Case 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, No. 4:15-cv-00054-RGD-DEM

Brief of *Amici Curiae* North Carolina Values Coalition and The Family Research Council in Support of Defendant-Appellee and Affirmance

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AND OTHER INTERESTS

FRAP RULE 26.1 and LOCAL RULE 26.1

Amici curiae, North Carolina Values Coalition and The Family Research Council, both nonprofit corporation, make the following disclosures:

1. Neither *amicus* is a publicly held corporation or other public entity.

2. Neither *amicus* has a parent corporation.

3. No publicly held corporation or other publicly held entity owns 10% or more of the stock of either *amicus*, because both are nonprofit corporations and neither issues stock.

4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

DATED: May 12, 2017

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INTEREST OF AMICI[1]

North Carolina Values Coalition and The Family Research Council, as *amici curiae*, respectfully urges this Court to affirm the district court.

The North Carolina Values Coalition ("NCVC") is a nonprofit educational and lobbying organization based in Raleigh, NC and located within the jurisdiction of the Fourth Circuit Court of Appeals that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. Consequently, NCVC has an interest in ensuring that North Carolina communities are free to enact policies that advance these values and preserve privacy. *See* www.ncvalues.org.

The Family Research Council is a non-profit organization located in Washington, D.C., that exists to advance faith, family and freedom in public policy and the culture from a Christian worldview. Consequently, FRC has an interest in ensuring that local communities are free to enact policies consistent with this worldview. *See* www.frc.org.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case implicates sensitive privacy issues involving some of the youngest members of American society. But "[t]he resolution of this difficult policy issue is

[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

not" the business of this Court. *Texas v. United States*, 201 F. Supp. 3d 811, 815 (N.D. Tex. 2016). "Instead, the Constitution assigns those policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure." *Id*. A ruling against the School Board would pose ominous threats to representative democracy and individual liberty on both vertical and horizontal levels.

Vertically, it would remove public education—a matter entrusted primarily to state and local governments—from the elected representatives closest to the people and most responsive to their concerns. Individuals would be deprived of the liberty to participate in a matter of national importance in the local public schools that educate their children. Public school students, subject to compulsory education laws, would be compelled to sacrifice their liberty and reasonable expectation of privacy on a daily basis. At the same time, the Gloucester School Board has not denied G. G. the right to receive an education or the liberty to assume a male identity. On the contrary, the Board supported and facilitated the transition in every reasonable manner.

Horizontally, a ruling against the school board would jeopardize the Constitution's separation of powers. This Court's original decision was grounded in certain guidance issued by the executive branch: The opinion letter dated January 5, 2015 from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy

in the Department of Education ("DOE") Office of Civil Rights (the "Ferg-Cadima Letter"), and the "Dear Colleague" letter dated May 13, 2016 from the Departments of Education and Justice to every Title IX-covered educational institution in America (the "Dear Colleague Letter") (collectively, the "Letters"). On February 22, 2017, the current administration withdrew the statements of policy and guidance reflected in the Letters. This Court's prior ruling is no longer legally or logically tenable. Instead, this Court should look to the unambiguous language in the original statute and respect the freedom of local communities to respond to the sensitive concerns of their young schoolchildren.

ARGUMENT

I. A RULING AGAINST THE SCHOOL BOARD WOULD USURP STATE AND LOCAL AUTHORITY TO CRAFT PUBLIC POLICY.

A ruling against the school board would impose a draconian solution robbing the people in this Circuit of the power to govern themselves and violating the individual liberty of school children**.** It would place state and local authorities in a straight-jacket, disabling their ability to craft workable policies that address the rights and concerns of local citizens. "The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself." Stephen Breyer, Active Liberty (Vintage Books 2006), at 3. An ultimatum against the school board would jeopardize both types of liberty, coercing conformity to a

controversial policy and denying individual liberty—the liberty of adults to participate in shaping public policy, and the liberty of young children to maintain bodily privacy. It would upend the federalist principles that preserve broad state and local decision-making authority, "secur[ing] decisions that rest on knowledge of local circumstances, [and] help[ing] to develop a sense of shared purposes and commitments among local citizens." Active Liberty, at 57.

The architects of the Constitution created a federal government "powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence." *Shelby v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). "[A] group of formerly independent states bound themselves together under one national government," delegating some of their powers—but not all—to the newly formed federal administration. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964). Power is divided, not only horizontally among the three co-equal branches (Section III), but also vertically between federal and state governments. The Supreme Court has long recognized the critical need to preserve that structure. No federal court should invade a matter of intense state and local concern that is not among the federal government's enumerated powers.

A. Education Is Primarily A State And Local Concern.

Education is among the many powers reserved to the states and the people, absent a constitutional restriction such as equal protection:

> [S]tate governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, *running public schools*, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so.

NFIB v. *Sebelius*, 132 S. Ct. 2566, 2578 (2012) (emphasis added).

Local control over public education is "deeply rooted" in American tradition. Indeed, "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974). Judicial restraint should characterize any federal attempt to intervene in public education:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968). "We see no reason to intrude on that historic control in this case." *Bd. of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 91 (1978) (citing *Epperson* and declining to formalize the academic dismissal process by requiring a hearing); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995) (declining to uphold federal firearms restriction based on proximity to public school). Even where the volatile issue of desegregation is implicated, "local authorities have the primary responsibility for elucidating, assessing, and solving the problems." *Missouri v. Jenkins*, 495 U.S.

33, 51-52 (1990) (internal quotation marks and citations omitted). The same is true here. There is no reason for the federal judiciary to interfere in local school privacy policies and shut citizens out of the process.

B. A Ruling Against The School Board Would Jeopardize The Liberty Of The People To Participate In The Political Process.

This case implicates the sensitive privacy concerns of young school children. Accommodation of those concerns—both for transgender students and all others—requires compassion and skillful crafting of a workable policy for each school district. It may require construction or remodeling of facilities to implement accommodations. A distant federal court lacks authority to dictate a one-size-fits-all "cookie cutter" solution for all school districts in the Fourth Circuit. It is impossible, at this level, to consider the multitude of factors that may differ from one school district to another.

Federalism safeguards individual liberty, allowing states and local communities to "respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States,* 564 U.S. 211, 221 (2011). Public school boards illustrate the outworking of this fundamental principle. Board members are typically selected, often by popular election, from among local citizens. Parents, teachers, and even students have the opportunity to

participate in meetings and express their concerns. If the School Board does not prevail, these voices will be silenced.

The Supreme Court recently reinforced the importance of maintaining "the status of the States as independent sovereigns in our federal system . . . [o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *NFIB*, 132 S. Ct. at 2602. In short, "federalism protects the liberty of the individual from arbitrary power." *Id*. at 2578 (internal quotation marks and citation omitted). It is hard to imagine a more striking instance of arbitrary power than this case presents.

The "double security" of American federalism is deeply rooted in the nation's history:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." The Federalist No. 51, p. 323.

Gregory v. Ashcroft, 501 U.S. 452, 458-459 (1991) (quoting James Madison). The "federalist structure of joint sovereigns . . . increases opportunity for citizen involvement in democratic processes" (*id.* at 458) and "frees citizens from restraints that a more distant central government might otherwise impose" (Active

Liberty, 56). This Court must not foreclose that opportunity for every citizen, student, and local school board in the Fourth Circuit.

II. A RULING AGAINST THE SCHOOL BOARD WOULD BE UNACCEPTABLY COERCIVE.

A ruling against the school board would cut off opportunities to voice disagreement with a coercive judicially mandated policy. "Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against." *Hill v. Colorado*, 530 U.S. 703, 769 (2000) (Kennedy, J., dissenting). This is not a case that punishes speech per se. But the result is virtually identical. An adverse ruling would crush the ability to meaningfully disagree. The sensitive issues raised by this case should be debated and addressed in local communities—but if this Court imposes a mandate on the School Board, discussion will be chilled or at least irrelevant. The coercive impact on school children is even more troubling. Young citizens, who have no direct voice in the political arena but are subject to compulsory education laws, would be compelled to sacrifice their bodily privacy on a daily basis.

A. A Ruling Against The School Board Would Violate Student Privacy In A Context Where Their Presence Is Mandatory.

The public school is a unique environment. First, it is the place where minor children spend most of their waking hours. Second, education is compulsory and

many families have little choice but to place their children in public schools. Some parents can afford private school tuition in addition to the taxes they must pay to support public education, but many cannot.

As the Supreme Court observed in a different context, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). This case does not involve religious exercise, but it does involve compulsory education. The coercion here is even greater. *Lee v. Weisman* involved a one-time event. This case involves daily school activities. *Lee v. Weisman* required students to stand respectfully for a few minutes. This case demands that children routinely sacrifice their bodily privacy, even exposing their unclothed bodies to students of the opposite sex, e.g., when changing clothes for physical education. *Lee v. Weisman* was about high school seniors ready to graduate and become adults. This case encompasses all elementary and secondary students—many of them much too young to understand transgenderism. The coercion is extreme and pervasive, intruding on the basic rights of children:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). In other contexts, perhaps there is an "emerging awareness that liberty gives substantial protection to *adult* persons in deciding how to conduct their *private* lives in matters pertaining to sex." *Lawrence v. Texas*, 539 U.S. 558, 571-572 (2003) (emphasis added). But here, the federal government demands that *children* sacrifice bodily privacy in a *public* place among other students—including those of the opposite biological sex.

This case is not like those involving adults, such as employment and credit. These settings do not involve minor children. "Courts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). *Davis* was about student-on-student sexual harassment, which can be difficult to distinguish from typically immature student behavior. The Supreme Court noted the unique qualities of the school setting, where "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* at 651-652. In this environment, it would be disastrous to mandate that children regularly expose their unclothed bodies to students of the opposite sex. Not only does this endanger students who are not transgendered—it potentially subjects students like G. G. to "insults, banter, teasing, shoving, pushing" beyond what might otherwise

occur. There is no compelling reason for the federal government to jeopardize the liberty and privacy of young schoolchildren—rights long recognized by this Court and many others.[2]

B. The School Board Has Not Denied G.G.'s Liberty To Assume A Male Identity.

The School Board's conduct falls far short of denying G.G. either the opportunity to receive an education or the liberty to assume a male identity. In *Davis*, the Supreme Court had to consider whether a fifth grade girl was the victim of sexual harassment by a classmate and whether the school district could be liable under Title IX as a recipient of federal funds. The Court held that liability was possible, but "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. Here, the school affirmed G.G.'s transition to a male identity and even acquiesced in G.G.'s request to use the boys' restroom. There is no evidence that G.G. was effectively denied "access to an educational opportunity or benefit," or the liberty to continue transitioning to a male identity, merely because the School Board ultimately had to address and accommodate the privacy needs of other students. If this Court mandates the policy G.G. is

[2] *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-375 (2009); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated on other grounds by* 122 S. Ct. 2653 (2002); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992); *Beard v. Whitmore Lack Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir. 1980).

requesting, it would place the school in a Catch-22 where it must grant the transgender student's demands, regardless of the impact on other students. This case demonstrates the dilemma: The school acquiesced to G.G.'s request to use the boys' bathroom, but that action created acute discomfort for both the boys and girls, and parental complaints ensued.

III. A RULING AGAINST THE SCHOOL BOARD ENDANGERS THE SEPARATION OF POWERS.

Power is of an "encroaching nature" and "ought to be effectually restrained from passing the limits assigned to it." Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961). In order to preserve liberty and guard against tyranny, the founders structured the Constitution to allocate power among three branches of government. Indeed, "the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Nat'l Labor Relations Bd. v. Noel Canning, et al.*, 134 S. Ct. 2550, 2592-2593 (2014).

The *legislative* branch—not the judicial or executive—is charged with making the law. U. S. Const., Art. I, § 1. The executive branch has limited rulemaking authority in the course of executing the law but lacks authority to alter the statutory scheme. Yet this branch is perhaps "the most powerful branch of government." Robert J. Reinstein, *The Limits of Executive Power*, 59 Am U. L. Rev. 259, 265 (2009). Agencies "routinely establish policy and even issue binding

regulations pursuant to statutes that provide only vague and highly general guidance regarding Congress's desired policy." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 683 (2014). But the limits woven into the constitutional fabric must be preserved:

> An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress." *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (quoting *Chevron*, 467 U.S. at 843).

Util. Air Reg. Grp. v. *EPA*, 134 S. Ct. 2427, 2445 (2014). Under the prior administration, the Departments of Education and Justice did exactly what they are constitutionally powerless to do—"tailor" Title IX, contrary to "the unambiguously expressed intent of Congress," to impose radical social engineering on the American people without their consent. The judicial branch should not replicate that error.

A. The Executive Departments Invaded Legislative Territory Because Their Interpretation Conflicted With Unambiguous Language In Both Title IX And Its Implementing Regulation.

Over the years, the Supreme Court has developed basic principles of judicial deference to executive agencies. In its prior decision, this Court disregarded those principles by giving extreme deference to an interpretation that conflicted with Title IX, C.F.R. § 106.33, and basic logic. Deference to the opinion of a single

executive branch official on a question of this magnitude flies in the face of our nation's constitutional principles. In light of the express withdrawal of the "Ferg-Cadima Letter," this Court must now consider the original statute and regulation.

When a statute is at issue, judicial review first inquires as to "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency interpretation "inconsisten[t] with the design and structure of the statute as a whole" does not merit deference. *Univ. of Tex. Southwestern Medical Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). Where Congress expressly or implicitly leaves gaps for an agency to fill, the agency's "reasonable interpretation" is entitled to deference. *Chevron*, 467 U.S. at 844. As the Supreme Court later explained, *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). Courts also defer to an agency's "reasonable interpretation" of an ambiguous statute. *Christensen v. Harris Cnty.*, 529 U.S. 576, 586-587 (2000). But here, the word "sex" in Title IX is *unambiguous*. Title IX was designed to ensure that women had educational opportunities equal to those provided to men. That purpose presupposes *two* sexes—male and female. Moreover, the School Board did not

deny G.G. the opportunity to receive an education and made every reasonable effort to accommodate G.G.'s liberty to make the female-to-male transition.

This Court, while purporting not to set policy because that task is entrusted to the political branches, initially cemented into law a radically novel policy dictated by non-binding agency documents reinterpreting the unambiguous term "sex" in Title IX and C.F.R. § 106.33:

> We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.

G. G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016); *see Auer v. Robbins*, 519 U.S. 452 (1997). This Court's original decision highlighted *Auer*'s potential for abuse. Extreme deference grants an agency permission, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. Addressing issues similar to *G. G.*, a district court in Texas understood this point: "Permitting the definition of sex to be defined in this way would allow Defendants to 'create [a] de facto new regulation' by agency action without complying with the proper procedures." *Texas v. United States*, 201 F. Supp. at *830-831 (citing *Christensen*). Now that the "de facto new regulation" has been rescinded, it is incumbent upon this Court to take a fresh look at the unambiguous statute originally passed by Congress.

B. This Court Should Not Invade Legislative Territory By Redefining The Unambiguous Statutory Term "Sex."

Just as the executive branch encroached on legislative territory when it issued the now-rescinded Letters, this Court would exceed its powers by injecting new meaning into an unambiguous statutory term that has stood the test of time. Title IX and its implementing regulation date back over four decades. G.G.'s position conflicts with both. This Court previously admitted that "[r]ead plainly . . . § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students." *G. G.*, 822 F.3d at 720. G. G.'s position, like the now-rescinded Letters, is logically incoherent and inconsistent with both the statute and regulation. As Judge Niemeyer explained, the term "sex" must logically mean one of the following if "biological sex" is not the sole definition: (1) biological sex *and* "gender identity" (conjunctive); (2) biological sex *or* "gender identity" (disjunctive); (3) *only* "gender identity." *Id.* at 737 (Niemeyer, J., dissenting). The results expose G.G.'s flawed reasoning:

> (1) "[A] transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria . . . such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms." *Id.* The boys' restroom is not consistent with G.G.'s biological sex, and the girls' restroom does not conform to G.G.'s gender identity.

(2) "[T]he School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive." *Id*.

(3) Under this option, "privacy concerns would be left unaddressed." *Id*. at 738. Yet it was exactly those concerns that led to the provision of sex-segregated facilities in the first place. Indeed, the whole concept of permissible sex-segregation collapses in view of the highly subjective standard required for a ruling in G. G.'s favor.

This Court previously determined that the Department of Education had chosen the third option, "determining maleness or femaleness with reference to gender identity." *G. G.*, 822 F.3d at 720. That is essentially the same position G.G. now advances. The implications are astounding. If a transgender person elects to use facilities corresponding to biological sex rather than "gender identity," is that permissible? If so, transgender students have the privilege of using the restrooms for either sex—a privilege not granted to non-transgender persons. Would the school then be discriminating against non-transgender students? This interpretation of "sex" is not coherent—let alone persuasive. Instead of resolving an ambiguity in either the statute or regulation, it would create one.

Both *Chevron* and *Auer* presuppose that—under our constitutional structure separating legislative, executive, and judicial powers—Congress could lawfully

delegate discretion to executive agencies to resolve statutory ambiguities or fill gaps in the process of executing a statutory scheme. This discretion must be exercised within reasonable limits. It is not a license to usurp legislative power by using "interpretation" to do an end-run around Congress and turn existing law on its head. Nor is it a license to encroach on judicial power by seizing authority to reinterpret its own regulation, decades later, transforming its meaning so the original becomes incomprehensible—as the Letters did by redefining "sex" and destroying the privacy rationale underlying the law.

Auer deference invites executive agencies to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 11-12 (1996). If this Court rules against the School Board, agencies will have a powerful incentive to frame imprecise regulations they can later revise according to the exigencies and political winds of the day. This is a formula for arbitrary government and tyranny.

Political accountability is also at stake. Obscuring the lines between the three branches generates confusion as to who is responsible for existing laws and policies. This in turn disrupts the political process at state and local levels, removing matters of local concern from the communities most directly impacted

and denying the people the opportunity to participate in government. This strikes at the heart of representative government.

C. No Reasonable Legislator Would Have Defined "Sex" As "Gender Identity."

It is possible—indeed, probable—that no legislator considered how Title IX would apply to transgender students. If Congress had addressed the issue, how would a "reasonable member of Congress" approached it? Active Liberty, at 88. The statute was designed to ensure equal educational opportunities for men and women. That essentially means all persons. Perhaps a "reasonable legislator" would have agreed that transgender students have the right to receive an education. Even so, it surely would have been *unreasonable* to disregard the privacy rights of all other students, setting aside the time-honored understanding of the word "sex" for a novel definition that essentially erases the line between male and female. This is an issue of paramount importance that Congress would have wanted to decide for itself rather than defer to either of the other two branches.

Here, no transgender student has been threatened with expulsion, denied the right to an education, or denied access to a bathroom. The school offered G.G. an accommodation providing a level of privacy beyond what most other students experience. Moreover, the prior administration's "solution"—allowing *any* student to use *any* bathroom by mere notice to the school of his or her subjective "gender identity"—fails to honor even the transgender student's own privacy. And no

matter what private facilities a transgender student uses, it is difficult to imagine the student's transgender status is invisible to others unless the transition has been completed and the student is enrolling in a new school. In this highly sensitive area, the people must have the flexibility to craft policies and solutions that fit local circumstances and protect the liberty of all students.

In its prior ruling, this Court deferred to executive agency guidance that no longer exists, creating an opportunity for the executive branch to encroach on the powers of the other branches. A second ruling against the School Board would create new law out of whole cloth—a judicial encroachment on the legislative branch.

CONCLUSION

Amici urge this Court to affirm the decision of the district court.

Dated: May 12, 2017

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it brief contains **4,938** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

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

Dated: May 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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