No. 15-2056

In the United States Court of Appeals for the Fourth Circuit

G.G., by his next friend and mother, Deirdre Grimm,

Plaintiff – Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellee.

On Appeal from the United States District Court
For the Eastern District of Virginia
No. 4:15-cv-00054-RGD-DEM

SUPPLEMENTAL BRIEF OF GLOUCESTER COUNTY SCHOOL BOARD

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INTRODUCTION

This appeal asks whether the restroom and locker room policy of the Gloucester County School Board ("Board") is lawful under Title IX of the Education Amendments of 1972 ("Title IX"). *See* 20 U.S.C. § 1681(a) (prohibiting discrimination "on the basis of sex" in federally funded educational programs). The case began with the Board confronting a difficult situation—whether a student who was born female but identifies as male could use the boys' restroom. After listening to parents, students and the broader community at two public meetings, the Board adopted a policy confirming that restrooms and locker rooms are designated by biology alone, not by a student's gender identity, while alternative facilities would be provided for any who need them. JA15–16. There is no perfect solution to this dilemma, but the Board believed its policy sensibly balanced both the privacy of the student in question as well as the privacy expectations of other students and their parents.

Whether the policy is *lawful* under Title IX, however, should never have been in question. Indeed, the Board's policy is not only permitted by Title IX, but *exceeds* what Title IX requires. After all, Title IX and its regulations have explicitly permitted sex-separated restrooms and locker

rooms for over forty years. *See, e.g.*, 34 C.F.R. § 106.33 (permitting "separate toilet, locker room, and shower facilities on the basis of sex," provided the facilities for "students of one sex" are "comparable" for "students of the other sex"). The Congress that enacted Title IX never dreamed that it was ending schools' ability to provide those basic privacy protections to students, and it never contemplated the situation facing the Board in this case. Thus, far from violating anyone's civil rights under Title IX, the Board's policy models one way schools can prudently address this sensitive and novel issue.

The first time this case came before this Court, a split panel resolved the controversy, not by referring to the text and structure of Title IX, but instead by deferring to federal agency guidance. While calling that guidance "novel" and "not … intuitive," *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016), *vacated and remanded,* 137 S. Ct. 1239 (2017), the majority nonetheless deferred to the view that Title IX requires access to restrooms—and presumably also locker rooms and showers—based on students' "gender identity" instead of physiological sex. *Id.* at 723. Things have changed, however. Those guidance documents have been rescinded, and the federal agencies in

charge of enforcing Title IX—the Departments of Education and Justice—have abandoned their reasoning.[1] Now on remand from the Supreme Court the merits question is cleanly posed: is the Board's restroom and locker room policy lawful under Title IX?

The answer is yes. Title IX and its implementing regulation have plainly permitted policies like the Board's for over forty years.

Why does the plaintiff nevertheless insist the answer is no? Because at the core of the plaintiff's lawsuit is the claim that the term "sex" in Title IX really means, not one's biological status as a male or female, but one's internal "gender identity." Consequently, the plaintiff asserts that the Board therefore *must* allow access to school restrooms on the basis of gender identity regardless of a student's physiological sex. But that novel idea is incompatible with Title IX's text, structure, and history. It is a concept that would not merely broaden Title IX beyond what its enacting Congress expected, but would usher in a new world

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[1] *See* Feb. 22, 2017 Dear Colleague Letter, at 1 (stating the Departments "have decided to withdraw and rescind [those] … guidance documents ... and will not rely on the views expressed within them"), available at https://www.justice.gov/opa/press-release/file/941551/download.

where biological males occupy not only the same restrooms, locker rooms, showers as females, but the same basketball, lacrosse, and wrestling teams. That is not merely an unforeseen application of Title IX but a subversion of it. If such a policy is to be part of Title IX—and therefore a condition on federal funding for virtually every educational program in the nation—then separation of powers requires that Congress must enact it, not an administrative agency or a court.

The district court properly dismissed the plaintiff's Title IX claim as foreclosed by the text of Title IX and its implementing regulation. This Court should affirm.

STATEMENT OF THE ISSUE

This case presents the following issue:

Is a school policy providing separate restrooms and locker rooms on the basis of physiological sex rather than gender identity permitted by Title IX and its implementing regulation?

STATEMENT OF THE CASE

The question posed by this case is answered by the straightforward text of the Title IX provisions permitting sex-separated restrooms, locker rooms, and showers. Those provisions are further illuminated by their

history, however, and so this brief starts there and then proceeds to the facts and procedural background.

A. Statutory and Regulatory Background

In the words of its principal sponsor, Senator Birch Bayh of Indiana, Title IX aimed "a death blow" at "one of the great failings of the American educational system"—namely, "corrosive and unjustified discrimination against women." 118 Cong. Rec. 5809, 5803. Congress did so by enacting in Title IX a straightforward ban on discrimination in federally funded educational programs on the basis of "sex." 20 U.S.C. § 1681(a). At the same time, Title IX preserved settled expectations of privacy between males and females by permitting "separate living facilities for the different sexes," 20 U.S.C. § 1686, and "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33 ("section 106.33"). Such exceptions were "designed," as Bayh explained, "to allow discrimination only in instances where personal privacy must be preserved." 121 Cong. Rec. 16060.

1. Title IX prohibited sex discrimination as a means of ending educational discrimination against women.

Title IX's ban on sex discrimination emerged from Congress's multifaceted efforts in the early 1970's to address discrimination against

women. *See generally* Paul C. Sweeney, *Abuse, Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. Rev. 41, 50–54 (1997). Frustrated with lack of progress on the Equal Rights Amendment ("ERA"), Senator Bayh decided to pursue its goals through other means. Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 Clev. St. L. Rev. 463, 467 (2007). Believing that the worst discrimination against women was in "the educational area," *id.* at 468, Bayh focused on the Higher Education Act of 1965, which granted money to universities. Sweeney, *supra*, at 51. In 1972, while that Act was being amended, floor amendments added the text that is now Title IX. *See* 117 Cong. Rec. 39098; 118 Cong. Rec. 5802–03.

Those amendments were principally designed to end discrimination against women in university admissions and appointments. *See* 117 Cong. Rec. 39250, 39253, 39258; 118 Cong. Rec. 5104–06. Title IX's architects viewed such discrimination as rooted in pernicious stereotypes about women. As Bayh vividly put it, "[w]e are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband,

and finally marry, have children, and never work again." 118 Cong. Rec. 5804.

2. Title IX allows certain facilities and programs to be separated by sex.

At the same time, Congress understood that not all distinctions between men and women are based on stereotypes. Foremost among those are distinctions needed to preserve privacy. As ERA proponents had grasped, "disrobing in front of the other sex is usually associated with sexual relationships," Barbara A. Brown, Thomas I. Emerson, Gail Falk, Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 901 (1971), and thus implicated the recently-recognized right to privacy. *See id.* at 900–01 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). That privacy right, the proponents believed, "would permit the separation of the sexes" in intimate facilities such as "public rest rooms[.]" *Id.*

Both the Senate and House likewise grasped this commonsense principle. For instance, Senator Bayh noted that sex separation would be justified where "absolutely necessary to the success of the program" such as "in classes for pregnant girls," and "in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec.

5807. [2] Representative Thompson—"disturbed" by suggestions that banning sex discrimination would prohibit all sex-separated facilities—proposed an amendment stating that "nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex." 117 Cong. Rec. 39260. The language was introduced that day and adopted by the House without debate. 117 Cong. Rec. 39263. Although Bayh's version lacked a similar proviso, the conference committee included Thompson's language without further discussion. H.R. Conf. Rep. No. 92-1085 at 222.

Subsequently, the Department of Health, Education, and Welfare ("HEW") proposed a Title IX regulation providing that sex separation would be permitted for "toilet, locker room and shower facilities." HEW, 39 Fed. Reg. 22228, 22230 (June 20, 1974). The final regulations retained HEW's clarification. HEW, 40 Fed. Reg. 24128, 24141 (June 4, 1975); 34

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[2] When unsuccessfully introducing similar legislation the year before, Bayh observed that, by "provid[ing] equal [educational] access for women and men students … [w]e are not requiring that intercollegiate football be desegregated, *nor that the men's locker room be desegregated*." 117 Cong. Rec. 30407 (emphasis added).

C.F.R. § 106.33.[3] HEW's regulations continued to use the statutory term "sex," without elaboration.

When Congress considered the HEW regulation, Senator Bayh again linked the issue to privacy. He introduced into the record a scholarly article explaining that Title IX "was designed to allow discrimination only in instances where personal privacy must be preserved. For example, the privacy exception lies behind the exemption from the Act of campus living facilities. The proposed regulations preserve this exception, as well as permit 'separate toilet, locker room, and shower facilities on the basis of sex.'" 121 Cong. Rec. 16060.

Title IX regulations contain another relevant provision for separating male and female students, one also based on physical differences. Funding recipients are prohibited from discriminating on the basis of sex in athletic activities and must provide "equal athletic

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[3] HEW's regulations were recodified in their present form after the reorganization that created the Department of Education in 1980. *See* United States Dep't of Educ., 45 Fed. Reg. 30802, 30960 (May 9, 1980). Additionally, because multiple agencies issue Title IX regulations, the section 106.33 exception appears verbatim in 25 other regulations. *See, e.g.*, 7 C.F.R. § 15a.33 (Agriculture); 24 C.F.R. § 3.410 (Housing & Urban Development); 29 C.F.R. § 36.410 (Labor); 38 C.F.R. § 23.410 (Veterans Affairs); 40 C.F.R. § 5.410 (EPA).

opportunity for members of both sexes." 34 C.F.R. § 106.41(a), (c); HEW, 40 Fed. Reg. 24128 (June 4, 1975). Nonetheless, recipients are permitted to establish "separate teams for members of each sex where selection … is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b).

3. Title IX is enforced by multiple agencies through formal rules and clear notice.

Because Title IX is authorized by the Spending Clause, *see Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992), Congress has vested enforcement responsibility with "[e]ach Federal department and agency … empowered to extend Federal financial assistance to any education program or activity[.]" 20 U.S.C. § 1682. Title IX may be enforced by terminating federal financial support to noncompliant institutions. 20 U.S.C. § 1682. Agencies seeking to enforce Title IX in that way must comply with certain procedural requirements, including notice and opportunity for a hearing, and must provide written reports on the termination to Congress. *Id.*

B. Factual Background

The student who invoked Title IX in this case, known by the initials G.G., is an 18-year-old senior at Gloucester High School who was born

female. JA9, 11.[4] According to G.G., however, "I was born in the wrong sex." JA33. In April 2014, a psychologist diagnosed G.G. with gender dysphoria, a condition involving "incongruence between a person's gender identity" and birth sex. JA9. G.G. defines "gender identity" as one's "innate sense of being male or female," in contrast to one's "sex … assigned at birth." JA12. G.G. was advised to "transition" to a male gender identity by adopting a male name and "us[ing] … the [boys'] restroom." JA13. G.G. has since begun hormone therapy and legally adopted a male name, JA13–14, but has not undergone any genital surgery and remains anatomically female. JA38.[5]

In August 2014, before the 2014–15 school year began, G.G. and G.G.'s mother met with the Gloucester High School principal and guidance counselor. JA30. The officials "expressed support for [G.G.] and

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[4] The factual background is taken primarily from G.G.'s complaint and declaration. JA9–24, 28–33, 34–50. G.G. is scheduled to graduate on June 10, 2017. Pl. Mot. to Expedite at 4, Doc. 102.

[5] G.G. claims in subsequent filings to have had "chest reconstruction surgery" and to have changed the sex designation on G.G.'s Virginia birth certificate from "female" to "male." *See* Pl's. Mot. to Expedite at 3, Doc. 102. Those developments do not appear in G.G.'s complaint, are not the basis for G.G.'s Title IX claim, and are consequently not relevant to the resolution of any issue in this appeal.

a willingness to ensure a welcoming environment." *Id.* G.G. initially agreed to use a separate restroom, being "unsure how other students would react to [G.G.'s] transition." *Id.* However, after two months G.G. "found it stigmatizing to use a separate restroom" and "determined that it was not necessary" to do so. JA31. Accordingly, beginning on October 20, 2014, the principal allowed G.G. to use the boys' restroom. *Id.*

The next day, the Board began receiving complaints from parents and students who regarded G.G.'s presence in the boys' restroom as an invasion of student privacy. JA57–58. The Board considered the problem and, after two public meetings on November 11 and December 9, 2014, adopted the following policy:

> Whereas the GCPS [Gloucester County Public Schools] recognizes that some students question their gender identities, and
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> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
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> 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.

Id. at 58.

Before the Board adopted this resolution, the high school announced it would install three single-stall unisex bathrooms, regardless of whether the Board approved the December 9 resolution. JA17, 19. These unisex restrooms—which were available on December 16—would be open to all students who, for whatever reason, desire greater privacy. JA58. G.G. refused to use them, however, claiming they made G.G. feel "stigmatized and isolated." JA19. G.G. acknowledges that male classmates may be "uncomfortable" using the restroom with G.G., but asserts that *they* should "avail [themselves] of the recently installed single stall bathrooms." JA20.

C. Procedural History

G.G. sued the Board on June 11, 2015, six months after the Board passed its resolution, claiming the Board's policy violates the Equal Protection Clause and Title IX. JA9. G.G. moved for a preliminary injunction on June 11, 2015. JA25.

With respect to Title IX, G.G. argued that section 106.33 does not allow a school to, as G.G. put it, "assign transgender boys to the girls' room," and that Title IX therefore requires giving G.G. access to the boys'

restroom. Dist. Ct. Doc. 18 at 37. G.G. reiterated that "gender identity" means "one's sense of oneself as male or female," *id.* at 1, or "the conviction of belonging to a particular gender," *id.* at 2, and asserted further that "[f]rom a medical perspective, there is no distinction between an individual's gender identity and his or her 'biological' sex or gender." *Id.* at 17 n.13. G.G. also cited guidance by the Department of Education taking the position that Title IX requires access to sex-separated facilities consistent with gender identity, and urged the district court to defer to that position under *Auer*. *Id.* at 38.

The district court dismissed G.G.'s Title IX claim and denied a preliminary injunction. JA137–38 (order); 139–64 (opinion). On appeal, a 2-1 panel of this Court reversed the district court's dismissal of G.G.'s Title IX claim, holding that the district court should have accepted the Department of Education's position letter as the "controlling" construction of Title IX and section 106.33 under *Auer*. *G.G.*, 822 F.3d at 719–23. The panel held that the letter's interpretation—"although perhaps not the intuitive one," *id.* at 722—was not, in the words of *Auer*, "plainly erroneous or inconsistent with the regulation or the statute." *Id.* at 721–22. On remand, the district court entered a preliminary

injunction. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 4:15-CV-54, 2016 WL 3581852 (E.D. Va. June 23, 2016).

The Supreme Court stayed this Court's mandate and the preliminary injunction, *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016) (per curiam), and granted certiorari. But before the Court heard argument, the Department of Education and Department of Justice withdrew their prior position on the interpretation of Title IX, noting among other things that the relevant guidance documents "do not … contain extensive legal analysis or explain how the[ir] position is consistent with the express language of Title IX." *See* Feb. 22, 2017 Dear Colleague Letter; Feb. 22, 2017 Ltr. E. Kneedler to S. Harris, *Gloucester Cnty. Sch. Bd. v. G.G.* (S. Ct. No. 16-273).[6] The Supreme Court accordingly vacated the panel's decision and remanded to this Court for further proceedings.

SUMMARY OF THE ARGUMENT

The Board's restroom and locker room policy reflects a sensible compromise, reached after considerable public input and deliberation,

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[6] Available at https://goo.gl/58Zi7W.

between a variety of competing interests, needs, and concerns. There is, again, no perfect solution to the problem of which restroom and locker room should be used by students whose gender identities diverge from the sex of their birth. Other school boards in other places may conclude that different approaches serve their communities better. But this case is not about choosing among different policies; it is about what a bedrock federal anti-discrimination law, Title IX, legally *requires* of the Board and thousands of other schools around the nation. The answer to that question is simple: Title IX *permits* the Board's policy challenged in this case, and Title IX does *not* require the gender-identity-based access policy at the core of G.G.'s claim.

At the threshold, however, it is unclear whether G.G. still has a justiciable claim. G.G.'s impending graduation, coming days after supplemental briefing is complete, threatens to moot the case before this Court can decide it. *If* G.G. still has a live claim after graduation, G.G. bears the burden of articulating what exactly will remain for this Court to decide.

Assuming this Court has jurisdiction and reaches the merits, there is no doubt that Title IX permits the Board to separate students in

restrooms and locker rooms based on physiology. All indicators of statutory meaning show that when Title IX was enacted, Congress understood "sex" to refer to physiological distinctions between men and women. Title IX-era dictionaries unanimously defined sex based on those physical characteristics; modern dictionaries overwhelmingly do the same; and *no* dictionary treats gender identity as determinative of one's sex—which is the interpretation that G.G. would have this Court adopt. Title IX's legislative history points the same way. While seeking to end discrimination against women, Title IX's architects deliberately allowed separation of the sexes to protect privacy—an interest rooted in physical differences between the sexes that would be nullified by equating sex with gender identity, as G.G.'s position demands.

Excluding physiological criteria from Title IX would also obstruct the statute's purposes. Restrooms, locker rooms, and showers could no longer be limited to members of only one physiological sex. Neither could single-sex athletic teams, even ones involving physical competition and contact. G.G.'s interpretation would also lead to new forms of discrimination and new legal risks for schools. Title IX would thus cease

to serve its purpose of combatting sex discrimination while improving opportunities for women.

Finally, the doctrine of constitutional avoidance forecloses G.G.'s claim. Even if the term "sex" in Title IX could now be equated with "gender identity," that interpretation would have been unimaginable until recently. For a Spending Clause statute like Title IX, which must provide clear notice of funding conditions, that unforeseeability is fatal. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This Court should avoid an interpretation of Title IX that casts it into constitutional doubt.

ARGUMENT

I. This Case May Be Mooted By G.G.'s Impending Graduation.

G.G.'s desire to use the boy's restrooms as a Gloucester student has been the driving force behind this case from the start. *See, e.g.*, JA13 (alleging that "it is critical that [G.G.'s] social transition involve full transition at school, including with respect to restrooms"); JA23 (requesting "[p]reliminary and permanent injunctions requiring the School Board to allow G.G. to use the boys' restrooms at school"). But G.G. is scheduled to graduate on June 10, 2017. *See* Pl's. Mot. to Expedite

at 4, Doc. 102. When G.G. moved for expedited briefing in an effort to obtain a ruling by that date, this Court denied it. Order, Doc. 110. Thus, G.G. will likely have graduated months before this Court issues a decision, and questions of restroom access during G.G.'s school days will be a thing of the past. That sequence of events suggests the case may become moot before it can be decided. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997).

G.G. therefore bears the burden of explaining why the case will remain live after graduation. *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999). G.G. has suggested, for example, that the Board's policy would apply to G.G. at alumni events. *See* Pl's. Mot. to Expedite at 4, Doc. 102. But this does not explain why *non*-educational events involving *non*-student alumni would be covered by Title IX's prohibition of discrimination in "any education program or activity." *See* 20 U.S.C. § 1681. Nor is it evident that the Board's policy even *applies* to alumni, given its repeated references to "students." Thus G.G. would lack either a cause of action or standing to proceed on such a theory.

To be sure, G.G. has alleged an entitlement to nominal damages. *See* JA23; Pl's. Initial Disclosures (July 7, 2016). G.G. may still wish to

pursue this action on that basis alone. But G.G.'s filings in this Court and the Supreme Court attach little evident importance, if any, to that form of relief. Having failed to persuade this Court to expedite proceedings and issue a decision before graduation, it is hardly a certainty that G.G. wishes to pursue this matter when G.G.'s interest will have been reduced to nominal damages.

In sum, it cannot be taken for granted that G.G. still has a live claim and wishes to pursue it. In light of this Court's obligation to assess its jurisdiction at each stage, *see, e.g.*, *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002), not to mention the interests of judicial economy, G.G. should be required to articulate a justiciable theory on which this case can proceed after G.G. graduates.

II. The Board's Policy Separating Restrooms By Physiological Sex Is Plainly Valid Under Title IX And Section 106.33.

If the Court determines there is still a justiciable controversy, the Court should conclude that G.G.'s Title IX claim is barred by the plain language of the statute and its implementing regulation. G.G. presses an interpretation of Title IX that determines "sex" solely according to "gender identity," meaning the internal perception of oneself as male or

female. JA11–12, 36.[7] The text, history, and structure of Title IX and the plain language of its implementing regulation foreclose that view. Although the panel majority previously accepted an *agency* interpretation adopting G.G.'s position, even then the majority acknowledged that such an interpretation is "not the intuitive one." *G.G.*, 822 F.3d at 722. The better interpretation—which is reflected in the Board's policy—is that when separating boys and girls on the basis of sex in restrooms and similar facilities, schools may rely on the physiological differences between males and females rather than students' gender identity.

A. The Text And History Of Title IX And Section 106.33 Refute The Notion That "Sex" Must Be Equated With "Gender Identity."

The most straightforward way to resolve the Title IX claim is the one taken by the district court. *See* JA148–53. As that court correctly

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[7] Some of G.G.'s more recent filings emphasize the change in G.G.'s birth certificate and G.G.'s chest reconstruction surgery. *See* Pl's. Mot. to Expedite at 3, Doc. 102. Those developments are not reflected in the Complaint and are not alleged to bear on G.G.'s internal perception of a male gender identity, which G.G.'s Complaint treats as the *sole* factor relevant to determination of "sex" under Title IX. They are therefore irrelevant to the factual and legal theories presented to this Court on appeal from the district court's dismissal of the Complaint.

explained, Title IX regulations "specifically allow[ ] schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable." JA150. It is beyond dispute that in the 1970s—when Congress enacted Title IX and HEW adopted section 106.33—the term "sex" at least *included* physiological distinctions between men and women.[8] It follows that when schools establish separate restrooms, locker rooms, and showers for boys and girls, Title IX and section 106.33 affirmatively permit them to rely on physiological sex to distinguish those facilities, regardless of whether the term "sex" could also theoretically include some notion of "gender identity." *See* JA150 (concluding that, because Board's policy is permitted by the regulation, "the Court need not decide whether 'sex' in … [s]ection 106.33 also includes 'gender identity'"). As the district court correctly explained, as a straightforward matter of interpretation, nothing more is necessary to dismiss G.G.'s Title IX claim. *See* JA150–51.

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[8] Indeed, as discussed below, all relevant indicia of meaning show that the understanding of "sex" shared by Title IX's architects was determined *wholly* by those physiological distinctions. The same is true, in common parlance, up to the present day. *See* JA150 (observing, "[u]nder any fair reading, 'sex' in [s]ection 106.33 clearly includes biological sex").

G.G.'s contrary position depends on a reading of Title IX incompatible with the plain meaning of the term "sex": namely, that for Title IX purposes one's internal, perceived sense of gender identity is *determinative* of one's sex. *See, e.g.*, G.G. S. Ct. Br. at 2 (asserting that G.G. "knew that he was a boy" because "[l]ike other boys, Gavin has a male gender identity"). Practically speaking, G.G.'s position means that physiology is not only irrelevant but *invalid* under Title IX as a basis for separating boys and girls in restrooms. G.G.'s interpretation thus forbids something the statute and regulation affirmatively permit: use of the physiological distinctions between males and females to separate boys and girls in restrooms, locker rooms, and showers. G.G.'s view is incorrect as a matter of law.

1. The term "sex" at a minimum *includes* the physiological distinctions between men and women.

As the Supreme Court and this Court have long held, "[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" as of "the era of [the statute's] enactment[.]" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)

(quotes omitted); *see also United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010) ("A statute's plain meaning is determined by reference to its words' 'ordinary meaning at the time of the statute's enactment.'") (quoting *United States v. Simmons*, 247 F.3d 118, 122 (4th Cir. 2001)). All available linguistic evidence confirms that the term "sex" deployed in Title IX and section 106.33 referred overwhelmingly to the physiological differences between men and women. The use of that term thus provides no support for the radical notion espoused by G.G. that one's "sex" for Title IX purposes should be determined, not by physiological or anatomical characteristics, but instead (and entirely) by one's internal "gender identity."

This conclusion plainly follows from the linguistic evidence considered by *both* the majority and dissenting opinions in the previous panel decision. Those opinions cited nine dictionaries between them, covering a period from before the enactment of Title IX to the present. Every single one referred to *physiological* characteristics as a criterion for distinguishing men from women.[9] For instance, the majority's

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[9] *See G.G.*, 822 F.3d at 721–22 & n.7 (majority) (citing *American College Dictionary* 1109 (1970), *Webster's Third New International*

definitions referred to "anatomical," "physiological," and "morphological" differences; "biparental reproduction"; and "sex chromosomes." *G.G.*, 822 F.3d at 721–22. Similarly, the dissent's definitions looked to "structural" differences, "reproductive functions," and "reproductive organs." *Id.* at 736–37. Thus, all of those Title IX-era definitions explicitly referred to physiological characteristics as a central determinant of one's "sex." None even hinted that "sex" includes—much less *turns on*—one's internal gender identity.

To be sure, in determining whether to defer to the Department under the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997), the majority found ambiguity in certain definitions of "sex." *G.G.*, 822 F.3d at 721–22. Because *Auer* is no longer at issue, however, the relevant inquiry is not whether there are any ambiguities for an agency to resolve. Now the key

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Dictionary 2081 (1971), *Black's Law Dictionary* 1583 (10th ed. 2014), and *American Heritage Dictionary* 1605 (5th ed. 2011)); *id.* at 736–37 (dissent) (citing *The Random House College Dictionary* 1206 (rev. ed. 1980), *Webster's New Collegiate Dictionary* 1054 (1979), *American Heritage Dictionary* 1187 (1976), *Webster's Third New International Dictionary* 2081 (1971), *The American College Dictionary* 1109 (1970), *Webster's New World College Dictionary* 1331 (5th ed. 2014), *The American Heritage Dictionary* 1605 (5th ed. 2011), and *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011)).

question is what the term "sex" *means* in Title IX, and no putative ambiguities in certain definitions can overcome the weight of linguistic evidence that physiology is at least a critical factor in the term "sex" as deployed in Title IX. *See, e.g.*, *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 226–28 (1994) (rejecting reliance on outlier dictionary definitions "whose suggested meaning contradicts virtually all others"). Furthermore, even the allegedly ambiguous definitions the panel majority identified *still* referred overwhelmingly to "anatomical and physiological differences" between the sexes, as well as characteristics that "subserve[ ] biparental reproduction." *See G.G.*, 822 F.3d at 721 (quoting *American College Dictionary* (1970) and *Webster's Third New International Dictionary* (1971)). And *none* referred to "gender identity," or anything like it, as a constitutive part of one's sex—much less the sole, determinative factor.

Consequently, G.G. has no linguistic basis to contend that the term "sex" in Title IX could ever have been understood to refer to gender identity *at all*, and certainly not to the exclusion of objective physiological characteristics distinguishing men from women. It is true, as G.G. has argued elsewhere, that "it is ultimately the provisions of our laws rather

than the principal concerns of our legislators by which we are governed," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), and that Title IX thus prohibits genuine sex-based discrimination "of any kind," *id.* at 80. *See* G.G. S. Ct. Br. at 38. But that general principle does not begin to explain why the concept of "sex" discrimination enacted by Congress in 1972 is so elastic that, today, someone born physiologically male could be considered a female for purposes of Title IX based on internal perceptions. That re-imagination of the term "sex" does not merely broaden the "comparable evils" at which the framers of Title IX were aiming. *Cf. Oncale*, 523 U.S. at 79. Rather, it entirely subverts the basis of Title IX's anti-discrimination provision. Instead of joining G.G. in rewriting Title IX, this Court should simply adopt the intuitive interpretation that the Board is permitted by Title IX to separate the sexes in restrooms and locker rooms based on the physiological distinctions between males and females, as school districts around the nation have been doing in reliance on Title IX for the past five decades. Again, that straightforward conclusion is enough to resolve G.G.'s claim.

2. Congress understood Title IX to permit classifications based on physiology.

Furthermore, to the extent the Court wishes to refer to Title IX's legislative history, that history confirms that "sex" was understood by the framers of Title IX and its regulations to encompass the physiological differences between men and women. *See, e.g.*, *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612–13 (1987) (confirming textual meaning through legislative history). Congress's manifest purpose in enacting Title IX's ban on "sex" discrimination was to fix the pervasive problem of discrimination against women in educational programs. *See, e.g.*, 118 Cong. Rec. 5803; 117 Cong. Rec. 39251. At the same time, however, Congress sought to preserve schools' ability to separate males and females to preserve "personal privacy," *see* 118 Cong. Rec. 5807 (Sen. Bayh), and to protect athletic opportunities for girls and women.[10]

These twin goals of Title IX confirm that Congress and HEW were employing the then-universal understanding of "sex" as a binary term

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[10] "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted" as Title IX, have been considered "an authoritative guide to the statute's construction." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982).

encompassing the physiological distinctions between men and women. Not a shred of legislative history suggests that Congress considered the concept of "gender identity" at all, much less that the concept could supplant physiology in determining one's sex. Nor is there any evidence that in promulgating section 106.33 HEW considered "sex" to include, much less turn on, gender identity. Even G.G. has conceded that the Congress that enacted Title IX and the agency that adopted section 106.33 were focused on physiological sex and never conceived of gender identity as a component of sex, much less its determinant. G.G. S. Ct. Br. in Opp. at 1; G.G. S. Ct. Br. at 39 ("There is no question that our understanding of transgender people has grown since Congress passed Title IX.").

Other indicators of congressional purpose likewise show that gender identity is outside the scope of Title IX. For example, the subsequently enacted Violence Against Women Act ("VAWA")—a Spending Clause statute, like Title IX—prohibits funded programs or activities from discriminating based on either "sex" or "gender identity." 42 U.S.C. § 13925(b)(13)(A). "Sex" and "gender identity" must have meant distinct things to the Congress that enacted VAWA; otherwise equating

sex with gender identity would create surplusage. *See, e.g.*, *National Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998) (rejecting agency interpretation under *Chevron* for this reason). Other statutes enacted after Title IX relate to discriminatory acts based on "gender" and "gender identity," implying Congress distinguished outward manifestations of sexual identity—akin to sex—from inward, perceived ones. 18 U.S.C. § 249 (federal hate crimes); 42 U.S.C. § 3716(a)(1)(C) (Attorney General authority to assist with State and local investigations and prosecutions); 20 U.S.C. § 1092(f)(1)(F)(ii) (crime reporting by universities); 42 U.S.C. § 294e-1(b)(2) (federal mental health grants). Yet Congress has never supplemented Title IX with an additional gender identity-based standard.

In addition to the absence in Title IX of a distinct prohibition on gender identity discrimination, in other contexts Congress has repeatedly declined to enact statutes forbidding gender identity discrimination in education. The Student Non-Discrimination Act, introduced in 2010, 2011, 2013, and 2015 in both the Senate and the

House,[11] would condition school funding on prohibiting gender identity discrimination. Another measure, the "Equality Act," would amend the Civil Rights Act of 1964 to prohibit gender identity discrimination in various contexts, including employment and education.[12] Neither bill has ever left committee.

In the face of Congress's failure to add the concept of gender identity to Title IX—indeed, its repeated decision *not* to do so—G.G.'s position amounts to asking this Court to "update" the law by judicial amendment. But no court has that authority. And in any event, there is no evidence remotely showing that modern Congresses believed that the term "sex" in Title IX *already* included gender identity since the 1970s, and that therefore amending it to cover gender identity was unnecessary. To the contrary, the only plausible explanation for the absence of the term "gender identity" from Title IX is that Title IX has *never* included it, and still does not. If Congress wishes to incorporate that distinct concept into

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[11] H.R. 4530 (111th Cong. 2010); S. 3390 (111th Cong. 2010); H.R. 998 (112th Cong. 2011); S. 555 (112th Cong. 2011); H.R. 1652 (113th Cong. 2013); S. 1088 (113th Cong. 2013); H.R. 846 (114th Cong. 2015); S. 439 (114th Cong. 2015).

[12] S. 1858 (114th Cong. 2015); H.R. 3185 (114th Cong. 2015).

Title IX, it knows how to do so. But a court lacks the authority to do Congress' work of legislation for it, which is what accepting G.G.'s re-interpretation of Title IX would amount to.

3. Supreme Court and Fourth Circuit precedent strongly supports the Board's interpretation of Title IX.

Supreme Court and Fourth Circuit sex discrimination precedent also offers compelling support for reading the term "sex" in Title IX as referring to (or at least including) the physiological differences between men and women. When determining the nature of prohibitions on sex discrimination, the Supreme Court and this Court have focused on physiological differences, especially in contexts involving the lawful separation of males and females for privacy purposes. That underscores the correctness of interpreting Title IX to rely on physiology and to permit the Board's restroom and locker room policy.

For instance, in *United States v. Virginia*, the Supreme Court held that the equal protection clause required the Virginia Military Institute to admit women. 518 U.S. 515, 540–46 (1996). Yet even as it rejected stereotypes based on "inherent differences" between the sexes, the Court nonetheless emphasized that "[p]hysical differences between men and

women are enduring," and explained that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Virginia*, 518 U.S. at 533, 550 n.19. Thus, the Court's analysis of its "privacy" concerns was grounded in objective, "physical differences" between the sexes, and not in subjective factors like gender identity.

Even more pointedly, in *Tuan Anh Nguyen v. INS*, the Supreme Court upheld against equal protection challenge a federal immigration standard that made it easier to establish citizenship if a person had an unwed citizen mother, as opposed to an unwed citizen father. 533 U.S. 53, 59–60 (2001). The easier standard for persons with citizen mothers was explicitly justified on *biological* grounds—namely that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. In so holding, the Court rejected the argument that this distinction "embodies a gender-based stereotype," explaining that "[t]here is nothing irrational or improper in the recognition that at the moment of birth … the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case

of the unwed father." *Id.* at 68. In its conclusion, the Court added these observations that apply with equal force here:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. … The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73. Here again, the Court's analysis of these issues was driven by objective, physiological differences between the sexes, not by subjective factors such as gender identity.

The physiological conception of sex in *Virginia* and *Tuan Anh Nguyen* has been recently deployed by this Court. In *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 372 (Oct. 31, 2016), the Court rejected the argument that differing FBI fitness standards for men and women—based on their "innate physiological differences"—constituted impermissible sex discrimination under Title VII. *Id.* at 343. Relying on *Virginia*, *Bauer* held that the different standards were justified because "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs," and, despite

Virginia's rejection of sex stereotypes, "some differences between the sexes [are] real, not perceived[.]" *Id.* at 350. Indeed, *Bauer*'s reasoning had been foreshadowed by this Court's earlier decision in *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993). In that case, the Court noted that sex separation in intimate facilities is justified by "acknowledged differences" between the sexes. *Id.* at 233. And the Court observed that "[t]he point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." *Id.* at 232.

Those decisions strongly support interpreting Title IX and its regulations to allow privacy-based separation of men and women on the basis of physiological differences, precisely as the School Board's policy does in multiple-user restrooms and locker rooms.[13] That conclusion is driven as much by commonsense and longstanding privacy expectations as anything else. As Justice Kennedy wrote for the Court in *Nguyen*, "[t]o fail to acknowledge even our most basic biological differences … risks

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[13] Lower courts have similarly concluded that federal prohibitions on "sex" discrimination concern physiological distinctions between men and women. *See, e.g.*, *Johnston v. Univ. of Pittsburgh of the Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670, 676 (W.D. Pa. 2015), appeal dismissed (Mar. 30, 2016) (collecting decisions).

making the guarantee of equal protection superficial, and so disserving it." *Nguyen*, 533 U.S. at 73. And Justice Stevens captured this point in *City of Los Angeles, Department of Water & Power v. Manhart*, when he wrote for the Court that "[t]here are both real and fictional differences between women and men." 435 U.S. 702, 707 (1978). Physiological differences between men and women are real ones, especially where they are relied on to safeguard reasonable privacy expectations that have long been part of the fabric of public life. And it is difficult to imagine a more appropriate setting for safeguarding privacy than school restrooms and locker rooms.

In response to this line of reasoning, G.G. has pointed to the Supreme Court's recognition that sex stereotyping—namely, "assuming or insisting" that men and women conform to "the stereotype associated with their group," *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)—can be a form of sex discrimination. *See., e.g.*, G.G. S. Ct. Br. at 36 ("Unlike other boys, Gavin had a different sex identified for him at birth. He therefore upsets traditional assumptions about boys .... Discriminating against Gavin for upsetting those expectations is sex discrimination."). But it makes no sense to say that distinguishing boys

from girls on the basis of *physiological or anatomical characteristics* amounts to prohibited sex "stereotyping," especially where those very characteristics directly relate to the privacy interests the Board's policy seeks to protect.

Furthermore, the Board's policy distinguishes boys and girls based on physical sex characteristics alone, and *not* based on any of the characteristics typically associated with sex stereotyping—such as whether a woman is perceived to be sufficiently "feminine" in the way she dresses or acts. *Cf., e.g.*, *Price Waterhouse*, 490 U.S. at 235 (finding sex stereotyping where female employee not promoted because her employer thought she was too "macho," "overly aggressive [and] unduly harsh" for a woman, and should have walked, talked, dressed, and styled her hair and make-up "more femininely"). Indeed, the Board's standard rejects classifying students based on whether they meet *any* stereotypical notion of maleness or femaleness. The Board's policy does not, for instance, allow only "masculine" boys into the boys room, while requiring more "effeminate" boys to use the girls room. Instead, the policy designates multiple-user restrooms and locker rooms based on *biology*, period—regardless of how "masculine" or "feminine" a boy or girl looks, acts, talks,

dresses, or styles their hair. Far from violating *Price Waterhouse*, then, the Board's policy is the *opposite* of the kind of sex stereotyping prohibited by that decision. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (concluding that *Price Waterhouse* does not require "employers to allow biological males to use women's restrooms," because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes").

B. Equating "Sex" With Gender Identity Would Undermine Title IX's Structure.

Not only does G.G.'s interpretation find no support in Title IX's text and history or in any analogous sex discrimination precedents, that interpretation—requiring access to sex-separated facilities based on gender identity alone—would also undermine Title IX's structure, obstruct its purposes, and lead to obvious and intractable problems of administration. Because "[i]t is implausible that Congress meant [Title IX] to operate in this manner," *King v. Burwell*, 135 S. Ct. 2480, 2494 (2015), this is yet another reason to reject G.G.'s radical interpretation of Title IX.

1. G.G.'s interpretation would frustrate Title IX's purposes.

Like any statute, Title IX should be interpreted so that its "manifest purpose is furthered, not hindered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). And here, one of Title IX's purposes was to maintain schools' ability to separate male and female students in some circumstances—for example, when personal privacy is implicated or where mixed-sex athletic competition would be unfair or unsafe. But this purpose is incompatible with an approach that understands "sex," not by the physiological distinctions between males and females, but instead by "gender identity"—one's "innate sense of being male or female." JA12. If access to sex-separated facilities turns on gender identity, then the sex separation contemplated by Title IX and its regulations would effectively cease to exist. Under that regime, although a school might *wish* to keep boys and girls in separate locker rooms (or on separate basketball teams), in practice any given locker room (or basketball team) would be open to members of both sexes. An interpretation of the key term "sex" that frustrates key goals of Title IX should be rejected.

By the same token, there is not the remotest suggestion that Title IX was intended to place school children in the position of using restrooms, lockers rooms, and showers in the presence of individuals with physical sex characteristics of the opposite sex. G.G.'s interpretation thus nullifies what the framers of Title IX and its regulations plainly sought to preserve: spaces available to members of one physiological sex and off-limits to the other. That outcome would shock Title IX's congressional advocates, who authorized separate "living facilities" to ensure that members of different physical sexes would be separable in certain intimate settings. If the law's framers had contemplated that members of one sex could use the opposite sex's facilities, based on their *perception* of having been "born in the wrong sex," JA33, there would have been no reason for permitting separation of sexes in intimate settings. *See G.G.*, 822 F.3d at 738 (Niemeyer, J. dissenting).

Likewise, Title IX regulations prohibit discriminating on the basis of sex in athletic activities and require recipients to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(a), (c). But the regulations also provide for "separate teams for members of each sex where selection … is based upon competitive skill or the activity

involved is a contact sport." 34 C.F.R. § 106.41(b). That separation is plainly grounded in physiology: Even beyond privacy interests in contact sports, providing separate teams for female students gives them more opportunities for participation and protects them from injury.

Sex separation in athletics only works, however, if "sex" means physiological sex. If it means "gender identity," nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women, based simply on those athletes' expressed perceptions of their gender. *See, e.g.*, *Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships*, CBS New York, June 8, 2016 (noting an "18-year old runner … [who] was born male and identifies as female" competed in "Class 3A girls' sprints").[14] Assuming, as the previous panel

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[14] Unsurprisingly, the NCAA does not take the radical approach to reinterpreting "sex" that G.G. does. While it seeks to accommodate transsexual individuals, the NCAA restricts male-to-female transsexuals from competing on female teams "until completing one calendar year of testosterone suppression treatment." Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* 13 (2011), available at https://goo.gl/V2Oxb2. Thus the NCAA's own policy is inconsistent with G.G.'s position that G.G. should be immediately treated as a boy "in all aspects" of life. JA9, 38–39, 42.

majority correctly did, that "'sex' should be construed uniformly throughout Title IX and its implementing regulations," *G.G.*, 822 F.3d at 723, such an outcome appears inevitable. G.G.'s proffered interpretation would thus turn Title IX *against* biological women and girls, the very people it was always understood to protect.

2. G.G.'s interpretation would itself lead to discrimination.

G.G.'s proposed interpretation leads to other contradictions as well, and to discrimination in different forms. Most obviously, persons whose gender identities align with physiological sex would have access only to one facility, but transgender individuals such as G.G. could elect to use *either* the facilities designated for people of their both gender *or* the opposite sex's facilities. There would thus be different degrees of access depending on whether a person's gender identity diverges from physiology. That is "sex" discrimination under G.G.'s own argument.

G.G.'s position also implies that while G.G.'s discomfort in the girls' restroom requires relief under Title IX, another boy's discomfort with G.G.'s presence in the boys' restroom is legally meaningless—indeed, that it must be stamped out as mercilessly as sentiments favoring racial segregation. *See* G.G. S. Ct. Br. at 30 (claiming that G.G. must be treated

as subject to invidious discrimination, citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)). For the Board to provide G.G. with a choice between the girls' room and an alternative unisex restroom open to all students is, in G.G.'s view, an affront to G.G.'s dignity. Yet forcing the same choice on G.G.'s male classmates—notwithstanding their own adolescent modesty, personal sensitivities, or religious scruples—is simply the price to be paid. The same logic would apply to the feelings of boys sharing locker rooms and showers with a transgender individual like G.G., and to 14-year old girls sharing facilities with 18-year old physiological males. Title IX should not be interpreted to create so one-sided a regime.

Not only does G.G.'s standard impose discriminatory burdens on others, but it would create new legal risks for regulated schools. For instance, a sexual assault victim may understandably feel that the presence of members of the opposite physiological sex in restrooms, lockers, or showers creates a hostile environment. *See* Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, The New Yorker (May 24, 2016).

Insofar as G.G. proposes solutions to any of these problems, they are unlikely to be of any help. For example, some of G.G.'s prior briefs

imply that a transgender individual's access to the other physiological sex's facilities turns on gender presentation (*i.e.*, whether someone appears to be relatively more masculine or feminine) and the sincerity of an individual's feelings of discomfort on being required to use a facility consistent with physiological sex. In other words, because G.G. "presents" as a boy, JA12, 13–14, 18–19, and feels more at home in a boys' restroom, JA19, G.G. should have access to boys' restrooms.

That standard does little for privacy concerns, and nothing for girls and women in school sports. Worse, it suggests that schools must evaluate access to restrooms, locker rooms, and showers based on how consistently or comprehensively a student "presents" his or her gender identity. Administrators would inevitably have to evaluate students' access to facilities based on relative masculine or feminine traits. But that is classic sex-stereotyping, *see Price Waterhouse*, 490 U.S. at 250–51 (forbidding adverse actions against women under Title VII based on stereotypical views of women's appearance or mannerisms), which schools would undertake at their peril.

These and other serious practical problems counsel strongly against an attempt to transform the statutory prohibition on sex discrimination

into the distinctly different prohibition on gender identity discrimination, as G.G.'s Title IX claim demands.

C. If "Sex" Were Equated With "Gender Identity," Title IX And Its Regulations Would Be Invalid For Lack Of Clear Notice.

Finally, even if Title IX and its regulations were ambiguous as applied to transgender individuals, G.G. admits that determining sex exclusively by gender identity was unimaginable at the time Title IX and its regulations were first adopted. G.G. S. Ct. Br. in Opp. at 1. If that is true—and it is—then under G.G.'s interpretation Title IX violates the Spending Clause for failure to afford funding recipients clear notice of the conditions of funding. This Court should interpret Title IX in a way that does not render it potentially unconstitutional.

Title IX was enacted under the Spending Clause, and the threat of withdrawing federal funding is the main enforcement mechanism. *See* 20 U.S.C. § 1682. Moreover, "[l]egislation enacted pursuant to the spending power is much in the nature of a contract, and therefore, to be bound by federally imposed conditions, recipients of federal funds must accept them voluntarily and knowingly." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quotes and alteration omitted)

(quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). For that reason, "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out unambiguously," for "States cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain." *Id.* (quotes and citation omitted).

For more than four decades, States have accepted Title IX funding with the understanding that they could maintain separate facilities based on men and women's different physiologies. And nothing in the text of Title IX or its implementing regulations "even hint[s]" that they would ever have to do anything else—and certainly not adopt a new regime of separation based on students' internal gender identities. *Id.* at 297. Thus, adopting G.G.'s implausible position would set the stage for a funding condition that States never could have anticipated.

Accordingly, given the limits on Congress' spending power, that position must be rejected under the rule of constitutional avoidance. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the

Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). That rule supports interpreting Title IX in a way that does not permit courts or agencies to "surpris[e] participating States with post-acceptance or retroactive conditions." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) (quoting *Pennhurst*, 451 U.S. at 25). This is yet another reason to reject the interpretation G.G. proposes.

CONCLUSION

The Title IX claim in this case should be rejected as a matter of straightforward statutory interpretation. The Board's sensible policy separating restrooms and locker rooms on the basis of the physiological differences between boys and girls has been expressly permitted by Title IX and its implementing regulation for five decades. G.G.'s proposed re-interpretation—substituting the new concept of "gender identity" for "sex"—would not merely broaden Title IX but subvert it altogether, creating a new world where biological males can occupy the same restrooms, locker rooms, showers, and athletic teams as biological females. If that is to be the new Title IX policy—one which will henceforward be a condition on federal funding for virtually every school

in the nation—then it should be enacted by Congress and not imposed by courts under the guise of "interpreting" Title IX.

The district court's decision dismissing G.G.'s Title IX claim should be affirmed.

REQUEST FOR ORAL ARGUMENT

The Board respectfully requests oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because the brief contains **9,529** 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. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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