FILED: December 1, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056
(4:15-cv-00054-RGD-DEM)

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

Plaintiff - Appellant

v.

GLOUCESTER COUNTY SCHOOL BOARD

Defendant - Appellee

JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF

CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D.

Amici Supporting Appellant

STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph. D.; JON LYNSKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND

Amici Supporting Appellee

O R D E R

Upon consideration of submissions relative to the motions to file an amicus curiae brief, the court grants the motions and accepts the amicus briefs filed by The Family Foundation of Virginia, John Walsh, Lorraine Walsh, Mark Frechette, Jon Lynsky, Bradly Friedlin, Lisa Terry, Lee Terry, Donald Caulder, Wendy Caulder,

Kim Ward, Alice May, Jim Rutan, Issac Rutan, Doretha Guju, Rodney Autry, James Larsen, David Thornton, Kathy Thornton, Joshua Cuba, Claudia Clifton, Ilona Gambill, Tim Byrd and Eagle Forum Education and Legal Defense Fund.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

No. 15-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.G., by his next friend and Mother, DEIRDRE GRIMM

Plaintiffs-Appellants,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

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

MOTION BY THE FAMILY FOUNDATION OF VIRGINIA, ET AL. FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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Pursuant to Rule 29(a), The Family Foundation of Virginia, Mr. John Walsh, Ms. Lorraine Walsh, Mr. Mark Frechette, Mr. Jon Lynsky, Mr. Bradly Friedlin, Ms. Lisa Terry, Mr. Lee Terry, Mr. Donald Caulder, Ms. Wendy Caulder, Ms. Kim Ward, Ms. Alice May, Mr. Jim Rutan, Mr. Issac Rutan, Ms. Doretha Guju, Doctor Rodney Autry, Pastor James Larsen, Mr. David Thornton, Ms. Kathy Thornton, Mr. Joshua Cuba, Ms. Claudia Clifton, Ms. Ilona Gambill, and Mr. Tim Byrd respectfully move this Court for leave to file the accompanying *amicus curiae* brief in the above-captioned matter in support of Defendant-Appellee and affirmance. *Amici* requested the consent of the parties to the filing of the proposed *amici curiae* brief. Counsel for Plaintiff-Appellant consented to the requested, and counsel for Defendant-Appellee does not oppose the request. *Amici* therefore seeks leave from this Court under the corresponding provisions of Fed. R. App. P. 29(a).

IDENTIFICATION AND INTEREST OF *AMICI CURIAE*

The Family Foundation of Virginia (FFV) is a non-partisan, non-profit organization that exists to strengthen families in Virginia through citizen advocacy and education. FFV focuses its efforts on public-policy issues involving the family, including students' constitutional rights at school. As a citizen advocacy organization, Amicus Curiae's interest in this case derives directly from its members throughout Virginia, including members in Gloucester County, who have children in public schools whose right to bodily privacy will be directly impacted

by the outcome of this case.

Mr. John Walsh, Ms. Lorraine Walsh, Mr. Mark Frechette, Mr. Jon Lynsky, Mr. Bradly Friedlin, Ms. Lisa Terry, Mr. Lee Terry, Mr. Donald Caulder, Ms. Wendy Caulder, Ms. Kim Ward, Ms. Alice May, Mr. Jim Rutan, Mr. Issac Rutan, and Ms. Doretha Guju are parents of students or students who attend school in Gloucester County, Virginia and whose interest in bodily privacy are at issue in this case. It is their rights that Defendant-Appellee sought to balance against the demands of G.G. when it adopted a policy limiting all students from accessing the restrooms and locker rooms of the opposite sex. Doctor Rodney Autry, Pastor James Larsen, Mr. David Thornton, Ms. Kathy Thornton, Mr. Joshua Cuba, Ms. Claudia Clifton, Ms. Ilona Gambill, and Mr. Tim Byrd are residents of Gloucester County, Virginia and community members concerned about maintaining students' right to bodily privacy in Gloucester County Public Schools.

DESIRABILITY OF *AMICI CURIAE'S* BRIEF

"Since an *amicus* does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of [its] participation." *Newark Branch of NAACP v. Town of Harriston*, 940 F.2d 792, 808 (3d Cir. 1991) (emphasis added and quotation omitted). But courts are "usually delighted to hear additional judgments from able *amici* that will help the court toward right answers." *Mass. Food Ass'n v. Mass.*

Alcoholic Beverages Control Comm'n, 197 F.3d 560, 567 (1st Cir. 1999). As Justice Alito explained while he was a judge on the United States Court of Appeals for the Third Circuit, an *amicus* brief should be accepted when "amici have stated an 'interest in the case,' and it appears that their brief is 'relevant' and 'desirable' since it alerts the merits panel to possible implications of the appeal." *Neonatology Associates v. Commissioner of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002).

FFV and the Families are able *Amici* that are well-suited to help this Court toward the right answers in a case involving significant constitutional concerns for students and their parents. *Amici* would show the Court that Title IX's text and legislative history does not require schools to ban all sex-specific facilities, including restrooms and locker rooms. *Amici* would also show the Court that exposing individuals to members of the opposite sex in places where personal privacy is expected is forbidden by the constitutional right of bodily privacy.

CONCLUSION

The direct stake that FFV and the Families have in preserving the constitutional right of bodily privacy in Virginia's schools justifies their filing an *amicus curiae* brief in this case. Consequently, FFV and the Families respectfully request that the Court grant their motion to file a timely and unopposed *amicus curiae* brief under Federal Rule of Appellate Procedure 29.

Respectfully submitted this 30th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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CORPORATE DISCLSOURE STATEMENT

The Family Foundation of Virginia is not publicly held, has no parent corporations, and no other entity owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

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Mr. John Walsh, Ms. Lorraine Walsh, Mr. Mark Frechette, Mr. Jon Lynsky, Mr. Bradly Friedlin, Ms. Lisa Terry, Mr. Lee Terry, Mr. Donald Caulder, Ms. Wendy Caulder, Ms. Kim Ward, Ms. Alice May, Mr. Jim Rutan, Mr. Issac Rutan, and Ms. Doretha Guju are parents of students or students who attend school in Gloucester County, Virginia and whose interest in bodily privacy are at issue in this case. It is their rights that Defendant-Appellee sought to balance against the demands of G.G. when it adopted a policy limiting all students from accessing the restrooms and locker rooms of the opposite sex. Doctor Rodney Autry, Pastor James Larsen, Mr. David Thornton, Ms. Kathy Thornton, Mr. Joshua Cuba, Ms. Claudia Clifton, Ms. Ilona Gambill, and Mr. Tim Byrd are residents of Gloucester County, Virginia and community members concerned about maintaining students' right to bodily privacy in Gloucester County Public Schools.

RULE 29(c) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* state that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money to fund the preparation or submission of this brief, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Requests to eliminate the sex-specific nature of restrooms and locker rooms in public schools cannot be analyzed apart from the constitutional right to bodily privacy. That fundamental right limits the application of sex-nondiscrimination laws in a variety of contexts, including those involving equal opportunity in employment, access to places of public accommodation, and access to facilities in public schools. Decades of case law have established that, in light of the right of bodily privacy, sex-nondiscrimination laws do not grant opposite-sex persons access to single-sex facilities where privacy interests are at their strongest and bodily exposure is commonplace.

G.G.'s requested relief squarely conflicts with these precedents. Placing students in circumstances where their privacy is compromised and they are at risk of bodily exposure in the vicinity of members of the opposite sex is not only demeaning and humiliating, but also denies individuals' personal dignity. The

negative effects of such exposure are particularly severe when students are involved because children are still physically, emotionally, and psychologically developing and are particularly body conscious. Courts have thus refused to require schools to open sex-specific restrooms and locker rooms to all students because permanent emotional impairment could result from the deprivation of students' bodily-privacy rights. Instead, courts have recognized that the constitutional right of bodily privacy is not limited to the lowest common denominator of modesty and that laws aimed at eliminating sex discrimination were never intended to force new privacy mores on the American public. This Court should do the same and affirm the decision of the district court. For if the right to bodily privacy does not prevent a transgender student who is biologically and physically a male from showering, changing, and using the restroom with students that are biologically and physically female, then why would the right to bodily privacy prevent a non-transgender student from doing the same?

ARGUMENT

Title IX bans "discrimination" against a student enrolled in an educational program receiving federal financial assistance "on the basis of sex." 20 U.S.C. § 1681. But it does not prohibit taking basic anatomy and respect for others' bodily privacy rights into account. The Code of Federal Regulations abounds with measures approving "separate toilet, locker room, and shower facilities on the basis

of sex" for "students," as long as they are "comparable."[1] And it does so for one simple reason: sex-nondiscrimination laws have never granted members of the opposite sex regular access to single-sex facilities where privacy rights are at their strongest and bodily exposure is commonplace.

Nondiscrimination laws serve laudable goals, but if taken to unreasonable extremes, they may infringe upon other's constitutional rights. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (striking down the application of a nondiscrimination law under the First Amendment); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (same). The reach of laws prohibiting discrimination based on sex, in particular, is limited by the fundamental right of bodily privacy. As explained below, whether public schools, general employment, places of public accommodation, or prison confinement are at issue, the constitutional right of bodily privacy is well established. This established right should lead the Court to affirm the lower court's decision here.

I. Title IX Does Not Require Schools to Violate Bodily Privacy Rights By Allowing Students to Use Restrooms and Facilities of the Opposite Sex.

As the district court properly determined, Title IX does not provide an

[1] 6 C.F.R. § 17.410; 7 C.F.R. § 15a.33; 13 C.F.R. § 113.410; 14 C.F.R. § 1253.410; 15 C.F.R. § 8a.410; 10 C.F.R. §§ 5.410 & 1042.410; 18 C.F.R. § 1317.410; 22 C.F.R. §§ 146.410 & 229.410; 24 C.F.R. § 3.410; 28 C.F.R. § 54.410; 29 C.F.R. § 36.410; 31 C.F.R. § 28.410; 32 C.F.R. § 196.410; 34 C.F.R. § 106.33; 36 C.F.R. § 1211.410; 38 C.F.R. § 23.410; 40 C.F.R. § 5.410; 41 C.F.R. § 101-4.410; 43 C.F.R. § 41.410; 44 C.F.R. § 19.410; 45 C.F.R. § 86.33; 45 C.F.R. §§ 618.410 & 2555.410; 49 C.F.R. § 25.410.

entitlement for G.G. to use restrooms, locker rooms, and other facilities—where students' privacy interests are at their pinnacle—of the opposite sex. The unambiguous language of Title IX and its implementing regulations clearly allow school districts to determine individually[2] whether they will, or will not, maintain sex-specific facilities.[3]

A. Title IX Unambiguously Allows Schools to Maintain Sex-Specific Facilities.

"Title IX embodies a national commitment to the elimination of discrimination based on sex." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 747 (1979). G.G.'s and the United States' arguments hinge on the meaning of the word "sex." To them, sex does not mean biological male and female; rather, it also includes the concepts of "gender identity and expression." United States' Br. 21; *Id.* at 9 ("Treating a student differently from other students because his birth-assigned sex diverges from his gender identity constitutes differential treatment 'on the basis of sex' under Title IX.").

But the plain language of Title IX rejects this view. As the federal courts have consistently held in both the Title IX and Title VII context, the term "sex"

[2] The *amici* brief on behalf of a handful of principals and superintendents argues that they have successfully implemented gender-neutral restrooms at their schools. Title IX, and 34 C.F.R. 106.33 in particular, allow each school district to decide whether or not it will establish gender neutral restrooms. Section 106.33 states that school districts "may provide separate toilet, locker room, and shower facilities on the basis of sex;" it does not say that districts must provide them.

[3] Only Congress can change Title IX and if it did, that would raise serious constitutional concerns, as explained herein.

"means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015); *accord Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("[T]here is nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) ("[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("[T]he plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise.").

These judicial definitions of the word "sex" reflect the common definition found in leading dictionaries before and after Title IX's passage. The 1961 edition of the *Oxford English Dictionary* defines "sex" as "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." Sex, 9 *Oxford English Dictionary* 578 (1961). And a dictionary from 1939 defines "sex" in purely biological terms. Sex, *Webster's New International Dictionary of the English Language* (2d ed. unabridged 1939). This biological understanding of "sex" persists to this day. *See*,

e.g., Sex, *Webster's New Collegiate Dictionary* (1981) ("either of two divisions or organisms distinguished respectively as male or female"); Sex, *Merriam-Webster.com* (last visited November 16, 2015) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures").

Title IX's language further confirms a binary view, specifically using the phrase "both sexes"—referring to male and female—twice. 20 U.S.C. § 1681. The regulations likewise require that facilities "of one sex" shall be comparable to those provide for "the other sex." 34 C.F.R. 106.32; 106.33. The language used emphasizes the binary view of sex, thus rejecting the incorporation of the concepts of "gender identity" and "gender expression."[4]

Title IX and its regulations not only authorize educational entities to establish separate facilities and programs for males and females under certain limited circumstances, they also authorize them to enforce those restrictions. For example, educational entities can "maintain[] separate living facilities for the different sexes." 20 U.S.C. § 1686. They can "provide separate housing on the basis of sex," 34 C.F.R. 106.32, and "provide separate toilet, locker room, and

[4] The American Psychological Association also defines "sex" as "a person's biological status" based on indicators such as "sex chromosomes, gonads, internal reproductive organs, and external genitalia." JA 59.

shower facilities on the basis of sex." 34 C.F.R. 106.33. Schools can "separat[e] … students by sex within physical education classes" and have "separate sessions for boys and girls" during classes "that deal primarily with human sexuality." 34 C.F.R. § 106.34. Thus, in situations where privacy—or common sense—dictates that boys and girls should be separated, Title IX authorizes schools to do just that.

Indeed, as the legislative history of Title IX illustrates, the bill's sponsors were keenly aware of the privacy and safety implications of the law and specifically stated that it was not designed to deprive schools of the ability to have sex-specific facilities for students where privacy and safety is paramount. When Senator Birch Bayh first introduced the legislation, Senator Dominick asked about the scope of the law:

> Mr. DOMINICK. The provisions on page 1, under section 601, refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera. The words "any program or activity," in what way is the Senator thinking here? Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here? Or are we dealing with just educational requirements?
>
> I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot segregate dormitories anyway. But suppose they want to segregate the dormitories; can they do it?
>
> Mr. BAYH. The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. I do not read this as requiring integration of dormitories between the

> sexes, nor do I feel it mandates the desegregation of football fields.
>
> What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated.

117 Cong. Rec. 30407 (1971).

The following year, when Title IX was finally passed, Senator Bayh again reiterated that it was not meant to force men and women to share facilities where their privacy rights would be violated:

> These regulations would allow enforcing agencies to permit differential treatment by sex only [sic]—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved.

118 Cong. Rec. 5807 (1972).

The same concerns were raised when Title IX was debated in the House. Representative Thompson, concerned about men and women using the same facilities, offered an amendment:

> I have been disturbed however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes. I have talked with the gentlewoman from Oregon (Mrs. Green) and discussed with the gentlewoman an amendment which she says she would accept. The amendment simply would state that nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex. So, with that understanding I feel that the amendment

> [exempting undergraduate programs from Title IX] now under consideration should be opposed and I will offer the "living quarters" amendment at the proper time.

117 Cong. Rec. 39260 (1971). This amendment was eventually introduced and passed. 117 Cong. Rec. 39263 (1971).

Thus, when Title IX's text, implementing regulations, and legislative history are read together, a clear, unambiguous picture emerges: when privacy or safety is implicated, schools have the authority to separate the sexes and enforce that separation so long as the facilities they provide for each sex are comparable.

But according to G.G. and the United States, while schools can have separate facilities based on sex, they cannot prohibit students from using facilities assigned to the opposite sex. United States' Br. 8 ("Where a school provides separate restrooms for boys and girls, barring a student from the restrooms that correspond to his or her gender identity because the student is transgender constitutes unlawful sex discrimination."); Appellant's Br. 35 ("The plain text of 34 C.F.R. § 106.33 allows schools to assign restrooms based on 'sex' but does not resolve—or even address—whether schools may exclude transgender students from the restrooms consistent with their gender identity.").

This interpretation would completely eviscerate the authority of schools to maintain separate restrooms and locker rooms under Title IX and preserve the privacy interests protected by separate facilities. If the right to bodily privacy does

not prevent a transgender student who is biologically and physically a male from showering, changing, and using the restroom with students that are biologically and physically female, then why would the right to bodily privacy prevent a non-transgender student from doing the same? Indeed, the non-transgender student could potentially have a strong equal protection claim for demanding such access.

By interpreting Title IX in a manner that removes biological sex as a basis for maintaining separate restrooms and locker rooms, G.G. and the United States are effectively removing biological sex from serving as a basis for schools to differentiate between students. As one court explained in a comparable context:

> If [G.G. and the United States] were to prevail, then all sex-segregated restrooms and locker rooms would have to be abolished. The absence of sex-segregated spaces would stifle the ability of the [school district] to continue with a respected educational methodology. It follows too that those students and parents who prefer an education with sex segregated restrooms and locker rooms would be denied their freedom of choice....
>
> It is not for us to pass upon the wisdom of segregating boys and girls in their use of restrooms and locker rooms. We are concerned not with the desirability of the practice but only its constitutionality. Once that threshold has been passed, it is the [school district's] responsibility to determine the best methods of accomplishing its mission.

Johnston, 97 F. Supp. 3d at 678 (quotation omitted).

B. The U.S. Department of Education's Interpretation of Title IX is Not Entitled to Deference.

Both G.G. and the United States argue that the Department of Education's interpretation of Title IX, as contained in a January 7, 2015 letter to school

districts, should be given deference under *Auer v. Robbins*, 519 U.S. 452 (1997). But deference is not proper here for several reasons.

First, this case does not involve the interpretation of a regulation; rather, it involves the interpretation of a statute. As both G.G. and the United States argue, the plain text of 34 C.F.R. 106.33 allows school districts to maintain sex-specific facilities, and neither G.G. nor the United States challenges the authority of school districts to have separate facilities. Appellant's Br. 34 ("The plain text of 34 C.F.R. § 106.33 allows schools to assign restrooms based on 'sex'"); United States' Br. 22 n.8 ("G.G. does not challenge the existence of male and female restrooms, and for good reason. ED has concluded that the mere act of providing separate restroom facilities for males and females does not violate Title IX (as long as the facilities are comparable)….").

The crux of G.G.'s and the United State's argument is that the term "on the basis of sex" in Title IX itself, *see* 20 U.S.C. § 1681, includes "gender identity." Appellant's Br. 22 ("Discrimination based on transgender status is discrimination based on sex under Title IX."); United States' Br. 9 ("Treating a student differently from other students because his birth-assigned sex diverges from his gender identity constitutes differential treatment 'on the basis of sex' under Title IX.").

However, *Auer* deference is limited "to an agency's interpretation of its own ambiguous regulation." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct.

2156, 2166, (2012); *accord Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). When, as here, an agency seeks deference for its interpretation of a statute, it must satisfy the stricter requirements of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Rather than going through the proper notice and comment rulemaking process, the Department of Education attempted to redefine the phrase "on the basis of sex" in Title IX to include gender identity through a Questions and Answers document on its website. OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity."). This "significant guidance document" is "non-binding [in] nature" and should not be "improperly treated as [imposing] legally binding requirements." 72 Fed. Reg. 3432, 3433, 3435 (Jan. 25, 2007).

The Department of Education's interpretation is not entitled to deference under the lesser *Auer* standard because the text of Title IX and its implementing regulations are not ambiguous. "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen*, 529 U.S. at 588. As discussed *supra*, the language of Title IX, its regulations, and its legislative history express a clear intent to limit "on the basis of sex" to male/female distinctions, not gender identity or expression. "To defer to the agency's position would be to

permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id*.

Nor is the Department's interpretation entitled to any deference under *Chevron*. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587.

Finally, courts are right to be deeply skeptical of affording deference to new agency interpretations of statutes or regulations issued decades before. *Christopher*, 132 S. Ct. at 2168 ("[W]here, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute."). Both Title IX and its implementing regulations were enacted over 40 years ago. *See* 34 C.F.R. 106.1 (setting an effective date of July 21, 1975). Yet it is only very recently—in April 2014—that the Department of Education sought to reinterpret "on the basis of sex" to include gender identity and expression. This gap from enactment to interpretation fatally undercuts the Department of Education's recent efforts to redefine "sex."

C. *Price Waterhouse* Did Not Expand Title IX to Include Gender Identity and Gender Expression.

G.G. and the United States are incorrect to argue that the Supreme Court's holding in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), should lead the

Court to conclude that denying a transgender person free access to restrooms dedicated to the opposite biological sex violates Title IX. Appellant's Br. 24; United States' Br. 10. *Price Waterhouse* involved an employer's decision to deny a partnership position to a female candidate because she did not conform to the employer's stereotype of what a woman should act like. That holding has no bearing on the question of whether a transgender person may use the restroom of the opposite sex. Rather, it applies only to situations where a school denies an opportunity to a student because he or she does not conform to stereotypes associated with his or her biological sex: for example, if a school told a female she was insufficiently "girly" to be a cheerleader or to use the girl's bathroom.

In fact, the United States' brief specifically acknowledges that these are the fact patterns to which *Price Waterhouse* applies:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom. To do so would engage in precisely the sort of sex stereotyping that *Price Waterhouse* forbids.

United States' Br. 27.

As G.G. candidly admits, the school continues to allow G.G. to use the female restroom despite the fact that G.G. does not look or dress like a female. Appellant's Br. 12 ("The Board has asserted that [G.G.] may use the girls'

restroom…."). Indeed, G.G. has the same options given to every other student in Gloucester: use the restroom reserved for your biological sex or one of numerous single-stall restrooms scattered throughout the school. JA 57-58. But G.G. refuses either alternative. JA 32.

Confusingly, G.G. advocates for a restroom policy that would facially violate *Price Waterhouse*. G.G. argues that it would be "more consistent with social norms" to assign restrooms "in accordance with [a person's] gender identity" because "[w]hen a person walks into a restroom" all that they see is "that person's manifestation of gender identity." Appellant's Br. 37. In other words, female restrooms would be assigned to those who look and act like females, and male restrooms to those who look and act like males. But this is precisely what *Price Waterhouse* forbids.

Because Gloucester is not denying G.G. any educational opportunity or benefit for failing to conform to stereotypical notions of femininity, *Price Waterhouse* is inapplicable.

II. Students' Bodily Privacy Rights Bar the School Board From Opening Sex-Specific Restroom and Locker Room Facilities to Members of the Opposite Sex.

Public school boards are "state actors" that must honor students' constitutional rights. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring) ("The public schools are invaluable and beneficent

institutions, but they are, after all, organs of the State."); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("We have held school officials subject to the commands of the First Amendment, and the Due Process Clause of the Fourteenth Amendment." (quotations omitted)). Those rights include the fundamental right of bodily privacy, which clearly applies to students. *See, e.g.*, *Beard v. Whitmore Lack Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated on other grounds by* 122 S. Ct. 2653 (2002) ("[T]here is no question that schoolchildren retain a legitimate expectation of privacy in their persons, including an expectation that one should be able to avoid the unwanted exposure of one's body, especially one's 'private parts.'").

Opening communal boys' and girls' restrooms and locker rooms to members of the opposite sex would directly violate students' constitutional right to privacy. "[C]hildren are extremely self-conscious about their bodies." *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993). This "adolescent vulnerability intensifies the patent intrusiveness of [bodily] exposure." *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 374 (2009). Requiring students to use the restroom and unclothe themselves in the vicinity of members of the opposite sex would necessarily be an "embarrassing, frightening, and humiliating" experience that would undermine their basic human dignity. *Id.* at 374-75. After

all, "[p]ublic school locker rooms [and restrooms] … are not notable for the privacy they afford." *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995).

Public schools have consequently always been empowered to avoid such damaging results to students' welfare, including in the face of misguided lawsuits, like this one, that wrongly claim that Title IX or the Equal Protection Clause mandate students be permitted to use the restroom of their choice. *See, e.g.*, *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009) (rejecting a students' Title IX, Title VII, and First and Fourteenth Amendment arguments for opposite-sex restroom use because a public college was motivated by privacy and safety reasons, not the student's sex); *Johnston*, 97 F. Supp. 3d at 668 (noting that ensuring "the privacy of … students to disrobe and shower outside of the presence of members of the opposite sex" is a "justification [that] has been repeatedly upheld by courts" in rejecting a student's Title IX and equal protection arguments for opposite-sex restroom use).

No court, to *amici*'s knowledge, has ever held to the contrary. This Court should not be the first. "[T]here are [anatomical] differences between males and females that the Constitution necessarily recognizes," particularly when the fundamental right of bodily privacy is at stake. *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring).

III. Exposing Individuals to Members of the Opposite Sex In Places Where Personal Privacy is Expected is Forbidden by the Constitutional Right of Bodily Privacy.

The right of bodily privacy applies in any circumstance in which government action, including the application of nondiscrimination laws, would require the co-mingling of sexes in places where personal privacy is required and where the potential exists for exposing unclothed individuals to members of the opposite sex.

For example, the United States District Court for the Southern District of West Virginia rejected a female employee's sex-discrimination claim based on her employer's refusal to assign her to clean male "bath-toilet-locker-room facilities." *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1125 (1982). It did so because "while using any of the bathhouses, the male employees had legitimate privacy rights that would have been violated by a female's entering and performing janitorial duties therein during their use thereof." *Id.* at 1132. Male employees, the court explained, had the right "to protect [their privacy] rights" by "insist[ing] that" biological females not have access to bathhouse facilities while they were in general use. *Id.* Even if separate changing and shower facilities were available, the court recognized that male employees "would still be unable to use the toilet facilities … without suffering violation of their privacy rights." *Id.* at 1132. Indeed, one of the plaintiff's proposed "schemes" required the employer to "erect

doors and/or walls which would obstruct the shower and toilet areas from her view." *Id*. The court rejected the feasibility or reasonability of this suggestion because building doors and walls "would merely divide the milieu in which the conflict exists rather than provide a solution to the conflict itself." *Id*.

Similarly, in *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410, 1417 (N.D. Ill. 1984), the court denied a woman's sex-discrimination complaint based on her private employer's refusal to allow her to clean male restrooms during the workday because "an opposite sex procedure would cause embarrassment and increased stress in both male and female washroom users (*e.g.*, men would not be able to urinate if a woman were present in the men's washroom)" and "the invasion of privacy that would be created by an opposite sex procedure would be extreme." Once again, the court rejected a proposed solution whereby the restrooms would be closed during a scheduled time so that they could be cleaned by a member of the opposite sex.

> As the evidence at trial demonstrated, privacy would be invaded to a degree under *any* opposite sex system. Even the least intrusive alternative, the scheduled closing of the washrooms each day, would still cause stress to tenants and guests when an attendant knocked on the opposite sex's washroom's door to determine if the washroom were in use. A person using the washroom at the time would not know if the attendant would, nevertheless, enter the washroom, not realizing the washroom was still in use.

Id. at 1422. Nor would a policy requiring "the attendant to leave the opposite sex washroom during the cleaning process whenever a person wishes to use the

washroom" alleviate the privacy concerns, because "tenants would be faced with a greater probability of embarrassing or stressful confrontations with cleaning attendants of the opposite sex in their washroom." *Id*. at 1422-23.

The same is true here. Reversing the trial court would result in students not being unable to use the communal restroom or shower facilities without forfeiting their constitutional privacy rights and experiencing the embarrassment and stress that accompanies being forced to perform intimate bodily functions in the presence (or potentially in view of) members of the opposite sex. Requiring the school board to add more walls or privacy barriers in the locker rooms and restrooms would do nothing to alleviate the underlying privacy violations.

It is reasonable for all students to expect that when engaging in activities where privacy is desired—from using the restroom to changing and showering—they will exclusively be in the presence of classmates of the same sex. The radical redefinition of these norms would cause even greater stress or embarrassment than was present in the *Brooks* and *Norwood* cases, discussed above, where the rational fear of a female janitor walking into the men's restroom created justifiable privacy concerns. And just as the privacy rights of other employees trumped the interests of the plaintiffs in those cases, so too do the undeniable privacy interests of the hundreds of students in Gloucester outweigh G.G.'s desire to use restrooms dedicated to the opposite sex.

IV. Bodily Privacy Rights Preclude Opening Even Certain Sex-Specific Places of Public Accommodation to Members of the Opposite Sex.

Privacy rights do not apply merely in the employment context to permit certain sex-specific job assignments. They are robust enough to entirely shut the doors of certain sex-specific public accommodations to members of the opposite sex. A Pennsylvania court did just that in response to the state human rights commission's efforts to force health clubs designed solely for women to open their doors to men. *Livingwell (North) Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1288 (Pa. Commw. Ct. 1992). Indeed, the court recognized an automatic defense to sex-discrimination claims in any situation "where there is a distinctly private activity involving exposure of intimate body parts." *Id.* at 1291. One of the reasons it did so was that otherwise "sex segregated accommodations such as bathrooms, showers and locker rooms would have to be open to the" opposite sex. *Id.*[5]

[5] Many state public accommodation laws provide broad exemptions for restrooms, locker rooms, and other public facilities where privacy is at issue, including some within the Fourth Circuit *See*, e.g., Md. Code Ann., State Gov't § 20-303(a)(2) (exempting facilities that are "(i) uniquely private and personal in nature; and (ii) designed to accommodate only a particular sex"); Conn. Gen. Stat. Ann. § 46a-64(b)(1)(B) ("the prohibition of sex discrimination shall not apply to … separate bathrooms or locker rooms based on sex"); 11 R.I. Gen. Laws Ann. § 11-24-3.1 ("Nothing contained in this chapter that refers to 'sex' shall be construed to mandate joint use of restrooms, bath houses, and dressing rooms by males and females."); Haw. Rev. Stat. Ann. § 489-4 (allowing separate facilities "for female and for male patrons" when needed "to protect personal rights of privacy"); 775 Ill. Comp. Stat. Ann. 5/5-103 (exempting "restrooms, shower rooms, bath houses, health clubs and other similar facilities"); Wis. Stat. Ann. § 106.52(c)

The court refused to take such a drastic step. Instead, it explained that "in relation to one's body, there are societal norms, *i.e.*, a spectrum of modesty, which one either follows or respects, and if one is required to breach a modesty value, one becomes humiliated or mortified." *Id.* at 1292. Disregarding these essential modesty norms and causing feelings of mortification in other citizens is not a matter of simple discomfort, it "invade[s] the individual's most fundamental privacy right, the right of privacy of one's own body." *Id.*

Significantly, the *Livingwell* Court explained that the fundamental right of bodily privacy is "not determined by the lowest common denominator of modesty that society considers appropriate." *Id.* at 1293. The state human rights commission's efforts to "impose" a "different sense of modesty" on the public consequently failed because the purpose of sex-nondiscrimination laws "'is to eliminate sex discrimination … not to make over the accepted mores and personal sensitivities of the American people in the more uninhibited image favored by any particular'" individual or group. *Id.* at 1294 (quoting *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981)). Because no "overriding considerations" weighed against the "legitimate privacy interest" of "women who want[ed] to exercise at an all-female facility" and it was "impossible to allow men

("Nothing in this subsection prohibits separate treatment of persons based on sex with regard to public toilets, showers, saunas and dressing rooms for persons of different sexes.").

to be present while these women are exercising and, at the same time protect their right to privacy," *id.*, the court approved of banning males from health clubs designed solely for female customers.

This public-accommodations case teaches important lessons that are directly applicable to the matter at hand. First, bodily privacy rights are strong and robust enough to preempt even public accommodation laws designed to give equal access to public facilities. Other students' constitutional right of bodily privacy thus poses a considerable barrier to G.G.'s appeal. Second, the fundamental right of bodily privacy bars government from using sex-nondiscrimination laws to change traditional modesty standards. The point of sex-nondiscrimination legislation like Title IX is to grant students equal educational opportunities, not alter traditional practices designed to ensure student privacy, such as providing sex-specific restrooms and locker rooms, which many Title IX regulations specifically affirm. *See supra* p. 4 n.1 Third, the scope of bodily privacy rights is not determined by the most bohemian members of society. Some may consider their fellow students' modesty principles "old-fashioned," but that does not rob them of their constitutional privacy rights.

To be sure, communal unisex restrooms are not something even the vast majority of fully-fledged adults would be willing to accept. *See, e.g.*, *Sommers*, 667 F.2d at 748-49 (affirming ruling in favor of employer who terminated a male-

to-female employee based on evidence that "a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel"); *Etsitty*, 502 F.3d at 1226-27 (finding that an employer's termination of a male-to-female employee who desired to use the female restroom was justified where the employee's "restroom usage could become a problem" and the employer was legitimately "concerned about such complaints [over restroom usage] arising in the future").

V. Even in the Prison Context, the Constitutional Right of Bodily Privacy Forbids Regularly Exposing Unclothed Inmates to the View of Opposite-Sex Guards and Students Have Much More Robust Privacy Rights.

Convicted prisoners "must surrender many rights of privacy." *Lee v. Downs*, 641 F.2d 1117, 1119 (1981). But the United States Court of Appeals for the Fourth Circuit established over thirty years ago that the constitutional right of bodily privacy is so fundamental that it is not among them:

> Most people … have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.

Id. "[D]espite the fact that the general employment of guards may be required to be open to persons of both sexes under equal employment opportunity legislation," *id.* at 1119-20, the "right of privacy" prohibits stationing male guards "in rooms in

which female prisoners [are] required to dress or undress," *id.* at 1120. Vice versa, the constitutional right of privacy bans placing female guards "in positions to observe … men while undressed or using toilets." *Id.*; *see also Strickler v. Waters*, 989 F.2d 1375, 1387 (4th Cir. 1993) ("[W]hen not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates [prisoners'] constitutional rights.").

In short, the right of bodily privacy is so fundamental that even convicted prisoners daily claim its protection to ensure that they are not forced to change clothes, shower, or use the restroom in plain view of the opposite sex. *See, e.g.*, *Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (noting that "[b]asic human dignity requires some minimal protection of privacy, at least from the opposite sex" and that "there is no alternative way for the prisoners to exercise this right of privacy than to be adequately shielded from view while performing ordinary bathroom functions"); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981) (ordering "that female prisoners … be supplied with suitable sleepwear and be enabled to use the toilet and undress without being needlessly observed by male guards"); *Hudson v. Goodlander*, 494 F. Supp. 890, 892-93 (D. Md. 1980) (finding an inmates' rights "were violated by the assignment of female guards to posts where they could view him while he was completely or entirely unclothed," such as when "washing, undressing or performing other private

functions").

What is true in prisons can be no less true in public schools. In fact, students possess far more robust constitutional freedoms than convicts. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (recognizing that "students" do not "shed their constitutional rights … at the schoolhouse gate"). If inmates' constitutional right to "privacy encompasses the … interest in not being viewed unclothed by members of the opposite sex," *Teamsters Local Union No. 117 v. Wash. Dep't of Corr.*, 789 F.3d 979, 990 (9th Cir. 2015) (quotations omitted), students' constitutional right to bodily privacy does the same, *see Poe v. Leonard*, 282 F.3d 123, 136, 138-39 (2d Cir. 2002) (explaining that the right to privacy extends beyond the "context of prison confinement and search or seizure by the government" and that "there is a right to privacy in one's unclothed or partially unclothed body, regardless of whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment"). Because accepting G.G.'s arguments would require other students to forego the essential right to bodily privacy, which even convicted prisoners maintain, they should be rejected by this Court.

CONCLUSION

Given compulsory attendance laws, such as Virginia Code § 22.1-254, "[m]ost parents, realistically, have no choice but to send their children to a public

school and little ability to influence what occurs in the school." *Morse*, 551 U.S. at 424 (Alito, J., concurring). The job of safeguarding students' fundamental rights therefore often falls to school boards. It would be no small irony to grant public schools the authority to shield "children … from [verbal] exposure to sexually explicit, indecent, or lewd speech," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986), and safeguard the "privacy rights of students" in their mere paper records, 20 U.S.C. § 1232g(a)(1)(D), but to deny them the ability to protect students' constitutional right to bodily privacy, which forestalls efforts to compel students to use the restroom, undress, change, or shower in the vicinity of members of the opposite sex. For the reasons explained above, *amici* respectfully requests that the Court affirm the decision of the lower court.

Respectfully submitted this 30th day of November, 2015.

/s/ J. Matthew Sharp

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CERTIFICATE OF COMPLIANCE

This *amici* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B), because this brief contains 6,873 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 Word in Times New Roman 14-point font.

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I hereby certify that on November 30, 2015, I electronically filed the foregoing *amici* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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