. 10-11; Sch. Admin. Br. 27.[2]

The Board protests that it is not motivated by a desire to stigmatize G.—an assertion that can be tested only with the benefit of discovery—but "absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy." *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). "Whether an [official] practice involves disparate treatment through explicit facial discrimination does not depend on why the [official] discriminates but rather on

[2] The assertion that G. may use the girls' restroom also undermines the Board's stated interest in protecting student privacy. Even before G. came out as transgender, girls objected to his presence in the girls' restrooms because they perceived him as male. JA 32. The privacy rationale for the policy is based on the premise that students with "gender identity issues" will go to "an alternative appropriate private facility," not that transgender boys will use the girls' restrooms and transgender girls will use the boys' restrooms. JA 58.

the explicit terms of the discrimination." *Id.* A policy that expressly targets transgender students is sex discrimination regardless of the motives behind the policy.

B. Excluding Transgender Students from Using the Same Restrooms as Other Students Discriminates Against G. on the Basis of Sex.

Title IX applies "broadly to encompass diverse forms of intentional sex discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005). Discrimination "on the basis of sex" necessarily includes discrimination based on transgender status. Pl.'s Br. 22-25; U.S. Br. 8-14; NWLC Br. 2-9. Just as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), did not create a "new sex classification" for women who are insufficiently feminine or men who are insufficiently masculine, applying Title IX to transgender students does not create a "new sex classification" for transgender students. Def.'s Br. 18. It simply acknowledges the reality that a student who is discriminated against for being transgender—*i.e.* for having a gender identity different than the sex assigned to him at birth—has been discriminated against on the basis of sex. All "sex classifications" are "on the basis of sex."[3]

[3] The Board's assertion that "courts have not permitted discrimination claims to proceed based upon transgender status alone" is demonstrably untrue. Def.'s Br. 36. As cited in G.'s brief, many federal courts—including two in this Circuit—have done exactly that. *See* Pl's Br. 21-25.

The Board does not argue that it is possible to discriminate based on transgender status without taking a person's sex into account. Instead, adopting the reasoning of *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 670-72 (W.D. Pa. 2015), *appeal docketed* No. 15-2022 (3d Cir. Apr. 22, 2015), the Board relies on outdated precedent from other circuits that carved out discrimination based on transgender status from the scope of sex discrimination under Title VII. Def.'s Br. 24-25.[4] With one exception, however, the opinions cited by the Board and *Johnston* were all decided before *Price Waterhouse*. *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), *overruling recognized by Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). These early cases, which narrowly limited sex discrimination to discrimination based on the status of being a man or a woman, were "overruled by the logic and language of *Price Waterhouse*," which clarified that sex

[4] The Board also cites *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 144 (4th Cir. 1996), which held that discrimination based on sexual orientation is not covered by Title VII. Def.'s Br. 16. That is a non sequitur; an individual's gender identity and sexual orientation are two different things. *See Lewis v. High Point Reg'l Sys.*, 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (reasoning that discrimination based on a person's sexual orientation is not discrimination for "fail[ing] to act and/or identify with his or her gender").

discrimination includes discrimination for failing to "act like" a man or a woman. *Schwenk*, 204 F.3d at 1201. *See* Pl.'s Br. 23-24; U.S. Br. 10; NWLC Br. 6-7.

The Tenth Circuit's outlier decision in *Etsitty* stands alone as the only circuit court decision since *Price Waterhouse* to endorse *Holloway*, *Sommers*, and *Ulane* by holding that discrimination based on transgender status is not sex discrimination. 502 F.3d at 1221. The Board nevertheless asks this Court to follow *Etsitty* in drawing a meaningless distinction between an individual's unprotected transgender status and an individual's protected gender nonconformity. Def.'s Br. 20-23. As the Eleventh Circuit explained, however, there is inherently "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). "[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is . . . discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle v. Howard Cty. Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *accord Rumble v. Fairview Health Servs.*, No. 14-cv-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008); *see* U.S. Br. 10-11; NWLC Br. 4-5.

Disagreeing with these precedents, the Board asserts that protections for transgender people under *Price Waterhouse* must be narrowly limited to their gender-nonconforming "behavior, mannerisms, or appearance," as opposed to their gender-related anatomical characteristics. Def.'s Br. 22-23. The Board does not identify any circuit precedent applying this arbitrary limitation. A policy based on the size of a woman's breasts or other physical attributes (whether gender-conforming or not) would be an obvious case of sex discrimination. Transgender individuals, like everyone else, may not be discriminated against based on their gender-related anatomical characteristics. "[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait." *Glenn*, 663 F.3d at 1318 (quoting *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004)).[5]

[5] Nor is a distinction between gender-nonconforming appearance and gender-related anatomical characteristics supported by *Etsitty* and *Kastl v. Maricopa Cnty. Cmty. Coll. Dist. ("Kastl II")*, 325 F. App'x 492 (9th Cir. 2009). Although those cases rejected the claims of transgender plaintiffs, they did not hold that discrimination based on gender-nonconforming anatomical characteristics is not sex discrimination. To the contrary, *Kastl II* held, and *Etsitty* assumed, that the transgender plaintiffs had established a prima facie case of sex discrimination based on their exclusion from the restroom corresponding to their gender identity. *Id.* at 493; *Etsitty*, 502 F.3d at 1224. Those cases then erroneously concluded that the employer had identified nondiscriminatory reasons for the exclusion, such as safety, *Kastl II*, 325 F. App'x at 493, and fear of lawsuits, *Etsitty*, 502 F.3d at 1224. That reasoning does not withstand scrutiny. As explained by the EEOC, *Kastl II* and *Etsitty* erroneously evaluated the plaintiffs' direct evidence of

Moreover, even if the scope of *Price Waterhouse* were limited to social characteristics instead of biological ones, that distinction would still not justify discrimination with respect to restroom access. Separate restrooms for boys and girls are based on social customs regarding modesty—not compelled by "urinary biology." SC Br. 22.

The Board's arbitrary limitations on *Price Waterhouse* are gerrymandered to preserve the underlying assumption in *Holloway*, *Sommers,* and *Ulane* that discrimination based on transgender status is not sex discrimination. But *Price Waterhouse* is not the *only* reason why *Holloway*, *Sommers,* and *Ulane* were wrongly decided. *See* U.S. Br. 12-13. Even without *Price Waterhouse*, those early decisions fail as a matter of basic statutory interpretation.

The plain meaning of "sex" is not restricted to "biological" sex. To the extent that the Board or its amici argue there is a semantic distinction between discrimination on the basis of "sex" and discrimination on the basis of "gender," *see* SC Br. 7 (citing to APA glossary from 2011), their argument not only conflicts

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discrimination under the *McDonnel Douglas* framework used for evaluating indirect evidence, and those decisions erroneously treated sex-based justifications as gender neutral. *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *7 n.6 (Apr. 1, 2015); *cf. Johnson Controls*, 499 U.S. at 198 ("The [lower] court assumed that because the asserted reason for the sex-based exclusion . . . was ostensibly benign, the policy was not sex-based discrimination. That assumption, however, was incorrect."). This Court should not repeat the same mistakes.

with *Price Waterhouse*, but is also anachronistic.[6] At the time Title VII and Title IX were enacted, contemporaneous dictionaries did not distinguish between sex and gender as distinct concepts, and they included psychological and behavioral differences within the definition of "sex." *See* Am. Heritage Dictionary 548, 1187 (1973) (defining "sex" as, *inter alia*, "the physiological, functional, and psychological differences that distinguish the male and the female" and defining "gender" as "sex"); Webster's New Collegiate Dictionary 347, 1062 (1973) (defining "sex" to include "behavioral characteristics" that "distinguish males and females" and defining "gender" as "sex"); 9 Oxford English Dictionary ("OED") 577-78 (1939) (defining "sex" as, *inter alia*, a "distinction between male and female in general").[7]

Holloway, *Sommers,* and *Ulane* reasoned that discrimination based on "sex" under Title VII should be construed narrowly because Congress ostensibly "had a narrow view of sex in mind" when it passed Title VII and did not specifically

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[6] The APA has replaced the 2011 guidelines with new guidelines that no longer use the term "biological sex." *See* Pl's Br. 4 n.3.

[7] South Carolina cites to some of the same definitions while omitting the language quoted above. SC Br. 6-7. South Carolina also erroneously relies on a proffered distinction between "sex" and "gender" from a portion of Judge Niemeyer's opinion in *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996), that was not joined by any other judge on the panel. In support of that distinction, Judge Niemeyer, in turn, cited Justice Scalia's dissenting opinion in *J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994), which, similarly, has never been adopted by the majority.

intend for the statute to prohibit discrimination based on transgender status. *Ulane*, 742 F.2d at 1086; *accord Sommers*, 667 F.2d at 750 ("[T]he legislative history does not show any intention to include transsexualism in Title VII."). That approach improperly elevates "judge-supposed legislative intent over clear statutory text," which "is no longer a tenable approach to statutory construction." *Schroer*, 577 F. Supp. 2d at 307. Sweeping language in a statute cannot be judicially narrowed based on suppositions about what was in the minds of the legislators who drafted it. "[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945); *accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) (refusing to narrow scope of civil RICO even though it has "evolve[ed] into something quite different from the original conception of its enactors").

Since *Ulane*, *Sommers* and *Holloway*, the Supreme Court has consistently refused to restrict the scope of statutory protections from sex discrimination based on suppositions about legislative intent. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (rejecting argument that Title VII does not cover sexual harassment because Congress was concerned with "'tangible loss' of 'an economic character'"); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)

(applying Title VII to "male-on-male sexual harassment in the workplace" even though it "was assuredly not the principal evil Congress was concerned with when it enacted Title VII"); *see also Wrightson*, 99 F.3d at 144 (Title VII applies to same-sex harassment by gay supervisor because "where Congress has unmistakably provided a cause of action, as it has through the plain language of Title VII, we are without authority in the guise of interpretation to deny that such exists, whatever the practical consequences"). Courts may not disregard the text of Title IX based on their own assumptions that Congress did not intend to protect students from *this kind* of sex discrimination.

Supreme Court precedent also negates the Board's assertion that Congress's failure to pass new bills explicitly protecting against discrimination based on transgender status indicates that Congress has excluded such protections from Title IX. Def.'s Br. 44; *cf. Holloway*, 566 F.2d at 662; *Sommers*, 667 F.2d at 750; *Ulane*, 742 F.2d at 1086. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Ameur v. Gates*, 759 F.3d 317, 331 (4th Cir. 2014); *accord Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Any argument that Congress has ratified *Holloway*, *Sommers*, and *Ulane* by not overturning those decisions is nullified by the countervailing argument that Congress has ratified more recent

decisions disagreeing with *Holloway*, *Sommers*, and *Ulane* by not overturning those decisions either.

It would be particularly inappropriate to read exceptions into Title IX because Congress has already explicitly included a discrete list of exceptions in the statutory text. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Far from supporting the Board's argument, the fact that Congress thought it necessary to create a statutory exception in 20 U.S.C. § 1686 for separate living quarters reinforces the conclusion that without a statutory exception, the plain text of Title IX would prohibit the practice. *Contra* Family Found. Br. 9-10. Indeed, the sponsors of Title IX declined to create a free-standing exception analogous to the "bona fide occupational qualification" exception in Title VII because they wanted to delegate those questions to the administrative agency to address in its discretion, not to the courts to resolve on an ad hoc basis. *See* 117 Cong. Rec. 30407 (1971) (statement of Sen. Bayh) ("I would not like to see that specific language written into the bill, because all too often this is the hook on which discrimination can be hung.").[8] When Congress has disagreed with the Title IX's implementing

[8] The Family Foundation notes that Senator Bayh stated the proposed bill would not require desegregation of the "men's locker room." 117 Cong. Rec. 30407 (1971) (statement of Sen. Bayh). During the same colloquy, however, Senator Bayh said that resolution of such issues would be delegated to the administering agency. *Id.* Moreover, allowing transgender boys to use the boys' restroom is fully consistent with maintaining sex-segregated restrooms.

regulations, it has acted quickly to enact new statutory exceptions. *See* 20 U.S.C. §§ 1681(a)(6)-(9); *Implementing Title IX: The New Regulations*, 124 U. Pa. L. Rev. 806, 808 (1976). If the Board thinks the existing exceptions, as interpreted by the Department of Education ("ED"), are too narrow, its remedy lies with Congress.

Because the plain text of Title IX covers all discrimination "on the basis of sex," courts must "accord it a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (internal quotation marks and brackets omitted).[9]

[9] South Carolina asserts that because Title IX was passed pursuant to the Spending Clause, it must be narrowly construed to comply with *Pennhurst State Sch.& Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Because the Board never raised this argument below or in its appellate brief, the argument is waived. *See United States v. Buculei*, 262 F.3d 322, 333 n.11 (4th Cir. 2001).

South Carolina's *Pennhurst* argument also fails on the merits. The Supreme Court has consistently held that Title IX provides "clear notice" under *Pennhurst* so long as money damages are limited to claims of intentional discrimination, as opposed negligence or vicarious liability. *Davis ex rel LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639-43 (1999). It has never used *Pennhurst* to narrow the scope of the underlying definition of "on the basis of sex" because recipients have already been put on notice that Title IX applies "broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 183.

Moreover, even if notice were inadequate, the lack of notice would not affect "the scope of the behavior Title IX proscribes," but merely the availability of "money damages." *Davis*, 526 U.S. 639; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). Such concerns have no bearing on G.'s motion for a preliminary injunction.

C. There Is No Conflict Between Maintaining Sex-Segregated Restrooms and Providing Equal Access to Transgender Students.

As the United States explains, 34 C.F.R. § 106.33 does not give schools a blank check to discriminate against transgender students. U.S. Br. 22-29. In an opinion letter from its Office of Civil Rights ("OCR") and in its Statement of Interest and amicus brief, ED has interpreted 34 C.F.R. § 106.33 as authorizing schools to provide separate restrooms for boys and girls, but not authorizing schools to deny transgender students equal access to those restrooms in accordance with their gender identity.

Under this Circuit's precedent, ED's interpretation of its own regulation is entitled to great deference under *Auer* and is "controlling unless it is plainly erroneous or inconsistent with the regulation." *D.L. ex rel. K.L. v. Balt. Bd. of Sch. Comm'rs*, 706 F.3d 256, 259-60 (4th Cir. 2013). *But see Johnston*, 97 F. Supp. 3d at 678 (interpreting 34 C.F.R. § 106.33 de novo without the benefit of ED's guidance). Here, ED's interpretation appropriately harmonizes the text of the regulation with the statutory mandate of equal educational opportunity and would have the power to persuade even without the benefit of such deference.

The Board argues that ED's interpretation is inconsistent with the regulation and would mean that sex-segregated restrooms "would have to be abolished." Def.'s Br. 37 (quoting *Johnston*, 97 F. Supp. 3d at 678). As discussed above, however, sex-segregated restrooms have never been based solely on individuals'

sex assigned at birth. Non-transgender students have always used restrooms that correspond with *both* the sex assigned to them at birth *and* their gender identity. Allowing transgender students to use the restrooms corresponding with their gender identity (but not the sex assigned to them at birth) is no less "sex segregated" than forcing transgender students to use the restrooms that correspond with the sex assigned to them at birth (but not their gender identity). Indeed, allowing transgender boys to use the same restrooms as other boys is far *more* consistent with social mores regarding privacy than a policy that places a transgender boy in the girls' restroom. As the experience of countless other school districts shows, there is no conflict between maintaining sex-segregated restrooms and providing transgender students equal access to them. *See* Sch. Admin. Br. 26-27. G. "simply needs to be recognized as the boy that he is and treated by the school like any other boy." WPATH Br. 21.

In accusing ED of creating "a completely new regulation concerning the rights of transgender students," Def.'s Br. 32, the Board fails to come to grips with the fact that 34 C.F.R. § 106.33 is a limited *exception* to Title IX's broad command. *All* disparate treatment on the basis of sex—including disparate treatment in sports teams or restrooms—is prohibited unless it is expressly permitted by one of the "specific, narrow exceptions to that broad prohibition" in the statute or regulations. *Jackson*, 544 U.S. at 175; *Mercer v. Duke Univ.*, 190

F.3d 643, 646 (4th Cir. 1999). OCR does not argue that 34 C.F.R. § 106.33 "means that transgender students must be allowed to use the restroom they identify with." Def.'s Br. 31. Instead, OCR has explained that 34 C.F.R. § 106.33 does not provide an *exception* to Title IX that allows the Board to discriminate against transgender students. The regulation does not add to or subtract from the rights of transgender students to use restrooms consistent with their gender identity. It simply does not speak to that issue at all. Even if the Board's contrary interpretation of the regulation were also reasonable, that would still not be enough to overcome the deference this Court must give to ED's interpretation under *Auer*.

The Family Foundation argues that ED's interpretation is not entitled to deference because it is ostensibly a newfound position. *See* Family Found. Br. 14. "A mere change in position, however, [does] not in itself render [an agency's] current position unreasonable" under *Auer*. *Philip Morris USA, Inc. v. Vilsack*, 736 F.3d 284, 295 (4th Cir. 2013); *accord Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296, n.7 (2009) (applying *Auer* deference even though agency's interpretation "has fluctuated"). Moreover, as explained in the United States' brief, it is only in recent years—as transgender adolescents have been able to live openly, honestly, and with medically necessary treatment—that schools have adopted policies purporting to assign restrooms based on "birth" or "biological" sex. U.S. Br. 28-29. ED has simply addressed how its longstanding

regulations apply in this new context. *Cf. Philip Morris USA*, 736 F.3d at 295 (applying *Auer* deference when agency had not previously taken a position on an issue because the issue had not previously arisen).

Finally, the Board cannot argue that it has been unfairly surprised by ED's interpretation. The Board member who voted against the policy specifically warned that it conflicted with guidance and consent agreements by the Department of Justice and OCR. Dec. 9 Video Tr. 2:07:02. But a Board member supporting the policy said "[w]e can't be fearful of the ACLU, the OCR, or the DOJ." *Id.* 1:58:26. Assertions of unfair surprise do not relieve parties of their obligation "to conform their conduct to an agency's interpretations once the agency announces them." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

II. G. Has Established a Likelihood of Success on His Equal Protection Claim.

Excluding transgender students from using the same restrooms as other students is discrimination based on gender under the Fourteenth Amendment. G. does not ask this Court to recognize transgender status as a new suspect classification. Def.'s Br. 14-15. He is simply applying the same heightened scrutiny test that applies to all forms of gender discrimination. "Because these

protections are afforded to everyone, they cannot be denied to a transgender individual." *Glenn*, 663 F.3d at 1319.[10]

The Board has not carried the "demanding" burden of demonstrating that its interests in privacy and safety are substantially advanced by prohibiting transgender students from the same restrooms as their peers. *United States v. Virginia*, 518 U.S. 551, 533 (1996).

Privacy

The Board relies on *Johnston* for the proposition that segregating "bathroom and locker room facilities on the basis of birth sex is substantially related to a sufficiently important governmental interest" in protecting privacy. 97 F. Supp. 3d at 669. But none of the cases cited by *Johnston* actually applied heightened scrutiny, and many of them had no connection whatsoever to the proposition for which they were cited. *Johnston* reasoned that because it is constitutional to provide different restrooms for men and women, it must also be constitutional to require transgender students to use separate restrooms no other student is required

[10] Although G. does not seek recognition of a "new suspect classification" on this appeal, courts have increasingly recognized that transgender status independently meets the criteria for recognizing a suspect or quasi-suspect classification. *See Adkins v. City of New York*, No. 14-CV-7519 JSR, 2015 WL 7076956, at *3 (S.D.N.Y. Nov. 15, 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015). This Court has not yet addressed the issue.

to use. To the contrary, *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993),[11] and similar cases pointed to restrooms for men and women as an example of facilities that are separate but truly equal and non-stigmatizing, *cf. Virginia*, 518 U.S. at 533 n.7; those cases do not hold that privacy interests (or any other interest) can justify treatment that is separate and unequal. *See* U.S. Br. 22 n.8. Separate restrooms for boys and girls do not stigmatize anyone as inferior; separate restrooms for transgender students stigmatize them as unfit to use the same facilities as their peers. Equal protection requires courts to take these social realities into account. *See* Student Br. 2-23; WPATH Br. 21-30; Sch. Admin. Br. 21-26. *See* Pl's Br. 30.

Moreover, all the constitutional privacy cases cited by the Board involved privacy in connection with nudity. Def.'s Br. 27-28. The Board has not presented any evidence—not even a "self-serving" declaration—to demonstrate that banning transgender students from the same restrooms other students use has any connection to preventing exposure to nudity, especially in light of the urinal dividers and additional privacy protections it has already installed.

In addition, the privacy cases cited by the Board and amici involved individuals who did not have the opportunity to opt out based on their own privacy objections. Here, all students have the option to use a separate private restroom to

[11] To the extent that dicta in *Faulkner* employed the "substantially comparable" standard from this Court's *VMI* cases, that standard has been expressly overruled by *Virginia*, 518 U.S. at 554-55.

protect their own privacy, and no student ever has to use the shared restrooms if he or she is uncomfortable with the "mere presence" of G. or any other student. JA 162. *See Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (employee who did not want to use same restroom as transgender employee was free to use unisex restroom instead). Although this case does not concern access to locker rooms, all students have access to private changing areas in the locker rooms too. Pl.'s Br. 41 n.13. If the Board believes these non-discriminatory alternatives are insufficient, it has the burden of "present[ing] sufficient evidence" to demonstrate their inadequacy. *See H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 256 (4th Cir. 2010).

All students have the option to protect their own privacy, however broadly defined, but—under any standard of scrutiny—the Board cannot force G. and other transgender students to use separate restrooms from everybody else in order to shield other students from their "mere presence." JA 162. *See* U.S. Br. 20; Sch. Admin. Br. 23-26.

Safety

The Board cryptically alludes to an interest in "safety" without further elaboration. Def.'s Br. 26. If the Board is arguing that transgender students must be excluded for *their own* safety, then the Board has improperly restricted transgender students' rights based on a "heckler's veto." "The possibility of

disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." *Wright v. Georgia*, 373 U.S. 284, 293 (1963). "[T]he reality of private biases and the possible injury they might inflict . . . may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Moreover, such safety concerns have no basis in the actual experiences at Gloucester High School or other school districts across the country. JA 31; Sch. Admin. Br. 16-21. *Cf. Watson v. City of Memphis*, 373 U.S. 526, 536-37 (1963) ("asserted fears of violence and tumult" were merely "personal speculations or vague disquietudes of city officials" and contradicted by experiences of other jurisdictions).

On the other hand, if the Board is referring to the safety of *non-transgender* students, its argument appears to be based on the notion that boys will pretend to be transgender girls in order to gain access to the girls' restrooms. There is no evidence that this type of misconduct has ever actually occurred. *See* Sch. Admin. Br. 16-21. Such concerns reflect a fundamental misunderstanding of gender identity and Gender Dysphoria, as recognized by every mainstream mental health

organization. *See* WPATH Br. 12-21; *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013) (recognizing WPATH Standards of Care as scientific consensus).[12]

There is no dispute that G. has a male gender identity and a bona fide diagnosis of Gender Dysphoria. Allowing G. to use the appropriate restroom as part of a full social role transition does not mean "that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion." *Doe v. Reg'l Sch.Unit 26*, 86 A.3d 600, 607 (Me. 2014); *see also Lusardi*, 2015 WL 1607756, at *8 (noting that "[o]n this record" there is "no cause to question" employee's gender identity).

Far-fetched hypothetical scenarios that have never occurred in reality cannot provide an "exceedingly persuasive" basis for the Board's categorical ban on all transgender students from using the same restrooms other students are permitted to use. *Virginia*, 518 U.S. at 531. Such "negative attitudes," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), or fear of "people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374-75 (Kennedy, J., concurring), cannot justify discrimination under any standard of scrutiny.

[12] The Liberty Center amicus brief reflects the views of fringe individuals and institutions with a long history of dissenting from the mainstream medical community's views about sexual orientation and gender identity.

III. G.'s Equal Protection and Title IX Claims Cannot Be Dismissed on the Pleadings.

Even if the Court were to conclude that G. has not established a likelihood of success on the merits, the Court should still reject the Board's request to affirm the Title IX dismissal and dismiss G.'s equal protection claim. The Board asserts through counsel that it enacted the transgender restroom policy for benign reasons. But even if the classification were not discriminatory on its face, *see Johnson Controls*, 499 U.S. at 199, the Board's motivation would still be a disputed question of fact that cannot be resolved on a motion to dismiss. *Cf. Etsitty*, 502 F.3d 1215 (ruling on summary judgment after full discovery on whether stated motive was pretext); *Kastl II*, 325 F. App'x at 493 (same).

In light of the derogatory statements made by speakers at the Board meetings, this is not a case where "[o]nly speculation can fill the gaps in [the] complaint" to draw an inference of improper motive. *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 586 (2015). The Board admits it passed the transgender restroom policy in response to "numerous complaints from parents and students." JA 57-58. But the Board has not disclosed the substance of the phone calls and emails it received, so there is no way to know whether those complaints were based on improper motives. "[I]t is well-established that community views may be attributed to government bodies when the government acts in response to these views." *A Helping Hand, LLC v. Baltimore Cty., Md.*, 515 F.3d 356, 366

(4th Cir. 2008). Even if Board members merely capitulated to the threats of being voted out of office, the Board cannot escape a finding of improper motive "by deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448. The Board may not short-circuit discovery into these questions of fact with counsel's unsworn assertions.

IV. G. Has Satisfied the Remaining Preliminary Injunction Factors.

Because G. is likely to prevail on the merits, he has also satisfied the remaining preliminary injunction factors.[13] The uncontested evidence submitted by G. also independently demonstrates he is experiencing irreparable harm and the balance of hardships tips in his favor. Tellingly, the Board makes no attempt to defend the court's arbitrary and erroneous exclusions of uncontested testimony because it was presented by declaration,[14] contained hearsay, was "self-serving," or came from an expert retained for litigation. Def.'s Br. 42. These errors of law necessarily constitute an abuse of discretion.

To be sure, in some circumstances a factfinder may choose to disbelieve even uncontested evidence when that evidence is not credible. But even "a jury

[13] On appeal, the Board abandons its argument that G. seeks a "mandatory injunction" instead of a "prohibitory" one.

[14] The Board argues that the court gave the parties a chance to present additional testimony at the hearing, Def.'s Br. 43 n.21, but the court never indicated that it would disregard uncontested facts if they were not presented by live testimony.

may not reject testimony that is uncontradicted and unimpeached (directly, circumstantially, or inferentially) unless credibility is at issue." *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 75 (1st Cir. 2002); *cf. Menghesha v. Gonzales*, 450 F.3d 142, 144 (4th Cir. 2006) ("In the absence of contrary evidence or an adverse credibility determination, we accept [petitioner's] uncontested account as true."). The court did not conclude that the testimony from G. or Dr. Ettner was not credible or implausible on its face. The court's preference for live testimony, non-hearsay, declarations from disinterested parties, and testimony from treating physicians (preferences that were not communicated to plaintiff prior to the hearing) does not undermine the uncontested evidence that was actually presented.

The Board argues that Dr. Ettner's declaration was not probative because she primarily discussed accepted standards of care for treating Gender Dysphoria and the medical necessity, as a general matter, for an adolescent to be able to use the restroom consistent with his gender identity. But it does not require a great leap of logic to conclude that expert testimony regarding the harms that typically occur when gender dysphoric students are denied access to the appropriate restroom is relevant in corroborating G.'s own testimony. The court, however, refused to assess G.'s psychological distress within the context of Dr. Ettner's testimony because it erroneously concluded that G.'s Gender Dysphoria diagnosis was inadmissible hearsay and would "not be considered." JA 163. The Board has

never disputed that G. has been diagnosed with Gender Dysphoria, and the court abused its discretion by refusing to analyze the testimony from G. and Dr. Ettner in light of that uncontested fact.

The Board argues any irreparable harm to G. is outweighed by the "safety and privacy interests" of non-transgender students, which ostensibly "will go unprotected if an injunction is entered." Def.'s Br. 42. No one has ever argued that G. is a threat to anyone's safety. And with the single-stall restrooms, no student will ever have to be in the same restroom with G. if they object to his mere presence, or the mere presence of anyone else. No one's asserted privacy rights "will go unprotected" if G. is allowed to use the boys' restroom. Def.'s Br. 42.

V. The Case Should Be Reassigned on Remand.

As explained in G.'s opening brief, G.'s request for the case to be reassigned on remand is based on several troubling statements the court made during oral argument. The Board does not argue that these statements are, in fact, unobjectionable. Unlike *United States v. North Carolina*, the court's statements based on preconceived beliefs about sexuality and other topics were not simply harsh criticisms of the terms of a consent decree, and this case does not have a "lengthy history" that would make the "waste of judicial resources" from reassignment "disproportionate to any increased appearance of fairness." 180 F.3d 574, 583 (4th Cir. 1999).

Any fair reading of the transcript shows that G.'s complaint is not "that the District Court judge has already ruled against him." Def.'s Br. 45. The court's statements from the bench regarding Gender Dysphoria, biology, sexuality, and other topics will continue to undermine public confidence in the proceedings regardless of which side ultimately prevails. Whether this Court affirms or reverses the court's ruling, this case presents "unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest." *United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir. 1991) (internal quotation marks and citations omitted).

CONCLUSION

The denial of Plaintiff's motion for preliminary injunction should be reversed, the dismissal of the Title IX claim should be reversed, and the case should be reassigned on remand.

Respectfully submitted,

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Dated: December 7, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

Dated: December 7, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, I filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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