[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 18-13592

DREW ADAMS,
a minor, by and through his next friend and mother, Erica Adams Kasper,

Plaintiff-Appellee,

versus

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant,

TIM FORSON, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:17-cv-00739-TJC-JBT

Before WILLIAM PRYOR, Chief Judge, WILSON, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, and BRASHER, Circuit Judges.

LAGOA, Circuit Judge, delivered the opinion of the Court, in which WILLIAM PRYOR, Chief Judge, NEWSOM, BRANCH, GRANT, LUCK, and BRASHER, joined.

LAGOA, Circuit Judge, filed a concurring opinion.

WILSON, Circuit Judge, filed a dissenting opinion.

JORDAN, Circuit Judge, filed a dissenting opinion, in which WILSON and ROSENBAUM, Circuit Judges, joined.

ROSENBAUM, Circuit Judge, filed a dissenting opinion.

JILL PRYOR, Circuit Judge, filed a dissenting opinion, in which ROSENBAUM, Circuit Judge, joined as to Parts I, II, III.A, III.B., III.D., and IV.

LAGOA, Circuit Judge:

This case involves the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex. This appeal requires us to determine whether separating the use of male and female bathrooms in the public schools based on a student's biological sex violates (1) the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, and (2) Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq*. We hold that it does not—separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant-Appellant, the School Board of St. Johns County (the "School Board"), is responsible for providing "proper attention to health, safety, and other matters relating to the welfare of students" within the St. Johns County School District (the "School District"). Fla. Stat. § 1001.42(8)(a). The School Board maintains and oversees the K-12 policies for the 40,000 students who attend the thirty-six different schools within the School District. *See generally id.* § 1001.42. Of the 40,000 students attending schools within the School District, around sixteen identify as transgender.

Plaintiff-Appellee, Drew Adams, is a transgender boy. This means that Adams identifies as male, while Adams's biological sex—sex based on chromosomal structure and anatomy at birth—is female. Adams entered the School District in the fourth grade as

a biological female and identified as a female. At the end of eighth grade, however, Adams began identifying and living as a boy. For example, Adams dressed in boys' clothing and wore a "chest binder" to flatten breast tissue. Most pertinently for this appeal, Adams adopted the male pronouns "he" and "him" and began using the male bathroom in public.

In August 2015, Adams entered ninth grade at Allen D. Nease High School ("Nease") within the School District. Nease provides female, male, and sex-neutral bathrooms for its 2,450 students. The communal female bathrooms have stalls, and the communal male bathrooms have stalls and undivided urinals. In addition to performing bodily functions in the communal bathrooms, students engage in other activities, like changing their clothes, in those spaces. Single-stall, sex-neutral bathrooms are provided to accommodate any student, including the approximately five transgender students at Nease, who prefer not to use the bathrooms that correspond with their biological sex. The bathrooms at Nease are ordinarily unsupervised.

The School Board, like many others, maintains a longstanding, unwritten bathroom policy under which male students must use the male bathroom and female students must use the female bathroom. For purposes of this policy, the School Board distinguishes between boys and girls on the basis of biological sex—which the School Board determines by reference to various documents, including birth certificates, that students submit when they first enroll in the School District. The School Board does not accept

updates to students' enrollment documents to conform with their gender identities.

According to the School Board, the bathroom policy addresses concerns about the privacy, safety, and welfare of students pursuant to the School Board's duties under the governing Florida statute. In line with these concerns, the parties specified the following in their joint pretrial statement:

> The parties stipulate that certain parents of students and students in the St. Johns County School District object to a policy or practice that would allow students to use a bathroom that matches their gender identity as opposed to their sex assigned at birth. These individuals believe that such a practice would violate the bodily privacy rights of students and raise privacy, safety and welfare concerns.

In 2012, School District personnel began a comprehensive review of LGBTQ[1] issues affecting students. Indeed, the then-Director of Student Services for the School District attended, and sent personnel to, national LGBTQ conferences to help inform the School District about issues affecting the LGBTQ student community. The Director conducted significant research on LGBTQ student issues, met with LGBTQ student groups at schools throughout the School District, and contacted school administrators outside the School District, as well as a local LGBTQ organization, to

[1] LGBTQ is an acronym for the phrase "lesbian, gay, bisexual, transgender, and questioning (and/or queer)."

"gather every bit of information" to "support [LGBTQ] children." The Director also convened an LGBTQ task force, which met with "district administrators, . . . principals, . . . attorneys, . . . guidance counselors, [and] mental health therapists" to hear "every perspective" on emerging LGBTQ issues.

The School District's review of LGBTQ student issues culminated in 2015 with the announcement of a set of "Guidelines for LGBTQ students – Follow Best Practices" (the "Best Practices Guidelines"). Under the Best Practices Guidelines, School District personnel, upon request, address students consistent with their gender identity pronouns. The guidelines also allow transgender students to dress in accordance with their gender identities and publicly express their gender identities. Finally, the guidelines formally note that: "Transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex."

The School Board's decision to maintain the longstanding bathroom policy separating bathrooms based on biological sex, while providing sex-neutral bathroom accommodations for transgender students under the Best Practices Guidelines, was motivated, in part, by the issue of gender fluidity in which students may switch between genders with which they identify. Both the Best Practices Guidelines and the bathroom policy apply to all schools with communal bathrooms in the School District, not only to high schools like Nease.

Because Adams is biologically female and first enrolled in the School District as a female, Adams is identified as a female for purposes of the bathroom policy. For the first few weeks of ninth grade, Adams used the male bathrooms (in violation of the bathroom policy) without incident. However, at some point during this period, two unidentified students observed Adams using a male bathroom and complained to school officials. The school then informed Adams that, under the bathroom policy, Adams had to use either the communal female bathrooms or the single-stall, sex-neutral bathrooms. Adams took issue with that directive and, with parental help, began petitioning the school to change its policy.

Adams continued the process of identifying as a male, including amending government documents with the State of Florida. For example, shortly before receiving a driver's license in the fall of 2016, Adams submitted medical documents to the Florida Department of Motor Vehicles to receive a male designation on the license. And, in 2017, while this litigation was pending, Adams obtained an amended birth certificate with a male designation.

Adams also began taking birth control to stop menstruation and testosterone to appear more masculine and underwent a "double-incision mastectomy" to remove breast tissue. Because Adams was still just a teenager who had not yet reached the age of maturity, Adams could not undergo additional surgeries to rework external genitalia. Thus, at all times relevant to this lawsuit, Adams

possessed the reproductive anatomy Adams was born with—that of a female.

On June 28, 2017, after Adams's efforts to change the School Board's bathroom policy failed, Adams filed suit against the School Board under 42 U.S.C. § 1983, alleging that its bathroom policy violated both the Equal Protection Clause and Title IX. After a three-day bench trial, the district court ruled in Adams's favor on both counts. The district court enjoined the School Board from prohibiting Adams's use of the male bathrooms and granted Adams $1,000 in compensatory damages.

The School Board timely appealed the district court's order. Following oral argument, a divided panel of this Court affirmed the district court over a dissent. *Adams ex rel. Kesper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1292 (11th Cir. 2020); *id.* at 1311 (Pryor, C.J., dissenting). After a member of this Court withheld the mandate, the panel majority sua sponte withdrew its initial opinion and issued a revised opinion, again affirming the district court over a revised dissent but on grounds that were neither substantively discussed in the initial panel opinion nor substantively made by any party before the district court or this Court.[2] *Adams ex rel. Kesper*

[2] Specifically, the revised opinion eschewed addressing Title IX. And, instead, the revised opinion sua sponte framed Adams's Equal Protection Clause claim as a challenge to the School Board's enrollment documents policy—i.e., the means by which the School Board determines biological sex upon a student's entrance into the School District—and not as a challenge to the School Board's

bathroom policy—i.e., the policy separating the male and female bathrooms by biological sex instead of transgender status or gender identity. But this case has never been about the enrollment documents policy.

This was not the challenge advanced by Adams in the district court. Indeed, Adams centered the district court litigation on the bathroom policy. For example, in Adams's amended complaint, Adams sought relief for "his exclusion" and denial of "equal access to the boys' restroom." Adams specifically challenged "[the School Board's] policy of excluding transgender students from the single-sex facilities that match their gender identity." Then, in the joint pretrial statement, Adams sought to recover damages for the harm Adams suffered "as a result of [the School Board's] implementation of its discriminatory restroom policy." In Adams's proposed findings of fact and conclusions of law, Adams defined the School Board's purported discriminatory bathroom policy as "[the School Board's] policy, custom, or usage, as these terms are used in 42 U.S.C. § 1983, barring transgender students from the restrooms consistent with their gender identity." And because Adams claimed that the policy "treated [Adams] differently (i) from other boys, who can use restrooms that match their male gender identity; and (ii) from non-transgender students, since the policy in effect relegates him to a gender neutral restroom," Adams sought to have the district court enjoin the School Board from enforcing a policy "that denies transgender students access to and use of restrooms that match a student's gender identity."

Ultimately, Adams maintained, until this en banc proceeding after two prior opinions had been vacated, that this lawsuit was about allowing transgender students to access bathroom facilities that match their gender identities, not revising the means by which the School Board determines biological sex. While Adams now tries to raise a new claim that the enrollment documents policy violates the Equal Protection Clause because it creates an "arbitrary sex-based distinction," Adams cannot amend the complaint by arguments made in an appellate brief. *Cf. Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (explaining that a plaintiff may not amend the complaint by argument in an appellate brief).

v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1303–04 (11th Cir. 2021); *id.* at 1321 (Pryor, C.J., dissenting). We then granted the School Board's petition for rehearing en banc and vacated the panel's revised opinion. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 9 F.4th 1369, 1372 (11th Cir. 2021).

Pursuant to our en banc briefing notice to the parties, on appeal the only questions before this Court are:

> 1) Does the School District's policy of assigning bathrooms based on sex violate the Equal Protection Clause of the Constitution? and
>
> 2) Does the School District's policy of assigning bathrooms based on sex violate Title IX?

II. STANDARD OF REVIEW

"After a bench trial, we review the district court's conclusions of law *de novo* and the district court's factual findings for clear error." *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1230 (11th Cir. 2009). A factual finding is clearly erroneous when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Morrissette–Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1319 (11th Cir. 2007) (quoting *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005)).

III. ANALYSIS

On appeal, Adams argues that the School Board's bathroom policy violates both the Equal Protection Clause and Title IX. At

its core, Adams's claim is relatively straightforward. According to Adams, the School Board's bathroom policy facially discriminates between males and females. Adams, who identifies as a male, argues that the policy violates Adams's rights because, as a transgender student, Adams cannot use the bathroom that corresponds to the sex with which Adams identifies. Which is to say, Adams argues that by facially discriminating between the two sexes, the School Board's bathroom policy also necessarily discriminates against transgender students. We disagree with Adams's theory that separation of bathrooms on the basis of biological sex necessarily discriminates against transgender students.[3]

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[3] Adams also argues that the appeal of the district court's order should be classified as an as-applied challenge to the School Board's bathroom policy limited to Adams's particular circumstances. But that does not help in our resolution of this appeal because "classifying a lawsuit as facial or as-applied . . . does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Indeed, an as-applied challenge merely "affects the extent to which" a plaintiff must demonstrate "the invalidity of the challenged law" or constitutional violation and "the corresponding 'breadth of the remedy.'" *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)). But an alleged violation of one individual's constitutional rights under the Equal Protection Clause would necessarily constitute a violation of the Equal Protection Clause and the Constitution at large, regardless of the individually-applied remedy. Further, as we discuss below, equating "sex" to "gender identity" or "transgender status" under Title IX, as Adams would have us do as a matter of statutory interpretation, would touch upon the interests of all Americans—not just Adams—who are students, as well as their parents or guardians, at institutions subject to the statute. We therefore do not find merit in Adams's attempt to cabin the lawsuit to Adams's particular circumstances.

Indeed, when we apply first principles of constitutional and statutory interpretation, this appeal largely resolves itself. The Equal Protection Clause claim must fail because, as to the sex discrimination claim, the bathroom policy clears the hurdle of intermediate scrutiny and because the bathroom policy does not discriminate against transgender students. The Title IX claim must fail because Title IX allows schools to separate bathrooms by biological sex. We now begin our full analysis with the Equal Protection Clause and end with Title IX.[4]

A. The Bathroom Policy Does Not Violate the Equal Protection Clause

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

There has been a long tradition in this country of separating sexes in some, but not all, circumstances—and public bathrooms are likely the most frequently encountered example. Indeed, the universality of that practice is precisely what made Justice

[4] For purposes of this opinion, unless otherwise indicated, our references to "the dissent" in this opinion refer to Judge Jill Pryor's dissent.

Thurgood Marshall's statement—"[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door"—so pithy. *City of Cleburne*, 473 U.S. at 468–69 (Marshall, J., concurring in the judgment in part and dissenting in part). Of course, not all sex-based classifications, no matter how longstanding, satisfy the mandate of the Equal Protection Clause. And it is well settled that when it comes to sex-based classifications, a policy will pass constitutional muster only if it satisfies intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). To satisfy intermediate scrutiny, the government must show "that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

For a governmental objective to be important, it cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. For a policy to be substantially related to an important governmental objective, there must be "enough of a fit between the . . . [policy] and its asserted justification." *Danskine v. Mia. Dade Fire Dep't*, 253 F.3d 1288, 1299 (11th Cir. 2001). But the Equal Protection Clause does not demand a perfect fit between means and ends when it comes to sex. *See Nguyen v. INS*, 533 U.S. 53, 70 (2001) ("None of our gender-based classification equal protection cases have required that the [policy] under consideration

must be capable of achieving its ultimate objective in every instance."); *see also Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro Dade County*, 122 F.3d 895, 929 (11th Cir. 1997) ("[U]nder intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.").

In the instant appeal, Adams argues that the bathroom policy unlawfully discriminates on both the basis of sex and transgender status. We address both of Adams's arguments in turn and hold that there has been no unlawful discrimination.

1. The Bathroom Policy Does Not Unlawfully Discriminate on the Basis of Sex

The School Board's bathroom policy requires "biological boys" and "biological girls"—in reference to their sex determined at birth—to use either bathrooms that correspond to their biological sex or sex-neutral bathrooms. This is a sex-based classification. Adams challenges the policy's requirement that Adams must either use the female bathrooms—which correspond with Adams's biological sex—or the sex-neutral bathrooms. Simply put, Adams seeks access to the male bathrooms, which correspond with the gender Adams identifies with.

Before reaching the merits of Adams's argument and the constitutional question presented in this case, we begin with one prefatory note: the role that schools have in setting policies for students. As the Supreme Court has recognized, constitutional rights, including "Fourteenth Amendment rights, are different in public

schools than elsewhere" because of "the schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). Schools operate in loco parentis to students and are "permit[ed] a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. This is because, "in a public school environment[,] . . . the State is responsible for maintaining discipline, health, and safety." *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002).

Indeed, schools' responsibilities are so great that they can be held liable for their failures to protect students from sexual assault and harassment. *See, e.g.*, *Miami-Dade Cnty. Sch. Bd. v. A.N.*, 905 So. 2d 203, 204–05 (Fla. Dist. Ct. App. 2005) (upholding a jury verdict that found a school to be negligent and thus liable for failure to protect a student from sexual assault by another student in the bathroom); *see also Williams v. Bd. of Regents*, 477 F.3d 1282, 1288–91 (11th Cir. 2007) (reversing a district court's dismissal of a Title IX claim against the University of Georgia alleging gang rape by a group of athletes in a university dormitory). Given schools' responsibilities, the Supreme Court has afforded deference to their decisions even when examining certain constitutional issues. *See, e.g.*, *Acton*, 515 U.S. at 665 (Fourth Amendment); *Morse v. Frederick*, 551 U.S. 393, 403–08 (2007) (First Amendment); *Ingraham v. Wright*, 430 U.S. 651, 671 (1977) (Eighth Amendment).

None of that, of course, is to say that schools have carte blanche. It is to say, though, that when school authorities have prudently assessed and addressed an issue that affects student

welfare, we should pay attention. Just so here. In this case, the School Board has gone to great lengths—as the district court itself acknowledged—to accommodate LGBTQ students:

> Beginning in 2012, the (now retired) Director of Student Services worked with LGBTQ students, attended and sent staff to LGBTQ conferences, and researched school policies in other school districts in Florida and elsewhere to educate herself and the School District about emerging LGBTQ issues. She formed a task force which consulted with district administrators, principals, attorneys, guidance counselors, mental health professionals, parents, students, members of the public, and LGBTQ groups in St. Johns County and elsewhere. The result was a set of Best Practices Guidelines adopted by the School Superintendent's Executive Cabinet and introduced to school administrators in September 2015. . . .
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> Under the Best Practices Guidelines, upon request by a student or parent, students should be addressed with the name and gender pronouns corresponding with the student's consistently asserted gender identity; school records will be updated upon receipt of a court order to reflect a transgender student's name and gender; unofficial school records will use a transgender student's chosen name even without a court order; transgender students are allowed to dress in accordance with their gender identity; students are permitted to publicly express their gender identity; and the school will not unnecessarily disclose a

> student's transgender status to others. The Best Practices Guidelines also provide that "[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex."

(second alteration in original) (citations omitted).

Thus, after completing this process and as part of its Best Practices Guidelines, the School Board decided to maintain its bathroom policy that separates bathrooms on the basis of biological sex while providing accommodative sex-neutral bathrooms. The School Board opted to maintain this policy also after taking into account the complex issues presented by the notion of gender fluidity.

Ultimately, the School Board believes its bathroom policy is necessary to ensure the privacy and overall welfare of its entire student body under the governing Florida statute. We will not insert ourselves into the School Board's ongoing development of policies to accommodate students struggling with gender identity issues—unless, of course, the School Board's policies are unconstitutional, an issue which we now address.

Turning to the constitutional question, because the policy that Adams challenges classifies on the basis of biological sex, it is

subject to intermediate scrutiny.[5] To satisfy intermediate scrutiny, the bathroom policy must (1) advance an important governmental objective and (2) be substantially related to that objective. *Miss. Univ. for Women*, 458 U.S. at 724. The bathroom policy clears both hurdles because the policy advances the important governmental objective of protecting students' privacy in school bathrooms and does so in a manner substantially related to that objective.[6]

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[5] The dissent separately asserts that intermediate scrutiny applies on the ground that there is "no doubt that Adams, as a transgender individual, is a member of a quasi-suspect class." Jill Pryor Dis. Op. at 38. We have two responses. First, the dissent reaches this conclusion through a selective reading of the record, citing to exhibits and testimony where it sees fit. But the dissent fails to acknowledge that the district court did not address the issue, expressly stating that it had "no occasion to engage in the further analysis" as to whether "transgender people are a quasi-suspect class, deserving of heightened scrutiny per se." Like the district court, we find no need to address the issue, given our conclusion that intermediate scrutiny applies, in any event. Second, and contrary to the dissent's assertion, we have grave "doubt" that transgender persons constitute a quasi-suspect class. Indeed, the Supreme Court has rarely deemed a group a quasi-suspect class. *See, e.g.*, *City of Cleburne*, 473 U.S. at 442–46.

[6] Although we do not need to address whether Adams is "similarly situated" to biological boys in the School District for purposes of reviewing the bathroom policy under the Equal Protection Clause in the first instance, we note that there are serious questions as to whether Adams would meet this requirement. *See City of Cleburne*, 473 U.S. at 439. The promise of equal protection is limited to "keep[ing] governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger,* 505 U.S. at 10. When it comes to the bathroom policy, biological sex is the "relevant

respect[]," *id.*, with respect to which persons must be "similarly situated," *City of Cleburne*, 473 U.S. at 439, because biological sex is the sole characteristic on which the bathroom policy and the privacy interests guiding the bathroom policy are based. And biological sex also is the driving force behind the Supreme Court's sex-discrimination jurisprudence. *See, e.g.*, *Nguyen*, 533 U.S. at 73 ("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 men and women]."); *Virginia*, 518 U.S. at 533 ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible . . . .'" (first alteration in original) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946))); *Frontiero*, 411 U.S. at 686 ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."). As the Supreme Court has made clear: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen*, 533 U.S. at 73.

Adams claims to be similarly situated to biological boys in the School District for purposes of the bathroom policy, even though Adams is not biologically male—the only characteristic on which the policy is based. Throughout the pendency of this case, Adams remained both biologically and anatomically identical to biological females—not males. Thus, in prohibiting Adams from using the male bathrooms, it can be argued that the School Board did not "treat[] differently persons who are in all relevant respects alike" for purposes of the Equal Protection Clause. *Nordlinger*, 505 U.S. at 10.

To argue otherwise, the dissent, like the district court, must assert that transgender status and gender identity are equivalent to biological sex. Indeed, this forms the foundation of the dissent's attempt to frame this case not as a case about the constitutionality and legality of separating bathrooms based on biological sex but rather as a case about the purported unlawfulness of excluding Adams—who attended school as a biological female—from using the male bathroom because, as the dissent claims, Adams is a boy for purposes of the bathroom policy. But such an assertion is contrary to the Supreme Court's

The protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is obviously an important governmental objective. Indeed, the district court "agree[d] that the School Board has a legitimate interest in protecting student privacy, which extends to bathrooms." Understanding why is not difficult—school-age children "are still developing, both emotionally and physically." *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 636 (4th Cir. 2020) (Niemeyer, J., dissenting) ("[A]ll individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in personal hygiene, and this privacy interest is heightened when persons of the opposite sex are

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reliance on physiological and biological differences between men and women in its sex-discrimination decisions, which therefore raises serious questions about Adams's similarly situated status for purposes of the bathroom policy under review. Such an assertion also is undercut by the dissent's refusal to engage the issue of gender fluidity—i.e., the practice, which the dissent acknowledges, in which some individuals claim to change gender identities associated with the male and female sexes and thereby treat sex as a mutable characteristic. Jill Pryor Dis. Op. at 63 ("This case has no bearing on the question how to assign gender fluid individuals to sex-separated bathrooms."). *But see Frontiero*, 411 U.S. at 686 ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."). Such an assertion is further undercut by the dissent's attempt to categorize transgender persons as members of a quasi-suspect class, which necessarily entails treating transgender persons as distinct from the sexes with which they identify. Jill Pryor Dis. Op. at 40-41. Nevertheless, as the opinion concludes, the bathroom policy passes constitutional muster regardless of whether Adams is similarly situated to biological boys for purposes of the bathroom policy because the policy's sex-based classification satisfies intermediate scrutiny.

present. Indeed, this privacy interest is heightened yet further when children use communal restrooms . . . ."). And even the more generally acceptable notion that the protection of individual privacy will occasionally require some segregation between the sexes is beyond doubt—as then-Professor Ruth Bader Ginsburg noted, "[s]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21 (emphasis added).

It is no surprise, then, that the privacy afforded by sex-separated bathrooms has been widely recognized throughout American history and jurisprudence. In fact, "sex-separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding." W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 229 (2019). The Supreme Court acknowledged this when it stated that admitting women to the Virginia Military Institute for the first time "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Virginia*, 518 U.S. at 550 n.19. So, too, have our sister circuits. *See*, *e.g.*, *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("[T]he law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs."); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("[Society has given its]

undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different."); *see also Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting) ("In light of the privacy interests that arise from the physical differences between the sexes, it has been commonplace and universally accepted—across societies and throughout history—to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time.").

Moreover, courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts. *E.g.*, *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing a "constitutional right to bodily privacy because 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'" (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981))); *Harris v. Miller*, 818 F.3d 49, 59 (2d Cir. 2016); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494–95 (6th Cir. 2008); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994); *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc).

Having established that the School Board has an important governmental objective in protecting students' privacy interests in school bathrooms, we must turn to whether the bathroom policy is substantially related to that objective. *Miss. Univ. for Women*,

458 U.S. at 724. Intermediate scrutiny is satisfied when a policy "has a close and substantial bearing on" the governmental objective in question. *Nguyen*, 533 U.S. at 70. The School Board's bathroom policy is clearly related to—indeed, is almost a mirror of—its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex and to shield their bodies from the opposite sex in the bathroom, which, like a locker room or shower facility, is one of the spaces in a school where such bodily exposure is most likely to occur. Therefore, the School Board's bathroom policy satisfies intermediate scrutiny.

The district court avoided this conclusion only by misconstruing the privacy interests at issue and the bathroom policy employed. The district court found that "allowing transgender students to use the restrooms that match their gender identity does not affect the privacy protections already in place." In the district court's eyes, this was because "Adams enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves" the male bathroom. The district court discounted the privacy interests at play by claiming that "Adams has encountered no problems using men's restrooms in public places, and there were no reports of problems from any boys or boys' parents during the six weeks . . . when Adams used the boys' restrooms." Thus, the district court found "the School Board's concerns about privacy" to be "only conjectural."

But the district court's contentions, which the dissent, Adams, and many amici echo, minimize the undisputed fact that, at

Nease, students' use of the sex-separated bathrooms is not confined to individual stalls, e.g., students change in the bathrooms and, in the male bathrooms, use undivided urinals. These contentions also ignore that the privacy interests, which animated the School Board's decision to implement the policy, are sex-specific privacy interests. After all, only sex-specific interests could justify a sex-specific policy. The privacy interests hinge on using the bathroom away from the opposite sex and shielding one's body from the opposite sex, not using the bathroom in privacy. Were it the latter, then only single-stall, sex-neutral bathrooms would pass constitutional muster. But that is not the law. Nor is the law predicated on "problems" or "reports of problems" from students or their parents when it comes to the validity of sex-separated bathrooms (although the record reflects that two students did, in fact, complain to the school and that—as stipulated by the parties—parents and students within the School District objected to a policy that would allow students to use the bathroom that matches their gender identity, instead of their biological sex, out of privacy, safety, and welfare concerns).

The sex-specific privacy interests for all students in the sex-separated bathrooms at Nease attach once the doorways to those bathrooms swing open. The privacy interests are not confined to the individual stalls in those bathrooms. In reaching the contrary conclusion, the district court erred by misconstruing the privacy interests at issue, minimizing the factual and practical realities of how the sex-separated bathrooms operate, and discounting the

parties' stipulation that students and parents objected to any bathroom policy that would commingle the sexes out of privacy concerns, among others. *Cf. Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 677–78 (2010) ("[F]actual stipulations are 'formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.'" (second alteration in original) (quoting 2 K. Broun, McCormick on Evidence § 254, at 181 (6th ed. 2006))).

The dissent repeats the district court's mistakes. Of particular note, in asserting that the School Board only provided "speculative" evidence in support of linking the bathroom policy to the protection of students' privacy interests, the dissent discounts the parties' stipulation that parents and students within the School District objected to a bathroom policy that commingled the sexes based on privacy concerns, among others. Jill Pryor Dis. Op. at 45, 52 n.22. The dissent equates concerns about privacy in the bathroom with unlawful complaints about racial segregation. *Id.* at 52 n.22, 64–65. But that is a false equivalence. As explained above, it is well established that individuals enjoy protection of their privacy interests in the bathroom, so concerns about privacy in the bathroom are legitimate concerns. In contrast, it is well established that racially segregating schools is unconstitutional, so complaints about racially integrating schools are illegitimate complaints. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Only by conflating legitimate concerns about privacy with illegitimate, and unconstitutional,

complaints about racial integration is the dissent able to discount the parties' binding stipulation and claim that the School Board's bathroom policy, which directly advances the important governmental objective of protecting students' privacy interests in the bathroom, fails intermediate scrutiny.

Finally, we turn to the dissent's contention that, despite all indications to the contrary, this case is not a case about "the legality of separating bathrooms by sex," which is primarily advanced by Judge Jill Pryor's dissent but also is discussed in Judge Jordan's dissent. Jill Pryor Dis. Op. at 2; Jordan Dis. Op. at 11–12. As such, the dissent claims that this case is about the exclusion of Adams, as "a boy," from the male bathrooms in which the School Board restricts access to "biological boys."

The dissent's argument relies on a misreading of the record and, in fact, contradicts the dissent's own analysis. The district court explained that Adams "is transgender, meaning he 'consistently, persistently, and insistently' identifies as a boy, a gender that is different than the sex he was assigned at birth (female)." In its analysis of the Equal Protection Clause claim, the district court stated that "[t]he undisputed evidence is that [Adams] is a *transgender* boy and wants access to use the boys' restroom." (Emphasis added). And, in concluding that the bathroom policy violated the Equal Protection Clause, the district court explained that "[t]here is no evidence to suggest that [Adams's] *identity* as a boy is any less consistent, persistent, and insistent than any other boy. Permitting [Adams] to use the boys' restroom will not integrate the

restrooms between the sexes." (Emphasis added). In holding the bathroom policy unconstitutional, the district court never made a finding that Adams is a "biological boy," as the dissent claims, which is the classification that the School Board uses to restrict access to the male bathrooms and the classification that Adams is challenging. Jill Pryor Dis. Op. at 29 n.10. The district court looked to Adams's gender identity—not Adams's biological sex—for purposes of evaluating the bathroom policy. And even the dissent acknowledges, as it must, that gender identity is different from biological sex. *Id.* at 32 (citing the district court's order to explain "that 'transgender' persons 'consistently, persistently, and insistently identif[y] as a gender different [from] the sex they were assigned at birth'").

Thus, despite the dissent's suggestion, the district court did not make a finding equating gender identity as akin to biological sex. Nor could the district court have made such a finding that would have legal significance. To do so would refute the Supreme Court's longstanding recognition that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); *see also Immutable*, *Oxford English Dictionary* (2d ed. 1989) ("Not mutable; not subject to or susceptible of change; unchangeable, unalterable, changeless."). Regardless of Adams's genuinely held belief about gender identity—which is not at issue—Adams's challenge to the bathroom policy revolves around whether Adams, who was "determined solely by the

accident of birth" to be a biological female—is allowed access to bathrooms reserved for those who were "determined solely by the accident of birth" to be biologically male. Thus, we are unpersuaded by the dissent's argument that the district court could make any factual finding (that would not constitute clear error) to change an individual's immutable characteristic of biological sex, just as the district court could not make a factual finding to change someone's immutable characteristic of race, national origin, or even age for that matter. Simply put, and contrary to the dissent's claims, this *is* a case about the constitutionality and legality of separating bathrooms by biological sex because it involves an individual of one sex seeking access to the bathrooms reserved for those of the opposite sex. Adams's gender identity is thus not dispositive for our adjudication of Adams's equal protection claim.

In sum, the bathroom policy does not unlawfully discriminate on the basis of biological sex.

2. The Bathroom Policy Does Not Discriminate Against Transgender Students

We now turn to whether the School Board's policy, which does not unlawfully discriminate on the basis of sex, discriminates against transgender students. In finding a violation of the Equal Protection Clause, the district court never properly conducted the requisite intermediate scrutiny analysis and, instead, concluded that "although the policy treats most boys and girls the same, it treats Adams differently because, as a transgender boy, he does not act in conformity with the sex-based stereotypes associated with"

biological sex. There are two flaws in the district court's conclusion.

First, the bathroom policy facially classifies based on biological sex—not transgender status or gender identity. Transgender status and gender identity are wholly absent from the bathroom policy's classification. And both sides of the classification—biological males and biological females—include transgender students. To say that the bathroom policy singles out transgender students mischaracterizes how the policy operates.

Both Adams and the dissent rely on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), to advance this faulty reasoning. Jill Pryor Dis. Op. at 35–37. *Bostock* involved employment discrimination under Title VII of the Civil Rights Act of 1964, § 701 *et seq.*, as amended, 42 U.S.C. § 2000e *et seq.*—specifically, various employers' decisions to fire employees based solely on their sexual orientations or gender identities. *Id.* at 1737–38. As a preliminary matter, the Supreme Court expressly declined to address the issue of sex-separated bathrooms and locker rooms, stating:

> Under Title VII, . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."

Id. at 1753. And the instant appeal is about schools and children—and the school is not the workplace. *See, e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) ("Courts, moreover, must bear in mind that schools are unlike the adult workplace."); *id.* at 675 (Kennedy, J., dissenting) (noting the "differences between children and adults, peers and teachers, schools and workplaces" and that "schools are not workplaces and children are not adults").

But even holding those preliminary points aside, *Bostock* does not resolve the issue before us. While *Bostock* held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex," 140 S. Ct. at 1747, that statement is not in question in this appeal. This appeal centers on the converse of that statement—whether discrimination based on biological sex necessarily entails discrimination based on transgender status. It does not—a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status. *See, e.g.*, *Nguyen*, 533 U.S. at 60. Indeed, while the bathroom policy at issue classifies students on the basis of biological sex, it does not facially discriminate on the basis of transgender status. Because the bathroom policy divides students into two groups, both of which include transgender students, there is a "lack of identity" between the policy and transgender status, as the bathroom options are "equivalent to th[ose] provided [to] all" students of the same biological sex. *See Geduldig v. Aiello*, 417 U.S. 484, 496–97 & n.20 (1974); *see also Bray v. Alexandria*

Women's Health Clinic, 506 U.S. 263, 271 (1993) (reaffirming this reasoning).

Our conclusion that there is a "lack of identity" between the bathroom policy and transgender status is informed by the Supreme Court's reasoning in *Geduldig*. In that case, the Supreme Court held that a state insurance program that excluded coverage for certain pregnancy-related disabilities did not classify on the basis of sex. *Geduldig*, 417 U.S. at 486, 496–97. Because the insurance program created two groups—a group that contained only females and a group that contained males and females—there was a "lack of identity" between the exclusion of those female-related disabilities from coverage and discrimination on the basis of being female since "[t]he fiscal and actuarial benefits of the program . . . accrue[d] to members of both sexes." *Id.* at 496 n.20. Like the insurance program in *Geduldig*, the School Board's bathroom policy does not classify students based on transgender status because a "lack of identity" exists between transgender status and a policy that divides students into biological male and biological female groups—both of which can inherently contain transgender students—for purposes of separating the male and female bathrooms by biological sex.

Second, the contention that the School Board's bathroom policy relied on impermissible stereotypes associated with Adams's transgender status is wrong. The bathroom policy does not depend in any way on how students act or identify. The bathroom policy separates bathrooms based on biological sex, which is not a

stereotype. As this opinion has explained, the Supreme Court has repeatedly recognized the biological differences between the sexes by grounding its sex-discrimination jurisprudence on such differences. *See, e.g.*, *Nguyen*, 533 U.S. at 73 ("The difference between men and women in relation to the birth process is a real one."); *Virginia*, 518 U.S. at 533 ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible . . . .'" (first alteration in original) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946))). And the biological differences between males and females are the reasons intermediate scrutiny applies in sex-discrimination cases in the first place. *See Frontiero*, 411 U.S. at 686 ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))). To say that the bathroom policy relies on impermissible stereotypes because it is based on the biological differences between males and females is incorrect. *See Nguyen*, 533 U.S. at 73 ("Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.").

At most, Adams's challenge amounts to a claim that the bathroom policy has a disparate impact on the transgender students in the School District. And a disparate impact alone does not

violate the Constitution. Instead, a disparate impact on a group offends the Constitution when an otherwise neutral policy is motivated by "purposeful discrimination." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *accord Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977).

The district court proclaimed that the bathroom policy was "no longer a neutral rule" because it "applies differently to transgender students" and because the School Board became "aware of the need to treat transgender students the same as other students." But the Supreme Court has long held that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279 (quoting *United Jewish Orgs. v. Carey,* 430 U.S. 144, 180 (1977) (Stewart, J., concurring in the judgment)); *see also Bray*, 506 U.S. at 271–72. Instead, a discriminatory purpose "implies that the decisionmaker," in this case the School Board, "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

There is no evidence suggesting that the School Board enacted the bathroom policy "because of . . . its adverse effects upon" transgender students. *See id.* The district court itself noted that the School Board did not even "have transgender students in mind when it originally established separate multi-stall restrooms for boys and girls." The policy impacts approximately 0.04 percent of the students within the School District—i.e., sixteen transgender

students out of 40,000 total students—in a manner unforeseen when the bathroom policy was implemented. And to accommodate that small percentage, while at the same time taking into account the privacy interests of the other students in the School District, the School Board authorized the use of sex-neutral bathrooms as part of its Best Practices Guidelines for LGBTQ issues. As discussed above, the School Board provided this accommodation only after undertaking significant education efforts and receiving input from mental health professionals and LGBTQ groups both within and beyond the School District community.

Contrary to the dissent's claim, the School Board, through the Best Practices Guidelines, did not discriminatorily "single[] out transgender students." Jill Pryor Dis. Op. at 32. The School Board sought to accommodate transgender students by providing them with an alternative—i.e., sex-neutral bathrooms—and not requiring them to use the bathrooms that match their biological sex—i.e., the bathroom policy Adams challenges. The School Board did not place a special burden on transgender students by allowing them to use sex-neutral bathrooms under the Best Practices Guidelines, which came well after the implementation of the longstanding bathroom policy separating bathrooms by biological sex; rather, the School Board gave transgender students an alternative option in the form of an accommodation. Ultimately, there is no evidence of purposeful discrimination against transgender students by the School Board, and any disparate impact that the bathroom policy has on those students does not violate the Constitution.

B. The Bathroom Policy Does Not Violate Title IX

Title IX was passed as part of the Education Amendments of 1972 and "patterned after" the Civil Rights Act of 1964. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–96 (1979). The statute mandates that, subject to certain exceptions: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). Its purpose, as derived from its text, is to prohibit sex discrimination in education. *See United States v. Bryant*, 996 F.3d 1243, 1264 (11th Cir. 2021) ("As in all cases of statutory interpretation, 'the purpose must be derived from the text.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 56 (2012))), *cert. denied*, 142 S. Ct. 583 (2021). The statute explicitly provides for administrative enforcement, *see* 20 U.S.C. § 1682, and the Supreme Court also has read in an implied private right of action for damages and injunctive relief, *see Cannon*, 441 U.S. at 717 (reading an implied private right of action into Title IX); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992) (concluding damages are a remedy available for an action under Title IX).

Notwithstanding Title IX's general prohibition on sex discrimination, the statute provides an express carve-out with respect to living facilities: "nothing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different

sexes." 20 U.S.C. § 1686. The regulations implementing Title IX explicitly permit schools receiving federal funds to "provide separate housing on the basis of sex," so long as the housing is "[p]roportionate in quantity to the number of students of that sex applying for such housing" and "[c]omparable in quality and cost to the student," 34 C.F.R. § 106.32(b), and "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex [are] comparable to such facilities provided for students of the other sex," *id.* § 106.33.

As such, this appeal requires us to interpret the word "sex" in the context of Title IX and its implementing regulations. We cannot, as the Supreme Court did in *Bostock*, decide only whether discrimination based on transgender status necessarily equates to discrimination on the basis of sex, as Adams would have us do. 140 S. Ct. at 1739 ("The question isn't just what 'sex' meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions 'because of' sex."). This is because Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes when it comes to separate living and bathroom facilities, among others. Therefore, if to "provide separate toilet . . . facilities on the basis of sex" means to provide separate bathrooms on the basis of *biological* sex, then the School Board's policy fits squarely within the carve-out. 34 C.F.R. § 106.33. And if the School Board's policy fits within the

carve-out, then Title IX permits the School Board to mandate that all students follow the policy, including Adams.

1. The Statute Is Not Ambiguous

To interpret "sex" within the meaning of Title IX, we look to the ordinary meaning of the word when it was enacted in 1972. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("[O]ur job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" (second alteration in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))). One of the methods of determining the ordinary meaning of a word "is by looking at dictionaries in existence around the time of enactment." *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021) (quoting *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016)). Reputable dictionary definitions of "sex" from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of "sex" in education, it meant biological sex, i.e., discrimination between males and females. *See, e.g.*, *Sex*, *American Heritage Dictionary of the English Language* (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); *Sex*, *American Heritage Dictionary of the English Language* (1979) (same); *Sex, Female, Male, Oxford English Dictionary* (re-issue ed. 1978) (defining "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female respectively," "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the

fecundating function of generation"); *Sex, Webster's New World Dictionary* (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."); *Sex, Female, Male, Webster's Seventh New Collegiate Dictionary* (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); *Sex*, *Random House College Dictionary* (rev. ed. 1980) ("[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions.").

The district court found "sex" to be "ambiguous as applied to transgender students," due to lack of explicit definition in either Title IX or its implementing regulations. And in deciding that "sex" was an ambiguous term, it noted that other courts, including the majority in *Grimm v. Gloucester County School Board*, "did not find the meaning [of 'sex'] to be so universally clear" under Title IX drafting-era dictionary definitions. But the district court mentioned only one dictionary definition—the *American College Dictionary* (1970), defining "sex" as "the character of being either male or female"—to support its conclusion that "sex" was an ambiguous term at the time of Title IX's enactment.

In the face of the overwhelming majority of dictionaries defining "sex" on the basis of biology and reproductive function, the

district court's determination that a single dictionary, which is supposedly at variance from its peers, supports the conclusion that the word "sex" had an ambiguous meaning when Title IX was enacted is wrong ab initio. Moreover, even a cursory examination of the *American College Dictionary*'s definition of "sex" confirms that it, too, defines "sex" based on biology and reproductive function, as illustrated by its definitions of "female" and "male." *See Female*, *American College Dictionary* (1970) ("[A] human being of the sex which conceives and brings forth young; a woman or girl."); *Male*, *American College Dictionary* (1970) ("[B]elonging to the sex which begets young, or any division or group corresponding to it."). The ambiguity purportedly found by the district court simply is not there.

But even if the district court's reading of the *American College Dictionary* supported its finding of "sex" to be ambiguous, a statutory term is not deemed to be ambiguous simply because the statute does not explicitly define the term or a single dictionary provides a different meaning. *See Perrin*, 444 U.S. at 42 ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Indeed, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). And reading in ambiguity to the term "sex" ignores the statutory context of Title IX.

For one, Title IX explicitly provides a statutory carve-out for "maintaining separate living facilities for the different sexes."

20 U.S.C. § 1686. So, if "sex" were ambiguous enough to include "gender identity," as Adams suggests and as the district court ultimately concluded, then this carve-out, as well as the various carve-outs under the implementing regulations, would be rendered meaningless. This is because transgender persons—who are members of the female and male sexes by birth—would be able to live in both living facilities associated with their biological sex and living facilities associated with their gender identity or transgender status. If sex were ambiguous, it is difficult to fathom why the drafters of Title IX went through the trouble of providing an express carve-out for sex-separated living facilities, as part of the overall statutory scheme. For this reason alone, reading in ambiguity to the term "sex" ignores the overall statutory scheme and purpose of Title IX, along with the vast majority of dictionaries defining "sex" based on biology and reproductive function.

The district court claimed that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), and this Court's decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), provided support for its conclusion that "the meaning of 'sex' in Title IX includes 'gender identity' for purposes of its application to transgender students." But both cases dealt with workplace discrimination involving nonconformity with sex stereotypes; neither case departed from the plain meaning of "sex," generally, or as used within Title IX. *Price Waterhouse*, 490 U.S. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive,

or that she must not be, [has discriminated on the basis of sex]."); *Glenn*, 663 F.3d at 1318–19 ("All persons, whether transgender or not, are protected from discrimination on the basis of [a sex stereotype].").

Neither case reads "gender identity" into the definition of "sex"; they discuss unlawful action by employers' reliance on impermissible stereotypes. And, as discussed above, "sex" is not a stereotype. Just as importantly, and contrary to Adams's arguments that *Bostock* equated "sex" to "transgender status," the Supreme Court in *Bostock* actually "proceed[ed] on the assumption" that the term "sex," as used in Title VII, "refer[ed] only to *biological* distinctions between male and female." 140 S. Ct. at 1739 (emphasis added). There simply is no alternative definition of "sex" for transgender persons as compared to nontransgender persons under Title IX. The district court erred by divining one, and applying that definition to Adams, because courts must "avoid interpretations that would 'attribute different meanings to the same phrase'" or word in "all but the most unusual" of statutory circumstances. *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000)).

In this regard, the district court's error is made even clearer when we consider the ramifications of its reading of Title IX. Reading "sex" to include "gender identity," and moving beyond a biological understanding of "sex," would provide more protection against discrimination on the basis of transgender status under the

statute and its implementing regulations than it would against discrimination on the basis of sex. Title IX and its implementing regulations prohibit discrimination on the basis of sex, but they also explicitly permit differentiating between the sexes in certain instances, including school bathrooms, locker rooms, and showers, under various carve-outs. As explained in our discussion about the statutory scheme and purpose of Title IX, transgender persons fall into the preexisting classifications of sex—i.e., male and female. Thus, they are inherently protected under Title IX against discrimination on the basis of sex. But reading "sex" to include "gender identity," as the district court did, would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity. Such a reading would thereby establish dual protection under Title IX based on *both* sex and gender identity when gender identity does not match sex. That conclusion cannot comport with the plain meaning of "sex" at the time of Title IX's enactment and the purpose of Title IX and its implementing regulations, as derived from their text.

Finally, in this appeal, any action by the School Board based on sex stereotypes is not relevant to Adams's claim because, as discussed, Title IX and its implementing regulations expressly allow the School Board to provide separate bathrooms "on the basis of sex." *See* 20 U.S.C. §§ 1681(a), 1686; 34 C.F.R. § 106.33. Regardless of whether Adams argues that the bathroom policy itself violates

Title IX's general prohibition against sex discrimination, this Court must still determine whether the application of the policy fits into Title IX's carve-out, which it does. An example makes this clear.

Think of a biological female student, who does not identify as transgender and who sued her school under Title IX to gain access to the male bathroom. Regardless of whether preventing the female student from using the male bathroom would constitute separation on the basis of sex—and it plainly would—the carve-out for bathrooms under Title IX would provide the school a safe harbor. In other words, because Title IX explicitly provides for separate bathrooms on the basis of sex, the student's claim would fail. So, too, must Adams's claim, because the carve-out for bathrooms provides the School Board a safe harbor for the same reasons.[7]

In summary, Title IX prohibits discrimination on the basis of sex, but it expressly permits separating the sexes when it comes to

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[7] Nevertheless, the dissent, using *Bostock*, argues "that 'sex' was a but-for cause of the discrimination Adams experienced," which the dissent argues violates Title IX. Jill Pryor Dis. Op. at 59. This argument is of no avail. Under the dissent's theory, any lawful policy separating on the basis of "sex" pursuant to Title IX's statutory and regulatory carve-outs would inherently provide the "but-for cause of . . . discrimination" that the dissent is concerned about because such a policy inherently involves distinguishing between the sexes from the outset. The dissent's theory, then, would swallow the carve-outs and render them meaningless because, as the dissent would have it, any policy separating by "sex" would provide "a but-for cause of . . . discrimination" if a litigant felt that she or he had been discriminated against by the sex-based separation authorized by the carve-outs. Adams, who is a biological female

bathrooms and other living facilities. When we read "sex" in Title IX to mean "biological sex," as we must, the statutory claim resolves itself. Title IX's implementing regulations explicitly allow schools to "provide separate toilet . . . facilities on the basis of [biological] sex." 34 C.F.R. § 106.33. The School Board does just that. Because the School Board thus acts in accordance with Title IX's bathroom-specific regulation, its decision to direct Adams—who was born, and enrolled in the School District as, a female—to use the female bathrooms is consistent with Title IX's precepts. As such, Adams's claim under the statute must fail.

2. Even if the Statute Were Unclear, the Spending Clause Militates Toward Finding for the School Board

Even if the term "sex," as used in Title IX, were unclear, we would still have to find for the School Board. This is because Congress passed Title IX pursuant to its authority under the Spending Clause. U.S. Const. art. I, § 8, cl. 1; *Davis*, 526 U.S. at 640 ("[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause."). And "if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Further, "private damages actions are available only where

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alleging discrimination based on not being able to access the bathrooms reserved for biological males, is no different from such a litigant.

recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Davis*, 526 U.S. at 640.

A safeguard of our federalist system is the demand that Congress provide the States with a clear statement when imposing a condition on federal funding because "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. Thus, the "legitimacy of Congress' power to legislate under the [S]pending [Clause] . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–98 (1937)). Otherwise, if Congress's spending authority were "to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause" would "give[] 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

Under the Spending Clause's required clear-statement rule, the School Board's interpretation that the bathroom carve-out pertains to biological sex would only violate Title IX if the meaning of "sex" unambiguously meant something other than biological sex, thereby providing the notice to the School Board that its understanding of the word "sex" was incorrect. As we have thoroughly

discussed, it does not. The dissent implicitly acknowledges this point. Jill Pryor Dis. Op. at 57 n.25 ("I . . . have no reason to address the majority opinion's Spending Clause argument. The Spending Clause cannon of construction only comes into play if we find ourselves dealing with an ambiguous statute."). Moreover, schools across the country separate bathrooms based on biological sex and colleges and universities across the country separate living facilities based on biological sex. The notion that the School Board could or should have been on notice that its policy of separating male and female bathrooms violates Title IX and its precepts is untenable.[8]

Title IX's statutory structure and corresponding regulatory scheme illustrate why a clear statement from Congress equating

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[8] Adams contends that the School Board made this argument—that Congress must condition funds under its Spending Clause authority in an unambiguous way—for the first time on appeal. Thus, Adams argues that this Court should not consider the School Board's argument. Adams is incorrect. We are duty bound to apply the correct law; "parties cannot waive the application of the correct law or stipulate to an incorrect legal test." *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 923 (11th Cir. 2018); *accord United States v. Lee*, 29 F.4th 665, 669 n.2 (11th Cir. 2022) (finding that a defendant could not waive the application of the *Blockburger* test in connection with asserting a violation of the Double Jeopardy Clause). And we are required to apply the clear-statement rule to legislation passed under Congress's Spending Clause authority. *See, e.g.*, *Davis*, 526 U.S. at 640 ("In interpreting language in spending legislation, we thus 'insis[t] that Congress speak with a clear voice,' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" (alternations in original)

"sex" to "gender identity" or "transgender status" is so important. Adams's view of what constitutes "sex" for purposes of Title IX will have ramifications far beyond the bathroom door at a single high school in Ponte Vedra, Florida. This is because Title IX's statutory carve-out from its general prohibition against sex discrimination applies to "living facilities," not only bathrooms. 20 U.S.C. § 1686. And the same regulation that authorizes schools to provide separate bathrooms on the basis of sex also permits schools to provide separate "locker room . . . and shower facilities on the basis of sex." 34 C.F.R. § 106.33. Therefore, affirming the district court's order, and equating "sex" with "gender identity" or "transgender status" for purposes of Title IX, would, at the very least, generally impact living facilities, locker rooms, and showers, in addition to bathrooms, at schools across the country—affecting students in kindergarten through the post-graduate level.

For the same reason, affirming the district court's order would have broad implications for sex-separated sports teams at institutions subject to Title IX, including public schools and public and private universities. While Title IX says nothing specifically about sports, its implementing regulations do. Those regulations, which necessarily flow from Title IX's general prohibition against sex discrimination, mirror the blanket-rule-with-specific-exception framework that Title IX applies to living facilities. The

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(quoting *Pennhurst*, 451 U.S. at 17)). For these reasons, Adams's contention lacks merit.

implementing regulations say, first, that "[n]o person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a). In the very next paragraph, however, the regulations instruct that, notwithstanding the above statement, "a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 106.41(b). Thus, equating "sex" to "gender identity" or "transgender status" would also call into question the validity of sex-separated sports teams.

To be sure, the district court disclaimed any suggestion that its decision would apply beyond the bathroom. But Title IX is not so limited; it applies to "living facilities," 20 U.S.C. § 1686, "toilet, locker room, and shower facilities," 34 C.F.R. § 106.33, and sports teams, *id.* § 106.41, at any institution subject to its mandates. The district court did not identify any textual or other support—because there is none—for its claim that its reading of "sex" applies only to high school bathrooms. Neither can the dissent identify any textual or persuasive support to cabin the district court's decision to high school bathrooms. Jill Pryor Dis. Op. at 62-64. If "sex" as used in Title IX means "gender identity" or "transgender status," then there is simply no principled reason to limit application of the district court's reasoning to the high school bathroom. Absent a clear statement from Congress, such a reading of Title IX would

offend first principles of statutory interpretation and judicial restraint.

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In sum, commensurate with the plain and ordinary meaning of "sex" in 1972, Title IX allows schools to provide separate bathrooms on the basis of biological sex. That is exactly what the School Board has done in this case; it has provided separate bathrooms for each of the biological sexes. And to accommodate transgender students, the School Board has provided single-stall, sex-neutral bathrooms, which Title IX neither requires nor prohibits. Nothing about this bathroom policy violates Title IX. Moreover, under the Spending Clause's clear-statement rule, the term "sex," as used within Title IX, must unambiguously mean something other than biological sex—which it does not—in order to conclude that the School Board violated Title IX. The district court's contrary conclusion is not supported by the plain and ordinary meaning of the word "sex" and provides ample support for subsequent litigants to transform schools' living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities. Whether Title IX should be amended to equate "gender identity" and "transgender status" with "sex" should be left to Congress—not the courts.

IV. CONCLUSION

For all these reasons, we reverse and remand the district court's order.

REVERSED AND REMANDED.

LAGOA, Circuit Judge, Specially Concurring:

I concur fully in the majority opinion's determination that the School Board of St. Johns County's unremarkable bathroom policy neither violates the Equal Protection Clause nor Title IX. I write separately to discuss the effect that a departure from a biological understanding of "sex" under Title IX—i.e., equating "sex" to "gender identity" or "transgender status"—would have on girls' and women's rights and sports.

As discussed in the majority opinion, Title IX does not explicitly define "sex" within its statutory scheme and corresponding implementing regulations. And Title IX's statutory language says nothing specifically about sports. But the Title IX regulations that apply to sports do, and those regulations mirror the blanket-rule-with-specific-exception framework that Title IX statutorily applies to living facilities. Indeed, notwithstanding the broad prohibition against discrimination "on the basis of sex" in athletics, 34 C.F.R. § 106.41(a), the implementing regulations also allow a recipient of federal funds to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport," *id.* § 106.41(b). As with all of Title IX's regulatory carve-outs allowing certain sex-separated activities, the interpretation of "sex" in the sex-separated sports carve-out flows from the meaning of "sex" within Title IX itself. And the interpretation of "sex" in the statute "would of course take precedence" when interpreting "sex" in the regulatory

sports carve-out. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1779 n.48 (2020) (Alito, J., dissenting).

Affirming the district court's order and adopting Adams's definition of "sex" under Title IX to include "gender identity" or "transgender status" would have had repercussions far beyond the bathroom door. There simply is no limiting principle to cabin that definition of "sex" to the regulatory carve-out for bathrooms under Title IX, as opposed to the regulatory carve-out for sports or, for that matter, to the statutory and regulatory carve-outs for living facilities, showers, and locker rooms. And a definition of "sex" beyond "biological sex" would not only cut against the vast weight of drafting-era dictionary definitions and the Spending Clause's clear-statement rule but would also force female student athletes "to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female." *Id.* at 1779–80. Such a proposition—i.e., commingling both biological sexes in the realm of female athletics—would "threaten[] to undermine one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports." *Id.* at 1779.

To understand why such a judicially-imposed proposition would be deleterious, one need not look further than the neighborhood park or local college campus to see the remarkable impact Title IX has had on girls and women in sports. At nearly every park in the country, young girls chase each other up and down soccer fields, volley back and forth on tennis courts, and shoot balls into

hoops. And at colleges, it is now commonplace to see young women training in state-of-the-art athletic facilities, from swimming pools to basketball arenas, with the records of their accolades hung from the rafters.

The implementation of Title IX and its regulations is the reason such scenes are now commonplace because Title IX "precipitated a virtual revolution for girls and women in sports." Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 15 (2000). Indeed, "Title IX has paved the way for significant increases in athletic participation for girls and women at all levels of education." *Id.* Its effects in this regard have been noteworthy:

> Fewer than 300,000 female students participated in interscholastic athletics in 1971. By 1998–99, that number exceed 2.6 million, with significant increases in each intervening year. To put these numbers in perspective, since Title IX was enacted, the number of girls playing high school sports has gone from one in twenty-seven, to one in three.

Id. (footnotes omitted).

And, as courts and commentators have noted, "Title IX *shapes* women's interest [in sports], rather than merely requiring equality based on a preexisting level of interest." *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 Harv. J.L. & Gender 217, 263 (2005) (emphasis added) (citing *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996)). "What stimulated [the] remarkable

change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports." *Cohen*, 101 F.3d at 188 (citing Robert Kuttner, *Vicious Circle of Exclusion*, Wash. Post, Sept. 4, 1996, at A15). In short, "[t]here can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports." *Id.*

But had the majority opinion adopted Adams's argument that "sex," as used in Title IX, includes the concept of "gender identity" or "transgender status," then it would have become the law of this Circuit for all aspects of the statute. Under such a precedent, a transgender athlete, who is born a biological male, could demand the ability to try out for and compete on a sports team comprised of biological females. Such a commingling of the biological sexes in the female athletics arena would significantly undermine the benefits afforded to female student athletes under Title IX's allowance for sex-separated sports teams.

This is because it is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports. Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 87–88 (2020). While pre-puberty physical differences that affect athletic performance are "not

unequivocally negligible" between males and females, measurable physical differences between males and females develop during puberty that significantly impact athletic performance. Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in The Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Medicine 200–01 (2021). Indeed, during puberty, "testosterone levels increase 20-fold in males, but remain low in females, resulting in circulating testosterone concentrations at least 15 times higher in males than in females of any age." *Id.* at 201. And "the biological effects of elevated pubertal testosterone are primarily responsible for driving the divergence of athletic performances between males and females." *Id.*

For example, in comparison to biological females, biological males have: "greater lean body mass," i.e., "more skeletal muscle and less fat"; "larger hearts," "both in absolute terms and scaled to lean body mass"; "higher cardiac outputs"; "larger hemoglobin mass"; larger maximal oxygen consumption (VO2 max), "both in absolute terms and scaled to lean body mass"; "greater glycogen utilization"; "higher anaerobic capacity"; and "different economy of motion." *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Pol'y 1 (Jan. 2019). These physical differences cut directly to the "main physical attributes that contribute to elite athletic performance," as recognized by sports science and sports medicine experts. *Id.* In tangible performance terms, studies have shown that these physical differences allow post-pubescent males to "jump (25%) higher than females, throw (25%) further

than females, run (11%) faster than females, and accelerate (20%) faster than females" on average. Jennifer C. Braceras, et al., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports*, Indep. Women's F. & Indep. Women's L. Ctr. 20 (2021) (footnotes omitted). The largest performance gap may be seen "in the area of strength." *Id.* Studies also have shown that males "are able to lift 30% more than females of equivalent stature and mass," as well as punch with significantly greater force than females. *Id.*

Importantly, scientific studies indicate that transgender females, even those who have undergone testosterone suppression to lower their testosterone levels to within that of an average biological female, retain most of the puberty-related advantages of muscle mass and strength seen in biological males. *See generally, e.g.*, Hilton & Lundberg, *supra*. As such, "trans women and girls remain fully male-bodied in the respects that matter for sport; [and] because of this, their inclusion effectively de-segregates the teams and events they join." Coleman et al., *supra*, at 108. This is because:

> [F]emale sport is by design and for good reasons, a reproductive sex classification. These reasons have nothing to do with transphobia and everything to do with the performance gap that emerges from the onset of male puberty. Whether one is trans or not, if one is in sport and cares about sex equality, this physical phenomenon is undeniably relevant. Changing how we define "female" so that it includes individuals

> of both sexes, and then disallowing any distinctions among them on the basis of sex, is by definition and in effect a rejection of Title IX's equality goals.

Id. at 133.

As particularly relevant to this appeal, such physiological differences exist in high school sports. *See id.* at 89–90. While most studies look at the differences between the best or "elite class" females in sport as compared to their male counterparts, "[i]t is perhaps more important . . . that those girls who are only average high school athletes . . . would fare even worse." *Id.* at 90. Looking to these young women and girls, "if sport were not sex segregated, most school-aged females would be eliminated from competition in the earliest rounds." *Id.* For that matter, many biological girls may not even make the team, missing out on the key skills learned from participation in sports and missing out on key opportunities to further their education through higher education scholarships. *See id.* at 72.

But why does it matter if women and girls are given the equal opportunity to compete in sports? The answer cuts to the heart of why Title IX is seen as such a success story for women's rights and why this case presents significant questions of general public concern. "Girls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead." Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Female Athletes the Same*

Funding as Men, World Econ. F. (Aug. 25, 2016), https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-in-sports-and-public-policy/. "[R]esearch shows stunningly that 94[] percent of women C-Suite executives today played sport, and over half played at a university level." *Id.*; Coleman et al., *supra*, at 106. Being engaged in sports "inculcate[s] the values of fitness and athleticism for lifelong health and wellness" and "impart[s] additional socially valuable traits including teamwork, sportsmanship, and leadership, as well as individually valuable traits including goal setting, time management, perseverance, discipline, and grit." Coleman et al., *supra*, at 104. To open up competition to transgender women and girls hinders biological women and girls—over half of the United States population—from experiencing these invaluable benefits and learning these traits. Indeed:

> [T]he sports exception to Title IX's general nondiscrimination rule has long been one of the statute's most popular features. This affirmative approach is understood to be necessary to ensure that the sex-linked differences that emerge from the onset of male puberty do not stand as obstacles to sex equality in the athletic arena. From the beginning, it was understood that any different, sex neutral measures would ensure precisely the opposite—that spaces on selective teams and spots in finals and podiums would all go to boys and men. The sports exception makes it possible for women and girls also to benefit from the multiple positive effects of these experiences, and for

> their communities and the broader society to reap the benefits of their empowerment.

Id. at 132 (footnote omitted).

Affirming the district court's conclusion that "the meaning of 'sex' in Title IX includes 'gender identity'" would open the door to eroding Title IX's beneficial legacy for girls and women in sports. And removing distinctions based on biological sex from sports, particularly for girls in middle school and high school, harms not only girls' and women's prospects in sports, but also hinders their development and opportunities beyond the realm of sports—a significant harm to society as a whole.

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To summarize, as a matter of principled statutory interpretation, there can only be one definition of "sex" under Title IX and its implementing regulations. Departing from a biological and reproductive understanding of such a definition, as supported by the overwhelming majority of drafting-era dictionaries, would have vast societal consequences and significantly impact girls' and women's rights and sports. The majority opinion is correct not to depart from such an understanding absent a clear statement from Congress. Whether "sex," as set forth in a statute enacted in 1972, should be updated to include "gender identity" or "transgender status" is best left for Congress and the democratic and legislative processes—not to unelected members of the Judiciary.

WILSON, Circuit Judge, dissenting:

I concur fully with Judge Jordan's analysis and agree that we should analyze the bathroom policy as a gender-based classification. I write separately, with his analysis in mind, to add that even accepting the Majority's argument that the relevant factor is an individual's biological sex, the policy is still discriminatory, and therefore we must engage in a robust Title IX and Equal Protection analysis.

Under the Majority's rationale, the bathroom policy distinguishes between boys and girls on the basis of biological sex—"which the School Board determines by reference to various documents, including birth certificates, that students submit when they first enroll in the School District." Maj. Op. at 4. Because the policy uses these same indicia for *all* students, according to the Majority, the policy is not discriminatory. *See* Maj. Op. at 31. Underlying this sex-assigned-at-matriculation bathroom policy, however, is the presumption that biological sex is accurately determinable at birth and that it is a static or permanent biological determination. In other words, the policy presumes it does not need to accept amended documentation because a student's sex does not change. This presumption is both medically and scientifically flawed. After considering a more scientific and medical perspective on biological sex, it is clear that the bathroom policy's refusal to accept updated medical documentation is discriminatory on the basis of sex.

I. Biological Sex is Not Static

For argument's sake, I adopt the Majority's succinct definition of biological sex: sex based on chromosomal structure and anatomy at birth. Under this definition, assigning sex at birth is typically a non-issue. Any person who has been in a delivery room knows that doctors routinely and with little effort ascertain an infant's biological sex. For this reason, it is easy to presume that identifying biological sex is per se accurate and correctly determinable in the first instance.

However, there are thousands of infants born every year whose biological sex is *not* easily or readily categorizable at birth. As Allan M. Josephson, M.D., an expert witness for the School Board, explained, "there are rare individuals who are delineated 'intersex' because they have physical, anatomical sex characteristics that are a mixture of those typically associated with male and female designations (e.g. congenital adrenal hyperplasia)."

The word intersex is an umbrella term describing a range of natural physiological variations—including external genitals, internal sex organs, chromosomes, and hormones—that complicate the typical binary of male and female. Intersex is not a gender identity nor a sexual orientation, but rather a way to describe conditions of physiological development. These variations occur for a variety of reasons, and the consequent developmental variations may become apparent at different ages. Intersex people have been

recognized for millennia,[1] and courts have been confronted with many intersex-related legal issues.[2]

For many intersex people, biological sex is not determinable at birth. Although intersex people are not the same as LGBTQ people, they face many of the same issues. Many intersex individuals are assigned a particular sex at birth based on the available indicia at the time, live their childhood as that sex, and later discover during adolescence—due to biological changes—that they in fact have the chromosomal or reproductive attributes of the opposite sex. Under the Majority's conception of male and female based on genital and chromosomal indicia—their biological sex assignment has changed.

Take for instance individuals who have 5-alpha reductase, a condition where the person has XY chromosomes (i.e., "male" chromosomes) and an enzyme deficiency that prevents the body

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[1]Justinian's Code, for example, recognized "hermaphrodites" and instructed they should be assigned whichever "sex . . . predominates." 1 *Enactments of Justinian: The Digest or Pandects*, tit. 5 para. 10 (Scott ed. 1932).

[2]*See, e.g.*, *Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020) (considering intersex identity on a passport application); *M.C. ex rel. Crawford v. Amrhein*, 598 F. App'x 143, 149 (4th Cir. 2015) (considering whether sex reassignment surgery in infancy violated a constitutional right to delay medically unnecessary intervention); *Thompson v. Lengerich*, 798 F. App'x 204, 213 (10th Cir. 2019) (considering equal protection implications for intersex inmates who are guaranteed private showers).

from properly processing testosterone.[3] At birth, because the body did not produce enough testosterone to generate external male genitalia, the infant will present as female. Later in life, because hormonal changes at puberty produce active testosterone, male genitalia can develop. So, an infant with 5-alpha reductase assigned female at birth can later develop male genitalia and discover underlying male chromosomes. Medical professionals would most certainly, in the second-instance, recategorize him as biologically male.

5-alpha reductase is not the only condition that causes delayed genital development, and there are similar conditions that cause the existence of ovaries to remain hidden until puberty and ovulation. Deanna Adkins, M.D., a pediatric endocrinologist at Duke University and expert for the plaintiff, explained that intersex variations occur frequently enough that doctors use a scale called the Prader Scale to describe the genitalia on a spectrum from male to female.

How then, does the bathroom policy account for intersex people?

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[3] Deanna Adkins, M.D., a pediatric endocrinologist at Duke University and expert for the plaintiff, explained this condition in her report along with the following medical conditions that lead to intersex development: Complete Androgen Insensitivity, Klinefelter Syndrome, Turner Syndrome, Mosaic Turner Syndrome, congenital adrenal hyperplasia, and cloacal exstrophy.

II. The Bathroom Policy is Discriminatory on Biological Sex Grounds

Despite the scientific reality that intersex individuals exist and develop changes in the presentation of their biological sex over time, the School Board policy refuses to accept changes to gender or sex documentation after matriculation. The student with 5-alpha reductase who develops male genitalia and discovers male chromosomes would be barred from updating their biological sex documentation and, per the policy, remains bound to continue using the female restroom despite having medically documented male genitalia.

Thus, these intersex students, unlike other students, cannot use the bathroom associated with their medically assigned biological sex. No other category of student is required to use the bathroom associated with the opposite biological sex, and therefore such a policy is plainly discriminatory.

All of this makes the Majority's deployment of the "proverbial straw man" all the more troubling. Jordan Diss. Op. at 13. By leading the court down this path of "biological sex," misconstruing Adams's argument the whole way, the Majority interprets the School Board's policy to avoid one constitutional challenge—that the policy is discriminatory on the basis of gender—while inviting another—that the policy is discriminatory on the basis of sex.

III. The Bathroom Policy Does Not Cure the School Board's Privacy Concerns

The existence of intersex students also reveals how nonsensical the Majority's justification for the bathroom policy is. Despite the Majority artfully sidestepping the constitutional analysis, they still devote many pages of their opinion to explaining that the policy alleviates "privacy, safety, and welfare concerns." *See* Maj. Op. at 5. Without belaboring the point, intersex students do exist; they have or can develop unexpected genitalia. Biological females may still have male genitalia in the female restroom, and vice versa. A sex-assigned-at-matriculation bathroom policy cannot prevent that phenomenon. The case of intersex students therefore proves that a privacy concern rooted in a thin conception of biological sex is untenable.

I do not raise the existence of intersex students as a fantastical hypothetical, but instead as a legitimate issue for consideration. Our sister circuit recently had to consider how intersex students disrupt the underlying premise for bathroom policies. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 615 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) ("As demonstrated by the record and amici such as interACT, the Board's policy is not readily applicable to other students who, for whatever reason, do not have genitalia that match the binary sex listed on their birth certificate . . . .").[4] Judge Wynn, in his concurrence, further reasoned:

> [i]f the Board's concern [justifying the policy] were truly that individuals might be exposed to those with

[4] InterACT is an intersex advocacy organization.

> differing physiology, it would presumably have policies in place to address differences between pre-pubescent and post-pubescent students, as well as intersex individuals who possess some mix of male and female physical sex characteristics and who comprise a greater fraction of the population than transgender individuals.

Id. at 623.

The same logic applies here. If the School Board were truly concerned about male genitalia in the female bathroom, or vice versa, the policy would account for intersex students and would accept updated documentation.

I conclude by acknowledging that the case before us does not directly force us to consider the panoply of issues related to intersex individuals and the Constitution. However, intersex individuals prove the Majority's analysis unworkable when applied to a fact pattern just slightly different from the one before us. We should not adopt haphazard and incomplete analyses that will ripple out for cases to come, nor should we do so in order to avoid engaging in the rigorous intermediate scrutiny analysis the Constitution requires. The Fourth Circuit's initial foray into this topic suggests that this is a real issue and one that will be before this court sooner rather than later. For these, and the reasons stated in Judge Jordan's capable dissent, I would affirm the district court's careful opinion, and I therefore respectfully dissent.

JORDAN, Circuit Judge, joined by WILSON and ROSENBAUM, Circuit Judges, Dissenting:

Two legal propositions in this case are undisputed. The first is that the School Board's unwritten bathroom policy regulates on the basis of gender. The second is that the policy, as a gender-based regulation, must satisfy intermediate scrutiny. Given these two propositions, the evidentiary record, and the district court's factual findings, the School Board cannot justify its bathroom policy under the Equal Protection Clause of the Fourteenth Amendment. *See Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1311–1320 (M.D. Fla. 2018); *Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1297–99 (11th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1308–11 (11th Cir. 2021).

The School Board did not allow Drew Adams, a transgender student, to use the boys' bathroom. As explained below, however, the School Board's policy allows a transgender student just like Drew to use the boys' bathroom if he enrolls after transition with documents listing him as male. Because such a student poses the same claimed safety and privacy concerns as Drew, the School Board's bathroom policy can only be justified by administrative convenience. And when intermediate scrutiny applies,

administrative convenience is an insufficient justification for a gender-based classification.[1]

I

Intermediate scrutiny requires a showing that the challenged classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks and citations omitted). "The burden of justification is demanding," and here it "rests entirely on" the School Board. *Id.*

In a number of cases applying intermediate scrutiny, the Supreme Court has held that a gender-based regulation cannot be justified on the basis of administrative convenience. These cases are *Craig v. Boren*, 429 U.S. 190, 198 (1976) ("Decisions following *Reed* [*v. Reed*, 404 U.S. 71 (1971)] . . . have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications."); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (where there is "no reason" to use "sex as a proxy for need," "not even an administrative-convenience rationale exists to justify operating by generalization or proxy"); *Wengler v. Druggists Mut. Ins.*

[1] The district court awarded Drew the same damages for both the equal protection claim and the Title IX claim, noting that the injuries arising out of these violations were "identical" and specifying that he was not entitled to double recovery. *See* D.E. 192 at 68 n.58. As an affirmance on the equal protection claim is sufficient to uphold the judgment, I do not address the Title IX claim.

Co., 446 U.S. 142, 151–52 (1980) (holding that the bare assertion of a difference in the economic standing of working men and women "falls far short of justifying gender-based discrimination on the grounds of administrative convenience"); and *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972) (although "[p]rocedure by presumption is always cheaper and easier than individualized determination[,]" the "Constitution recognizes higher values than speed and efficiency").

This is not a controversial proposition. Scholars and commentators agree that administrative convenience cannot save a gender-based classification under intermediate scrutiny. *See, e.g.,* Laurence H. Tribe, American Constitutional Law 1568 n.24 (2d ed. 1988) (explaining that, at the time of its decision in *Wengler*, the Supreme Court had "never upheld a gender classification on [the] basis" of administrative convenience); 1 William J. Rich, Modern Constitutional Law: Liberty and Equality § 13:5 (3d ed. 2021) (noting that the Supreme Court has "repeatedly concluded that administrative convenience served by use of [traditional gender] stereotypes will not meet a state's need for an 'important governmental interest'"); Gabrielle Fromer, *With Equal Opportunity Comes Equal Responsibility: The Unconstitutionality of a Male-Only Draft*, 18 Geo. J. of Gender & L. 173, 189 (2017) ("Administrative convenience is an insufficient basis to uphold a law under intermediate scrutiny.").

II

The School Board's unwritten bathroom policy is that, for grades four and up, "biological boys" must use the boys' bathrooms and "biological girls" must use the girls' bathrooms, with the terms boys and girls defined as the sex assigned at birth. *See* D.E. 162 at 10–11. For transgender students, the policy purportedly requires them to use the bathrooms that correspond to their sex assigned at birth—in conflict with their gender identity—or gender-neutral/single-stall bathrooms. But, as the district court found, that is not really how the policy works.

A

As the School Board's own witnesses explained at trial, a student's enrollment paperwork—which are "accept[ed] . . . at face value"—controls for the purpose of the bathroom policy. In other words, for the School Board the enrollment documents dictate gender with respect to the bathroom policy. *See* D.E. 161 at 229, 234–35; D.E. 162 at 12–13, 50–51.

Drew registered in the St. Johns County school system as an incoming fourth-grader prior to his transition. *See* D.E. 192 at 24. When he did so, he submitted enrollment documentation reflecting his sex assigned at birth, including a birth certificate that listed his gender as "female." *See* D.E. 161 at 31–32. The School Board therefore classified him as a girl based on his original enrollment documents. *See* D.E. 161 at 253. Years later, the School Board continued to classify him as a girl for the purposes of its bathroom policy even after he (i) had transitioned socially at school (including using male pronouns), (ii) had a double mastectomy, and (iii) had

his Florida driver's license and current Florida birth certificate changed to list him as male. *See* D.E. 160-1 at 95–96 (social transition), 99–101 (medical transition), 108–110 (legal transition).

The problem for the School Board is that a transgender student who is the same age as Drew and is like him in all relevant respects (including physical appearance and the stage of gender transition and gender identity) will be treated as a boy for purposes of the bathroom policy if he registers in the school system after starting gender transition and after changing his driver's license and birth certificate to indicate that he is male. That transgender student, who presents the same safety and privacy concerns that the School Board claims Drew does, would nevertheless be allowed to use the boys' bathroom. This is fatal under intermediate scrutiny.

Here is the testimony of Sallyanne Smith, the retired director of student services for the School Board:

> Q: If a . . . transgender child comes in with a birth certificate that says their gender identity, they come in with a driver's license, would St. Johns admit that student in their school?
>
> A: You mean as a certain gender?
>
> Q: That's right . . . .
>
> A: It's based on the records in the registration packet. It's based on the birth certificate, any physicals. There are forms that are filled out where a box is checked female or male. We specifically go by that

> unless we had a court order to do anything different. But we have to use what's on the registration packet.
>
> Q: So you could have a situation where you have a transfer student, say, from Broward County, a transfer transgender student, let's say a – changed to male who shows up who had their birth certificate from that – prior to coming to St. Johns and they register, you would have a transgender student basically violating your [restroom] policy because you would know; is that correct, ma'am?
>
> A: I would go specifically by the paperwork. Whatever I see is what we would go by.

D.E. 161 at 205–06.

The testimony of Cathy Mittelstadt, the School Board's deputy superintendent for operations, was the same:

> Q: If . . . a transgender person matriculated to your school and had a birth certificate listing their gender identity that was different than their biological birth sex, but that's the first document that the school had that showed . . . their sex, how would they be characterized by the St. Johns County School District?
>
> A: If that student is entering our district for the first time with a birth certificate that indicates male or female . . . and all the other documents support that's what the student is entering, then that first-time entry would predicate. That's how we would manage that student.

> Q: And what would that mean vis-à-vis bathroom usage?
>
> A: Based on how they enrolled, they would have access to that restroom that corresponded with how we coded it in the system at the time of enrollment.

D.E. 162 at 35–36.

And so was the testimony of Frank Upchurch, the School Board's attorney:

> Q: Let's assume . . . just a hypothetical, a student transfers in. The enrollment form is clicked male. The birth certificate says male. And all the other documents on the papers indicate male. And for purposes of St. Johns County's way of determining biological sex, we have a male, but the student is actually a biological female.
>
> Does that raise any concern from the district's perspective, that situation?
>
> A: As a practical matter, I would say no. The district does not play bathroom cop. . . .
>
> . . . .
>
> Q: If you had a transgender boy in your hypothetical who came with all the paperwork checked off that's consistent with his gender identity, you would agree with me, sir, that at that point in time the school district would have no reason to question that individual's use of the boys' bathroom, yes?
>
> A: I agree with that, yes.

> Q: If you have a transgender boy who came in but whose documentation was later changed because originally it indicated female, that individual would not be permitted to use a bathroom that conforms with their gender identity, right?
>
> A: That's correct. Because the school board would then know that the student was not a biological male who's eligible to use that bathroom.
>
> Q: Understood. So during that period of time when they're both in school, both transgender students, they not both being treated the same way, agreed?
>
> A: I agree as far as that goes. The difference is that in one instance, the district would have knowledge of the pertinent facts. Whereas in the other, it wouldn't. It can't . . . redirect a student to another bathroom if it doesn't know that that student is not eligible to use the one he's been using.

D.E. 162 at 53, 89–90.

B

Based on this consistent and unrefuted testimony, the district court found that "if a transgender student initially enrolls with documents listing the gender that matches the student's gender identity," the School Board "will accept the student as being of that gender." *Adams*, 318 F. Supp. 3d at 1302. In other words, "if a transgender student enrolled in . . . St. Johns County . . . having already changed their legal documents to reflect their gender identity, the student's school records would reflect that gender as well.

. . . Thus, unless there was a complaint, a transgender student could use the restroom matching his or her gender identity until he or she graduated and the school would be none the wiser." *Id.* at 1306.

Given the testimony quoted above, the district court's findings of fact are well supported by the record and are not clearly erroneous. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) ("A [factual] finding that is 'plausible' in light of the full record—even if another one is equally or more so—must govern."). And those findings are significant. They establish that if a high-school transgender student identical to Drew had registered in the St. Johns County school system for the first time as an incoming transfer student, his enrollment documents would have listed him as male and he would have been allowed to use the boys' bathroom under the School Board's policy.

If, as the majority says, gender at birth is the "driving force" behind equal protection jurisprudence, the high-school transgender transfer student described above is in all relevant respects identical to Drew. Yet he would be treated differently and allowed to use the boys' bathroom even though he, like Drew, was born female and presents the same purported safety and privacy concerns that Drew allegedly does. This is irrational, and indefensible under intermediate scrutiny.

The School Board, which shoulders a "demanding" burden under intermediate scrutiny, *see Virginia*, 518 U.S. at 533, does not and cannot explain, much less justify, this state of affairs. If the

means by which the School Board is attempting to enforce its interests in the safety and privacy of students ultimately undermines the bathroom policy, I struggle to see how the policy passes constitutional muster under intermediate scrutiny. Unfortunately, the majority is once again relegating a district court's findings of fact to the dustbin. *See Schultz v. Alabama*, 42 F. 4th 1298, 1336-42 (11th Cir. 2022) (Rosenbaum, J., dissenting in part); *Otto v. City of Boca Raton*, 41 F.4th 1271, 1285 (11th Cir. 2022) (Jordan, J., dissenting from the denial of rehearing en banc); *United States v. Brown*, 996 F.3d 1171, 1196–99, 1202–05 (11th Cir. 2021) (en banc) (Wilson, J., dissenting); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1066 (11th Cir. 2020) (en banc) (Jordan, J., dissenting); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1279 (11th Cir. 2020) (Wilson, J., dissenting). That this keeps happening, in cases arising in every conceivable procedural posture—preliminary injunction, evidentiary hearing, trial—does not make it right.

Even if the district court had not made findings of fact on how the bathroom policy applies to transgender students just like Drew who enroll after transition, affirmance would still be in order. First, as we have held sitting en banc, we review the judgment on appeal and not the district court's rationale. *See, e.g., United States v. $242,484.00*, 389 F.3d 1149, 1153 (11th Cir. 2004) (en banc) ("A bedrock principle upon which our appellate review has relied is that the appeal is not from the opinion of the district court but from its judgment.") (internal quotation marks and citation omitted). Second, we can "affirm the . . . judgment on any ground that appears

in the record, whether or not that ground was relied upon or even considered by the [district] court[.]" *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007). The majority says nothing about these settled principles of Eleventh Circuit law.

The majority's silence is all the more remarkable because, just earlier this year, we held that we can take up, consider, and decide a forfeited issue *sua sponte* to affirm a judgment if there are so-called extraordinary circumstances. *See United States v. Campbell*, 26 F.4th 660, 873 (11th Cir. 2022) (en banc). Here there is a simple and sufficient ground—amply supported by witness testimony and factual findings—on which to affirm the district court's judgment. We will be criticized, and rightly so, for selectively applying our precedent—when we approve of the result below, we strain to find a way to affirm, but when the result is not to our liking, we do not consider alternative grounds on which to affirm.

C

"[R]eal issues must be dealt with at retail[.]" Alexander Bickel, The Least Dangerous Branch 139 (Bobbs-Merrill Co. 1962). Although the district court explained that "[t]his case is not about eliminating separate sex bathrooms," *Adams*, 318 F. Supp. 3d at 1317, the majority insists on discussing bathrooms at wholesale, while addressing issues not presented by the case. So much for judicial restraint, whose "fundamental principle" is that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2311 (2022) (Roberts, C.J., concurring). *See Washington*

State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008) ("[C]ourts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.") (citation and internal quotation marks omitted).

On the ground, the School Board's restroom policy treats physically-similar transgender students differently based solely on their initial enrollment documents. And because the School Board's claimed safety and privacy concerns presented by someone just like Drew are the same for similarly-situated high-school transgender students who enroll with documents indicating their current gender identity, the School Board's claimed safety and privacy rationales go out the window. The only thing left to justify the School Board's refusal to accept new or revised enrollment paperwork identifying Drew as male is administrative convenience, and that does not satisfy intermediate scrutiny. *See, e.g., Craig*, 429 U.S. at 198; *Wengler*, 446 U.S. at 151–52.

Apparently understanding the difficulty posed by the School Board's reliance on enrollment documents, the majority says that Drew did not challenge the constitutionality of the enrollment documents policy in the district court. That assertion, however, is the proverbial straw man. At issue is the validity of the School Board's bathroom policy, and no one is claiming that the enrollment documents policy independently violates the Constitution. To satisfy intermediate scrutiny, which is a "demanding" standard, the

"discriminatory means employed" must be "substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533. So the School Board must show that the means employed actually further its asserted interests. Here the means chosen by the School Board—the enrollment documents—actually undermine the claimed safety and privacy interests for the bathroom policy and at best amount to justification based on administrative convenience. On this point the majority has no satisfactory answers.

To make matters worse for the School Board, its student database already contains a pop-up window notifying teachers about Drew's "desire to be called upon with male pronouns." D.E. 161 at 253. As the district court found, the School Board "has agreed to treat [Drew] as a boy in all other respects, but its position is that [his] enrollment documents and official school records identify him as a female, and he has not presented any evidence that he is a 'biological male.'" *Adams*, 318 F. Supp. 3d at 1308. If the School Board's own records already take into account Drew's identification as male, it is difficult to see why that same gender identification could not govern for purposes of the bathroom policy. All it would take is for the School Board to accept the new (or revised) enrollment documents (such as a new form, a new birth certificate, and a new driver's license) identifying Drew as male. Because it is already treating Drew as male for all other purposes, the School

Board can only rely on administrative convenience to refuse that course of action for its bathroom policy.[2]

III

On this record, the School Board's unwritten bathroom policy fails under intermediate scrutiny. The policy allows transgender students just like Drew whose initial enrollment documents set out their current gender identity to use the bathrooms associated with that identity. Because such students pose the same claimed safety and privacy concerns as Drew, the policy can only be justified by administrative convenience, which is constitutionally insufficient. And given that the student database already identifies Drew as male for all other purposes, it is difficult to understand why the School Board could not accept new or revised enrollment documents for Drew identifying him as male.

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[2] The School Board has also instituted a policy creating a column on the "official student data panel" for "affirmed name." D.E. 161 at 112. This affirmed column "populates [the school's] grade book, … BASIS, which is [the school's] information center, . . . another database called Virtual Counselor, so that . . . child's affirmed name is changed on all those databases." *Id.* at 113. The purpose of the affirmed name column is to inform teachers of a student's preferred name when it may be different from the student's legal name. *See id.* Though Drew did not change his name, this affirmed column shows that the School Board could easily go back into its databases and records to update information that is outdated and/or may be contrary to a student's gender identity.

I would affirm the district court's well-reasoned opinion and judgment on the equal protection claim, and therefore respectfully dissent.

ROSENBAUM, Circuit Judge, Dissenting:

My colleagues Judge Jill Pryor and Judge Jordan have written excellent dissents explaining why the district court's order here should be affirmed. I join Judge Jordan's dissent in its entirety and Judge Jill Pryor's dissent's equal-protection analysis.[1] I write separately only to emphasize one point that Judge Jill Pryor already persuasively makes: the Majority Opinion's misplaced suggestions that affirming the district court's order on equal-protection grounds would require courts in this Circuit to find that all challenges involving restrooms, locker rooms, and changing facilities must necessarily be upheld are wrong.[2]

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[1] As Judge Jordan notes, *see* Jordan Dissent at 2 n.1, the district court awarded Drew the same damages on both his equal-protection and Title IX claims because it found that the injuries arising out of these violations were "identical" and Adams was not entitled to double damages. *See* D.E. 192 at 68 n.58. Because affirming on Adams's equal-protection claim is enough to uphold the judgment, I do not address the Title IX claim.

[2] I note that Judge Lagoa's special concurrence limits itself to the Title IX analysis and does not discuss the equal-protection analysis. For good reason. For the reasons I explain in this dissent, none of the arguments Judge Lagoa asserts in her special concurrence have any application in the equal-protection context. Judge Lagoa's concurrence, which singles out the Title IX analysis for attack, implicitly concedes that its reasoning does not apply in the equal-protection context. That is so because, as I explain, equal-protection analysis has a limiting principle—the factual record. So affirming the district court's equal-protection conclusion here would not require courts in this Circuit to find that all challenges involving restrooms, locker rooms, and changing facilities (and sports) must be upheld.

The Majority Opinion incorrectly suggests that if we affirm the district court here on its equal-protection analysis, required transgender students' use of locker rooms and other changing facilities of the gender with which they identify will inevitably follow.[3] Because it may be possible that the suggestion that our decision here would dictate the outcome of all cases involving sex-separated facilities might cloud some readers' vision as to what the law requires in Adams's case, I think it's important to let the sunlight in and show why that's not accurate.

Namely, the heightened-scrutiny test that governs our analysis is an extremely fact-bound test.

First, it requires the government to identify the important interest or interests that its policy serves. *See Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) (citation omitted). Here, the School Board identified privacy and safety. But in another case involving another policy or another type of policy, the governmental entity might invoke other important interests. And it might choose not to rely on privacy or safety. Put simply, any opinion we write today cannot limit a future governmental entity's ability to identify more or different important interests than did the School Board here.

Second, heightened scrutiny requires the governmental entity to provide evidence that its challenged policy "serve[s]

[3] Of course, even if this were correct—and it's not, as I explain above—it would not be an acceptable reason to avoid doing what the Equal Protection Clause requires.

important governmental objectives" and is "substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also Plyler v. Doe*, 457 U.S. 202, 228–29 (1982) (assuming that the state's interest was important but holding that the challenged statute failed heightened scrutiny because the record contained no credible evidence supporting the stated governmental objective). That the School Board did not offer any such evidence, *see* J. Pryor Dissent at 43–51, does not mean that other governmental entities will fail to do so when defending against challenges to their policies. Indeed, the School Board's failed evidentiary efforts here have no bearing on what another governmental entity might offer in the way of evidence to support its important interest in another case. Nor do they rule out the possibility that a governmental entity in the future might be able to show the right "fit," *Craig*, 429 U.S. at 202, between its stated interest or interests and the evidence it offers to show that the challenged policy directly and substantially furthers that interest.

In short, the record in each particular case drives the equal-protection analysis. And that the School Board here utterly failed to present any non-speculative evidence to support the two particular interests it invokes does not in any way prejudice other governmental entities under equal-protection analysis in future challenges. For that reason, the concern that the Majority Opinion suggests that ruling for Adams would mean all equal-protection-based challenges to other policies involving sex-separated facilities would

necessarily fail should not even subconsciously figure into the correct analysis here.

JILL PRYOR, Circuit Judge, dissenting, in which ROSENBAUM, Circuit Judge, joins as to Parts I, II, III.A, III.B, III.D, and IV:

Each time teenager Andrew Adams needed to use the bathroom at his school, Allen D. Nease High School, he was forced to endure a stigmatizing and humiliating walk of shame—past the boys' bathrooms and into a single-stall "gender neutral" bathroom. The experience left him feeling unworthy, like "something that needs to be put away." The reason he was prevented from using the boys' bathroom like other boys? He is a transgender boy.

Seeking to be treated as equal to his cisgender boy classmates, Adams sued, arguing that his assignment to the gender neutral bathrooms and not to the boys' bathrooms violated the promise of the Fourteenth Amendment's Equal Protection Clause. He prevailed in the district court, and a panel of this Court, of which I was a member, affirmed. Today, a majority of my colleagues labels Adams as unfit for equal protection based on his transgender status.

To start, the majority opinion simply declares—without any basis—that a person's "biological sex" is comprised solely of chromosomal structure and birth-assigned sex. So, the majority opinion concludes, a person's gender identity has no bearing on this case *about equal protection for a transgender boy*. The majority opinion does so in disregard of the record evidence—evidence the majority does not contest—which demonstrates that gender identity is an immutable, biological component of a person's sex.

With the role of gender identity in determining biological sex thus obscured, the majority opinion next focuses on the wrong question: the legality of separating bathrooms by sex. Adams has consistently agreed throughout the pendency of this case—in the district court, on appeal, and during these en banc proceedings—that sex-separated bathrooms are lawful. He has never challenged the School District's policy of having one set of bathrooms for girls and another set of bathrooms for boys. In fact, Adams's case logically depends upon the existence of sex-separated bathrooms. He—a transgender boy—wanted to use *the boys' restrooms* at Nease High School and sought an injunction that would allow him to use *the boys' restrooms*.

When the majority opinion reaches Adams's equal protection claim, these errors permeate its analysis. So does another: the majority overlooks that the School District failed to carry its evidentiary burden at trial. Everyone agrees that heightened scrutiny applies. The School District therefore bore the evidentiary burden of demonstrating a substantial relationship between its bathroom policy and its asserted governmental interests. Yet the School District offered no evidence to establish that relationship.

Next, the majority opinion rejects Adams's Title IX claim. Here, too, the majority opinion errs. Even accepting the majority opinion's premise—that "sex" in Title IX refers to what it calls a "biological" understanding of sex—the biological markers of Adams's sex were but-for causes of his discriminatory exclusion from the boys' restrooms at Nease High School. Title IX's statutory and

regulatory carveouts do not speak to the issue we face here: the School District's categorical assignment of transgender students to sex-separated restrooms at school based on the School District's discriminatory notions of what "sex" means.

Finally, the majority opinion depicts a cascade of consequences flowing from the mistaken idea that a ruling for Adams will mean the end of sex-separated bathrooms, locker rooms, and sports. But ruling for Adams would not threaten any of these things, particularly if, as I urge here, the ruling was based on the true nature of Adams's challenge and the School District's evidentiary failures at trial.

In sum, the majority opinion reverses the district court without addressing the question presented, without concluding that a single factual finding is clearly erroneous, without discussing any of the unrebutted expert testimony, and without putting the School District to its evidentiary burden. I respectfully dissent.

I. BACKGROUND

I set out the factual and procedural background to this case in four parts. In this section I first discuss Adams's status as a transgender boy; define relevant terms; and describe the substantial changes Adams has undergone socially, physically, and legally. Second, I identify the St. Johns County School District's (the "School District") bathroom policy and discuss alternative bathroom policies other schools have adopted. Third, I explain how the School District enforced its bathroom policy against Adams at

Nease High School. Fourth and finally, I provide the procedural background of this case.

A. Adams's Status as a Transgender Boy

Before I discuss Adams's status as a transgender boy, I note that this case comes to us after a bench trial, at which experts, School District officials, and Adams testified. The evidence introduced at trial is relevant to the issues on appeal and matters for the parties involved in this case. And the district court's fact-findings based on the trial evidence are entitled to deference. Indeed, the majority opinion does not challenge these findings.

From as far back as he can remember, Adams has "liv[ed] basically as a boy." Doc. 160-1 at 189.[1] At trial, he testified that he always engaged in what he thinks of as "masculine" behaviors. *Id.* at 88, 103. For example, as a child Adams played with race cars, airplanes, and dinosaurs. If he was "given a girls' toy, it would stay primarily in its toy box." *Id.* at 85. He refused to wear skirts and dresses. When he played sports as a child, he played "almost entirely" with boys. *Id.* at 88. Adams's father testified, "You can go back through his whole childhood and see things like that." Doc. 161 at 87. "[H]e just always wasn't acting like a girl." *Id.* at 87. Adams's mother remembered his childhood the same way: "[H]e never clicked with any of the female things, the standard female stereotype things." Doc. 160-1 at 218.

[1] "Doc." refers to docket entries in the district court record.

Inconsistent with Adams's consistently "masculine" behavior was the fact that the doctor who attended Adams's birth "assigned" him the "[f]emale" sex at birth. *Id.* at 83. The doctor made the assignment by briefly examining Adams's external genitalia in the moments after birth. Still, for the first several years of his life, Adams was unperturbed by any disconnect between how he lived—as a boy—and how his first birth certificate and early medical records identified him—as a girl.

When Adams reached puberty, though, his life took a painful turn. His body began to exhibit female traits, and he "started to hate . . . every aspect of [his] body." *Id.* at 89. At the time, Adams did not consciously associate the hatred he felt for his body with feminine characteristics specifically. But upon reflection, he "only really hated strongly the things that made [him] look more feminine; my hips, my thighs, my breasts." *Id.*

Aided by his concerned and supportive parents, Adams got help. He assumed he "had a mental illness," but he "didn't really [know of] any particular cause" for his negative feelings. *Id.* at 90. He saw multiple therapists for what he assumed was only "anxiety" or "depression." *Id.* After he entered therapy, Adams, his parents, and his medical providers all concluded that something else was at the root of Adams's discontent—he was transgender. Being "transgender" meant that Adams "consistently, persistently, and insistently[] identifie[d] as a gender different [from] the sex [he was] assigned at birth." Doc. 192 at 7 (internal quotation marks

omitted).[2] Put differently, his "gender identity"—his "internal sense of being male, female, or another gender," *id.* (internal quotation marks omitted—was, and remains, that of a male. As one of Adams's physicians and expert witnesses—Deanna Adkins, M.D., a pediatric endocrinologist at Duke University—testified at trial, a person's gender identity cannot be changed; it is not a choice. Diane Ehrensaft, Ph.D., a clinical psychologist and expert witness for Adams echoed Dr. Adkins's opinion, testifying that the "prevailing perspective on gender identity" is that gender identity is "an innate . . . effectively immutable characteristic." Doc. 166-5 at 38 (internal quotation marks omitted). It is a "deep-seated, deeply felt component of human identity"; it "is not a personal decision, preference, or belief." Doc. 166-3 at ¶ 22. It "appears to be related to one's brain messages and mind functioning" and so, crucially, "has a biological basis." *Id.* ¶¶ 21, 25.

Putting these concepts together, Adams is a transgender boy because his gender identity—male—is different from his birth-assigned sex—female. When a person is not transgender, meaning his or her birth-assigned sex and gender identity align, that person is "cisgender." Doc. 192 at 7.

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[2] The record treats the terms "sex" and "gender" as synonymous and interchangeable. Although the terms "sex" and "gender" may refer to distinct, if interconnected, concepts, I am confined to the record, where the terms are used synonymously.

Upon realizing he was transgender, Adams learned why he hated the feminine parts of his own body. His psychologist diagnosed him with "gender dysphoria." *Id.* at 11. Gender dysphoria "is characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex." *Id.* at 7 (internal quotation marks omitted). The condition is recognized by the Diagnostic and Statistical Manual of Mental Disorders. The intensity of the negative emotion Adams felt, he would later testify, was life-threatening. Adams's deep distress was unexceptional when compared to the mental well-being of other transgender school-age children. Tragically, "more than 50% of transgender students report attempting suicide." Doc. 151-8 at 13. It therefore should come as no surprise that Adams and his parents sought to treat his gender dysphoria.

The World Professional Association for Transgender Health ("WPATH") has established a standard of care for persons suffering from gender dysphoria. "Many of the major medical and mental health groups in the United States recognize the WPATH Standards of Care as representing the consensus of the medical and mental health community regarding the appropriate treatment for gender dysphoria." Doc. 119-1 at 10. "The recommended treatment for transgender people with gender dysphoria includes assessment, counseling, and, as appropriate, social transition, puberty-blocking drug treatment, hormone therapy, and surgical interventions to bring the body into alignment with one's gender identity." *Id.* at 10–11. With the support of his parents and medical providers,

Adams underwent changes to ensure his body and behaviors were aligned with his gender identity.

Adams began with social changes. Often, these social changes involve "changing your appearance, your activities, and your actions . . . to the gender that matches your gender identity so that everything you do from the time you get up in the morning and you go to bed at night is in that particular gender." Doc. 166-2 at 27. For Adams, these changes included cutting his hair, wearing masculine clothing, using male pronouns to refer to himself, and wearing a chest binder—a device that gives the wearer the appearance of a flat chest.

Adams also began using the men's restroom in public as part of his social transition. For Adams, using the men's restroom was important because it was a "simple action" that expressed he was "just like every other boy" who could "use the men's bathroom without thinking about it." Doc. 160-1 at 107. Transgender individuals "typically seek privacy and discreteness in restroom use and try to avoid exposing any parts of their genitalia that would reveal sex characteristics inconsistent with their gender identity." Doc. 192 at 8. When Adams uses the men's restroom, he walks in, goes into a stall, locks the door to the stall, uses the restroom, leaves the stall, washes his hands, and exits the restroom.

In addition to his social transition, Adams underwent medical changes. He took birth control medication to halt menstruation. With the help of his endocrinologist, he also began to take testosterone to produce secondary sex characteristics: "increased

muscle mass, increased body hair on the face, chest, and abdomen, and a deepening of the voice." *Id.* at 9. Eventually, Adams had a double mastectomy to remove his breasts.

Adams pursued legal changes, too. He followed Florida's procedure to change the sex on his driver's license to male, which required a statement from his medical provider. He followed another procedure to change the sex on his birth certificate to male. Now, the State of Florida recognizes Adams's sex as male.

The social, medical, and legal changes Adams underwent dramatically changed his outlook. His mother testified that the changes had an "absolutely remarkable" effect on him. Doc. 160-1 at 220. "He went from this quiet, withdrawn, depressed kid to this very outgoing, positive, bright, confident kid. It was a complete 180." *Id.* Adams testified, "[L]ooking back on my life up to this point and thinking about my happiest moments, the happiest moments of my life have been big moments in my transition; when I started testosterone, when I first put on the binder, when I first saw my chest after surgery." *Id.* at 107. "I don't hate myself anymore," he said. "I don't hate the person I am." *Id.* at 106.

B. The School District's Bathroom Policy and Alternative Bathroom Policies Adopted by Other School Districts

There are two components that together make up the School District's bathroom policy: (1) a longstanding unwritten policy and (2) a set of written guidelines the School District promulgated in 2012 (the "Best Practices Guidelines"). In this subsection,

I begin by describing the School District's longstanding unwritten policy. I next describe the Best Practices Guidelines. In discussing the Best Practices Guidelines, I also review evidence in the record about alternative bathroom policies adopted by other school districts. Last, I describe how the School District assigned students to the boys' or girls' bathrooms based on the students' enrollment documents.

1. *The Longstanding Unwritten Bathroom Policy and Its Use of the Term "Biological Sex"*

The School District has long had an unwritten school bathroom policy under which boys use the boys' restrooms, and girls use the girls' restrooms, based on their "biological sex." Doc. 192 at 14 (internal quotation marks omitted). "Biological sex" for purposes of the School District's bathroom policy means birth-assigned sex—the sex a doctor assigns an infant in the moments after birth by examining the infant's external genitalia.[3]

[3] The School Board did not define "biological sex." It contextualized the term by using words like "physiological" or "anatomical" sex, but it did not explain what it meant by those words, either. Appellant's En Banc Br. at 8. The district court found that "biological sex" as used in the bathroom policy meant birth-assigned sex. Doc. 192 at 19. And at oral argument, the School Board confirmed that, for purposes of the policy, "biological sex" meant birth-assigned sex. In using the term "biological sex," then, the School Board refers to only one biological characteristic—a child's "external genitalia" which "has historically been used to determine gender for purposes of recording a birth as male or female." *Id.* at 6.

Dr. Ehrensaft's expert testimony illuminated the differences between the School District's definition of "biological sex" and the scientific community's biological understanding of sex. Dr. Ehrensaft testified that "[b]y the beginning of the twentieth century scientific research had established that external genitalia alone—the typical criterion for assigning sex at birth—[was] not an accurate proxy for a person's sex." Doc. 166-3 ¶ 20. Instead, she continued:

> [M]edical understanding recognizes that a person's sex is comprised of a number of components including: chromosomal sex, gonadal sex, fetal hormonal sex (prenatal hormones produced by the gonads), internal morphologic sex (internal genitalia, i.e., ovaries, uterus, testes), external morphological sex (external genitalia, i.e., penis, clitoris, vulva), hypothalamic sex (i.e., sexual differentiations in brain development and structure), pubertal hormonal sex, neurological sex, and gender identity and role.

Id. As with components like chromosomal sex or external morphological sex, Dr. Ehrensaft testified, gender identity is "immutable" and "has a biological basis." *Id.* ¶ 25; Doc. 166-5 at 38.

After spelling out these numerous biological components of sex, Dr. Ehrensaft testified: "When there is a divergence between these factors, neurological sex and related gender identity are the most important and determinative factors" for determining sex. Doc. 166-3 ¶ 20. The School District did not offer any evidence to rebut this expert testimony.

The term "biological sex," as used by the School District in its bathroom policy, thus does not include many of the biological components that together make up an individual's sex as understood by medical science, including gender identity. Nor does the term "biological sex," when used to mean only sex assigned at birth, account for the reality that the biological components of sex in an individual might diverge.[4] And the term fails to account for the primacy of two biological components in particular, gender identity and neurological sex, when such a divergence occurs. Put simply, the term "biological sex" as used by the School District is at odds with medical science.

2. *The Taskforce, the Best Practices Guidelines, and Alternative Bathroom Policies Accommodating Transgender Students*

In 2012, the School District formed a taskforce to review policies related to LGBTQ students.[5] The taskforce convened in part to consider whether the School District's longtime bathroom policy appropriately accounted for transgender students' desire to use the restrooms corresponding to their gender identity. As part of its

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[4] Other unrebutted evidence made clear that the biological markers of sex "may not be in line with each other (e.g., a person with XY chromosomes may have female-appearing genitalia)." Doc. 151-4 at 7; *see also* Wilson Dissenting Op. at 2–4 (describing examples of divergent sex components in intersex people).

[5] The acronym "LGBTQ" refers to: "lesbian, gay, bisexual, transgender, and questioning (and/or queer)." Doc. 192 at 13 n.19.

work, the taskforce researched the policies of other school districts concerning their treatment of transgender students. The taskforce learned that other school districts had policies in place permitting transgender students to use the restrooms consistent with their gender identity. The taskforce did not learn of a single negative consequence for any student resulting from transgender students' use of the restroom matching their gender identity.

At trial, Adams put on evidence of other school districts' bathroom policies that accommodated transgender students' desire to use restrooms matching their gender identity. For example, in Florida's Broward County Public Schools ("BCPS"), the sixth largest school district in the nation, "[s]tudents who identify as transgender . . . have access to the restroom that corresponds to their gender identity." Doc. 151-8 at 49. BCPS's policy provides that "[w]hen meeting with the transgender student . . . to discuss transgender safety and care, . . . the principal and student address [the] student's access to the restroom, locker room[,] and changing facility" independently, customizing the student's access to these facilities "based on the particular circumstances of the student and the school facilities." *Id.*

Addressing BCPS's experience with concerns like safety and privacy that are sometimes voiced in opposition to such policies, BCPS official Michaelle Valbrun-Pope testified that "with 271,000 students, 300 schools, and implementation over . . . five years, [BCPS] ha[s] not had issues related to safety in the restrooms that are specifically connected to transgender students." Doc. 161 at 64.

And she had never heard about a single privacy concern related to transgender students using the restroom corresponding to their gender identity. Valbrun-Pope learned from her conversations with transgender students and other BCPS officials that "transgender students are not trying to expose parts of their anatomy . . . [t]hat do[] not align with their gender identity" and are typically discrete in using bathrooms that do not match their birth-assigned sex. *Id.* at 65.

A BCPS high school principal who worked district-wide on issues involving transgender students, Michelle Kefford, amplified Valbrun-Pope's observations about the absence of safety and privacy issues arising out of BCPS's bathroom policy. Kefford testified that she has not "heard of a case anywhere" in which a transgender student has threatened another student's "safety or privacy" by using a restroom matching the transgender student's gender identity. *Id.* at 118. She was unaware of "any child having an issue with a transgender child using the bathroom that aligns with their gender identity." *Id.* Although the students themselves were unbothered by the bathroom policy, she explained, she encountered adults who expressed opposition to the policy. Kefford explained that, in her experience,

> [P]eople are afraid of what they don't understand . . . [and] a lot of that fear [is because] they haven't experienced it, they don't know enough about it, and the first thing that comes to mind is this person wants to go into this bathroom for some other purpose. That's

> not the reality. The reality is this child . . . just want[s] to be accepted.

Id. at 119–20.

Dr. Thomas Aberli, a high school principal with another school district, the Jefferson County Public Schools ("JCPS") in Kentucky, testified about his school's bathroom policy as it related to transgender students. Aberli testified that, initially, he was unsure whether being transgender was "a real thing." Doc. 160-1 at 29. But after diligent research, conversations with community members, and discussions with his staff, Aberli concluded that "being transgender was a real thing that the school would have to respond to." *Id.* at 31. While he was principal, Aberli's school adopted a policy permitting transgender students to use bathrooms aligning with their gender identity. Aberli testified that since adopting the policy, his school has experienced no privacy or security issues related to transgender students using restrooms that matched their gender identity. Although not spelled out in detail, it is clear from the record that several school districts in Florida and across the country maintain alternative bathroom policies similar to BCPS's and the one at Aberli's high school.

Notwithstanding its knowledge of the success in other school districts of bathroom policies that permitted transgender students to use school bathrooms consistent with their gender

identity,[6] the taskforce rejected such a policy for St. Johns County. The leader of the taskforce, Sallyanne Smith, explained why at trial:

> [W]hen a girl goes into a girls' restroom, she feels that she has the privacy to change clothes in there, to go to the bathroom, to refresh her makeup. They talk to other girls. It's kind of like a guy on the golf course; the women talk in the restrooms, you know. And to have someone else in there that may or may not make them feel uncomfortable, I think that's an issue we have to look at. It's not just for the transgender child, but it's for the [cisgender students].

Doc. 161 at 213. Smith testified that the taskforce also was concerned about how a change in the policy might apply to gender-fluid students—students "whose gender changes between male and female." Doc. 192 at 17[7]:

> There's another population of people that we learned [about] at the conference, it's called gender fluid, and some days they feel they're a boy and some days they feel they're a girl. So potentially a boy could come,

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[6] It is unclear whether the taskforce was aware of the policy at Aberli's school specifically when it conducted its review. The record supports, however, that the taskforce reviewed BCPS's policy and other similar policies allowing transgender students to use the restrooms corresponding to their gender identities.

[7] The term "gender fluid" likely carries a more nuanced meaning that the district court's definition, but I am confined to the way in which the term is used in the record.

> the football quarterback could come in and say I feel like a girl today and so I want to be able to use the girls' room.

Doc. 161 at 213.

Other members of the taskforce and School Board witnesses echoed these concerns. The Deputy Superintendent for Operations of the School District, Cathy Ann Mittelstadt, testified that "if someone [has] to go [to the restroom] and perhaps undress or clean up a stain on their clothing . . . , they ha[ve] that opportunity to enter that area and receive that privacy." *Id.* at 248. Frank D. Upchurch, III, a long-time School District attorney, testified that the bathroom policy probably prevented "people with untoward intentions" from "do[ing] things they ought not do." Doc. 162 at 112. To summarize the evidence at trial, witnesses representing the taskforce and the School District voiced two concerns with permitting transgender students to use the restrooms matching their gender identity: student privacy and student safety.

At the conclusion of its work, the taskforce produced the Best Practice Guidelines, which were then adopted by the School District. The Best Practices Guidelines address transgender students specifically, providing that "[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." Doc. 152-6 at 1. Apart from offering gender-neutral bathrooms to transgender students as an alternative, the Best Practices Guidelines did nothing to alter the longstanding bathroom policy of

assigning students to bathrooms corresponding to their birth-assigned sex, commonly determined by the appearance of their external genitalia immediately after birth.

3. *The Enrollment Process*

The School District administered its bathroom policy through its enrollment process. To enroll at a St. Johns County school, a student had to provide paperwork, including state health forms and a birth certificate. Students' enrollment paperwork determined their "biological sex" for the purposes of the bathroom policy. Even "[i]f a student later present[ed] a document, such as a birth certificate or driver's license, which list[ed] a different sex, the original enrollment documents [would] control." Doc. 192 at 14. But if a transgender student transitioned and had the necessary paperwork altered before enrolling in a St. Johns County school, that student could use a "restroom matching his or her gender identity . . . and the [School Board] would be none the wiser." *Id.* at 22.

The district court summarized the School District's bathroom policy, including how it assigned students to the boys' or girls' bathrooms at the time Adams attended Nease High School:

> "[B]iological boys" may only use boys' restrooms or gender-neutral single-stall bathrooms and "biological girls" may only use girls' restrooms or gender-neutral single-stall bathrooms, with the terms "biological boys" and "biological girls" being defined by the student's sex assigned at birth, as reflected on the student's enrollment documents.

Id. at 19.

C. Adams's Experience at Nease High School

The summer before he entered Nease High School, Adams was already "present[ing] as a boy." Doc. 192 at 25. He wore his chest binder, kept his hair cut short, dressed in boys' clothing, and went by male pronouns. He used men's restrooms in public. But because Adams had enrolled in the School District in fourth grade, his enrollment documents reflected he was "female." *Id.* at 24. The School District's bathroom policy therefore assigned him to the girls' restrooms and gave him the option to use the gender-neutral restrooms.

Adams's mother contacted Nease High School before the school year began to tell the school that Adams would be entering the freshman class as a boy. To help affirm his gender identity, and as required under the Best Practices Guidelines when a student or parent makes a request, Adams's classmates and teachers used male pronouns to refer to him. And when Adams began his freshman year at Nease, he used the boys' restrooms. There is no evidence to suggest that any fellow occupant of the boys' restroom was bothered by, or even noticed, Adams's presence there.

But about six weeks after Adams started ninth grade, two anonymous female students complained to school authorities that they saw Adams entering the boys' restroom. After the female students complained, Adams was called over the school's intercom system to report to the school office. When he arrived in the school

office, three adults were waiting for him. One of them, a guidance counselor, told Adams that there had been an anonymous complaint about his using the boys' bathroom and that he could no longer use it. The guidance counselor instructed Adams to use the gender-neutral bathroom or the girls' bathrooms.

Adams was humiliated. He could not use the girls' restrooms. "[J]ust thinking about" doing that caused him a great deal of "anxiety." Doc. 160-1 at 118. Indeed, the district court found the school's suggestion that Adams could use the girls' restrooms "disingenuous." Doc. 192 at 28 n.30. Adams had "facial hair," "typical male muscle development," a flat chest, and had a "voice . . . deeper than a girl's." *Id.* at 66. He also wore his hair short and dressed in boys' clothing. Teachers and students at Nease High School treated Adams like any other boy in every other respect. "It would seem that permitting [Adams] to use the girls' restroom would be unsettling for all the same reasons the School District does not want any other boy in the girls' restroom," the district court found. *Id.* at 28 n.30. In reality, the School District left Adams with only one option: he had to use the gender-neutral restrooms while at school.

Nease is a large school comprising multiple buildings, and some of its gender-neutral bathrooms are "considerably f[a]rther away than the boys' restrooms," depending upon where a student's

classes are located.[8] *Id.* at 26. As a result, Adams had to "walk past [the] men's room" to the gender-neutral restroom in what he called "humiliating" "walk[s] of shame." Doc. 160-1 at 117, 204. Even on days when there were "not very many people in the hallway," Adams testified, it felt like "a thousand eyes" were watching him as he walked past the boys' restroom to make his way to a gender-neutral restroom. *Id.* at 204. The experience of being forced to use the gender-neutral restrooms, Adams testified, sent the message that he was "[un]worthy of occupying the same space as [his] classmates." *Id.* The School District's enforcement of the policy against Adams made him feel inferior. In his words, it:

> ma[de] a statement . . . to the rest of the people at the school that I'm somehow different or I'm somehow separate or I'm something that needs to be separate; that I'm something that needs to be put away and not in the commonplace and not in with the rest of the student body.

Id. at 117.

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[8] As part of its fact-finding, the district court went onsite to examine the bathrooms at Nease High School. The court found "[t]here are four sets of multi-stall, sex-segregated bathrooms available" to Nease students. Doc. 192 at 23. The boys' restrooms have both urinals and stalls with doors. In addition, Nease has 11 gender-neutral single-stall bathrooms which are open to any student or staff member. There is no gender-neutral bathroom near the cafeteria; a student who wishes to use a gender-neutral bathroom during lunch must ask permission to leave that area.

D. Procedural History

After his sophomore year at Nease, Adams filed this lawsuit against the School Board. Adams claimed that his exclusion as a transgender boy from the boys' restrooms at Nease violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq*. The district court held a three-day bench trial. In a 70-page opinion containing its findings of fact and conclusions of law, the district court ruled for Adams on both claims. The district court awarded Adams $1,000 in compensatory damages and enjoined the School Board of St. Johns County from barring Adams from using the boys' restrooms at Nease.

The School Board appealed. A panel of this Court affirmed the district court's judgment on both the equal protection and Title IX claims with one member of the panel writing in dissent. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty*. (*Adams I*), 968 F.3d 1286 (11th Cir. 2020). A member of the Court then withheld the mandate. The panel majority *sua sponte* withdrew its opinion and issued a revised majority opinion over another dissent. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.* (*Adams II*), 3 F.4th 1299 (11th Cir. 2021). The revised panel opinion affirmed the district court's judgment on narrower grounds in an effort to gain broader consensus among members of the Court. *Id.* at 1304. A member of the Court nevertheless continued to withhold the mandate.

A majority of the Court then voted to rehear Adams's case en banc. Our en banc proceedings resulted in the above majority

opinion. The majority opinion vacates *Adams II*, rejects *Adams I*, vacates the district court's judgment, and reverses the district court on Adams's equal protection and Title IX claims.

II. STANDARD OF REVIEW

Following a bench trial, we review a district court's findings of fact for clear error and its conclusions of law *de novo*. *See Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1301 (11th Cir. 2020). A factual finding is clearly erroneous only if in examining the record and commensurate finding we are "left with the definite and firm conviction that a mistake has been made." *In re Stanford*, 17 F.4th 116, 121 (11th Cir. 2021) (internal quotation marks omitted). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Wallace v. NCL (Bahamas) Ltd.*, 733 F.3d 1093, 1100 (11th Cir. 2013) (internal quotation marks omitted).

III. DISCUSSION

My analysis proceeds in four parts. First, I clarify the question before the Court and highlight an error permeating the majority opinion—its counterfactual use of the term "biological sex." Second, I address Adams's equal protection claim. Third, I discuss Adams's Title IX claim. Fourth, I explain why the School District's slippery slope arguments and concerns about the lack of a limiting principle are unfounded.

A. The Majority Opinion Has Reframed This Case and Addressed the Wrong Issue.

To summarize the most relevant facts thus far: The School District's bathroom policy separates students according to their sex assigned at birth—what it calls their "biological sex." The policy permits students assigned female at birth to use the girls' bathrooms and students assigned male at birth to use the boys' bathrooms. The policy requires transgender students to use the bathrooms corresponding to their birth-assigned sex or, alternatively, a single-stall gender-neutral bathroom. The policy's definition of "biological sex," however, is at odds with the medical-science definition of the term, which encompasses numerous biological components, including gender identity. And the policy fails to account for the primacy of gender identity (an immutable characteristic) when a student's biological markers of sex diverge—as they will with all transgender students because, by definition, their gender identity is different from their sex assigned at birth. So, even though at least one primary biological component of a transgender student's "biological sex" is, for example, male, that transgender student is deemed female under the School District's policy.

Adams has challenged the School District's assignment of transgender students to the bathrooms of their birth-assigned sex or gender-neutral bathrooms. He wants to use the boys' bathrooms, because those facilities align with the most important biological component of his biological sex: his gender identity. The School District's practice of separating bathrooms by sex has never

been at issue. To the contrary, Adams's claim depends on the existence of sex-separated bathrooms.

Refusing to engage with the record or with the actual question on appeal, the majority opinion reframes this case to its liking. It declares that "biological sex" is "sex based on chromosomal structure and anatomy at birth." Maj. Op. at 3. From this ipse dixit, the majority easily decides that gender identity is entirely separate from "biological sex," that Adams is "a biological female," that the Supreme Court has long relied on "biological sex" to distinguish between men and women in its sex-discrimination jurisprudence, and that this case has to be about the legality of sex-separated bathrooms because it is only about this narrow definition of "biological sex." These are but smoke and mirrors.

The majority opinion's definition of "biological sex" is untethered to anything in this case. It is not the definition the School District has employed. It is most certainly not the definition established by the unrebutted expert testimony in the record. It ignores the unrefuted evidence that gender identity is an immutable, biological component of sex, not something entirely separate. And it ignores the unrefuted evidence that birth-assigned sex and chromosomal structure take a back seat in determining a person's sex when that person's gender identity diverges from those two

components.[9] In short, the majority opinion's definition of "biological sex" has no business driving the framing and resolution of this case.

With these truths out of the way, the majority opinion's definition of "biological sex" permits it to declare that Adams is a biological female and that his gender identity is irrelevant to this case. *See id.* at 28 (arguing that "Adams's gender identity is . . . not dispositive for our adjudication of [his] equal protection claim"). For all the reasons I just summarized, that is wrong.

The majority opinion's counterfactual "biological sex" definition obscures the nuance of this case. The majority opinion invokes Supreme Court sex-discrimination cases that generally recognize "biological" differences between men and women. *See, e.g.*, *id.* at 27 ("[T]he district court did not make a finding equating gender identity as akin to biological sex. Nor could the district court have made such a finding that would have legal significance. To do so would refute the Supreme Court's longstanding recognition that 'sex . . . is an immutable characteristic determined solely by the accident of birth.'" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973))); *see also, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("'To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and

[9] Neither the School District nor the majority opinion even argues that any of the district court's findings of fact are clearly erroneous—they both simply ignore them.

so disserving it."). None of the principles in the cases the majority opinion cites is at issue, though. This case deals with a preliminary issue—what it means to be biologically male or female "by the accident of birth," *Frontiero*, 411 U.S. at 686—and, more importantly, with an issue these cases did not address—the rights of transgender people. No matter how many times the majority says otherwise, this case is not simply about whether there are differences between men and women.

The majority opinion uses the above counterfactuals to reframe the primary issue in this case from whether the bathroom policy discriminates against transgender students to the legality of sex-separated bathrooms. *See* Maj. Op. at 11 ("We disagree with Adams's theory that separation of bathrooms on the basis of *biological sex* necessarily discriminates against transgender students." (emphasis added)). But Adams's case is not about that.

Adams's position in this litigation—from his operative complaint through these en banc proceedings—has always been that his exclusion, as a transgender boy, from the boys' restrooms at Nease High School violated the Equal Protection Clause and Title IX. He sought an injunction that would permit him to use the boys' restrooms at school. Far from wanting to eliminate sex-separated bathrooms, Adams's case logically depends on their existence: he simply wanted to use the boys' restrooms. *See* Appellee's En Banc Br. at 22 ("Defendant's policy of separating boys and girls in restrooms . . . is not at issue . . . . Instead, [Adams] challenges Defendant's decision to treat him differently from other boys[.]"). This

case is, and always has been, about whether Adams's exclusion from the boys' bathrooms under the School District's bathroom policy violated the Equal Protection Clause or Title IX. *See* Doc. 192 at 47 ("This case is not about eliminating sex separate bathrooms; it is only about whether to allow a transgender boy to use the boys' bathroom."). It is not, and has never been (again, no matter how many times the majority opinion says it), about whether the School District can maintain separate bathrooms for boys and girls.

A hallmark of the federal judiciary is its passive nature—we only decide the issues presented to us by the parties. *See The Federalist No. 78* (Alexander Hamilton) (asserting that "the judiciary . . . will always be the least dangerous [branch of government]" because it "can take no active resolution" of social issues). As part of our commitment to remain "neutral arbiter[s] of matters the parties present," we follow the party presentation principle and "rely on the parties to frame the issues for decision." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (internal quotation marks omitted). We "wait for cases to come to [us], and when cases arise," we "normally decide only questions presented by the parties." *Id.* (internal quotation marks omitted) (alteration adopted). We do not enter the fray uninvited to weigh in on divisive issues. Yet that is exactly what the majority does.

In sum, two errors permeate the majority opinion, infecting the entirety of its analysis. First, the majority opinion misuses the term "biological sex," contradicting unchallenged findings of fact

that reflect medical science and oversimplifying—indeed, excising—the role of gender identity in determining a person's biological sex. Second, and based on the first error, the majority opinion addresses itself to answering the wrong question. In the sections that follow, I answer the questions presented—whether Adams's exclusion from the boys' restrooms at Nease High School violated the Equal Protection Clause of the Fourteenth Amendment and Title IX. In my analysis, I rely on the district court's findings of fact and the evidence in the record. I conclude that the School District's discriminatory exclusion of Adams from the boys' restrooms violated both the Equal Protection Clause and Title IX.

B. Adams's Exclusion from the Boys' Restrooms Under the Bathroom Policy Violated the Equal Protection Clause.

I begin with Adams's equal protection claim. The Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).[10] State-sanctioned differential treatment is a "classification" in equal-protection terms.

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[10] The School District argues that Adams is not similarly situated to "a biological male" because he is "a biological female." *See* En Banc Reply Br. at 6–7. Without outright agreeing, the majority opinion expresses doubt that Adams is similarly situated to "biological boys" in the School District for purposes of

There are three tiers of "scrutiny" we apply when analyzing equal protection claims. If the state[11] has made a classification based on race, we apply strict scrutiny. *See Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1305 (11th Cir. 2009). "Laws or regulations almost never survive" our exacting analysis under this test. *Otto v. City of Boca Raton*, 981 F.3d 854, 962 (11th Cir. 2020). If the classification is based on sex, we apply heightened

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its bathroom policy, apparently because Adams—unlike the "biological boys" under the policy—was not assigned male at birth. Majority Op. at 18–20 n.6. By seeking to compare Adams's treatment under the policy to that of "biological girls," rather than to that of cisgender boys, the School District (and in turn the majority opinion) reveals its own bias: "it believes that [Adams's] gender identity is a choice, and it privileges sex-assigned-at-birth over [his] medically confirmed, [biologically rooted,] persistent and consistent gender identity." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020). "The overwhelming thrust of everything in the record . . . is that [Adams] was similarly situated to other [cisgender] boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth." *Id.* "Adopting the [School District's] framing of [Adams's] equal protection claim here would only vindicate [its] own misconceptions, which themselves reflect stereotypic notions." *Id.* (internal quotation marks omitted).

And, once again, the majority opinion's reference to Supreme Court cases addressing the physical differences between men and women misses the point: those cases do not define what it means to be a man or a woman, so they do not demonstrate that "biological sex" as the majority opinion sees that term—sex assigned at birth, or sex assigned at birth and chromosomal structure—was the "driving force behind" the Court's sex-discrimination jurisprudence. Maj. Op. at 18 n.6. We are in new territory here, despite the majority opinion's refusal to explore it.

[11] There is no dispute that the School Board is a state actor for the purposes of this lawsuit.

scrutiny, under which the state must provide an "exceedingly persuasive justification" for the classification. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (internal quotation marks omitted). Other classifications are benign, and to those we apply "rational basis" review. Under rational basis review, the law or policy will be upheld if it is "rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440.

I analyze Adams's equal protection claim in three parts. First, I show that the School District's bathroom policy facially discriminates against transgender students.[12] Second, I offer two alternative reasons why heightened scrutiny applies. Third, I explain why the school bathroom policy of assigning children to a bathroom based only on their birth-assigned sex does not pass heightened scrutiny.

1. *The Bathroom Policy Facially Discriminates Against Transgender Students.*

Even though part of the School District's bathroom policy is unwritten, its substance is not in dispute. The district court found that the policy "[i]ncorporat[ed] both" (1) "the long-standing unwritten School Board bathroom policy" and (2) "the Best Practices

[12] Because the policy facially discriminates against transgender students, we do not need to discuss discriminatory intent. Only when a law is neutral on its face but has a discriminatory impact does a plaintiff have to demonstrate discriminatory intent behind the policy or law. *See generally Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

Guidelines." Doc. 192 at 19. All agree that the first component—the longstanding policy—provides that "only 'biological boys' may use the boys' restroom and . . . only 'biological girls' may use the girls' restroom." *Id.* at 19 n.24. All agree that the second component—the Best Practices Guidelines—provides that "[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." Doc. 152-6 at 1.

Taking these findings together, two critical properties of the policy jump out. First, the bathroom policy singles out transgender students on its face. The Best Practices Guidelines provide that "transgender students" may use gender neutral restrooms and do not have to use the restrooms matching their birth-assigned sex. Second, in addition to referring to transgender students expressly, the bathroom policy categorically deprives transgender students of a benefit that is categorically provided to all cisgender students—the option to use the restroom matching one's gender identity.

Let me explain this second point. The bathroom policy assigns "biological boys'" to boys' restrooms, and "biological girls" to girls' restrooms. The policy is exclusive in that *only* "biological boys"—those assigned male at birth—may use the boys' restroom, and *only* "biological girls"—those assigned female at birth—may use the girls' restroom. Recall that "transgender" persons "consistently, persistently, and insistently identif[y] as a gender different [from] the sex they were assigned at birth." Doc. 192 at 7 (internal quotation marks omitted). If transgender students are "biologically

female" under the policy, their gender identity is necessarily male, and vice versa. It follows that the School District's bathroom policy facially bans *all* transgender students from using the restrooms corresponding to their gender identity.

In contrast to transgender students, *all* cisgender students are permitted to use the restroom matching their gender identity. The policy, therefore, facially discriminates against transgender students by depriving them of a benefit that is provided to all cisgender students. It places all transgender students on one side of a line, and all cisgender students on the other side. The School District cannot hide beyond facially neutral-sounding terms like "biological sex." As the Supreme Court has observed, "neutral terms can mask discrimination that is unlawful." *Nguyen*, 533 U.S. at 64.

The majority opinion contends that there is a "lack of identity" problem here, citing the fact that the School District's classifications of "biological males" who may use the boys' restrooms and "biological females" who may use the girls' restrooms both contain transgender students. Maj. Op. at 30–31 (citing *Geduldig v. Aiello*, 417 U.S. 484 (1974)). I do not see it that way. The School District's policy facially discriminates against transgender students; thus, the class we are concerned with is transgender students. On one side of the policy's line, cisgender students may use the bathrooms corresponding with their gender identities. On the other side of the line, transgender students may not. The majority opinion, in concluding otherwise, overlooks that under the policy *only* transgender students are denied the benefit of using the restrooms

corresponding to their gender identities. Unlike in *Geduldig*, no "benefits of the [policy] accrue to" transgender students. 417 U.S. at 496 n.20.

Because the bathroom policy facially discriminates against transgender students, I next ask what implications that classification carries for the Equal Protection Clause—namely, what level of scrutiny is appropriate given the bathroom policy's classification of transgender versus cisgender students.

2. *The Bathroom Policy Contains a Sex-Based Classification, Triggering Heightened Scrutiny.*

This case presents a cornucopia of different and sometimes overlapping theories for why the bathroom policy's classification between transgender and cisgender students is a "sex-based classification." Adams presents us with at least six theories.[13] The School District and the majority opinion rely on a seventh.[14]

Although the majority and I agree that heightened scrutiny applies to the bathroom policy, the majority opinion's decision to

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[13] Adams argues that heightened scrutiny applies because: (1) the policy cannot be stated without referencing sex-based classifications; (2) the bathroom policy excludes him on the basis of sex; (3) the bathroom policy relies on impermissible stereotypes; (4) the policy creates two classes of transgender students; (5) transgender individuals constitute a quasi-suspect class; (6) even if the policy is not facially discriminatory, it deliberately targets and disparately impacts transgender individuals.

[14] The majority opinion and the School District contend that heightened scrutiny applies simply because the bathroom policy separates the two sexes.

apply heightened scrutiny is based on its misconception that Adams challenges the legality of sex-separated bathrooms. In the majority opinion's view, a policy providing for sex-separated bathrooms triggers heightened scrutiny. Because Adams never challenged the legality of sex-separated bathrooms and instead challenged his exclusion from the boys' restroom based on his status as a transgender boy, it is necessary to view this case through that lens and therefore ask whether the policy requiring Adams's exclusion from the boys' restroom triggers heightened scrutiny. Next , I flesh out two of Adams's theories for why heightened scrutiny applies.

i. Heightened Scrutiny Applies under *Bostock v. Clayton County*'s Rationale.

One of Adams's theories is that his exclusion from the boys' restroom was "based on sex" under the logic of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Appellee's En Banc Br. at 31. *Bostock* did not purport to answer any constitutional question. Instead, it interpreted Title VII by exploring the language and meaning of the statute as originally enacted. But that surface-level distinction is of no moment, Adams argues, because it is *Bostock*'s logic—apart from any Title VII-specific language—that requires us to find there has been a sex-based classification here. I agree with Adams's reading of *Bostock*.

In *Bostock*, the Supreme Court considered whether Title VII barred employers from firing employees because they were gay or transgender. *See Bostock*, 140 S. Ct. at 1737. The Supreme Court began with the text of Title VII, which prohibits discrimination in

employment "because of . . . sex." *Id.* at 1738 (citing 42 U.S.C. § 2000e-2(a)(1)). Because the parties "concede[d] the point for argument's sake," the Supreme Court assumed, but did not decide, that the term "sex" in the statute "refer[ed] only to the biological distinctions between male and female." *Id.* at 1739. In making that assumption, the Supreme Court assumed that the term "sex" did not encompass a person's status as transgender or homosexual, separate and apart from his or her status as "male" or "female." *Id.*

Even with these assumptions about the scope of "sex," the Supreme Court concluded that Title VII prohibits employers from firing employees "because" they are transgender. Why? "[B]ecause it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* at 1741. The Supreme Court explained that "[w]hen an employer fires an employee because she is . . . transgender, two causal factors [are] in play—*both* the individual's sex *and* something else (the sex . . . with which the individual identifies)." *Id.* at 1742. For this reason, the Court observed, discrimination based on transgender status was "inextricably bound up with sex" and thus proscribed by Title VII. *Id.*

Although *Bostock* is a Title VII case, *Bostock*'s reasoning maps onto Adams's exclusion from the boys' restrooms at Nease High School. Adams was excluded for one of two reasons: either because the School District concluded that (1) Adams was a "biological girl" or (2) Adams was not a "biological boy." Either way, Adams was barred from the boys' restrooms based on a reason

"inextricably bound up with sex." *Id.* In excluding Adams from a state-controlled space for a reason "inextricably bound up with sex," the School District made a sex-based classification. *See id.*; *Virginia*, 518 U.S. at 530–31 (finding that policy of excluding women from the Virginia Military Institute was a sex-based classification requiring the application of heightened scrutiny); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (concluding that policy of excluding men from nursing school required the application of heightened scrutiny). Heightened scrutiny applies because Adams's exclusion from the boys' restrooms at Nease was "based on sex" under *Bostock*'s logic.

ii. Heightened Scrutiny Applies Because Adams Is a Member of a Quasi-Suspect Class.

Adams also argues that his exclusion from the boys' restrooms was "based on his transgender status." Appellee's En Banc Br. at 33. Here, Adams contends that transgender individuals form a quasi-suspect class.[15] When a state statute or policy makes a classification based on a "quasi-suspect class," courts apply heightened scrutiny as we would for a sex-based classification. *See Cleburne*, 473 U.S. at 440–42.

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[15] The majority says it does not address the quasi-suspect-class issue because the district court did not do so. Maj. Op. at 17–18 n.5. But we can affirm the district court's decision that the Board's policy violates the Equal Protection Clause on any basis supported by the record. *Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008).

Courts consider four factors in determining whether a group constitutes a quasi-suspect class. First, we ask whether the group historically has been subjected to discrimination. *See Lying v. Castillo*, 477 U.S. 635, 638 (1986). Second, we look at whether the group has a defining characteristic that "frequently bears no relation to [the] ability to perform or contribute to society." *City of Cleburne*, 473 U.S. at 440–41 (citation omitted). Third, we consider whether the group has "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Lying*, 477 U.S. at 638. And fourth, we review whether the group is a minority lacking in political power. *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Applying these factors here, I have no doubt that Adams, as a transgender individual, is a member of a quasi-suspect class.

The first factor—whether the class historically has been subject to discrimination—weighs heavily in favor of concluding that transgender individuals make up a quasi-suspect class. The district court found there was "a documented history of discrimination against transgender individuals." Doc. 192 at 8 n.15. For instance, transgender people "are frequently harassed and discriminated against when seeking housing or applying to jobs or schools and are often victims of violent hate crimes." Doc. 115-10 at 2.[16] They

[16] This exhibit comes from an organization called the American Psychiatric Association. It is a three-page document called "Position Statement on Discrimination Against Transgender and Gender Variant Individuals." Doc. 115-

"experience . . . disproportionate rate[s]" of homelessness, unemployment, and job discrimination" as well as "disproportionately report income below the poverty line." *Id.* (internal citations omitted);[17] *see* Doc. 114-6 at 13 (U.S. Commission on Civil Rights report noting "extensive[] document[ation of] . . . a long, serious, and pervasive history of official and unofficial employment discrimination" by public and private employers).[18] Even as children, the district court found, transgender individuals "face[] discrimination and safety concerns." Doc. 192 at 8. And "[s]eventy-five percent of transgender students report feeling unsafe at school." Doc 115-2 at 2.[19]

Other circuits have observed that transgender individuals are disproportionally victims of discrimination and violence. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) (observing that transgender individuals have historically been subjected to discrimination); *Whitaker ex rel. Whitaker v.*

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10. The district court took judicial notice of this exhibit and others at Docket Entry 115 cited in this paragraph to the extent the court "relied on the materials." Doc. 192 at 13 n.19.

[17] This exhibit is also from the American Psychological Association. It is a five-page document captioned "Transgender, Gender Identity, and Gender Expression Non-Discrimination." Doc. 115-12 at 2.

[18] The district court took judicial notice of this report. *See* Doc. 192 at 8 n.15.

[19] This exhibit comes from an organization called the American Family Therapy Academy. It is a two-page document called "Statement on Transgender Students." Doc. 115-2.

Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (reviewing "alarming" statistics that document the "discrimination, harassment, and violence" faced by transgender individuals). Evidence abounds that transgender individuals have historically been, and continue to be, subjected to discrimination.[20] Thus, the first factor weighs in favor of finding that transgender individuals form a quasi-suspect class.

For the second factor, we determine whether the defining characteristic of the class frequently bears no relation to the class's ability to contribute to society. At trial, Dr. Adkins offered unrebutted expert testimony that being transgender did not limit a person's

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[20] The majority opinion expresses "grave doubt" that transgender individuals belong to a quasi-suspect class, noting that the Supreme Court has declined to designate individuals with intellectual disabilities as such. Maj. Op. at 18 n.5 (internal quotation marks omitted). In declining to deem those with intellectual disabilities members of a quasi-suspect class, the Court emphasized "the distinctive legislative response, both national and state," demonstrating that "lawmakers have been addressing their difficulties in a manner that belies a continuing apathy or prejudice." *Cleburne*, 473 U.S. at 443; *see id.* at 444 (explaining that legislation had "singl[ed] out the [intellectually disabled] for special treatment" and that further legislative efforts to afford additional special treatment should be encouraged rather than potentially discouraged with the application of heightened scrutiny). This included remedial efforts in funding, hiring, government services, and education. *Id.* at 443. This is not at all the case with transgender individuals. Instead of a nationwide effort to provide "special treatment" for members of this group, rampant discrimination continues largely unchecked. Indeed, legislation that has the effect of limiting the rights of transgender individuals has been introduced (and in some cases, enacted) by legislatures in this country. No precedent prevents us from concluding that transgender people are a quasi-suspect class.

"ability to function in society." Doc. 166-2 at 13. Dr. Ehrensaft testified similarly that transgender individuals "have the same capacity for happiness, achievement, and contribution to society as others." *See* Doc. 166-3 ¶ 32. Transgender individuals "live in every state, serve in our military, and raise children." Medical, Mental Health, and Other Health Care Organizations Amicus Br. at 5. "Being transgender . . . implies no impairment in judgment, stability, reliability, or general social or vocational capabilities[.]" Doc. 115-10 at 2. The Fourth Circuit likewise concluded that one's status as transgender bears "no such relation" to one's "ability to perform or contribute to society." *Grimm*, 972 F.3d at 612 (internal quotation marks omitted). The second factor, too, points to the conclusion that transgender individuals constitute a quasi-suspect class.

Now to the third factor—whether there are "obvious, immutable, or distinguishing characteristics" that define the class as a discrete group. Here again, the record contains unrebutted expert testimony from Dr. Atkins that, for transgender individuals, gender identity is not "a choice" and that it is not "voluntary." Doc. 166-2 at 12–13. Dr. Ehrensaft similarly testified that gender identity is an "innate," effectively "immutable" characteristic for transgender individuals. *See* Doc. 166-3 ¶ 26. The School District does not challenge any of the evidence establishing that one's status as a transgender person is born of immutable characteristics. The third factor thus weighs in favor of concluding that transgender individuals are a quasi-suspect class. *See also Grimm*, 972 F.3d at 612–13

(concluding that the third factor supports the existence of a quasi-suspect class of transgender individuals).

Fourth and finally, we must determine whether transgender individuals are a minority class lacking in political power. The district court found that "0.6 percent of the adult population" is transgender. Doc. 192 at 7. Even when we take into account the small proportion of the population transgender individuals comprise, they are underrepresented in political and judicial office nationwide. *See Grimm*, 972 F.3d at 613 (observing that "[e]ven considering the low percentage of the population that is transgender, transgender persons are underrepresented in every branch of government"). Plus, as I noted in discussing the first quasi-suspect-class factor, the district court found that "there is a documented history of discrimination against transgender individuals." Doc. 192 at n.15. In support, the district court cited Adams's filing identifying numerous examples of governmental discrimination against transgender individuals—for example, a 2017 Presidential directive excluding transgender people from open service or accession in the United States armed forces and a North Carolina law that blocks local governments from passing anti-discrimination rules that grant protections to transgender individuals. No group with any political power would allow this type of purportedly legalized discrimination against it. *See Grimm*, 972 F.3d at 613 ("[E]xamples of discrimination cited under the first factor affirm what we intuitively know: Transgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the

political process."). The fourth factor likewise breaks heavily in favor of concluding that transgender individuals constitute a quasi-suspect class.

Like the Fourth Circuit in *Grimm*, I have no trouble concluding that transgender individuals constitute a quasi-suspect class. Adams's transgender status provides an alternative reason why heightened scrutiny applies.

3. *The Policy Does Not Survive Heightened Scrutiny.*

I turn now to why the School District's bathroom policy fails heightened scrutiny. Under the heightened scrutiny test, a sex classification "fails unless it is substantially related to a sufficiently important governmental interest." *City of Cleburne*, 473 U.S. at 441 (citing *Hogan*, 458 U.S. at 721). "[T]he means adopted . . . [must be] in substantial furtherance of important governmental objectives. The fit between the means and the important end [must be] 'exceedingly persuasive.'" *Nguyen*, 533 U.S. at 70 (quoting *Virginia*, 518 U.S. at 533). "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions . . . ." *Hogan*, 458 U.S. at 725–26. "The burden of justification is demanding and it rests entirely" on the School District. *Virginia*, 518 U.S. at 533. As the defender of the sex-based classification, the School Board must demonstrate that its bathroom policy (1) advances an important governmental interest and (2) is in substantial furtherance of that interest. *Hogan*, 458 U.S. at 724.

i. The School District Presented No Evidence that the Policy Substantially Furthers Its Interest in Protecting Student Privacy.

The School District first asserts that the bathroom policy advances the important governmental interest of student "privacy." The majority opinion defines the privacy interest this way: "The privacy interests hinge on using the bathroom away from the opposite sex and shielding one's body from the opposite sex." Majority Op. at 24. The Supreme Court has recognized a legitimate government interest in protecting the bodily privacy of students. *Virginia*, 518 U.S. at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements[.]"). I agree with the majority opinion that the first *Hogan* factor is satisfied—the School Board's asserted interest of student "privacy" is a sufficiently important interest to pass heightened scrutiny.

It is on the second factor—whether the bathroom policy is "substantially related" to the asserted governmental interest—that I part ways with the majority opinion. I have four reasons.

First, the majority opinion ignores that the School District failed to introduce any nonspeculative evidence on this point. When it comes to defending a sex-based classification, we are in the business of relying on evidence, not speculation. *Nguyen*, 533 U.S. at 70; *see Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993) (observing that there is an "extensive evidentiary showing" required

for a classification "to survive heightened scrutiny"). "[S]heer conjecture and abstraction" will not do. *Whitaker*, 858 F.3d at 1052.

The only evidence the School District provided to link its legitimate privacy interest with the policy of assigning transgender students to the bathrooms corresponding with their birth-assigned sex was speculative in nature. Smith, the leader of the taskforce that produced the Best Practices Guidelines, explained that "a girl . . . refresh[ing] her makeup" in the bathroom might not want "someone else in there [who] may or may not make them feel uncomfortable." Doc. 161 at 213. I assume this statement articulates, however inartfully, a legitimate privacy interest. But Smith then speculated—without any evidence to support her supposition—that the mere presence of, or example, a transgender girl could make a cisgender girl feel as uncomfortable in the bathroom as she might be in the presence of a cisgender boy. Similarly, the School District's Deputy Superintendent for Operations, Mittelstadt, opined that the policy of assigning transgender students to the bathrooms of their birth-assigned sex made sense because "if [a cisgender student] [has] to go [to the restroom] and perhaps undress or clean up a stain on their clothing . . . , they [should] ha[ve] that opportunity to enter that area and receive that privacy." *Id.* at 248. I agree with the district court that generalized guesses about how school-aged cisgender students may or may not feel with transgender students in the bathroom is not enough to carry the heavy weight of heightened scrutiny. The School District's failure to carry its evidentiary

burden, standing alone, is reason enough to affirm the district court's judgment on Adams's equal protection claim.

Second, the majority opinion fails to contend with the evidence regarding how transgender students typically use the restroom. The majority opinion asserts that the privacy interest at issue involves "shielding one's body from the opposite sex." Majority Op. at 24. The record reflects, however, that transgender individuals are discrete in using the restroom aligning with their gender identity. As a general matter, transgender students wish to shield parts of their anatomy that would identify them as belonging to their birth-assigned sex. And with respect to Adams specifically, the district court found that he always uses a stall, locks the door to the stall, uses the restroom, leaves the stall, washes his hands, and exits the restroom. In response to this evidence, the majority opinion deflects, saying that the privacy right at issue here is different from "using the bathroom in priva[te]." *Id.* Rather, the majority opinion says, there is some abstract student privacy interest that requires students to use restrooms according to birth-assigned sex.

Herein lies the third problem for the majority opinion—Adams's evidence that the bathroom policy's assignment of Adams to the girls' restrooms would actually *undermine* the abstract privacy interest the School District wished to promote. While he attended Nease and was excluded from the boys' bathrooms, Adams had "facial hair," "typical male muscle development," a deep voice, and a short haircut. Doc. 192 at 66. He had no visible breast tissue; his chest appeared flat. He wore masculine clothing. Any occupant of

the girls' restroom would have seen a boy entering the restroom when Adams walked in. Thus, the district court found, "permitting him to use the girls' restroom would be unsettling for all the same reasons the School District does not want any other boy in the girls' restroom." *Id.* at 28 n.30. In other words, the evidence showed that a transgender boy walking into the girls' restroom would undermine the sense of privacy for all involved.[21] The policy therefore lacks "fit" with the asserted privacy interest because by assigning students who identify as and appear to be male to the girls' restroom and students who identify as and appear to be female to the boys' bathroom, the policy is drastically underinclusive with respect to its stated purpose. *See Friedman v. Harold*, 638 F.2d 262, 269 (1st Cir. 1981) (observing in dicta that a state law prohibiting creditors of a wife from attaching her interest in a tenancy by the entirety but permitting creditors of a husband to attach his interest would not survive intermediate scrutiny because the law's "limitation to only one half of the relevant situations [wives but not husbands] renders it dramatically underinclusive as a means of attaining [the] end" of protecting the interests of innocent non-debtor spouses in property held by the entirety, and thus "presents such a

[21] I do not buy the majority opinion's characterization of the School District's bathroom policy as it applies to transgender students "an accommodation" under which they could use either of two restroom options. Maj. Op. at 34. In practice, the policy forced transgender students like Adams to use only the gender-neutral bathrooms.

sharp and dramatic lack of fit between means and ends as to suggest that no such purpose was intended").

Fourth, and finally, evidence in the record that cisgender students were permitted to use the gender-neutral bathrooms further undermines any notion that there is an "exceedingly persuasive" connection between the School District's privacy interest and its policy banning transgender students from the bathrooms that align with their gender identities. *Nguyen*, 533 U.S. at 70 (internal quotation marks omitted). BCPS official Kefford and task force director Smith both testified at trial that gender-neutral, single-stall bathrooms had long been used by cisgender students who needed "extended," or "additional privacy." Doc. 161 at 101–02, 149. Based on this testimony, the district court found—and the majority opinion does not dispute—that the gender-neutral bathrooms were a way to "accommodate[] the occasional student who needed *additional privacy*" for any number of reasons. Doc. 192 at 15 n.20 (emphasis added). The fact that, by the School District's own admission, the gender-neutral single-stall bathrooms provide more privacy than the bathrooms that separate students by biological sex undermines the District's asserted privacy interest in keeping transgender students from the bathrooms that align with their gender identities because their inclusion might theoretically create privacy problems for a cisgender student who is, for example, "undress[ing] or clean[ing] up a stain on their clothing." Doc. 161 at 248; *cf. Hogan*, 458 U.S. at 730–31 (explaining that school's policy of permitting men to attend all-women's nursing school classes as auditors

"fatally undermines its claim that women . . . are adversely affected by the presence of men" in the classroom).

For all these reasons, the School District failed to carry its evidentiary burden to establish a "substantial relationship" between the bathroom policy and student privacy.

ii. The School District Presented No Evidence that the Policy Substantially Furthers Its Interest in Keeping Students Safe.

The School District likewise failed to produce any evidence showing a "substantial relationship" between its policy and student safety, either for Adams as a transgender student or for cisgender students using school bathrooms. *Hogan*, 458 U.S. at 725. Tellingly, the majority opinion does not rely on student safety as sufficient justification for the policy.

As an initial matter, the School District's brief does not adequately explain what it means by "student safety." Is it referring to transgender students' safety? The safety of cisgender students? Or both? Is it suggesting that a transgender boy's presence in the boys' restroom makes it more unsafe for cisgender boys than when the boys' restroom contains only cisgender boys, for example? The School District leaves us to guess. It makes a few conclusory and passing references to "student safety" in its en banc brief without pointing to any evidence, citing any case law, or otherwise explaining how the bathroom policy furthers student safety. Instead, it seems to rely only on stereotypes and assumptions.

But even if the School District had done a better job of explaining in its brief on appeal, the evidentiary record would still be bare. "Any predictive judgments concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence." *Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (Thomas, J.). As our sister circuit has recognized, a "sex-based classification cannot survive unless the 'sex-centered generalization' asserted in the law's defense 'actually comports with fact' and is not 'too tenuous.'" *Lamprecht*, 958 F.3d at 393 n.3 (alteration adopted) (quoting *Craig v. Boren*, 429 U.S. 190, 199, 204 (1976)); *see Craig*, 429 U.S. at 201–02 (rejecting maleness as a proxy for drinking and driving because a correlation of 2 percent was "unduly tenuous"). Upchurch, a School District witness, vaguely guessed that the bathroom policy probably prevented "people with untoward intentions" from "do[ing] things they ought not do." Doc. 162 at 112. The district court found this speculation insufficient to carry the burden of heightened scrutiny. It further observed that "[t]here was no evidence that Adams encountered any safety concerns during the six weeks he used the boys' restroom at Nease or when he does so in other public places." Doc. 192 at 43. And there was no evidence that "Adams present[ed] any safety risk to other students or that transgender students are more likely than anyone else to assault or molest another student in the bathroom." *Id.*

Nor was there evidence that other schools experienced threats to student safety resulting from their bathroom policies that

permitted transgender students to use the school bathrooms matching their gender identity. Recall that Valbrun-Pope, a BCPS official, testified that "with 271,000 students, 300 schools, and implementation over . . . five years, [BCPS] ha[d] not had issues related to safety in the restrooms that are specifically connected to transgender students." Doc. 161 at 64. Kefford was unaware of "any child having an issue with a transgender child using the bathroom that aligns with their gender identity." *Id.* at 118. And Aberli, a JCPS high school principal, said he had encountered no safety issues due to the implementation of a bathroom policy allowing transgender students to use the restrooms aligning with their gender identity.

What is more, Adams showed the bathroom policy could in fact undermine student safety. At trial, Smith was asked whether it would be safe for "a transgender girl, with girls' parts, in terms of her breasts and everything else" to use the boys' restroom. *Id.* at 209. Smith admitted that it would be more "comfortable and safe with all parties involved" if that transgender girl did not use the boys' restroom. *Id.*

Having failed either to explain what it meant by student safety or to introduce any evidence at trial to support its speculation, the School District failed to carry its evidentiary burden to show a "substantial relationship" between its bathroom policy and student safety. *Hogan*, 458 U.S. at 725. Because the School Board

failed to meet its burden of proof, the bathroom policy fails heightened scrutiny.[22]

iii. The Policy Is Administered Arbitrarily and Enforced Inconsistently.

Another telltale sign that the policy is untethered from any legitimate government interest is that it is administered arbitrarily. When a state actor does not take care to administer a policy containing a sex-based classification in a consistent or effective fashion, the state actor's inconsistent administration and enforcement calls

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[22] The majority opinion points to the following stipulation as evidence of safety and privacy concerns:

> The parties stipulate that certain parents of students and students in the St. Johns County School District object to a policy or practice that would allow students to use a bathroom that matches their gender identity as opposed to their sex assigned at birth. These individuals believe that such a practice would violate the bodily privacy rights of students and raise privacy, safety and welfare concerns. Plaintiff submits this stipulation does not apply to himself or his parents.

Doc. 116 at 22 ¶ 3. The import of this stipulation is lost on me. What do the personal beliefs of "certain" individuals in the School District have to do with whether the policy actually furthers the asserted privacy and security interests or is instead founded on stereotypic biases and assumptions? *Id.* And even if the stipulation provided some support for the School District's policy, how does it get the District close to the "exceedingly persuasive" fit it is required to establish? *Nguyen*, 533 U.S. at 70 (internal quotation marks omitted). It cannot and does not.

into question whether the sex-based classification is substantially related to any important interest. *See Whitaker*, 858 F.3d at 1054 (observing that a transgender student could use the bathroom matching his or her gender identity if he or she simply chose to register with the school district using a passport rather than a birth certificate, which demonstrated "the arbitrary nature of the policy"); *Grimm*, 972 F.3d at 620 (Wynn, J., concurring) (observing that the bathroom policy at issue "is arbitrary and provides no consistent reason" for assigning certain students to certain bathrooms). And that makes sense: how can the School District's policy be substantially related to a legitimate state interest if the School District does not even care enough about the policy to administer it effectively?[23]

The School District's reliance on a student's enrollment documents gives rise to this sort of problem—the School District administers the policy in an arbitrary and haphazard way. As the School District admitted, if a transgender student legally changed his or her birth certificate and other enrollment documents to

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[23] The majority opinion asserts that Adams, the appellee, waived this line of argument by failing to raise it in the district court or his opening brief to the panel. *See* Majority Op. at 8–10 & n.2. The majority opinion is mistaken. "Parties can most assuredly waive or forfeit positions and issues on appeal, but not individual arguments." *Hi-Tech Parm. Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1194 (11th Cir. 2018) (alteration adopted) (internal quotation marks omitted). Adams did not waive this argument, but even if he had, we may affirm the district court on any basis supported by the record. *Wetherbee v. S. Co.*, 754 F.3d 901, 905 (11th Cir. 2014).

reflect a different gender *before* enrolling in the School District, then that transgender student would be able to use the bathrooms matching his or her gender identity. The School Board also admitted that it had no process for identifying transgender students in its student population, so transgender students could violate the policy and the School District would be none the wiser. *See also* Jordan Dissenting Op. at 4–8. At the same time, if after enrollment a transgender student had his official documents changed to reflect his sex consistently with his gender identity, the School District will not accept the revised documents for purposes of the bathroom policy. Therefore, the policy is arbitrary in that some transgender students—like Adams—are restricted by the bathroom policy, while other transgender students are unaffected by it.

And recall Smith's admission that she hopes transgender students will *ignore* parts of the bathroom policy. When asked whether "a transgender girl, with girls' parts, in terms of her breasts and everything else" should use the boys' restroom, Smith said that she would rather that student avoid using the boys' restroom. Doc. 161 at 209. So the bathroom policy is arbitrary and "disingenuous," to use the district court's word, in this sense too: the School District hopes that transgender students will follow parts of the bathroom policy and ignore other parts of it. Doc. 192 at 28 n.30.

The arbitrary way in which the School District enforces the policy offers yet another reason why the bathroom policy fails

heightened scrutiny. For this reason, too, I would affirm the district court on Adams's equal protection claim.[24]

C. Adams's Exclusion from the Boys' Restroom Under the Bathroom Policy Violated Title IX.

I turn now to Adams's Title IX claim. Title IX provides: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). There is no dispute that the use of school restrooms constitutes an "educational program or activity" and that the School District receives federal funding as required by Title IX. Therefore, Adams must show only that he was subjected to "discrimination" "on the basis of sex" to succeed on his Title IX claim. *Id.*

I begin with discrimination. Discrimination "refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 59 (2006). To determine what it means to "discriminate" under Title IX, we look to the relevant implementing regulations, which

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[24] The majority opinion asserts that the School District is owed deference regarding how it chooses to manage the student population. That may be true in appropriate contexts, but no tenet of constitutional law provides that children "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). None of the cases the majority opinion cites provides for a doctrine of deference that would excuse a violation of a student's equal protection rights.

explain that a school cannot "[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment" on the basis of sex. 34 C.F.R. § 106.31(b)(4). Neither can a school "[p]rovide different aid, benefits, or services or provide aid, benefits, or services in a different manner," or "[d]eny any person such aid, benefit, or service" on the basis of sex. *Id.* § 106.31(b)(2), (3).

The School District's bathroom policy bans transgender students from using the restroom that matches their gender identity. There is no doubt that this constitutes discrimination, because transgender boys are treated differently from cisgender boys and transgender girls are treated differently from cisgender girls, with only cisgender students receiving the benefit of being permitted to use the restroom matching their gender identity and transgender students being denied that benefit. *White*, 548 U.S. at 59; *see* 34 C.F.R. § 106.31(b). Being denied this benefit injures transgender students. Adams testified that the bathroom policy left him feeling anxious, depressed, ashamed, and unworthy—like "less of a person" than his peers. Doc. 160-1 at 204. And the record evidence reflects that many transgender people benefit from using bathrooms consistent with their gender identity because it alleviates the debilitating distress and anxiety of living with gender dysphoria.

The harder question is whether the discrimination is "on the basis of sex." To begin with, we need a definition for the word "sex" in the Title IX context. Consulting contemporaneous dictionary definitions, the majority opinion concludes that the word "sex" as used in Title IX unambiguously refers to "biological sex." Majority

Op. at 36–38; *see id.* at 38, 40 (explaining that "sex" in Title IX equates to "biology and reproductive function"). I assume, for the purposes of our discussion today, that the term "sex" as used in Title IX unambiguously refers to "biological sex," a term even the majority opinion acknowledges contains more than one biological component.[25]

As I have explained above, though, undisputed record evidence in this case demonstrates that, among other biological components, "biological sex" *includes gender identity*. And, of course, it would defy the record and reality to suggest that all the markers of a person's biological sex must be present and consistent with either maleness or femaleness to determine an individual's "biological sex." Based on the unrebutted evidence that Adams introduced, the district court found that "'physical aspects of maleness and femaleness' may not be in alignment (for example, 'a person with XY chromosomes [may] have female-appearing genitalia)." Doc. 192 at 6 (quoting Doc. 151-4 at 7); *see also* Wilson Dissenting Op. at 2–4. I believe the majority would agree with me that a person can be female after a hysterectomy, for example. Or that an individual with Mayer-Rokitansky-Küster-Hauser Syndrome (that is, born with XX chromosomes, ovaries, and labia but without a vagina and

[25] I therefore have no reason to address the majority opinion's Spending Clause argument. The Spending Clause cannon of construction arguably comes into play only if we find ourselves dealing with an ambiguous statute. *See generally Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

uterus) can be female. Putting together these two concepts—that "biological sex" includes gender identity and that the markers of a person's biological sex may diverge—despite the majority's protestations otherwise, a person can be male if some biological components of sex, including gender identity, align with maleness, even if other biological components (for example, chromosomal structure) align with femaleness.[26]

Next, "on the basis of." The clause "on the basis of," appearing before the word "sex," imposes the familiar but-for standard of causation. When interpreting statutes generally, and antidiscrimination laws specifically, "Congress is normally presumed" to have legislated a "but for" causation standard "when creating its own new causes of action." *Comcast Corp. v. Nat'l Ass. of African American-Owned Media*, 140 S. Ct. 1009, 1014 (2020). The but-for causation standard means that "a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 140 S. Ct. at 1739. It is possible for the same event to have more than one but-for cause. *Id.* Putting these concepts together, we ask whether Adams's discriminatory exclusion from the boys' restroom at Nease High School under the bathroom policy would not have happened but for the biological markers of his sex.

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[26] So, the majority is simply wrong when it asserts that my reading of Title IX would result in "dual protection . . . based on both sex and gender identity." Maj. Op. at 42 (emphasis omitted). On this record, we can discern that gender identity is one of the components of a person's sex, so protection based on gender identity *is* protection based on sex.

Here again, *Bostock*'s reasoning, separate from any Title VII-specific language, demonstrates that "sex" was a but-for cause of the discrimination Adams experienced. Recall that in *Bostock* the Supreme Court reasoned that when an employer fired an employee for being transgender, the discrimination was due to at least two factors, the individual's "sex" and "something else." *Id.* at 1742.[27] The same reasoning applies here: Adams was excluded from the boys' bathroom under the policy either because he had one specific biological marker traditionally associated with females, genital anatomy (or, put differently, because he lacked that one specific biological marker traditionally associated with males). And so a but-for cause of Adams discriminatory exclusion from the boys' restroom was "sex" within the meaning of Title IX. I would therefore affirm the district court's judgment on Adam's Title IX claim in addition to the equal protection claim.[28]

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[27] Again, and importantly, the Court in *Bostock* merely *assumed* that "sex" did not include gender identity. *Bostock*, 140 S. Ct. at 1739.

[28] In a special concurrence, Judge Lagoa writes that permitting "sex" under Title IX to include gender identity would require that institutions allow transgender girls to participate in girls' sports. She worries that such integration threatens to undermine the progress girls and women have made via participation in Title IX programs. *See* Lagoa Concurring Op. at 2. But there is no empirical data supporting the fear that transgender girls' participation in girls' sports in any way undermines the experience and benefits of sports to cisgender girls. The fact that there may be biological differences between transgender and cisgender girls does not mean that transgender girls will so overwhelm girls' sports programs with competitive advantages as to

undermine the value of girls' sports for cisgender girls. For one thing, there will never be many transgender girls who participate in girls' sports, considering the very low percentage of the population identifying as transgender, only some of whom identify as girls and many of whom will not compete in sports. *See* Jody L. Herman et al., UCLA School of Law Williams Institute, *How Many Adults and Youth Identify as Transgender in the United States?* (June 2022), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states (last accessed Dec. 28, 2022) (estimating that less than 1.5% of the youth population identifies as transgender). For another, an abundance of biological differences has always existed among cisgender girls and women, who compete against one another despite some having distinct biological advantages over others. *See, e.g.*, Canadian Center for Ethics in Sport E-Alliance, *Transgender Women Athletes and Elite Sport: A Scientific Review* at 18–30 (2022), https://www.transathlete.com/_files/ugd/2bc3fc_428201144e8c4a5595fc748ff8190104.pdf ("E-Alliance Review") (last accessed Dec. 28, 2022) (analyzing biological factors affecting trans- and cis- women athletes' participation in high performance sports and concluding that there is no compelling evidence, with or without testosterone suppression, of performance benefits that can be traced directly to transgender status). Indeed, something as simple as being left-handed may offer a significant competitive advantage in some sports, and yet we do not handicap or ban left-handed girls in Title IX-funded programs. *See* Steph Yin, *Do Lefties Have an Advantage in Sports? It Depends*, https://www.nytimes.com/2017/11/21/science/lefties-sports-advantage.html (last accessed Dec. 28, 2022). Plus, to adopt Judge Lagoa's concerns is to deny the myriad ways in which transgender girls and women are *disadvantaged* in athletics, further casting doubt on any fears that transgender athletes will overwhelmingly dominate, and somehow spoil, girls' sports. *See* E-Alliance Review at 36–38.

What is more, Judge Lagoa's concurrence fails to acknowledge the value that inclusion of transgender girls may have on girls' sports, both to trans- *and* cisgender girls. It is well documented that the primary beneficiaries of Title IX have been white girls from socioeconomically-advantaged backgrounds.

The majority opinion's analysis of Adams's Title IX claim relies on statutory and regulatory carveouts, which, it says, foreclose the claim. It points to the following language in Title IX: "[N]othing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The majority opinion also points to Title IX's implementing regulations, which allow for "separate toilet[s], locker room[s], and shower facilities on the basis of sex." 34 C.F.R. § 106.33.

But all the carveouts "suggest[] is that the act of creating sex-separated [facilities] in and of itself is not discriminatory." *Grimm*, 972 F.3d at 618. That is, separating the sexes based on biological sex is not per se a violation of Title IX. The carveouts do not, however, address how an educational institution may assign a person to a facility when the biological markers of his sex point in different directions. Nor do the carveouts permit an educational institution to "rely on its own *discriminatory* notions of what 'sex' means." *Id.* (emphasis added). Adams, a transgender boy, has biological markers of sex indicating that he is male and markers indicating that he is female. The School District's policy categorically assigned transgender students, including Adams, to bathrooms based on

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Alanis Thames, *Equity in Sports has Focused on Gender, Not Race. So Gaps Persist*, https://www.nytimes.com/2022/06/30/sports/title-ix-race.html (last accessed Dec. 28, 2022). Integration into girls' sports of girls, including transgender girls, who may have gone without such historical privileges, undoubtedly would benefit the whole of girls' sports.

only one biological marker: their sex assigned at birth. Adams's claim that the School District's notion of what "sex" means is discriminatory is not foreclosed by the Title IX carveouts. *See id.*[29]

D. There is No Reason to Fear the Majority Opinion's Slippery Slope Arguments.

The majority opinion warns that ruling for Adams would "have ramifications far beyond the bathroom door." Majority Op. at 46. If we ruled for Adams, the majority opinion cautions, our decision would "transform schools' living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities." *Id.* at 49. One School Board witness expressed concern that, without the bathroom policy, "the football quarterback" could say "I feel like a girl today," gain entry to the girls' restroom, and harm female

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[29] And no, my reading does not "swallow the carve-outs and render them meaningless." Maj. Op. at 43 n.7. Rather, my reading recognizes the limits to the carveouts—they cannot provide carte blanche for educational institutions to set policies defining "sex" in a manner that discriminates against transgender students like Adams. This is why the majority opinion's hypothetical of "a biological female student, who does not identify as transgender and who sued her school under Title IX to gain access to the male bathroom," Maj. Op. at 42, is unenlightening. The majority is of course correct that "preventing the female student from using the male bathroom would constitute separation on the basis of sex." *Id.* But the majority's hypothetical case—where all biological markers of the female student point to one sex—falls squarely within the carveouts, and this case—for all the reasons I have just explained—does not. The majority's hypothetical, based on its counterfactual assumption that sex is a single-factor label, is not a helpful analytical tool in this case.

students. Doc. 161 at 213. For at least three reasons, the majority opinion's slippery-slope predictions are unfounded.

First, most of the majority opinion's concerns, and the concerns of the School District, have to do with *gender fluid* individuals—people who are not transgender or cisgender, but who instead, according to the record, have a flexible view of gender that "changes between male and female." Doc. 192 at 17. This case has no bearing on the question how to assign gender fluid individuals to sex-separated bathrooms, though. The School District's bathroom policy categorically bans only transgender students—defined as those who "consistently, persistently, and insistently" identify as *one* gender—from using the restroom that matches their gender identity. *Id.* at 47 (internal quotation marks omitted). By its plain terms, the policy simply does not apply to gender fluid individuals. So, for today, we can set aside the concerns about gender fluidity.

Second, we could affirm the district court's judgment on Adams's equal protection claim based on the School District's evidentiary failures alone. The School District stipulated that this is a heightened scrutiny case, but it failed to submit any evidence to establish a "substantial relationship" between the bathroom policy and student privacy or safety. Notably, although Adams presented scientific expert testimony, the School District chose not to call its experts to rebut that evidence. Affirming the district court's judgment in this narrow way would not prevent other school districts from relitigating this issue, so long as they brought evidence to court with them. But the majority has rejected that approach.

Third, recall that Adams's entire lawsuit depends upon the existence of sex-separated bathrooms. Adams sought only to be treated like any other boy. He asked for, and the district court awarded, an injunction that prevented the School District from barring Adams from the boys' bathroom, not from having sex-separated bathrooms. The majority opinion employs stereotypic ideas and assumptions in an attempt to persuade readers that admitting transgender students into the bathrooms corresponding with their consistent, persistent, and insistent biological gender identity will result in the elimination of sex-separated bathroom facilities. This is simply not so. As to equal protection claims by transgender students, the facts unique to each case will determine whether a school district has met its burden under heightened scrutiny. And with respect to Title IX claims, the fact that sex is a but-for cause of differential treatment does not necessarily mean that actionable discrimination exists. Our law, both constitutional law and statutes and regulations, recognizes a legitimate, protectible privacy interest in the practice of separating bathroom facilities by sex. But that interest is not absolute: it must coexist alongside fundamental principles of equality. Where exclusion implies inferiority, as it does here, principles of equality prevail.

IV. CONCLUSION

Adams's case tells the story of a hauntingly familiar harm. By forcing Adams to use the gender-neutral restrooms, the School Board required Adams to undergo "humiliating" public "walk[s] of shame" in front of his peers and others at school to use a separate

bathroom. Doc. 160-1 at 117, 204. A member of our sister circuit powerfully described the connection between the harm Adams experienced and the harm other children suffered in the not-so-distant past:

> No less than the recent historical practice of segregating Black and white restrooms . . . the unequal treatment enabled by the [School District's] policy produces a vicious and ineradicable stigma. The result is to deeply and indelibly scar the most vulnerable among us—children who simply wish to be treated as equals at one of the most fraught developmental moments in their lives—by labeling them as unfit for equal protection in our society.

Grimm, 972 F.3d at 683. By excluding Adams from the boys' restrooms at Nease High School and relegating him to the gender-neutral restrooms, the School District forced Adams to wear what courts have called a "badge of inferiority." *See Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399, 403 (4th Cir. 2020) (Wynn, J., concurring in denial of reh'g en banc). The Constitution and laws of the United States promise that no person will have to wear such a badge because of an immutable characteristic. The majority opinion breaks that promise. Respectfully, I dissent.

2:21-cv-00415-JRS-MG
United States District Court, Southern District of Indiana

B.E. v. Vigo Cnty. Sch. Corp.

608 F. Supp. 3d 725 (S.D. Ind. 2022)
Decided Jun 24, 2022

No. 2:21-cv-00415-JRS-MG

2022-06-24

B.E., S.E., Plaintiffs, v. VIGO COUNTY SCHOOL CORPORATION, Principal, Terre Haute North Vigo High School, Defendants.

Kathleen Belle Bensberg, Indiana Legal Services, Indianapolis, IN, Kenneth J. Falk, Stevie J. Pactor, ACLU of Indiana, Indianapolis, IN, Megan Stuart, Indiana Legal Services, Inc., Bloomington, IN, for Plaintiffs. Jonathan Lamont Mayes, Mark Wohlford, Philip R. Zimmerly, Bose McKinney & Evans, LLP, Indianapolis, IN, for Defendants. Julia Catherine Payne, Melinda Rebecca Holmes, Thomas M. Fisher, Indiana Office of the Attorney General, Indianapolis, IN, for Amicus States of Indiana, Alabama, Alaska, Arkansas, Georgia, Idaho, Kentucky, Mississippi, Montana, Nebraska, South Carolina, South Dakota, Tennessee, and West Virginia as Amici Curiae Office of the Indiana Attorney General IGC South.

JAMES R. SWEENEY II, JUDGE

726 *726

Kathleen Belle Bensberg, Indiana Legal Services, Indianapolis, IN, Kenneth J. Falk, Stevie J. Pactor, ACLU of Indiana, Indianapolis, IN, Megan Stuart, Indiana Legal Services, Inc., Bloomington, IN, for Plaintiffs.

Jonathan Lamont Mayes, Mark Wohlford, Philip R. Zimmerly, Bose McKinney & Evans, LLP, Indianapolis, IN, for Defendants.

Julia Catherine Payne, Melinda Rebecca Holmes, Thomas M. Fisher, Indiana Office of the Attorney General, Indianapolis, IN, for Amicus States of Indiana, Alabama, Alaska, Arkansas, Georgia, Idaho, Kentucky, Mississippi, Montana, Nebraska, South Carolina, South Dakota, Tennessee, and West Virginia as Amici Curiae Office of the Indiana Attorney General IGC South.

Order on Motion for Preliminary Injunction

727 JAMES R. SWEENEY II, JUDGE *727 2022 marks fifty years of Title IX and its prohibition of discrimination "on the basis of sex" in educational programs and activities receiving federal financial assistance. 20 U.S.C. § 1681(a). Plaintiffs B.E. and S.E., transgender boys attending Terre Haute North Vigo High School, moved for a preliminary injunction, (ECF No. 12), contending that the School's refusal to allow them to use the male restroom and locker room violates Title IX and the Equal Protection Clause. Because the Court finds that Plaintiffs have shown a likelihood of success on the merits of their Title IX claim, and that the other requirements of a preliminary injunction are satisfied, the Court grants the Motion for a Preliminary Injunction.

Background

Plaintiffs were designated female at birth but have identified as male since they were about eleven years old; they are now fifteen. (B.E. Decl. ¶¶ 2–5, ECF No. 22-4; S.E. Decl. ¶¶ 2–5, ECF No. 22-5.) They use names and pronouns that reflect their male identities, wear masculine clothes, and have

masculine haircuts, all of which leads others to perceive them—correctly, in Plaintiffs' view—as boys. (B.E. Decl. ¶¶ 6–8, ECF No. 22-4; S.E. Decl. ¶¶ 6–8, ECF No. 22-5.) Plaintiffs have begun gender-affirming testosterone therapy, which initiates anatomical and physiological changes consistent with the male gender, such as deepening of the voice and the growth of facial hair. (Dr. James D. Fortenberry Suppl. Decl. ¶¶ 7–8, ECF No. 43-6; B.E. Decl. ¶ 24, ECF No. 22-4.) Plaintiffs also have legally changed their names and gender identification, and their birth certificates have been amended to reflect their masculine names and male gender.[1] (L.E. Suppl. Decl. ¶¶ 2–3, ECF No. 43-9; *id.* at Ex. 1–2.)

[1] The Court understands that Defendants have agreed to refer to Plaintiffs by their male names and male pronouns, and only the restroom and locker room issues remain for the Court. (Mason Dep. 19–20, ECF No. 43-1; Pls.' Reply 2 n.2, ECF No. 44.)

Plaintiffs have been diagnosed with gender dysphoria, a condition defined by the American Psychiatric Association as "a marked incongruence between one's experienced/expressed gender and assigned gender." (Fortenberry Decl. ¶¶ 21, 36, ECF No. 22-2 (citing Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders (5th ed. 2013)); B.E. Decl. ¶ 19, ECF No. 22-4; S.E. Decl. ¶ 19, ECF No. 22-5.) Untreated gender dysphoria can result in "significant distress, clinically significant anxiety and depression, self-harming behaviors, substance abuse, and suicidality." (Fortenberry Decl. ¶ 18, ECF No. 22-2.) Specifically, denial of the use of toilet facilities consistent with an individual's expressed gender is an "ever-present source of distress and anxiety," which is linked to "increases in self-harming behaviors including suicidality." (*Id.* ¶ 31.) The principal treatment of gender dysphoria is "to allow the young person full expression of their experienced gender identity," which includes allowing individuals to express their gender "with social behaviors consistent with their experienced
728 *728 gender." (*Id.* ¶¶ 26, 29.) Hormone therapy can also help. (*Id.* ¶ 26.) Allowing the person to express themselves in a manner consistent with their gender identity is "an essential component of amelioration of gender dysphoria that is essential to future mental health," and support in doing so "at least partially ameliorates" gender dysphoria and its negative consequences. (*Id.* ¶¶ 28, 29; Dr. Janine M. Fogel Decl. ¶¶ 21–23, ECF No. 22-1.)

Plaintiffs used the boys' bathrooms at the beginning of the school year without incident. (B.E. Decl. ¶¶ 10–11, ECF No. 22-4; S.E. Decl. ¶¶ 10–11, ECF No. 22-5; Stacy Mason Dep. 29–30, ECF No. 43-1.) A school employee noticed their use and reported it. (B.E. Decl. ¶¶ 11–14, ECF No. 22-4.) The vice principal then instructed Plaintiffs that they can only use the girls' bathrooms or the unisex bathroom in the health office and that they may be disciplined if they use the boys' bathrooms. (*Id.* ; Mason Dep. 39, ECF No. 43-1.) It is the School's position that Plaintiffs cannot use the boys' facilities "without surgical or anatomical change." (Mason Dep. 18, 22, 41–42, ECF No. 43-1.)

Plaintiffs have been using the health office bathroom because using the girls' bathroom "feels wrong," makes Plaintiffs extremely anxious and upset, and causes confusion among peers who do not know that Plaintiffs are transgender, forcing Plaintiffs to explain why they are using the girls' bathroom. (B.E. Decl. ¶¶ 18, 22–23, ECF No. 22-4; S.E. Decl. ¶¶ 18, 22–23, ECF No. 22-5.) The health office bathroom is far away from Plaintiffs' classes, which makes them late for class when they need to use the restroom between classes and causes them to miss more class when they need to use the restroom during class. (B.E. Decl. ¶ 26, ECF No. 22-4; S.E. Decl. ¶ 26, ECF No. 22-5.) Similarly, Plaintiffs arrive late, and separately from other students, to gym class, as they change in the health office bathroom. (B.E. Decl. ¶ 30, ECF No. 22-4; S.E. Decl. ¶ 30, ECF No. 22-5.)

Vigo County School Corporation's Director of Secondary Education, Stacy Mason, is not aware of any other students who use the health office bathroom, other than students who are in the nurse's office for a health issue. (Mason Dep. 35–36, ECF No. 43-1.) There have also been a few instances when the health office bathroom has been locked, and Plaintiffs had to "hold it" while they waited for it to be unlocked. (B.E. Dep. 35–36, ECF No. 29-3; S.E. Dep. 21–22, ECF No. 29-2.) As a result, Plaintiffs try to avoid going to the bathroom at all when at school. (B.E. Decl. ¶ 29, ECF No. 22-4; S.E. Decl. ¶ 29, ECF No. 22-5.)

This is compounded by Plaintiffs' lifelong gastrointestinal problems, which require Plaintiffs to use the bathroom frequently and urgently and to take laxatives. (B.E. Decl. ¶ 20, ECF No. 22-4; S.E. Decl. ¶ 20, ECF No. 22-5; B.E. Dep. 27, ECF No. 29-3.) The Parties dispute how frequently Plaintiffs have had restroom accidents at school, but they agree that at least once in high school, Plaintiffs' mother brought S.E. a change of clothes because of an accident. (L.E. Dep. 76–83, ECF No. 29-1.) Additionally, Plaintiffs' mother once picked B.E. up from school because B.E.'s stomach hurt from "holding it." (L.E. Dep. 76–83, ECF No. 29-1; B.E. Dep. 33–35, ECF No. 29-3.)

Legal Standard

A plaintiff seeking a preliminary injunction must show that "(1) they will suffer irreparable harm in the absence of an injunction, (2) traditional legal remedies are inadequate to remedy the harm, and (3) they have some likelihood of success on the merits." *Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin.* , 24 F.4th 640, 644 (7th Cir. 2022). If those elements are *729 shown, the court must "balance the harm" the plaintiff would suffer if an injunction is denied against the harm the opposing party would suffer if one is granted, "and the court must consider the public interest, which takes into account the effects of a decision on non-parties." *Id.*

Discussion

Plaintiffs assert that Defendants' actions violate both Title IX and the Equal Protection Clause of the Fourteenth Amendment. (Compl. ¶ 1, ECF No. 1.) Because the Court agrees that Plaintiffs are likely to succeed on the merits of their Title IX claim, the Court does not address the Equal Protection Clause argument. *See, e.g.* , *ISI Int'l, Inc. v. Borden Ladner Gervais LLP* , 256 F.3d 548, 552 (7th Cir. 2001), *as amended* (July 2, 2001), ("[F]ederal courts are supposed to do what they can to avoid making constitutional decisions, and strive doubly to avoid making unnecessary constitutional decisions.").

A. Likelihood of Success on the Merits

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Defendants admit that they receive federal funding and therefore are covered by Title IX. (Answer ¶ 44, ECF No. 27.)

At the heart of the Parties' dispute are the Supreme Court's decision in *Bostock v. Clayton County* , —— U.S. ——, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020), and the Seventh Circuit's decision in *Whitaker v. Kenosha Unified School District No. 1 Board of Education* , 858 F.3d 1034 (7th Cir. 2017), *abrogated on other grounds by Illinois Republican Party v. Pritzker* , 973 F.3d 760 (7th Cir. 2020).

Bostock established that Title VII's prohibition of discrimination "because of such individual's ... sex" encompasses discrimination because an individual is homosexual or transgender. *Bostock* , 140 S. Ct. at 1741–43 ; 42 U.S.C. § 2000e-2(a)(1). More precisely, the Court held that an employer violates Title VII when it fires an individual for being homosexual or transgender. *Bostock* , 140 S. Ct. at 1753. The Court reasoned that "it is impossible to discriminate against a person for being homosexual or transgender without

discriminating against that individual based on sex;" "homosexuality and transgender status are inextricably bound up with sex." *Id.* at 1741–42.

Three years before *Bostock* , the Seventh Circuit decided *Whitaker* . There, the court affirmed the issuance of a preliminary injunction enjoining a school district from denying a transgender boy access to the boys' restroom. *Whitaker* , 858 F.3d at 1042, 1055. The court found the plaintiff demonstrated a likelihood of success on the merits of his Title IX claim because a "policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id.* at 1049. Further, such a policy subjects a transgender student "to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX." *Id.* at 1049–50 ; *see* 34 C.F.R. § 106.31(b)(4) (prohibiting institutions covered by Title IX from "[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment"). However, the *Whitaker* court applied the wrong standard for evaluating whether preliminary injunctive relief was warranted. 858 F.3d at 1046. The court stated
730 that a plaintiff *730 seeking a preliminary injunction need only show that his chance to succeed on his claim was "better than negligible," *id.* —a standard that has been "retired by the Supreme Court," *Illinois Republican Party v. Pritzker* , 973 F.3d 760, 763 (7th Cir. 2020).

In Defendants' view, this error renders *Whitaker* meaningless, and *Whitaker* "should have no precedential value here." (Defs.' Resp. 13, ECF No. 30.) Defendants also stress that *Bostock* "expressly declined" to reach the issue of sex-segregated bathrooms and locker rooms. (*Id.* at 14.) The crux of Defendants' argument is that *Bostock* 's determination that discrimination based on transgender status "necessarily entails discrimination based on sex," 140 S. Ct. at 1747, should not apply to Title IX, which expressly permits institutions to "provide separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33. Perhaps the Supreme Court will adopt that position when it takes up the issue in the Title IX context. But until then, this Court must follow *Whitaker* and, to the extent it supports *Whitaker* as relevant here, *Bostock* .

Bostock held, in clear terms, that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." 140 S. Ct. at 1741. Much like Title VII, Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). It follows, then, that Title IX similarly prohibits discrimination because of an individual's transgender status. *Whitaker* reached this same conclusion, albeit under a different theory of sex discrimination. 858 F.3d at 1046–50 (finding transgender plaintiff was discriminated against for his failure to conform to sex-based stereotypes of the sex he was assigned at birth).

To be sure, the Court in *Bostock* explicitly noted that only Title VII was before it, and not "other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. But courts have looked regularly to Title VII when interpreting Title IX. *See, e.g.* , *Olmstead v. L.C. ex rel. Zimring* , 527 U.S. 581, 616 n.1, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) (Thomas, J., dissenting) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX ...."); *Franklin v. Gwinnett Cnty. Pub. Schs.* , 503 U.S. 60, 75, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (applying Title VII's conception of sexual harassment as sex discrimination to Title IX claim); *Smith v. Metro. Sch. Dist. Perry Twp.* , 128 F.3d 1014, 1023 (7th Cir. 1997) (noting that "it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX"). And the Supreme Court's explanation of how discrimination on the

basis of transgender status constitutes discrimination on the basis of sex applies just the same in the Title IX context.

It is true, however, that *Bostock* did not address the issue of "sex-segregated bathrooms, locker rooms, and dress codes." 140 S. Ct. at 1753 ; (Defs.' Resp. 14, ECF No. 30.) But while this might portend a different result when considering the issue squarely, it does not *sub silentio* overrule *Whitaker* , which addressed both Title IX and sex-segregated bathrooms. The defendants there made the same argument as Defendants here: Title IX specifically permits separate bathrooms based on sex, 34 C.F.R. § 106.33, so the school district can provide separate bathrooms based upon gender identity. (Kenosha Unified School District No. 1. Board of Education and Sue Savaglio-Jarvis' 731 Appellate Brief at 11–12, 24, 26, *731 *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* , 858 F.3d 1034 (7th Cir. 2017) (No. 16-3522), ECF No. 25-1; Kenosha Unified School District No. 1. Board of Education and Sue Savaglio-Jarvis' Reply Brief at 11–13, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* , 858 F.3d 1034 (7th Cir. 2017) (No. 16-3522), ECF No. 71.) And the Seventh Circuit explicitly cited the regulation permitting institutions to do so. *Whitaker* , 858 F.3d at 1047 (citing 34 C.F.R. § 106.33). Nevertheless, the Seventh Circuit still concluded that denial of restroom access based on transgender status violates Title IX. *Id.* at 1047–51.

Of course, that is why the Parties dispute the significance of *Whitaker* after *Illinois Republican Party* . The impact of the subsequent abrogation is not totally clear. Plaintiffs argue *Whitaker* is still binding; Defendants say the Title IX issue remains an open one. It seems clear, however, that cases abrogated in part do not lose all their value. The Seventh Circuit has continued to look to abrogated cases, and it makes sense intuitively that a court's view is not rendered meaningless merely because it looked through the wrong lens. *See, e.g.* , *Skiba v. Ill. Cent. R.R.* , 884 F.3d 708, 720 (7th Cir. 2018) (citing *Hemsworth v. Quotesmith.Com, Inc.* , 476 F.3d 487, 491 (7th Cir. 2007), *abrogated on other grounds by Ortiz v. Werner Enters., Inc.* , 834 F.3d 760, 765 (7th Cir. 2016)) (citing *Hemsworth* for support that remark was too remote to establish discriminatory intent, even though *Ortiz* expressly overruled *Hemsworth* for employing the wrong legal standard by separating "direct" from "indirect" evidence in employment discrimination framework). That seems particularly true here, where the *Whitaker* court never indicated that the issue was a close one or hinted that the low threshold it applied was determinative. Indeed, decisions of other district courts, while not binding on this Court, have concluded that *Whitaker* remains good law. *See, e.g.* , *A.C. v. Metro. Sch. Dist. of Martinsville,* No. 1:21-cv-2965-TWP-MPB, 601 F.Supp.3d 345, 354 (S.D. Ind. Apr. 29, 2022) (recognizing that *Whitaker* "remains good law and thus is binding on this court"; granting preliminary injunction to a 13-year-old having no gastrointestinal problems and not having begun gender-affirming testosterone therapy), *appeal docketed* , No. 22-1786 (7th Cir. May 3, 2022); *see also D.T. v. Christ* , 552 F. Supp. 3d 888, 896 (D. Ariz. 2021) (citing *Whitaker* , among other cases, as support that discrimination against transgender people is discrimination based on sex). At best for Plaintiffs, *Whitaker* remains binding precedent on this Court; at worst, the Seventh Circuit has tipped its hand that it thinks Plaintiffs have the better of the argument.[2] With the appeal of *A.C.* pending before the Seventh Circuit, these murky waters 732 may soon become *732 clear, but until then, and despite cogent arguments from Defendants, this Court is bound by *Whitaker* .

[2] Defendants also argue that *Bostock* casts doubt upon *Whitaker* because *Whitaker* premised its finding of sex discrimination upon a sex-stereotyping theory, which "*Bostock* does not embrace." (Defs.' Resp. 13–15, ECF No. 30.) This distinction misses the point. Defendants' argument is that § 106.33 permits them "to separate

> toilet and locker room facilities on the basis of anatomical differences." (*Id.* at 15.) Regardless of the theory on which the Seventh Circuit relied to find sex discrimination, it still decided that § 106.33 did not alter the conclusion that the transgender plaintiff was being subjected to impermissible discrimination.
>
> Defendants also note that *Whitaker* addressed only access to bathrooms, not locker rooms. (Defs.' Resp. 9–10, ECF No. 30.) The Court finds this distinction immaterial. The reasoning applies the same to locker rooms, especially considering Plaintiffs would use the stalls in the locker room, just as they used the stalls in the restroom. (Pls.' Reply 4, ECF No. 44; B.E. Suppl. Decl. ¶ 6, ECF No. 43-7; S.E. Suppl. Decl. ¶ 6, ECF No. 43-8.) Indeed, § 106.33, on which Defendants rely, applies to both bathrooms and locker rooms, so it follows that the outcome is the same for both.

Further, other courts have agreed with the Seventh Circuit's assessment. In *Grimm v. Gloucester County School Board* , the Fourth Circuit stated that after *Bostock* , it had "little difficulty" holding that a bathroom policy precluding a transgender boy from using the boys' restroom discriminated against him "on the basis of sex." 972 F.3d 586, 616 (4th Cir. 2020). And it rejected the school board's argument—the same argument Defendants make here—that 34 C.F.R. § 106.33 allows for such a policy. *Id.* at 618. That is because transgender plaintiffs don't "challenge sex-separated restrooms;" rather, they challenge the "discriminatory exclusion" from the "sex-separated restroom matching [their] gender identity." *Id.* ; *see also id.* ("All [§ 106.33] suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like [the plaintiff], the Board may rely on its own discriminatory notions of what 'sex' means."). The Eleventh Circuit reached the same conclusion, also after *Bostock* , although the opinion was later vacated in an effort to reach only the Equal Protection issue. *Adams v. Sch. Bd. of St. John's Cnty.* , 968 F.3d 1286, 1308 (11th Cir. 2020) ("Thus, the language of § 106.33 does not insulate the School Board from [the plaintiff's] discrimination claim based on his transgender status."), *vacated* , 3 F.4th 1299 (11th Cir. 2021), *rehearing en banc granted* , 9 F.4th 1369 (11th Cir. 2021). Indeed, Defendants do not cite a district court or majority circuit court case adopting their position, and the Court can find none, which speaks to Plaintiffs' likelihood of success. *Cf. Texas v. United States* , 201 F. Supp. 3d 810 (N.D. Tex. 2016) (noting that court's order was not addressing resolution of the "difficult policy issue" of transgender students' access to facilities but whether agencies followed proper administrative procedures in promulgating guidance).

As applicants for preliminary relief, Plaintiffs "bear[ ] a significant burden." *Ill. Republican Party* , 973 F.3d at 763. But they need not show proof by a preponderance or that they "definitely will win the case." *Id.* Plaintiffs have carried the requisite burden here.

B. Other Requirements

Likelihood of success is not the end of the inquiry; Plaintiffs must demonstrate that the other preliminary injunction factors also weigh in their favor. *Ill. Republican Party* , 973 F.3d at 763. While *Whitaker* might have employed the wrong standard as to the threshold showing of success, that has no bearing on *Whitaker* 's analysis of the remaining factors. The Court turns to those factors with that in mind.

1. Irreparable Harm

Similar to *Whitaker* , the Court is presented with expert opinions that use of the boys' facilities is "integral" to Plaintiffs' "transition and emotional well-being" and that Plaintiffs will suffer irreparable harm absent preliminary relief. *Whitaker* , 858 F.3d at 1045 ; (Fortenberry Decl. ¶ 31, ECF No. 22-2 ("The ability to be able to use

toilet facilities consistent with one's experienced and expressed gender is a prime component of gender affirmation. Being denied the use [of] gendered toilet facilities consistent with expressed gender is experienced as an ever-present source of distress and anxiety.")); (Fogel Decl. ¶ 27, ECF No. 22-1 (stating that "[t]he importance of being able to use restrooms" consistent with the person's
733 gender identity *733 "cannot be underestimated;" "Being forced to use restrooms that differ from the person's identity is a prime reminder that the transgender person is 'different,' and this undercuts the purpose and goal of social role transition and can exacerbate the negative consequences of gender dysphoria ... and can have permanent negative consequences.").)[3] Dr. Fortenberry noted that both Plaintiffs "have explicitly and consistently noted school-related distress associated with mis-gendering and with restrictions on bathroom and locker room access" and that these experiences have "long-term influences on mental health, physical health, and overall wellbeing," including heightened risk for posttraumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality.[4] (Fortenberry Decl. ¶¶ 34–35, ECF No. 22-2.) He opined that Plaintiffs' "overall health and wellbeing is best served" by access to the male bathroom and locker facilities. (*Id.* ¶ 37.)

[3] Defendants object to Dr. Fortenberry and Dr. Fogel's declarations "to the extent that they are based on inadmissible hearsay." (Defs.' Resp. 20 n.4, ECF No. 30.) It is not clear that the declarations are based on inadmissible hearsay, but even if they were, "hearsay can be considered in entering a preliminary injunction." *S.E.C. v. Cherif* , 933 F.2d 403, 412 n.8 (7th Cir. 1991) (citing *Asseo v. Pan Am. Grain Co.* , 805 F.2d 23, 26 (1st Cir. 1986)).

[4] That Dr. Fortenberry based his opinions in part on conversations with the Plaintiffs for which he was not physically present—the conversations were relayed to him by the fellow he was supervising, Dr. Nomi Sherwin—does not change the Court's analysis. (*See* Defs.' Supp. R. ¶ 8, ECF No. 51.)

Defendants attempt to distinguish *Whitaker* by stating that unlike the plaintiff there, B.E. and S.E. have not "restricted their water intake" or "contemplated self harm as result of the restroom options offered to them." (Defs.' Resp. 19–20, ECF No. 30.) Plaintiffs have stated, however, that they try to avoid going to the bathroom at all, which is "very uncomfortable" and makes it hard to concentrate in class. (B.E. Decl. ¶ 29, ECF No. 22-4; S.E. Decl. ¶ 29, ECF No. 22-5.) And their mother testified that at least on one occasion, she picked up B.E. from school because B.E.'s stomach hurt from "holding it." (L.E. Dep. 76–83, ECF No. 29-1; B.E. Dep. 33–35, ECF No. 29-3.) Plaintiffs also stated that being excluded from the boys' facilities worsens their anxiety and depression, makes them feel isolated and punished for being who they are, and makes them not want to go to school. (B.E. Decl. ¶¶ 18, 31, ECF No. 22-4; S.E. Decl. ¶¶ 18, 31, ECF No. 22-5.) And Plaintiffs' mother testified that Plaintiffs have contemplated and carried out self-harm "because of what they are going through," although what they are "going through" likely encompasses more than just the School's stance. (L.E. Dep. 36, ECF No. 43-3.) While the circumstances here are not identical to those in *Whitaker* , they are sufficiently similar as to support a finding of irreparable harm.

Defendants also state that there is "no evidence that B.E. or S.E. have been ostracized or singled out for their use of the health office restroom." (Defs.' Resp. 20, ECF No. 30.) But as in *Whitaker* , the health office bathroom is not located near Plaintiffs' classrooms, and Plaintiffs are the only students who use it, other than students who are in the nurse's office for a health issue. (B.E. Suppl. Decl. ¶ 4, ECF No. 43-7; S.E. Suppl. Decl. ¶ 4, ECF No. 43-8; Mason Dep. 35–36, ECF No. 43-1.) Plaintiffs, too, are "faced with the unenviable choice between using a bathroom that would

further stigmatize [them] and cause [them] to miss class time, or avoid use of the bathroom altogether
734 at the expense of *734 [their] health." *Whitaker* , 858 F.3d at 1045. The latter is not a viable option for Plaintiffs due to their gastrointestinal issues, and the former requires them to head to the health office—as effectively the only students who do so —and risk having an accident, while their peers use the nearby restrooms. (Mason Dep. 35–36, ECF No. 43-1; B.E. Decl. ¶ 27, ECF No. 22-4; S.E. Decl. ¶ 27, ECF No. 22-5.) Both Plaintiffs noted that this highlights that they are different than their peers; S.E. specifically testified that using the health office restroom made Plaintiffs "outcasts." (S.E. Dep. 18, ECF No. 29-2; B.E. Decl. ¶ 30, ECF No. 22-4; S.E. Decl. ¶ 30, ECF No. 22-5); *see Whitaker* , 858 F.3d at 1045 (plaintiff using restroom to which only he had access "further stigmatized" him, "indicating that he was 'different' because he was a transgender boy"). And all of this undermines the treatment for Plaintiffs' gender dysphoria, the consequences of which have been detailed extensively by Dr. Fogel and Dr. Fortenberry. In sum, like the plaintiff in *Whitaker* , Plaintiffs have shown that they will suffer irreparable harm in the absence of a preliminary injunction.

2. Inadequate Legal Remedies

In concluding that the plaintiff in *Whitaker* had shown that there was no adequate remedy at law, the court rejected the school district's argument that any harm the plaintiff suffered could be remedied by monetary damages. *Whitaker* , 858 F.3d at 1046. The court cited the plaintiff's statement that he had contemplated suicide due to the school's position, as well as an expert's opinion that the school's actions were "directly causing significant psychological distress" and placed the plaintiff "at risk for experiencing life-long diminished well-being and life-functioning." *Id.* at 1045–46. The court concluded that there was no adequate remedy for "preventable 'life-long diminished well-being and life-functioning' " or for the potential harm of suicide. *Id.*

Here, Defendants do not appear to even argue that there is an adequate remedy at law. Regardless, while Plaintiffs have not explicitly stated that they have contemplated suicide because of the School's policy, the same risk of "preventable 'life-long diminished well-being and life-functioning' " is present. Dr. Fortenberry noted Plaintiffs' "school-related distress associated with mis-gendering and with restrictions on bathroom and locker room access" and stated that these feelings of shame and discrimination "have long-term influences on mental health, physical health, and overall wellbeing." (Fortenberry Decl. ¶¶ 34–35, ECF No. 22-2.) He further opined that studies show that the "stress and victimization" experienced by transgender and gender nonbinary middle and high school students is associated "with a greater risk for posttraumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality as an adult" and that Plaintiffs' health and well-being would best be served by access to the boys' bathroom and locker facilities. (*Id.* ¶¶ 34, 37.) And Dr. Fogel stated that being forced to use restrooms that differ from a person's identity can exacerbate the negative consequences of gender dysphoria and "can have permanent negative consequences." (Fogel Decl. ¶¶ 27–28, ECF No. 22-1.) Plaintiffs detailed the distress and anxiety they experience and described how their exclusion from the boys' facilities worsens their anxiety and depression. (B.E. Decl. ¶¶ 18, 22–23, 27, 29, 31, 39, ECF No. 22-4; S.E. Decl. ¶¶ 18, 22–23, 27, 29, 31, 39, ECF No. 22-5; L.E. Dep. 38, ECF No. 29-1.) In short, there is a preventable risk that Plaintiffs will experience long-term detrimental effects on their
735 health, and there is no adequate remedy *735 for such a risk. *See Whitaker* , 858 F.3d at 1046 ; *see also J.A.W. v. Evansville Vanderburgh Sch. Corp.* , 323 F. Supp. 3d 1030, 1042 (S.D. Ind. 2018) (finding "a monetary award would be an inadequate remedy for the type of stress and anxiety" transgender plaintiff would experience if injunction allowing for restroom access were not granted).

3. Balancing of Harms and Public Interest

The Court has already described the irreparable harm Plaintiffs would suffer absent preliminary injunctive relief. Now, the Court must balance that harm against the harm Defendants would suffer if an injunction were granted, and the Court must consider the public interest. *Camelot Banquet Rooms, Inc.* , 24 F.4th at 644.

In support of their argument that the balance of harms weighs against a preliminary injunction, Defendants claim an injunction would violate the privacy interests of Plaintiffs' classmates and would "create many uncertainties," as the School would have to "immediately police students with different anatomy disrobing and showering in the same facility." (Defs.' Resp. 21, ECF No. 30.) This argument does not tip the balance in this case for several reasons. First, like the plaintiff in *Whitaker* , Plaintiffs used the boys' restroom at the beginning of the school year without incident; " [n]one of [Plaintiffs'] classmates questioned [their] presence in the boys' bathrooms." (B.E. Decl. ¶¶ 10–11, ECF No. 22-4; S.E. Decl. ¶¶ 10–11, ECF No. 22-5; Mason Dep. 29–30, ECF No. 43-1); *Whitaker* , 858 F.3d at 1055 (dismissing school district's argument that it would be harmed when plaintiff used the bathroom for months without incident and district failed to produce any evidence that any students ever complained about plaintiff's presence or that plaintiff's presence actually caused an invasion of any other student's privacy). There is no reason to think the locker room would be any different: Plaintiffs will use the stalls to change for gym class, just as they used the stalls in the restroom. (Pls.' Reply 4, ECF No. 44; B.E. Suppl. Decl. ¶ 6, ECF No. 43-7; S.E. Suppl. Decl. ¶ 6, ECF No. 43-8.) Nor would showering be an issue: students generally do not use the locker room showers during the day, and Plaintiffs have stated that they would not use the showers in the boys' locker room. (B.E. Suppl. Decl. ¶¶ 6–7, ECF No. 43-7; S.E. Suppl. Decl. ¶¶ 6–7, ECF No. 43-8.) Regarding Defendants' concerns about policing students with different anatomy disrobing in the same facility, to the extent Defendants mean they are concerned about distinguishing between transgender students and those students with merely a desire to gain access to the other locker room, (*see* Amicus Br. of Indiana & 13 Other States in Opp'n 11, ECF No. 35), then Plaintiffs are right: the School can require documentation to verify the legitimacy of a student's request, much like it already does. (*See* Vigo County School Corporation Administrative Guideline Regarding Accommodations for Transgender Students, ECF No. 43-2.)

Finally, Defendants argue that public policy weighs against an injunction. The decision that Title IX does not permit the separation of toilet, locker room, and shower facilities "on the basis of sex" should be made by Congress or through the notice-and-comment process, Defendants say. (Defs.' Resp. 21–22, ECF No. 30.) But that decision was already made when the Seventh Circuit decided *Whitaker* . *See, e.g.* , *J.A.W. v. Evansville Vanderburgh Sch. Corp.* , 323 F. Supp. 3d 1030, 1042 (S.D. Ind. 2018) (granting transgender boy's motion for preliminary
736 injunction *736 to allow him to use boys' restroom; "the issuance of an injunction in this case would not require moving the applicable line from where the court in *Whitaker* has already drawn it"); *see Donohoe v. Consol. Operating & Prod. Corp.* , 30 F.3d 907, 910 (7th Cir. 1994) (in a hierarchical judiciary, lower courts should follow higher courts' decisions on point). And protecting civil rights is "a purpose that is always in the public interest." *Dodds v. U.S. Dept. of Educ.* , 845 F.3d 217, 222 (6th Cir. 2016) (citations omitted) (denying motion to stay preliminary injunction that ordered school district to allow transgender girl to use girls' restroom).

Having determined that Plaintiffs will suffer irreparable harm absent preliminary injunctive relief, and that Defendants and the public interest

will not be harmed if such relief is granted, this balance weighs in Plaintiffs' favor. *Whitaker* , 858 F.3d at 1054–55.

C. Bond Requirement

Finally, Plaintiffs request that the injunction be issued without bond. (Mot. Prelim. Inj. 2, ECF No. 12; Pls.' Br. 32, ECF No. 22.) Rule 65 of the Federal Rules of Civil Procedure provides that a court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). However, Plaintiffs state that bond should not be required in this case because issuance of the injunction will not result in any monetary harm to the School. *See Habitat Educ. Ctr. v. U.S. Forest Serv.* , 607 F.3d 453, 458 (7th Cir. 2010) (district court can waive bond requirement when there is no danger the opposing party will incur any damages from the injunction). The School does not respond to this argument or contend that it would incur damages as a result of the injunction. Failure to respond to an argument results in waiver. *Bonte v. U.S. Bank, N.A.* , 624 F.3d 461, 466 (7th Cir. 2010). Accordingly, the Court will waive the bond requirement.

Conclusion

Plaintiffs' Motion for Preliminary Injunction, (ECF No. 12), is **granted** . The injunction shall issue in a separate order. *See, e.g.* , *MillerCoors LLC v. Anheuser-Busch Cos., LLC* , 940 F.3d 922, 922–23 (7th Cir. 2019) (per curiam) (remanding for failure, in part, to enter injunction as a separate document).

SO ORDERED .

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BOSTOCK *v.* CLAYTON COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17–1618. Argued October 8, 2019—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 4–33.

(a) Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The straightforward application of Title VII's terms interpreted in accord

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*Together with No. 17–1623, *Altitude Express, Inc., et al.* v. *Zarda et al., as Co-Independent Executors of the Estate of Zarda*, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18–107, *R. G. & G. R. Harris Funeral Homes, Inc.* v. *Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

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with their ordinary public meaning at the time of their enactment resolves these cases. Pp. 4–12.

(1) The parties concede that the term "sex" in 1964 referred to the biological distinctions between male and female. And "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" *University of Tex. Southwestern Medical Center* v. *Nassar,* 570 U. S. 338, 350. That term incorporates the but-for causation standard, *id.,* at 346, 360, which, for Title VII, means that a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment action. The term "discriminate" meant "[t]o make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745. In so-called "disparate treatment" cases, this Court has held that the difference in treatment based on sex must be intentional. See, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986. And the statute's repeated use of the term "individual" means that the focus is on "[a] particular being as distinguished from a class." Webster's New International Dictionary, at 1267. Pp. 4–9.

(2) These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. There is no escaping the role intent plays: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking. Pp. 9–12.

(b) Three leading precedents confirm what the statute's plain terms suggest. In *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542, a company was held to have violated Title VII by refusing to hire women with young children, despite the fact that the discrimination also depended on being a parent of young children and the fact that the company favored hiring women over men. In *Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U. S. 702, an employer's policy of requiring women to make larger pension fund contributions than men because women tend to live longer was held to violate Title VII, notwithstanding the policy's evenhandedness between men and women as groups.

And in *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U. S. 75, a male plaintiff alleged a triable Title VII claim for sexual harassment by co-workers who were members of the same sex.

The lessons these cases hold are instructive here. First, it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer might have called its rule a "life expectancy" adjustment, and in *Phillips*, the employer could have accurately spoken of its policy as one based on "motherhood." But such labels and additional intentions or motivations did not make a difference there, and they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex. Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the employer easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. Here, too, it is of no significance if another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from the one assigned at birth, might also be at work, or even play a more important role in the employer's decision. Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. *Manhart* is instructive here. An employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule. Pp. 12–15.

(c) The employers do not dispute that they fired their employees for being homosexual or transgender. Rather, they contend that even intentional discrimination against employees based on their homosexual or transgender status is not a basis for Title VII liability. But their statutory text arguments have already been rejected by this Court's precedents. And none of their other contentions about what they think the law was meant to do, or should do, allow for ignoring the law as it is. Pp. 15–33.

(1) The employers assert that it should make a difference that plaintiffs would likely respond in conversation that they were fired for being gay or transgender and not because of sex. But conversational conventions do not control Title VII's legal analysis, which asks simply whether sex is a but-for cause. Nor is it a defense to insist that intentional discrimination based on homosexuality or transgender status is not intentional discrimination based on sex. An employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. Nor does it make a difference

Syllabus

that an employer could refuse to hire a gay or transgender individual without learning that person's sex. By intentionally setting out a rule that makes hiring turn on sex, the employer violates the law, whatever he might know or not know about individual applicants. The employers also stress that homosexuality and transgender status are distinct concepts from sex, and that if Congress wanted to address these matters in Title VII, it would have referenced them specifically. But when Congress chooses not to include any exceptions to a broad rule, this Court applies the broad rule. Finally, the employers suggest that because the policies at issue have the same adverse consequences for men and women, a stricter causation test should apply. That argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action under Title VII, a suggestion at odds with the statute. Pp. 16–23.

(2) The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. But legislative history has no bearing here, where no ambiguity exists about how Title VII's terms apply to the facts. See *Milner* v. *Department of Navy,* 562 U. S. 562, 574. While it is possible that a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context, the employers do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms ordinarily carried some missed message. Instead, they seem to say when a new application is both unexpected and important, even if it is clearly commanded by existing law, the Court should merely point out the question, refer the subject back to Congress, and decline to enforce the law's plain terms in the meantime. This Court has long rejected that sort of reasoning. And the employers' new framing may only add new problems and leave the Court with more than a little law to overturn. Finally, the employers turn to naked policy appeals, suggesting that the Court proceed without the law's guidance to do what it thinks best. That is an invitation that no court should ever take up. Pp. 23–33.

No. 17–1618, 723 Fed. Appx. 964, reversed and remanded; No. 17–1623, 883 F. 3d 100, and No. 18–107, 884 F. 3d 560, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 17–1618, 17–1623 and 18–107

GERALD LYNN BOSTOCK, PETITIONER
17–1618 *v.*
CLAYTON COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS
17–1623 *v.*
MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER
18–107 *v.*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 2020]

JUSTICE GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the

county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 78 Stat. 255, 42 U. S. C. §2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. 723 Fed. Appx. 964 (2018). Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. 883 F. 3d 100 (2018). Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of

their transgender status. 884 F. 3d 560 (2018). During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons. 587 U. S. ___ (2019).

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations. See *New Prime Inc.* v. *Oliveira*, 586 U. S. ___, ___–___ (2019) (slip op., at 6–7).

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350 (2013) (citing *Gross* v. *FBL Financial Services*, *Inc.*, 557 U. S. 167, 176 (2009); quotation altered). In the language of law, this means that Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. *Nassar*, 570 U. S., at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U. S., at 176. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident

occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage* v. *United States*, 571 U. S. 204, 211–212 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U. S., at 350.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. Cf. 11 U. S. C. §525; 16 U. S. C. §511. Or it could have written "primarily because of" to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. Cf. 22 U. S. C. §2688. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, §107, 105 Stat. 1075, codified at 42 U. S. C. §2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. §2000e–2(a)(1).

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of" sex. The statute imposes liability on

employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. *Ibid.* The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise . . . discriminate against." By virtue of the word *otherwise*, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 59 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, *e.g., Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." Webster's New Collegiate Dictionary 326 (1975); see also *post,* at 27–28, n. 22 (ALITO, J., dissenting). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal

too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." §2000e–2(a)(1) (emphasis added). And the meaning of "individual" was as uncontroversial in 1964 as it is today: "A particular being as distinguished from a class, species, or collection." Webster's New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that "it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment." It might have said that there should be no "sex discrimination," perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only "sexist policies" against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so

equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 239 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the

male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here.

When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is

not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 883 F. 3d, at 135 (Cabranes, J., concurring in judgment).

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms suggest, this Court's cases have already confirmed. Consider three of our leading precedents.

In *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of" sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now,

these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. *Id.*, at 707–708. Even so, the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True, women as a class may live longer than men as a class. But "[t]he statute's focus on the individual is unambiguous," and any individual woman might make the larger pension contributions and still die as early as a man. *Id.*, at 708. Likewise, the Court dismissed as irrelevant the employer's insistence that its actions were motivated by a wish to achieve classwide equality between the sexes: An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables. *Ibid.* The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex. *Id.*, at 711.

In *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court

held it was immaterial that members of the same sex as the victim committed the alleged discrimination. Nor did the Court concern itself with whether men as a group were subject to discrimination or whether something in addition to sex contributed to the discrimination, like the plaintiff's conduct or personal attributes. "[A]ssuredly," the case didn't involve "the principal evil Congress was concerned with when it enacted Title VII." *Id.*, at 79. But, the Court unanimously explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.* Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar.

First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer called its rule requiring women to pay more into the pension fund a "life expectancy" adjustment necessary to achieve sex equality. In *Phillips*, the employer could have accurately spoken of its policy as one based on "motherhood." In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender status. But just as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips*, they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.

Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the defendant easily could have pointed to some other, nonprotected trait and insisted it was the

more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. As *Manhart* teaches, an employer is liable for intentionally requiring an individual female employee to pay more into a pension plan than a male counterpart even if the scheme promotes equality at the group level. Likewise, an employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.

The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. But each of these arguments turns out only to repackage errors we've already seen and this Court's precedents have already rejected. In the end, the employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes

in enacting Title VII or certain expectations about its operation. They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex. Cf. *post,* at 3 (ALITO, J., dissenting); *post,* at 8–13 (KAVANAUGH, J., dissenting).

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. In *Phillips*, for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex

wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't *intentionally* discriminate based on sex, as a disparate treatment claim requires. See *post*, at 9–12 (ALITO, J., dissenting); *post*, at 12–13 (KAVANAUGH, J., dissenting). But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

What, then, do the employers mean when they insist intentional discrimination based on homosexuality or transgender status isn't intentional discrimination based on sex? Maybe the employers mean they don't intend to harm one sex or the other as a class. But as should be clear by now, the statute focuses on discrimination against individuals, not groups. Alternatively, the employers may mean that they don't perceive themselves as motivated by a desire to discriminate based on sex. But nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In *Manhart*, the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In *Phillips*, the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole *favored* women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination

because of sex, and Title VII liability necessarily followed.

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes

men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically. Cf. *post,* at 7–8 (ALITO, J., dissenting); *post,* at 13–15 (KAVANAUGH, J., dissenting).

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. *Oncale*, 523 U. S., at 79–80. Same with "motherhood discrimination." See *Phillips*, 400 U. S., at 544. Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however

they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something. Cf. *post*, at 2, 42–43 (ALITO, J., dissenting); *post*, at 4, 15–16 (KAVANAUGH, J., dissenting).

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt. *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990); see also *United States* v. *Wells*, 519 U. S. 482, 496 (1997); *Sullivan* v. *Finkelstein*, 496 U. S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr.

Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability. Just cast a glance back to *Manhart*, where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips*, where motherhood was the added variable.

Still, the employers insist, something seems different here. Unlike certain other employment policies this Court has addressed that harmed only women or only men, the employers' policies in the cases before us have the same adverse consequences for men and women. How could sex be

necessary to the result if a member of the opposite sex might face the same outcome from the same policy?

What the employers see as unique isn't even unusual. Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute. Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire. But like the employers before us today, this employer would say not so fast. By comparing the woman who applied to be a mechanic to a man who applied to be a mechanic, we've quietly

changed two things: the applicant's sex and her trait of failing to conform to 1950s gender roles. The "simple test" thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, doing the work. So we need to hold that second trait constant: Instead of comparing the disappointed female applicant to a man who applied for the same position, the employer would say, we should compare her to a man who applied to be a secretary. And because that jobseeker would be refused too, this must not be sex discrimination.

No one thinks *that*, so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand.

This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. See, *e.g.*, *Carcieri* v. *Salazar*, 555 U. S. 379, 387 (2009); *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992); *Rubin* v. *United States*, 449 U. S. 424, 430 (1981). Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. Cf. *post*, at 40 (ALITO, J., dissenting). But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner* v. *Department of Navy*, 562 U. S. 562, 574 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. *Oncale*, 523 U. S., at 79. But "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress'" does not demonstrate ambiguity; instead, it simply "'demonstrates [the] breadth'" of a legislative command. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 499 (1985). And "it is ultimately the provisions of" those legislative commands "rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U. S., at 79; see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012) (noting that unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions").

Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing

today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence. For example, in the context of the National Motor Vehicle Theft Act, this Court admitted that the term "vehicle" in 1931 could literally mean "a conveyance working on land, water or air." *McBoyle* v. *United States*, 283 U. S. 25, 26 (1931). But given contextual clues and "everyday speech" at the time of the Act's adoption in 1919, this Court concluded that "vehicles" in that statute included only things "moving on land," not airplanes too. *Ibid.* Similarly, in *New Prime*, we held that, while the term "contracts of employment" today might seem to encompass only contracts with employees, at the time of the statute's adoption the phrase was ordinarily understood to cover contracts with independent contractors as well. 586 U. S., at ___–___ (slip op., at 6–9). Cf. *post,* at 7–8 (KAVANAUGH, J., dissenting) (providing additional examples).

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers *agree* with our understanding of all the statutory language—"discriminate against any individual . . . because of such individual's . . . sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the ag-

gregate. Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

That is exactly the sort of reasoning this Court has long rejected. Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's "expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.

If anything, the employers' new framing may only add new problems. The employers assert that "no one" in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. See, *e.g.*, *Smith* v. *Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 (ND Ga. 1975) (addressing claim from 1969); *Holloway* v. *Arthur Andersen & Co.*, 566 F. 2d 659, 661 (CA9 1977) (addressing claim from 1974). And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination. See, *e.g.*, Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583–584 (1973).

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? How do we account for those who change their minds over time, after learning new facts or hearing a new argument? How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any.

One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group. Take this Court's encounter with the Americans with Disabilities Act's directive that no "'public entity'" can discriminate against any "'qualified individual with a disability.'" *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 208 (1998). Congress, of course, didn't list every public entity the statute would apply to. And no one batted an eye at its application to, say, post offices. But when the statute was applied to *prisons*, curiously, some demanded a closer look: Pennsylvania argued that "Congress did not 'envisio[n] that the ADA would be applied to state prisoners.'" *Id.*, at 211–212. This Court emphatically rejected that view, explaining that, "in the context of an unambiguous statutory text," whether a specific application was anticipated by Congress "is irrelevant." *Id.*, at 212. As *Yeskey* and today's cases exemplify, applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees

in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms. Cf. *post*, at 28–35 (ALITO, J., dissenting); *post,* at 21–22 (KAVANAUGH, J., dissenting).

The employer's position also proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with *Oncale*. How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U. S., at 79. Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's passage, the words of "'the sex provision of Title VII [are] difficult to . . . control.'" Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1338 (2012) (quoting Federal Mediation Service To Play Role in Implementing Title VII, [1965–1968 Transfer Binder] CCH Employment Practices ¶8046, p. 6074). The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility

of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. See C. Whalen & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115–118 (1985). Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law. In the years immediately following Title VII's passage, the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory. Franklin, 125 Harv. L. Rev., at 1340 (citing Press Release, EEOC (Sept. 22, 1965)). Some courts held that Title VII did not prevent an employer from firing an employee for refusing his sexual advances. See, *e.g.*, *Barnes* v. *Train*, 1974 WL 10628, *1 (D DC, Aug. 9, 1974). And courts held that a policy against hiring mothers but not fathers of young children wasn't discrimination because of sex. See *Phillips* v. *Martin Marietta Corp*., 411 F. 2d 1 (CA5 1969), rev'd, 400 U. S. 542 (1971) (*per curiam*).

Over time, though, the breadth of the statutory language proved too difficult to deny. By the end of the 1960s, the EEOC reversed its stance on sex-segregated job advertising. See Franklin, 125 Harv. L. Rev., at 1345. In 1971, this Court held that treating women with children differently from men with children violated Title VII. *Phillips*, 400 U. S., at 544. And by the late 1970s, courts began to recognize that sexual harassment can sometimes amount to sex discrimination. See, *e.g.*, *Barnes* v. *Costle*, 561 F. 2d 983,

990 (CADC 1977). While to the modern eye each of these examples may seem "plainly [to] constitut[e] discrimination because of biological sex," *post*, at 38 (ALITO, J., dissenting), all were hotly contested for years following Title VII's enactment. And as with the discrimination we consider today, many federal judges long accepted interpretations of Title VII that excluded these situations. Cf. *post*, at 21–22 (KAVANAUGH, J., dissenting) (highlighting that certain lower courts have rejected Title VII claims based on homosexuality and transgender status). Would the employers have us undo every one of these unexpected applications too?

The weighty implications of the employers' argument from expectations also reveal why they cannot hide behind the no-elephants-in-mouseholes canon. That canon recognizes that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). But it has no relevance here. We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an elephant. But where's the mousehole? Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.

With that, the employers are left to abandon their concern for expected applications and fall back to the last line

of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Cf. *post*, at 44–54 (ALITO, J., dissenting). Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. & S. F. R.*, 548 U. S., at 59. Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices

might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. §2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U. S. C. §2000bb *et seq.* That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. §2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See §2000bb–3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now

before us. So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

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Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 17–1618, 17–1623 and 18–107

GERALD LYNN BOSTOCK, PETITIONER
17–1618 *v.*
CLAYTON COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS
17–1623 *v.*
MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER
18–107 *v.*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 2020]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U. S. C. §2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list,[1] and in recent years, bills have included "gender identity" as well.[2] But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H. R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H. R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty.[3] This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, §7, cl. 2), Title VII's prohibition of

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[1] *E.g.*, H. R. 166, 94th Cong., 1st Sess., §6 (1975); H. R. 451, 95th Cong., 1st Sess., §6 (1977); S. 2081, 96th Cong., 1st Sess. (1979); S. 1708, 97th Cong., 1st Sess. (1981); S. 430, 98th Cong., 1st Sess. (1983); S. 1432, 99th Cong., 1st Sess., §5 (1985); S. 464, 100th Cong., 1st Sess., §5 (1987); H. R. 655, 101st Cong., 1st Sess., §2 (1989); S. 574, 102d Cong., 1st Sess., §5 (1991); H. R. 423, 103d Cong., 1st Sess., §2 (1993); S. 932, 104th Cong., 1st Sess. (1995); H. R. 365, 105th Cong., 1st Sess., §2 (1997); H. R. 311, 106th Cong., 1st Sess., §2 (1999); H. R. 217, 107th Cong., 1st Sess., §2 (2001); S. 16, 108th Cong., 1st Sess., §§701–704 (2003); H. R. 288, 109th Cong., 1st Sess., §2 (2005).

[2] See, *e.g.*, H. R. 2015, 110th Cong., 1st Sess. (2007); H. R. 3017, 111th Cong., 1st Sess. (2009); H. R. 1397, 112th Cong., 1st Sess. (2011); H. R. 1755, 113th Cong., 1st Sess. (2013); H. R. 3185, 114th Cong., 1st Sess., §7 (2015); H. R. 2282, 115th Cong., 1st Sess., §7 (2017); H. R. 5, 116th Cong., 1st Sess. (2019).

[3] H. R. 5331, 116th Cong., 1st Sess., §§4(b), (c) (2019).

discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation.[4] A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22

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[4] Section 7(b) of H. R. 5 strikes the term "sex" in 42 U. S. C. §2000e–2 and inserts: "SEX (INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY)."

(1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.[5]

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.

It indisputably did not.

I

A

Title VII, as noted, prohibits discrimination "because of . . . sex," §2000e–2(a)(1), and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined "sex" to mean sexual orientation, gender identity, or "transgender status."[6] *Ante*, at 2. (Appendix A, *infra*, to

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[5] That is what Judge Posner did in the Seventh Circuit case holding that Title VII prohibits discrimination because of sexual orientation. See *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339 (2017) (en banc). Judge Posner agreed with that result but wrote:

"*I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted*." *Id.*, at 357 (concurring opinion) (emphasis added).

[6] The Court does not define what it means by "transgender status," but the American Psychological Association describes "transgender" as "[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth." A Glossary: Defining Transgender Terms, 49 Monitor on Psychology 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary. It defines "gender identity" as "[a]n internal sense of being male, female or something else, which may or may not correspond

this opinion includes the full definitions of "sex" in the unabridged dictionaries in use in the 1960s.)

In all those dictionaries, the primary definition of "sex" was essentially the same as that in the then-most recent edition of Webster's New International Dictionary 2296 (def. 1) (2d ed. 1953): "[o]ne of the two divisions of organisms formed on the distinction of male and female." See also American Heritage Dictionary 1187 (def. 1(a)) (1969) ("The property or quality by which organisms are classified according to their reproductive functions"); Random House Dictionary of the English Language 1307 (def. 1) (1966) (Random House Dictionary) ("the fact or character of being either male or female"); 9 Oxford English Dictionary 577 (def. 1) (1933) ("Either of the two divisions of organic beings distinguished as male and female respectively").

The Court does not dispute that this is what "sex" means in Title VII, although it coyly suggests that there is at least some support for a different and potentially relevant definition. *Ante*, at 5. (I address alternative definitions below. See Part I–B–3, *infra*.) But the Court declines to stand on that ground and instead "proceed[s] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female." *Ante*, at 5.

If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity. If "sex" in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

How then does the Court claim to avoid that conclusion?

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to an individual's sex assigned at birth or sex characteristics." *Ibid.* Under these definitions, there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity.

The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that "sex" was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights. See *ante*, at 5–9, 11.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a "motivating factor" in the challenged employment action, 42 U. S. C. §2000e–2(m), so the question we must decide comes down to this: if an individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a "motivating factor" in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated "because of . . . sex"? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way*. According to the Court, the text is unambiguous. See *ante*, at 24, 27, 30.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. See Part III–B, *infra*. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means.

Hively v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. See Part III–C, *infra.* And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.[7] Day in and day out, the Commission enforced Title VII but did not grasp what discrimination "because of . . . sex" unambiguously means. See Part III–C, *infra.*

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes. *Ante*, at 19 ("homosexuality and transgender status are distinct concepts from sex"). And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes. See *ante*, at 10 (recognizing that "discrimination on these bases" does not have "some disparate impact on one sex or another"). Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes.[8] And individuals who are born with

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[7] The EEOC first held that "discrimination against a transgender individual because that person is transgender" violates Title VII in 2012 in *Macy* v. *Holder*, 2012 WL 1435995, *11 (Apr. 20, 2012), though it earlier advanced that position in an *amicus* brief in Federal District Court in 2011, *ibid.*, n. 16. It did not hold that discrimination on the basis of sexual orientation violated Title VII until 2015. See *Baldwin* v. *Foxx*, 2015 WL 4397641 (July 15, 2015).

[8] "Sexual orientation refers to a person's erotic response tendency or sexual attractions, be they directed toward individuals of the same sex (homosexual), the other sex (heterosexual), or both sexes (bisexual)." 1 B.

the genes and organs of either biological sex may identify with a different gender.[9]

Using slightly different terms, the Court asserts again and again that discrimination because of sexual orientation or gender identity inherently or necessarily entails discrimination because of sex. See *ante*, at 2 (When an employer "fires an individual for being homosexual or transgender," "[s]ex plays a necessary and undisguisable role in the decision"); *ante*, at 9 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"); *ante*, at 11 ("[W]hen an employer discriminates against homosexual or transgender employees, [the] employer . . . inescapably *intends* to rely on sex in its decisionmaking"); *ante*, at 12 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex"); *ante*, at 14 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex"); *ante*, at 19 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex"). But repetition of an assertion does not make it so, and the Court's repeated assertion is demonstrably untrue.

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in

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Sadock, V. Sadock, & P. Ruiz, Comprehensive Textbook of Psychiatry 2061 (9th ed. 2009); see also American Heritage Dictionary 1607 (5th ed. 2011) (defining "sexual orientation" as "[t]he direction of a person's sexual interest, as toward people of the opposite sex, the same sex, or both sexes"); Webster's New College Dictionary 1036 (3d ed. 2008) (defining "sexual orientation" as "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes").

[9] See n. 6, *supra*; see also Sadock, *supra,* at 2063 ("transgender" refers to "any individual who identifies with and adopts the gender role of a member of the other biological sex").

and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual." Appendix D, *infra*, at 88, 101.

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination.[10] And she was right.

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. Contra, *ante*, at 19. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of

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[10] See Tr. of Oral Arg. in Nos. 17–1618, 17–1623, pp. 69–70 ("If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex"); see also *id.*, at 69 ("Somebody who comes in and says I'm not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose").

sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee's sex. As explained, a disparate treatment case requires proof of intent—*i.e.,* that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court's chief argument collapses.

Trying to escape the consequences of the attorney's concession, the Court offers its own hypothetical:

> "Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not." *Ante*, at 18.

How this hypothetical proves the Court's point is a mystery. A person who checked that box would presumably be black, Catholic, or both, and refusing to hire an applicant because of race or religion is prohibited by Title VII. Rejecting applicants who checked a box indicating that they are homosexual is entirely different because it is impossible to tell from that answer whether an applicant is male or female.

The Court follows this strange hypothetical with an even stranger argument. The Court argues that an applicant

could not answer the question whether he or she is homosexual without knowing something about sex. If the applicant was unfamiliar with the term "homosexual," the applicant would have to look it up or ask what the term means. And because this applicant would have to take into account his or her sex and that of the persons to whom he or she is sexually attracted to answer the question, it follows, the Court reasons, that an employer could not reject this applicant without taking the applicant's sex into account. See *ante*, at 18–19.

This is illogical. Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant's sex.

While the Court's imagined application form proves nothing, another hypothetical case offered by the Court is telling. But what it proves is not what the Court thinks. The Court posits:

> "Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman." *Ante*, at 11.

This example disproves the Court's argument because it is perfectly clear that the employer's motivation in firing the female employee had nothing to do with that employee's sex. The employer presumably knew that this employee was a woman before she was invited to the fateful party. Yet the employer, far from holding her biological sex

against her, rated her a "model employee." At the party, the employer learned something new, her sexual orientation, and it was this new information that motivated her discharge. So this is another example showing that discrimination because of sexual orientation does not inherently involve discrimination because of sex.

In addition to the failed argument just discussed, the Court makes two other arguments, more or less in passing. The first of these is essentially that sexual orientation and gender identity are closely related to sex. The Court argues that sexual orientation and gender identity are "inextricably bound up with sex," *ante*, at 10, and that discrimination on the basis of sexual orientation or gender identity involves the application of "sex-based rules," *ante*, at 17. This is a variant of an argument found in many of the briefs filed in support of the employees and in the lower court decisions that agreed with the Court's interpretation. All these variants stress that sex, sexual orientation, and gender identity are related concepts. The Seventh Circuit observed that "[i]t would require considerable calisthenics to remove 'sex' from 'sexual orientation.'" *Hively*, 853 F. 3d, at 350.[11] The Second Circuit wrote that sex is necessarily "a factor in sexual orientation" and further concluded that "sexual orientation is a function of sex." 883 F. 3d 100, 112–113 (CA2 2018) (en banc). Bostock's brief and those of *amici* supporting his position contend that sexual orientation is "a sex-based consideration."[12] Other briefs state that sexual orientation is "a function of sex"[13] or is "intrinsically related to

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[11] See also Brief for William N. Eskridge Jr. et al. as *Amici Curiae* 2 ("[T]here is no reasonable way to disentangle sex from same-sex attraction or transgender status").

[12] Brief for Petitioner in No. 17–1618, at 14; see also Brief for Southern Poverty Law Center et al. as *Amici Curiae* 7–8.

[13] Brief for Scholars Who Study the LGB Population as *Amici Curiae* in Nos. 17–1618, 17–1623, p. 10.

sex."[14] Similarly, Stephens argues that sex and gender identity are necessarily intertwined: "By definition, a transgender person is someone who lives and identifies with a sex different than the sex assigned to the person at birth."[15]

It is curious to see this argument in an opinion that purports to apply the purest and highest form of textualism because the argument effectively amends the statutory text. Title VII prohibits discrimination because of *sex itself,* not everything that is related to, based on, or defined with reference to, "sex." Many things are related to sex. Think of all the nouns other than "orientation" that are commonly modified by the adjective "sexual." Some examples yielded by a quick computer search are "sexual harassment," "sexual assault, "sexual violence," "sexual intercourse," and "sexual content."

Does the Court really think that Title VII prohibits discrimination on all these grounds? Is it unlawful for an employer to refuse to hire an employee with a record of sexual harassment in prior jobs? Or a record of sexual assault or violence?

To be fair, the Court does not claim that Title VII prohibits discrimination because of *everything* that is related to sex. The Court draws a distinction between things that are "inextricably" related and those that are related in "some vague sense." *Ante*, at 10. Apparently the Court would graft onto Title VII some arbitrary line separating the things that are related closely enough and those that are not.[16] And it would do this in the name of high textualism.

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[14] Brief for American Psychological Association et al. as *Amici Curiae* 11.

[15] Reply Brief for Respondent Aimee Stephens in No. 18–107, p. 5.

[16] Notably, Title VII itself already suggests a line, which the Court ignores. The statute specifies that the terms "because of sex" and "on the basis of sex" cover certain conditions that are biologically tied to sex,

An additional argument made in passing also fights the text of Title VII and the policy it reflects. The Court proclaims that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Ante*, at 9. That is the policy view of many people in 2020, and perhaps Congress would have amended Title VII to implement it if this Court had not intervened. But that is not the policy embodied in Title VII in its current form. Title VII prohibits discrimination based on five specified grounds, and neither sexual orientation nor gender identity is on the list. As long as an employer does not discriminate based on one of the listed grounds, the employer is free to decide for itself which characteristics are "relevant to [its] employment decisions." *Ibid.* By proclaiming that sexual orientation and gender identity are "not relevant to employment decisions," the Court updates Title VII to reflect what it regards as 2020 values.

The Court's remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are "attracted to men," and "*to the employer's mind*" the two employees are "materially identical" except that one is a man and the other is a woman. *Ante*, at 9 (emphasis added). The Court reasons that if the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. *Ante*, at 9–10. After all, if two employees are identical in every respect but sex, and the employer fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to

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namely, "pregnancy, childbirth, [and] related medical conditions." 42 U. S. C. §2000e(k). This definition should inform the meaning of "because of sex" in Title VII more generally. Unlike pregnancy, neither sexual orientation nor gender identity is biologically linked to women or men.

members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. As noted, other than prohibiting discrimination on any of five specified grounds, "race, color, religion, sex, [and] national origin." 42 U. S. C. §2000e–2(a)(1), Title VII allows employers to decide whether two employees are "materially identical." Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.

Once this is recognized, what we have in the Court's hypothetical case are two employees who differ in *two* ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, see *ante*, at 10–11, 14–15, 21, but its example does not show that sex necessarily played *any* part in the employer's thinking.

The Court tries to avoid this inescapable conclusion by arguing that sex is really the only difference between the two employees. This is so, the Court maintains, because both employees "are attracted to men." *Ante*, at 9–10. Of course, the employer would couch its objection to the man differently. It would say that its objection was his sexual orientation. So this may appear to leave us with a battle of

labels. If the employer's objection to the male employee is characterized as attraction to men, it seems that he is just like the woman in all respects except sex and that the employer's disparate treatment must be based on that one difference. On the other hand, if the employer's objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.

The Court insists that its label is the right one, and that presumably is why it makes such a point of arguing that an employer cannot escape liability under Title VII by giving sex discrimination some other name. See *ante*, at 14, 17. That is certainly true, but so is the opposite. Something that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label. So the Court cannot prove its point simply by labeling the employer's objection as "attract[ion] to men." *Ante*, at 9–10. Rather, the Court needs to show that its label is the correct one.

And a labeling standoff would not help the Court because that would mean that the bare text of Title VII does not unambiguously show that its interpretation is right. The Court would have no justification for its stubborn refusal to look any further.

As it turns out, however, there is no standoff. It can easily be shown that the employer's real objection is not "attract[ion] to men" but homosexual orientation.

In an effort to prove its point, the Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. (A large employer will likely have applicants and employees who fall into all four categories, and a small employer can potentially have all four as well.) We now have the four exemplars listed below, with the discharged employees crossed out:

~~Man attracted to men~~
Woman attracted to men
~~Woman attracted to women~~
Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive.

In sum, the Court's textual arguments fail on their own terms. The Court tries to prove that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *ante,* at 9, but as has been shown, it is entirely possible for an employer to do just that. "[H]omosexuality and transgender status are distinct concepts from sex," *ante*, at 19, and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.

But even if the words of Title VII did not definitively refute the Court's interpretation, that would not justify the Court's refusal to consider alternative interpretations. The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. Unless the Court has met that high standard, it has no justification for its blinkered approach. And to say that the Court's interpretation is the only possible reading is indefensible.

B

Although the Court relies solely on the arguments discussed above, several other arguments figure prominently in the decisions of the lower courts and in briefs submitted

by or in support of the employees. The Court apparently finds these arguments unpersuasive, and so do I, but for the sake of completeness, I will address them briefly.

1

One argument, which relies on our decision in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989) (plurality opinion), is that discrimination because of sexual orientation or gender identity violates Title VII because it constitutes prohibited discrimination on the basis of sex stereotypes. See 883 F. 3d, at 119–123; *Hively*, 853 F. 3d, at 346; 884 F. 3d 560, 576–577 (CA6 2018). The argument goes like this. Title VII prohibits discrimination based on stereotypes about the way men and women should behave; the belief that a person should be attracted only to persons of the opposite sex and the belief that a person should identify with his or her biological sex are examples of such stereotypes; therefore, discrimination on either of these grounds is unlawful.

This argument fails because it is based on a faulty premise, namely, that Title VII forbids discrimination based on sex stereotypes. It does not. It prohibits discrimination because of "sex," and the two concepts are not the same. See *Price Waterhouse*, 490 U. S., at 251. That does not mean, however, that an employee or applicant for employment cannot prevail by showing that a challenged decision was based on a sex stereotype. Such evidence is relevant to prove discrimination because of sex, and it may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex. See *ibid.*

Much of the plaintiff's evidence in *Price Waterhouse* was of this nature. The plaintiff was a woman who was passed over for partnership at an accounting firm, and some of the adverse comments about her work appeared to criticize her for being forceful and insufficiently "feminin[e]." *Id.*, at 235–236.

The main issue in *Price Waterhouse*—the proper allocation of the burdens of proof in a so-called mixed motives Title VII case—is not relevant here, but the plurality opinion, endorsed by four Justices, commented on the issue of sex stereotypes. The plurality observed that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" but "can certainly be *evidence* that gender played a part." *Id.*, at 251.[17] And the plurality made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Ibid.*

Plaintiffs who allege that they were treated unfavorably because of their sexual orientation or gender identity are not in the same position as the plaintiff in *Price Waterhouse*. In cases involving discrimination based on sexual orientation or gender identity, the grounds for the employer's decision—that individuals should be sexually attracted only to persons of the opposite biological sex or should identify with their biological sex—apply equally to men and women. "[H]eterosexuality is not a *female* stereotype; it not a *male* stereotype; it is not a *sex-specific* stereotype at all." *Hively*, 853 F. 3d, at 370 (Sykes, J., dissenting).

To be sure, there may be cases in which a gay, lesbian, or transgender individual can make a claim like the one in *Price Waterhouse*. That is, there may be cases where traits or behaviors that some people associate with gays, lesbians, or transgender individuals are tolerated or valued in persons of one biological sex but not the other. But that is a

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[17] Two other Justices concurred in the judgment but did not comment on the issue of stereotypes. See *id.*, at 258–261 (opinion of White, J.); *id.*, at 261–279 (opinion of O'Connor, J.). And Justice Kennedy reiterated on behalf of the three Justices in dissent that "Title VII creates no independent cause of action for sex stereotyping," but he added that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.*, at 294.

different matter.

2

A second prominent argument made in support of the result that the Court now reaches analogizes discrimination against gays and lesbians to discrimination against a person who is married to or has an intimate relationship with a person of a different race. Several lower court cases have held that discrimination on this ground violates Title VII. See, *e.g.*, *Holcomb* v. *Iona College*, 521 F. 3d 130 (CA2 2008); *Parr* v. *Woodmen of World Life Ins. Co.*, 791 F. 2d 888 (CA11 1986). And the logic of these decisions, it is argued, applies equally where an employee or applicant is treated unfavorably because he or she is married to, or has an intimate relationship with, a person of the same sex.

This argument totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination. And without taking history into account, it is not easy to see how the decisions in question fit the terms of Title VII.

Recall that Title VII makes it unlawful for an employer to discriminate against an individual "because of *such individual's race*." 42 U. S. C. §2000e–2(a) (emphasis added). So if an employer is happy to employ whites and blacks but will not employ any employee in an interracial relationship, how can it be said that the employer is discriminating against either whites or blacks "because of such individual's race"? This employer would be applying the same rule to all its employees regardless of their race.

The answer is that this employer is discriminating on a ground that history tells us is a core form of race discrimination.[18] "It would require absolute blindness to the history

[18] Notably, Title VII recognizes that in light of history distinctions on the basis of race are always disadvantageous, but it permits certain dis-

of racial discrimination in this country not to understand what is at stake in such cases . . . . A prohibition on 'race-mixing' was . . . grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites." 883 F. 3d, at 158–159 (Lynch, J., dissenting).

Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women. An employer who discriminates on this ground might be called "homophobic" or "transphobic," but not sexist. See *Wittmer* v. *Phillips 66 Co.*, 915 F. 3d 328, 338 (CA5 2019) (Ho, J., concurring).

3

The opinion of the Court intimates that the term "sex" was not universally understood in 1964 to refer just to the categories of male and female, see *ante*, at 5, and while the Court does not take up any alternative definition as a ground for its decision, I will say a word on this subject.

As previously noted, the definitions of "sex" in the unabridged dictionaries in use in the 1960s are reproduced in Appendix A, *infra*. Anyone who examines those definitions can see that the primary definition in every one of them refers to the division of living things into two groups, male and female, based on biology, and most of the definitions further down the list are the same or very similar. In addition, some definitions refer to heterosexual sex acts. See

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tinctions based on sex. Title 42 U. S. C. §2000e–2(e)(1) allows for "instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise." Race is wholly absent from this list.

Random House Dictionary 1307 ("coitus," "sexual intercourse" (defs. 5–6)); American Heritage Dictionary, at 1187 ("sexual intercourse" (def. 5)).[19]

Aside from these, what is there? One definition, "to neck passionately," Random House Dictionary 1307 (def. 8), refers to sexual conduct that is not necessarily heterosexual. But can it be seriously argued that one of the aims of Title VII is to outlaw employment discrimination against employees, whether heterosexual or homosexual, who engage in necking? And even if Title VII had that effect, that is not what is at issue in cases like those before us.

That brings us to the two remaining subsidiary definitions, both of which refer to sexual urges or instincts and their manifestations. See the fourth definition in the American Heritage Dictionary, at 1187 ("the sexual urge or instinct as it manifests itself in behavior"), and the fourth definition in both Webster's Second and Third ("[p]henomena of sexual instincts and their manifestations," Webster's New International Dictionary, at 2296 (2d ed.); Webster's Third New International Dictionary 2081 (1966)). Since both of these come after three prior definitions that refer to men and women, they are most naturally read to have the same association, and in any event, is it plausible that Title VII prohibits discrimination based on *any* sexual urge or instinct and its manifestations? The urge to rape?

Viewing all these definitions, the overwhelming impact is that discrimination because of "sex" was understood during the era when Title VII was enacted to refer to men and women. (The same is true of current definitions, which are reproduced in Appendix B, *infra*.) This no doubt explains why neither this Court nor any of the lower courts have tried to make much of the dictionary definitions of sex just

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[19] See American Heritage Dictionary 1188 (1969) (defining "sexual intercourse"); Webster's Third New International Dictionary 2082 (1966) (same); Random House Dictionary of the English Language 1308 (1966) (same).

discussed.

II

A

So far, I have not looked beyond dictionary definitions of "sex," but textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. See Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 109 (2001). Dictionary definitions are valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean. *Ibid.* But they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment?

Justice Scalia was perfectly clear on this point. The words of a law, he insisted, "mean *what they conveyed to reasonable people at the time*." Reading Law, at 16 (emphasis added).[20]

Leading proponents of Justice Scalia's school of textualism have expounded on this principle and explained that it is grounded on an understanding of the way language works. As Dean John F. Manning explains, "the meaning of language depends on the way a linguistic community uses words and phrases in context." What Divides Textualists From Purposivists? 106 Colum. L. Rev. 70, 78 (2006). "[O]ne can make sense of others' communications only by placing them in their appropriate social and linguistic context," *id.*, at 79–80, and this is no less true of statutes than any other verbal communications. "[S]tatutes convey meaning only because members of a relevant linguistic

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[20] See also *Chisom* v. *Roemer*, 501 U. S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of [a statutory] text as any ordinary Member of Congress would have read them . . . and apply the meaning so determined").

community apply shared background conventions for understanding how particular words are used in particular contexts." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2457 (2003). Therefore, judges should ascribe to the words of a statute "what a reasonable person conversant with applicable social conventions would have understood them to be adopting." Manning, 106 Colum. L. Rev., at 77. Or, to put the point in slightly different terms, a judge interpreting a statute should ask "'what one would ordinarily be understood as saying, given the circumstances in which one said it.'" Manning, 116 Harv. L. Rev., at 2397–2398.

Judge Frank Easterbrook has made the same points:

> "Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding. . . . Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance." *Herrmann* v. *Cencom Cable Assocs.*, *Inc.*, 978 F. 2d 978, 982 (CA7 1992).

Consequently, "[s]licing a statute into phrases while ignoring . . . the setting of the enactment . . . is a formula for disaster." *Ibid.*; see also *Continental Can Co.* v. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F. 2d 1154, 1157 (CA7 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities").

Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a

distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.

For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

B

The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

1

In 1964, the concept of prohibiting discrimination "because of sex" was no novelty. It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.

Long before Title VII was adopted, many pioneering state and federal laws had used language substantively indistinguishable from Title VII's critical phrase, "discrimination because of sex." For example, the California Constitution of 1879 stipulated that no one, "*on account of sex*, [could] be disqualified from entering upon or pursuing any lawful business, vocation, or profession." Art. XX, §18 (emphasis added). It also prohibited a student's exclusion from any state university department "on account of sex." Art. IX, §9; accord, Mont. Const., Art. XI, §9 (1889).

Wyoming's first Constitution proclaimed broadly that "[b]oth male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges," Art. VI, §1 (1890), and then provided specifically that "[i]n none of the public schools . . . shall distinction or discrimination be made *on account of sex*," Art. VII, §10 (emphasis added); see also §16 (the "university shall be equally open to students of both sexes"). Washington's Constitution likewise required "ample provision for the education of all children . . . without distinction or preference *on account of . . . sex*." Art. IX, §1 (1889) (emphasis added).

The Constitution of Utah, adopted in 1895, provided that the right to vote and hold public office "shall not be denied or abridged *on account of sex*." Art. IV, §1 (emphasis added). And in the next sentence it made clear what "on account of sex" meant, stating that "[b]oth male and female citizens . . . shall enjoy equally all civil, political and religious rights and privileges." *Ibid*.

The most prominent example of a provision using this language was the Nineteenth Amendment, ratified in 1920, which bans the denial or abridgment of the right to vote "on account of sex." U. S. Const., Amdt. 19. Similar language appeared in the proposal of the National Woman's Party for an Equal Rights Amendment. As framed in 1921, this proposal forbade all "political, civil or legal disabilities or inequalities *on account of sex*, [o]r on account of marriage."

Women Lawyers Meet: Representatives of 20 States Endorse Proposed Equal Rights Amendment, N. Y. Times, Sept. 16, 1921, p. 10.

Similar terms were used in the precursor to the Equal Pay Act. Introduced in 1944 by Congresswoman Winifred C. Stanley, it proclaimed that "[d]iscrimination against employees, in rates of compensation paid, *on account of sex*" was "contrary to the public interest." H. R. 5056, 78th Cong., 2d Sess.

In 1952, the new Constitution for Puerto Rico, which was approved by Congress, 66 Stat. 327, prohibited all "discrimination . . . *on account of* . . . *sex*," Art. II, Bill of Rights §1 (emphasis added), and in the landmark Immigration and Nationality Act of 1952, Congress outlawed discrimination in naturalization "*because of* . . . *sex*." 8 U. S. C. §1422 (emphasis added).

In 1958, the International Labour Organisation, a United Nations agency of which the United States is a member, recommended that nations bar employment discrimination "made *on the basis of* . . . *sex*." Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, Art. 1(a), June 25, 1958, 362 U. N. T. S. 32 (emphasis added).

In 1961, President Kennedy ordered the Civil Service Commission to review and modify personnel policies "to assure that selection for any career position is hereinafter made solely on the basis of individual merit and fitness, *without regard to sex*."[21] He concurrently established a "Commission on the Status of Women" and directed it to recommend policies "for overcoming discriminations in government and private employment *on the basis of sex*." Exec. Order No. 10980, 3 CFR 138 (1961 Supp.) (emphasis

[21] J. Kennedy, Statement by the President on the Establishment of the President's Commission on the Status of Women 3 (Dec. 14, 1961) (emphasis added), https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/093/JFKPOF-093-004.

added).

In short, the concept of discrimination "because of," "on account of," or "on the basis of" sex was well understood. It was part of the campaign for equality that had been waged by women's rights advocates for more than a century, and what it meant was equal treatment for men and women.[22]

2

Discrimination "because of sex" was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day.

For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment.

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[22] Analysis of the way Title VII's key language was used in books and articles during the relevant time period supports this conclusion. A study searched a vast database of documents from that time to determine how the phrase "discriminate against . . . because of [some trait]" was used. Phillips, The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality (manuscript, at 3) (May 11, 2020) (brackets in original), https://ssrn.com/abstract=3585940. The study found that the phrase was used to denote discrimination against "someone . . . motivated by prejudice, or biased ideas or attitudes . . . directed at people with that trait in particular." *Id.*, at 7 (emphasis deleted). In other words, "*discriminate against*" was "associated with negative treatment directed at members of a discrete group." *Id.,* at 5. Thus, as used in 1964, "discrimination because of sex" would have been understood to mean discrimination against a woman or a man based on "unfair beliefs or attitudes" about members of that particular sex. *Id.,* at 7.

In its then-most recent Diagnostic and Statistical Manual of Mental Disorders (1952) (DSM–I), the American Psychiatric Association (APA) classified same-sex attraction as a "sexual deviation," a particular type of "sociopathic personality disturbance," *id.*, at 38–39, and the next edition, issued in 1968, similarly classified homosexuality as a "sexual deviatio[n]," Diagnostic and Statistical Manual of Mental Disorders 44 (2d ed.) (DSM–II). It was not until the sixth printing of the DSM–II in 1973 that this was changed.[23]

Society's treatment of homosexuality and homosexual conduct was consistent with this understanding. Sodomy was a crime in every State but Illinois, see W. Eskridge, Dishonorable Passions 387–407 (2008), and in the District of Columbia, a law enacted by Congress made sodomy a felony punishable by imprisonment for up to 10 years and permitted the indefinite civil commitment of "sexual psychopath[s]," Act of June 9, 1948, §§104, 201–207, 62 Stat. 347–349.[24]

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[23] APA, Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM–II, 6th Printing, p. 44 (APA Doc. Ref. No. 730008, 1973) (reclassifying "homosexuality" as a "[s]exual orientation disturbance," a category "for individuals whose sexual interests are directed primarily toward people of the same sex and who are either disturbed by . . . or wish to change their sexual orientation," and explaining that "homosexuality . . . by itself does not constitute a psychiatric disorder"); see also APA, Diagnostic and Statistical Manual of Mental Disorders 281–282 (3d ed. 1980) (DSM–III) (similarly creating category of "Ego-dystonic Homosexuality" for "homosexuals for whom changing sexual orientation is a persistent concern," while observing that "homosexuality itself is not considered a mental disorder"); *Obergefell* v. *Hodges*, 576 U. S. 644, 661 (2015).

[24] In 1981, after achieving home rule, the District attempted to decriminalize sodomy, see D. C. Act No. 4–69, but the House of Representatives vetoed the bill, H. Res. 208, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 22764–22779 (1981). Sodomy was not decriminalized in the District until 1995. See Anti-Sexual Abuse Act of 1994, §501(b), 41 D. C. Reg. 53 (1995), enacted as D. C. Law 10–257.

This view of homosexuality was reflected in the rules governing the federal work force. In 1964, federal "[a]gencies could deny homosexual men and women employment because of their sexual orientation," and this practice continued until 1975. GAO, D. Heivilin, Security Clearances: Consideration of Sexual Orientation in the Clearance Process 2 (GAO/NSIAD–95–21, 1995). See, *e.g.*, *Anonymous* v. *Macy*, 398 F. 2d 317, 318 (CA5 1968) (affirming dismissal of postal employee for homosexual acts).

In 1964, individuals who were known to be homosexual could not obtain security clearances, and any who possessed clearances were likely to lose them if their orientation was discovered. A 1953 Executive Order provided that background investigations should look for evidence of "sexual perversion," as well as "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct." Exec. Order No. 10450, §8(a)(1)(iii), 3 CFR 938 (1949–1953 Comp.). "Until about 1991, when agencies began to change their security policies and practices regarding sexual orientation, there were a number of documented cases where defense civilian or contractor employees' security clearances were denied or revoked because of their sexual orientation." GAO, Security Clearances, at 2. See, *e.g.*, *Adams* v. *Laird*, 420 F. 2d 230, 240 (CADC 1969) (upholding denial of security clearance to defense contractor employee because he had "engaged in repeated homosexual acts"); see also *Webster* v. *Doe*, 486 U. S. 592, 595, 601 (1988) (concluding that decision to fire a particular individual because he was homosexual fell within the "discretion" of the Director of Central Intelligence under the National Security Act of 1947 and thus was unreviewable under the APA).

The picture in state employment was similar. In 1964, it was common for States to bar homosexuals from serving as teachers. An article summarizing the situation *15 years after Title VII became law* reported that "[a]ll states have statutes that permit the revocation of teaching certificates

(or credentials) for immorality, moral turpitude, or unprofessionalism," and, the survey added, "[h]omosexuality is considered to fall within all three categories."[25]

The situation in California is illustrative. California laws prohibited individuals who engaged in "immoral conduct" (which was construed to include homosexual behavior), as well as those convicted of "sex offenses" (like sodomy), from employment as teachers. Cal. Educ. Code Ann. §§13202, 13207, 13209, 13218, 13255 (West 1960). The teaching certificates of individuals convicted of engaging in homosexual acts were revoked. See, *e.g.*, *Sarac* v. *State Bd. of Ed.*, 249 Cal. App. 2d 58, 62–64, 57 Cal. Rptr. 69, 72–73 (1967) (upholding revocation of secondary teaching credential from teacher who was convicted of engaging in homosexual conduct on public beach), overruled in part, *Morrison* v. *State Bd. of Ed.*, 1 Cal. 3d 214, 461 P. 2d 375 (1969).

In Florida, the legislature enacted laws authorizing the revocation of teaching certificates for "misconduct involving moral turpitude," Fla. Stat. Ann. §229.08(16) (1961), and this law was used to target homosexual conduct. In 1964, a legislative committee was wrapping up a 6-year campaign to remove homosexual teachers from public schools and state universities. As a result of these efforts, the state board of education apparently revoked at least 71 teachers' certificates and removed at least 14 university professors. Eskridge, Dishonorable Passions, at 103.

Individuals who engaged in homosexual acts also faced the loss of other occupational licenses, such as those needed to work as a "lawyer, doctor, mortician, [or] beautician."[26] See, *e.g.*, *Florida Bar* v. *Kay*, 232 So. 2d 378 (Fla. 1970) (attorney disbarred after conviction for homosexual conduct in

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[25] Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L. J. 799, 861 (1979).

[26] Eskridge, Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961–1981, 25 Hofstra L. Rev. 817, 819 (1997).

public bathroom).

In 1964 and for many years thereafter, homosexuals were barred from the military. See, *e.g.*, Army Reg. 635–89, §I(2)(a) (July 15, 1966) ("Personnel who voluntarily engage in homosexual acts, irrespective of sex, will not be permitted to serve in the Army in any capacity, and their prompt separation is mandatory"); Army Reg. 600–443, §I(2) (April 10, 1953) (similar). Prohibitions against homosexual conduct by members of the military were not eliminated until 2010. See Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515 (repealing 10 U. S. C. §654, which required members of the Armed Forces to be separated for engaging in homosexual conduct).

Homosexuals were also excluded from entry into the United States. The Immigration and Nationality Act of 1952 (INA) excluded aliens "afflicted with psychopathic personality." 8 U. S. C. §1182(a)(4) (1964 ed.). In *Boutilier* v. *INS*, 387 U. S. 118, 120–123 (1967), this Court, relying on the INA's legislative history, interpreted that term to encompass homosexuals and upheld an alien's deportation on that ground. Three Justices disagreed with the majority's interpretation of the phrase "psychopathic personality."[27] But it apparently did not occur to anyone to argue that the Court's interpretation was inconsistent with the INA's express prohibition of discrimination "because of sex." That was how our society—and this Court—saw things a half century ago. Discrimination because of sex and discrimination because of sexual orientation were viewed as two entirely different concepts.

To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to "update" Title VII. But that is not our job. Our

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[27] Justices Douglas and Fortas thought that a homosexual is merely "one, who by some freak, is the product of an arrested development." *Boutilier*, 387 U. S., at 127 (Douglas, J., dissenting); see also *id.*, at 125 (Brennan, J., dissenting) (based on lower court dissent).

duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms of that time. We must therefore ask whether ordinary Americans in 1964 would have thought that discrimination because of "sex" carried some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

The questions answer themselves. Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at that time. To paraphrase something Justice Scalia once wrote, "our job is not to scavenge the world of English usage to discover whether there is any possible meaning" of discrimination because of sex that might be broad enough to encompass discrimination because of sexual orientation or gender identity. *Chisom* v. *Roemer*, 501 U. S. 380, 410 (1991) (dissenting opinion). Without strong evidence to the contrary (and there is none here), our job is to ascertain and apply the "*ordinary* meaning" of the statute. *Ibid*. And in 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity.

The Court makes a tiny effort to suggest that at least some people in 1964 might have seen what Title VII really means. *Ante*, at 26. What evidence does it adduce? One complaint filed in 1969, another filed in 1974, and arguments made in the mid-1970s about the meaning of the Equal Rights Amendment. *Ibid*. To call this evidence

merely feeble would be generous.

C

While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of "transgender status" or "gender identity," terms that would have left people at the time scratching their heads. The term "transgender" is said to have been coined "'in the early 1970s,'"[28] and the term "gender identity," now understood to mean "[a]n internal sense of being male, female or something else,"[29] apparently first appeared in an academic article in 1964.[30] Certainly, neither term was in common parlance; indeed, dictionaries of the time still primarily defined the word "gender" by reference to grammatical classifications. See, *e.g.*, American Heritage Dictionary, at 548 (def. 1(a)) ("Any set of two or more categories, such as masculine, feminine, and neuter, into which words are divided . . . and that determine agreement with or the

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[28] Drescher, Transsexualism, Gender Identity Disorder and the DSM, 14 J. Gay & Lesbian Mental Health 109, 110 (2010).

[29] American Psychological Association, 49 Monitor on Psychology, at 32.

[30] Green, Robert Stoller's *Sex and Gender*: 40 Years On, 39 Archives Sexual Behav. 1457 (2010); see Stoller, A Contribution to the Study of Gender Identity, 45 Int'l J. Psychoanalysis 220 (1964). The term appears to have been coined a year or two earlier. See Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001, 33 Archives Sexual Behav. 87, 93 (2004) (suggesting the term was first introduced at 23rd International Psycho-Analytical Congress in Stockholm in 1963); J. Meyerowitz, How Sex Changed 213 (2002) (referring to founding of "Gender Identity Research Clinic" at UCLA in 1962). In his book, Sex and Gender, published in 1968, Robert Stoller referred to "*gender identity*" as "a working term" "associated with" his research team but noted that they were not "fixed on copyrighting the term or on defending the concept as one of the splendors of the scientific world." Sex and Gender, p. viii.

selection of modifiers, referents, or grammatical forms").

While it is likely true that there have always been individuals who experience what is now termed "gender dysphoria," *i.e.*, "[d]iscomfort or distress related to an incongruence between an individual's gender identity and the gender assigned at birth,"[31] the current understanding of the concept postdates the enactment of Title VII. Nothing resembling what is now called gender dysphoria appeared in either DSM–I (1952) or DSM–II (1968). It was not until 1980 that the APA, in DSM–III, recognized two main psychiatric diagnoses related to this condition, "Gender Identity Disorder of Childhood" and "Transsexualism" in adolescents and adults.[32] DSM–III, at 261–266.

The first widely publicized sex reassignment surgeries in the United States were not performed until 1966,[33] and the great majority of physicians surveyed in 1969 thought that an individual who sought sex reassignment surgery was either "'severely neurotic'" or "'psychotic.'"[34]

It defies belief to suggest that the public meaning of discrimination because of sex in 1964 encompassed discrimination on the basis of a concept that was essentially unknown to the public at that time.

D

1

The Court's main excuse for entirely ignoring the social context in which Title VII was enacted is that the meaning of Title VII's prohibition of discrimination because of sex is

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[31] American Psychological Association, 49 Monitor on Psychology, at 32.

[32] See Drescher, *supra*, at 112.

[33] Buckley, A Changing of Sex by Surgery Begun at Johns Hopkins, N. Y. Times, Nov. 21, 1966, p. 1, col. 8; see also J. Meyerowitz, How Sex Changed 218–220 (2002).

[34] Drescher, *supra*, at 112 (quoting Green, Attitudes Toward Transsexualism and Sex-Reassignment Procedures, in Transsexualism and Sex Reassignment 241–242 (R. Green & J. Money eds. 1969)).

clear, and therefore it simply does not matter whether people in 1964 were "smart enough to realize" what its language means. *Hively,* 853 F. 3d, at 357 (Posner, J., concurring). According to the Court, an argument that looks to the societal norms of those times represents an impermissible attempt to displace the statutory language. *Ante*, at 25–26.

The Court's argument rests on a false premise. As already explained at length, the text of Title VII does not prohibit discrimination because of sexual orientation or gender identity. And what the public thought about those issues in 1964 is relevant and important, not because it provides a ground for departing from the statutory text, but because it helps to explain what the text was understood to mean when adopted.

In arguing that we must put out of our minds what we know about the time when Title VII was enacted, the Court relies on Justice Scalia's opinion for the Court in *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998). But *Oncale* is nothing like these cases, and no one should be taken in by the majority's effort to enlist Justice Scalia in its updating project.

The Court's unanimous decision in *Oncale* was thoroughly unremarkable. The Court held that a male employee who alleged that he had been sexually harassed at work by other men stated a claim under Title VII. Although the impetus for Title VII's prohibition of sex discrimination was to protect women, anybody reading its terms would immediately appreciate that it applies equally to both sexes, and by the time *Oncale* reached the Court, our precedent already established that sexual harassment may constitute sex discrimination within the meaning of Title VII. See *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986). Given these premises, syllogistic reasoning dictated the holding.

What today's decision latches onto are *Oncale*'s comments about whether "'male-on-male sexual harassment'" was on Congress's mind when it enacted Title VII. *Ante*, at 28 (quoting 523 U. S., at 79). The Court in *Oncale* observed that this specific type of behavior "was assuredly not the *principal evil* Congress was concerned with when it enacted Title VII," but it found that immaterial because "statutory prohibitions often go beyond the *principal evil* to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the *principal concerns* of our legislators by which we are governed." 523 U. S., at 79 (emphasis added).

It takes considerable audacity to read these comments as committing the Court to a position on deep philosophical questions about the meaning of language and their implications for the interpretation of legal rules. These comments are better understood as stating mundane and uncontroversial truths. Who would argue that a statute applies only to the "principal evils" and not lesser evils that fall within the plain scope of its terms? Would even the most ardent "purposivists" and fans of legislative history contend that congressional intent is restricted to Congress's "*principal* concerns"?

Properly understood, *Oncale* does not provide the slightest support for what the Court has done today. For one thing, it would be a wild understatement to say that discrimination because of sexual orientation and transgender status was not the "principal evil" on Congress's mind in 1964. Whether we like to admit it now or not, in the thinking of Congress and the public at that time, such discrimination would not have been evil at all.

But the more important difference between these cases and *Oncale* is that here the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964. To

decide for the defendants in *Oncale*, it would have been necessary to carve out an exception to the statutory text. Here, no such surgery is at issue. Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding. And the reasoning of *Oncale* does not preclude or counsel against our taking those norms into account. They are relevant, not for the purpose of creating an exception to the terms of the statute, but for the purpose of better appreciating how those terms would have been understood at the time.

2

The Court argues that two other decisions—*Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), and *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978)—buttress its decision, but those cases merely held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex. In *Philips*, the employer treated women with young children less favorably than men with young children. In *Manhart*, the employer required women to make larger pension contributions than men. It is hard to see how these holdings assist the Court.

The Court extracts three "lessons" from *Phillips*, *Manhart*, and *Oncale*, but none sheds any light on the question before us. The first lesson is that "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it." *Ante*, at 14. This lesson is obviously true but proves nothing. As to the label attached to a practice, has anyone ever thought that the application of a law to a person's conduct depends on how it is labeled? Could a bank robber escape conviction by saying he was engaged in asset enhancement? So if an employer discriminates because of sex, the employer is liable no matter what it calls its conduct, but if the employer's

conduct is not sex discrimination, the statute does not apply. Thus, this lesson simply takes us back to the question whether discrimination because of sexual orientation or gender identity is a form of discrimination because of biological sex. For reasons already discussed, see Part I–A, *supra*, it is not.

It likewise proves nothing of relevance here to note that an employer cannot escape liability by showing that discrimination on a prohibited ground was not its sole motivation. So long as a prohibited ground was a motivating factor, the existence of other motivating factors does not defeat liability.

The Court makes much of the argument that "[i]n *Phillips*, the employer could have accurately spoken of its policy as one based on 'motherhood.'" *Ante*, at 14; see also *ante,* at 16. But motherhood, by definition, is a condition that can be experienced only by women, so a policy that distinguishes between motherhood and parenthood is necessarily a policy that draws a sex-based distinction. There was sex discrimination in *Phillips*, because women with children were treated disadvantageously compared to men with children.

Lesson number two—"the plaintiff's sex need not be the sole or primary cause of the employer's adverse action," *ante*, at 14—is similarly unhelpful. The standard of causation in these cases is whether sex is necessarily a "motivating factor" when an employer discriminates on the basis of sexual orientation or gender identity. 42 U. S. C. §2000e–2(m). But the essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied. The Court's extensive discussion of causation standards is so much smoke.

Lesson number three—"an employer cannot escape liability by demonstrating that it treats males and females comparably as groups," *ante,* at 15, is also irrelevant. There

is no dispute that discrimination against an individual employee based on that person's sex cannot be justified on the ground that the employer's treatment of the average employee of that sex is at least as favorable as its treatment of the average employee of the opposite sex. Nor does it matter if an employer discriminates against only a subset of men or women, where the same subset of the opposite sex is treated differently, as in *Phillips*. That is not the issue here. An employer who discriminates equally on the basis of sexual orientation or gender identity applies the same criterion to every affected *individual* regardless of sex. See Part I–A, *supra*.

III

A

Because the opinion of the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court's textualist argument were stronger, that would not explain today's decision. Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of "congressional intent," including legislative history.

So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent or legislative history seriously undermines the Court's interpretation.

B

As the Court explained in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976), the legislative history of Title VII's prohibition of sex discrimination is brief, but it is nevertheless revealing. The prohibition of sex discrimination was "added to Title VII at the last minute on the floor of the

House of Representatives," *Meritor Savings Bank*, 477 U. S., at 63, by Representative Howard Smith, the Chairman of the Rules Committee. See 110 Cong. Rec. 2577 (1964). Representative Smith had been an ardent opponent of the civil rights bill, and it has been suggested that he added the prohibition against discrimination on the basis of "sex" as a poison pill. See, *e.g.*, *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1085 (CA7 1984). On this theory, Representative Smith thought that prohibiting employment discrimination against women would be unacceptable to Members who might have otherwise voted in favor of the bill and that the addition of this prohibition might bring about the bill's defeat.[35] But if Representative Smith had been looking for a poison pill, prohibiting discrimination on the basis of sexual orientation or gender identity would have been far more potent. However, neither Representative Smith nor any other Member said one word about the possibility that the prohibition of sex discrimination might have that meaning. Instead, all the debate concerned discrimination on the basis of biological sex.[36] See 110 Cong. Rec. 2577–2584.

Representative Smith's motivations are contested, 883 F. 3d, at 139–140 (Lynch, J., dissenting), but whatever they

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[35] See Osterman, Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident, 20 Yale J. L. & Feminism 409, 409–410 (2009).

[36] Recent scholarship has linked the adoption of the Smith Amendment to the broader campaign for women's rights that was underway at the time. *E.g.*, Osterman, *supra*; Freeman, How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 L. & Ineq. 163 (1991); Barzilay, Parenting Title VII: Rethinking the History of the Sex Discrimination Provision, 28 Yale J. L. & Feminism 55 (2016); Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 Duquesne L. Rev. 453 (1981). None of these studies has unearthed evidence that the amendment was understood to apply to discrimination because of sexual orientation or gender identity.

were, the meaning of *the adoption of the prohibition* of sex discrimination is clear. It was no accident. It grew out of "a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance," and it marked a landmark achievement in the path toward fully equal rights for women. *Id.*, at 140. "Discrimination against gay women and men, by contrast, was not on the table for public debate . . . [i]n those dark, pre-Stonewall days." *Ibid.*

For those who regard congressional intent as the touchstone of statutory interpretation, the message of Title VII's legislative history cannot be missed.

C

Post-enactment events only clarify what was apparent when Title VII was enacted. As noted, bills to add "sexual orientation" to Title VII's list of prohibited grounds were introduced in every Congress beginning in 1975, see *supra*, at 2, and two such bills were before Congress in 1991[37] when it made major changes in Title VII. At that time, the three Courts of Appeals to reach the issue had held that Title VII does not prohibit discrimination because of sexual orientation,[38] two other Circuits had endorsed that interpretation in dicta,[39] and no Court of Appeals had held otherwise. Similarly, the three Circuits to address the application of Title VII to transgender persons had all rejected the argument

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[37] H. R. 1430, 102d Cong., 1st Sess., §2(d) (as introduced in the House on Mar. 13, 1991); S. 574, 102d Cong., 1st Sess., §5 (as introduced in the Senate on Mar. 6, 1991).

[38] See *Williamson* v. *A. G. Edwards & Sons, Inc.*, 876 F. 2d 69, 70 (CA8 1989) (*per curiam*), cert. denied, 493 U. S. 1089 (1990); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F. 2d 327, 329–330 (CA9 1979); *Blum* v. *Gulf Oil Corp.*, 597 F. 2d 936, 938 (CA5 1979) (*per curiam*).

[39] *Ruth* v. *Children's Med. Ctr.*, 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1084–1085 (CA7 1984), cert. denied, 471 U. S. 1017 (1985).

that it covered discrimination on this basis.[40] These were also the positions of the EEOC.[41] In enacting substantial changes to Title VII, the 1991 Congress abrogated numerous judicial decisions with which it disagreed. If it also disagreed with the decisions regarding sexual orientation and transgender discrimination, it could have easily overruled those as well, but it did not do so.[42]

After 1991, six other Courts of Appeals reached the issue of sexual orientation discrimination, and until 2017, every single Court of Appeals decision understood Title VII's prohibition of "discrimination because of sex" to mean discrimination because of biological sex. See, *e.g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 259 (CA1 1999); *Simonton* v. *Runyon*, 232 F. 3d 33, 36 (CA2 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F. 3d 257, 261 (CA3 2001), cert. denied, 534 U. S. 1155 (2002); *Wrightson* v. *Pizza Hut of Am., Inc.*, 99 F. 3d 138, 143 (CA4 1996); *Hamm* v. *Weyauwega Milk Products, Inc.*, 332 F. 3d 1058, 1062 (CA7 2003); *Medina* v. *Income Support Div., N. M.*, 413 F. 3d 1131, 1135 (CA10 2005); *Evans* v. *Georgia Regional Hospital*, 850 F. 3d 1248, 1255 (CA11), cert. denied, 583 U. S. ___ (2017). Similarly, the other Circuit to formally address whether Title VII applies to claims of discrimination based on transgender status had also rejected the argument, creating unanimous consensus prior to the Sixth Circuit's decision below. See *Etsitty* v. *Utah Transit Authority*, 502 F. 3d 1215, 1220–1221 (CA10

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[40] See *Ulane*, 742 F. 2d, at 1084–1085; *Sommers* v. *Budget Mktg., Inc.*, 667 F. 2d 748, 750 (CA8 1982) (*per curiam*); *Holloway* v. *Arthur Andersen & Co.*, 566 F. 2d 659, 661–663 (CA9 1977).

[41] *Dillon* v. *Frank*, 1990 WL 1111074, *3–*4 (EEOC, Feb. 14, 1990); *LaBate* v. *USPS*, 1987 WL 774785, *2 (EEOC, Feb. 11, 1987).

[42] In more recent legislation, when Congress has wanted to reach acts committed because of sexual orientation or gender identity, it has referred to those grounds by name. See, *e.g.*, 18 U. S. C. §249(a)(2)(A) (hate crimes) (enacted 2009); 34 U. S. C. §12291(b)(13)(A) (certain federally funded programs) (enacted 2013).

2007).

The Court observes that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms," *ante*, at 24, but it has no qualms about disregarding over 50 years of uniform judicial interpretation of Title VII's plain text. Rather, the Court makes the jaw-dropping statement that its decision exemplifies "judicial humility." *Ante*, at 31. Is it humble to maintain, not only that Congress did not understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination "because of sex" really means? If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.

IV

What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, *infra*; *e.g.*, 20 U. S. C. §1681(a) (Title IX); 42 U. S. C. §3631 (Fair Housing Act); 15 U. S. C. 1691(a)(1) (Equal Credit Opportunity Act). The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." *Ante*, at 31. And it declines to say anything about other statutes whose terms mirror Title VII's.

The Court's brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least

some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.

I will briefly note some of the potential consequences of the Court's decision, but I do not claim to provide a comprehensive survey or to suggest how any of these issues should necessarily play out under the Court's reasoning.[43]

"[B]athrooms, locker rooms, [and other things] of [that] kind." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.[44]

Under the Court's decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the

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[43] Contrary to the implication in the Court's opinion, I do not label these potential consequences "undesirable." *Ante*, at 31. I mention them only as possible implications of the Court's reasoning.

[44] Brief for Defend My Privacy et al. as *Amici Curiae* 7–10.

sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time.[45] Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance.[46] In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination,[47] and some lower court decisions have agreed. See *Whitaker* v. *Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F. 3d 1034, 1049 (CA7 2017); *G. G.* v. *Gloucester Cty. School Bd.*, 822 F. 3d 709, 715 (CA4 2016), vacated and remanded, 580 U. S. ___ (2017); *Adams* v. *School Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1325 (MD Fla. 2018); cf. *Doe* v. *Boyertown Area*

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[45] See 1 Sadock, Comprehensive Textbook of Psychiatry, at 2063 (explaining that "gender is now often regarded as more *fluid*" and "[t]hus, gender identity may be described as masculine, feminine, or somewhere in between").

[46] Title IX makes it unlawful to discriminate on the basis of sex in education: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. §1681(a).

[47] See Dept. of Justice & Dept. of Education, Dear Colleague Letter on Transgender Students, May 13, 2016 (Dear Colleague Letter), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

School Dist., 897 F. 3d 518, 533 (CA3 2018), cert. denied, 587 U. S. ___ (2019).

Women's sports. Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.[48] This issue has already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports. The effect of the Court's reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male. See, *e.g.*, Complaint in *Soule* v. *Connecticut Assn. of Schools*, No. 3:20–cv–00201 (D Conn., Apr. 17, 2020) (challenging Connecticut policy allowing transgender students to compete in girls' high school sports); Complaint in *Hecox* v. *Little*, No. 1:20–cv–00184 (D Idaho, Apr. 15, 2020) (challenging state law that bars transgender students from participating in school sports in accordance with gender identity). Students in these latter categories have found success in athletic competitions reserved for females.[49]

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[48] A regulation allows single-sex teams, 34 CFR §106.41(b) (2019), but the statute itself would of course take precedence.

[49] "[S]ince 2017, two biological males [in Connecticut] have collectively won 15 women's state championship titles (previously held by ten different Connecticut girls) against biologically female track athletes." Brief for Independent Women's Forum et al. as *Amici Curiae* in No. 18–107, pp. 14–15.

At the college level, a transgendered woman (biological male) switched from competing on the men's Division II track team to the women's Division II track team at Franklin Pierce University in New Hampshire after taking a year of testosterone suppressants. While this student had placed "eighth out of nine male athletes in the 400 meter hurdles the

The logic of the Court's decision could even affect professional sports. Under the Court's holding that Title VII prohibits employment discrimination because of transgender status, an athlete who has the physique of a man but identifies as a woman could claim the right to play on a women's professional sports team. The owners of the team might try to claim that biological sex is a bona fide occupational qualification (BFOQ) under 42 U. S. C. §2000e–2(e), but the BFOQ exception has been read very narrowly. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 334 (1977).

Housing. The Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates. A provision of Title IX, 20 U. S. C. §1686, allows schools to maintain "separate living facilities for the different sexes," but it may be argued that a student's "sex" is the gender with which the student identifies.[50] Similar claims may be brought under the Fair Housing Act. See 42 U. S. C. §3604.

Employment by religious organizations. Briefs filed by a wide range of religious groups—Christian, Jewish, and Muslim—express deep concern that the position now adopted by the Court "will trigger open conflict with faith-

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year before, the student won the women's competition by over a second and a half—a time that had garnered tenth place in the men's conference meet just three years before." *Id.*, at 15.

A transgender male—*i.e.*, a biological female who was in the process of transitioning to male and actively taking testosterone injections—won the Texas girls' state championship in high school wrestling in 2017. Babb, Transgender Issue Hits Mat in Texas, Washington Post, Feb. 26, 2017, p. A1, col. 1.

[50] Indeed, the 2016 advisory letter issued by the Department of Justice took the position that under Title IX schools "must allow transgender students to access housing consistent with their gender identity." Dear Colleague Letter 4.

based employment practices of numerous churches, synagogues, mosques, and other religious institutions."[51] They argue that "[r]eligious organizations need employees who actually live the faith,"[52] and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization's faith forces the group to communicate an objectionable message.

This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty "communicate a particular way of life to its students," and a "violation by the faculty of those precepts" may undermine the school's "moral teaching."[53] Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment.

At least some teachers and applicants for teaching positions may be blocked from recovering on such claims by the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012). Two cases now pending before the Court present the question whether teachers who provide religious instruction can be considered to be "ministers."[54] But even if teachers with those responsibilities qualify, what about other very visible school employees who may not qualify for

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[51] Brief for National Association of Evangelicals et al. as *Amici Curiae* 3; see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, pp. 8–18.

[52] Brief for National Association of Evangelicals et al. as *Amici Curiae* 7.

[53] McConnell, Academic Freedom in Religious Colleges and Universities, 53 Law & Contemp. Prob. 303, 322 (1990).

[54] See *Our Lady of Guadalupe School* v. *Morrissey-Berru*, No. 19–267; *St. James School* v. *Biel*, No. 19–348.

the ministerial exception? Provisions of Title VII provide exemptions for certain religious organizations and schools "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the "activities" of the organization or school, 42 U. S. C. §2000e–1(a); see also §2000e–2(e)(2), but the scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection.[55]

Healthcare. Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery.[56] Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.[57]

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[55] See, *e.g.*, *EEOC* v. *Kamehameha Schools/Bishop Estate*, 990 F. 2d 458, 460 (CA9 1993); *EEOC* v. *Fremont Christian School*, 781 F. 2d 1362, 1365–1367 (CA9 1986); *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1166 (CA4 1985); *EEOC* v. *Mississippi College*, 626 F. 2d 477, 484–486 (CA5 1980); see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, at 30, n. 28 (discussing disputed scope). In addition, 42 U. S. C. §2000e–2(e)(1) provides that religion may be a BFOQ, and allows religious schools to hire religious employees, but as noted, the BFOQ exception has been read narrowly. See *supra*, at 48.

[56] See, *e.g.*, Amended Complaint in *Toomey* v. *Arizona*, No. 4:19–cv–00035 (D Ariz., Mar. 2, 2020). At least one District Court has already held that a state health insurance policy that does not provide coverage for sex reassignment surgery violates Title VII. *Fletcher* v. *Alaska*, ___ F. Supp. 3d ___, ___, 2020 WL 2487060, *5 (D Alaska, Mar. 6, 2020).

[57] See, *e.g.*, Complaint in *Conforti* v. *St. Joseph's Healthcare System*, No. 2:17–cv–00050 (D NJ, Jan. 5, 2017) (transgender man claims discrimination under the ACA because a Catholic hospital refused to allow a surgeon to perform a hysterectomy). And multiple District Courts have already concluded that the ACA requires health insurance coverage for sex reassignment surgery and treatment. *Kadel* v. *Folwell*, ___ F. Supp. 3d ___, ___, 2020 WL 1169271, *12 (MDNC, Mar. 11, 2020) (allowing

Such claims present difficult religious liberty issues because some employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore requiring them to pay for or to perform these procedures will have a severe impact on their ability to honor their deeply held religious beliefs.

Freedom of speech. The Court's decision may even affect the way employers address their employees and the way teachers and school officials address students. Under established English usage, two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females). But several different sets of gender-neutral pronouns have now been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories.[58] Some jurisdictions, such as

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claims of discrimination under ACA, Title IX, and Equal Protection Clause); *Tovar* v. *Essentia Health*, 342 F. Supp. 3d 947, 952–954 (D Minn. 2018) (allowing ACA claim).

Section 1557 of the ACA, 42 U. S. C. §18116, provides:

"Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U. S. C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U. S. C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U. S. C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection." (Footnote omitted.)

[58] See, *e.g.*, University of Wisconsin Milwaukee Lesbian, Gay, Bisexual, Transgender, Queer Plus (LGBTQ+) Resource Center, Gender Pronouns (2020), https://uwm.edu/lgbtrc/support/gender-pronouns/ (listing six new categories of pronouns: (f)ae, (f)aer, (f)aers; e/ey, em, eir, eirs; per, pers;

New York City, have ordinances making the failure to use an individual's preferred pronoun a punishable offense,[59] and some colleges have similar rules.[60] After today's decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination. See *Prescott* v. *Rady Children's Hospital San Diego*, 265 F. Supp. 3d 1090, 1098–1100 (SD Cal. 2017) (hospital staff's refusal to use preferred pronoun violates ACA).[61]

The Court's decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today's decisions employers will fear

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ve, ver, vis; xe, xem, xyr, xyrs; ze/zie, hir, hirs).

[59] See 47 N. Y. C. R. R. §2–06(a) (2020) (stating that a "deliberate refusal to use an individual's self-identified name, pronoun and gendered title" is a violation of N. Y. C. Admin. Code §8–107 "where the refusal is motivated by the individual's gender"); see also N. Y. C. Admin. Code §§8–107(1), (4), (5) (2020) (making it unlawful to discriminate on the basis of "gender" in employment, housing, and public accommodations); cf. D. C. Mun. Regs., tit. 4, §801.1 (2020) (making it "unlawful . . . to discriminate . . . on the basis of . . . actual or perceived gender identity or expression" in "employment, housing, public accommodations, or educational institutions" and further proscribing "engaging in verbal . . . harassment").

[60] See University of Minn., Equity and Access: Gender Identity, Gender Expression, Names, and Pronouns, Administrative Policy (Dec. 11, 2019), https://policy.umn.edu/operations/genderequity ("University members and units are expected to use the names, gender identities, and pronouns specified to them by other University members, except as legally required"); *Meriwether* v. *Trustees of Shawnee State Univ.*, 2020 WL 704615, *1 (SD Ohio, Feb. 12, 2020) (rejecting First Amendment challenge to university's nondiscrimination policy brought by evangelical Christian professor who was subjected to disciplinary actions for failing to use student's preferred pronouns).

[61] Cf. Notice of Removal in *Vlaming* v. *West Point School Board*, No. 3:19–cv–00773 (ED Va., Oct. 22, 2019) (contending that high school teacher's firing for failure to use student's preferred pronouns was based on nondiscrimination policy adopted pursuant to Title IX).

that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims.

Constitutional claims. Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. *Sessions* v. *Morales-Santana*, 582 U. S. ___, ___ (2017) (slip op., at 8); *United States* v. *Virginia*, 518 U. S. 515, 532–534 (1996). By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

Under this logic, today's decision may have effects that extend well beyond the domain of federal anti-discrimination statutes. This potential is illustrated by pending and recent lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds. See, *e.g.*, Complaint in *Hecox*, No. 1: 20–CV–00184 (state law prohibiting transgender students from competing in school sports in accordance with their gender identity); Second Amended Complaint in *Karnoski* v. *Trump*, No. 2:17–cv–01297 (WD Wash., July 31, 2019) (military's ban on transgender members); *Kadel* v. *Folwell*, ___ F. Supp. 3d ___, ___–___, 2020 WL 1169271, *10–*11 (MDNC, Mar. 11, 2020) (state health plan's exclusion of coverage for sex reassignment procedures); Complaint in *Gore* v. *Lee*, No. 3:19–cv–00328 (MD Tenn., Mar. 3, 2020) (change of gender on birth certificates); Brief for Appellee in *Grimm* v. *Gloucester Cty. School Bd.*, No. 19–1952 (CA4, Nov. 18, 2019) (transgender student forced to use gender neutral bathrooms at school); Complaint in *Corbitt* v. *Taylor*, No. 2:18–cv–00091 (MD Ala.,

July 25, 2018) (change of gender on driver's licenses); *Whitaker*, 858 F. 3d, at 1054 (school policy requiring students to use the bathroom that corresponds to the sex on birth certificate); *Keohane* v. *Florida Dept. of Corrections Secretary*, 952 F. 3d 1257, 1262–1265 (CA11 2020) (transgender prisoner denied hormone therapy and ability to dress and groom as a female); *Edmo* v. *Corizon, Inc.*, 935 F. 3d 757, 767 (CA9 2019) (transgender prisoner requested sex reassignment surgery); cf. *Glenn* v. *Brumby*, 663 F. 3d 1312, 1320 (CA11 2011) (transgender individual fired for gender non-conformity).

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.

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The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.

The Court itself recognizes this:

> "The place to make new legislation . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us." *Ante*, at 31.

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

APPENDIXES

A

Webster's New International Dictionary 2296 (2d ed. 1953):

sex (sĕks), *n.* [F. *sexe*, fr. L. *sexus;* prob. orig., division, and akin to L. *secare* to cut. See SECTION.] **1.** One of the two divisions of organisms formed on the distinction of male and female; males or females collectively. **2.** The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female, or of pertaining to the distinctive function of the male or female in reproduction. *Conjugation,* or *fertilization* (union of germplasm of two individuals), a process evidently of great but not readily explainable importance in the perpetuation of most organisms, seems to be the function of differentiation of sex, which occurs in nearly all organisms at least at some stage in their life history. Sex is manifested in the conjugating cells by the larger size, abundant food material, and immobility of the female gamete (*egg*, *egg cell*, or *ovum*), and the small size and the locomotive power of the male gamete (*spermatozoon* or *spermatozoid*), and in the adult organisms often by many structural, physiological, and (in higher forms) psychological characters, aside from the necessary modification of the reproductive apparatus. Cf. HERMAPHRODITE, 1. In botany the term *sex* is often extended to the distinguishing peculiarities of staminate and pistillate flowers, and hence in dioecious plants to the individuals bearing them.

In many animals and plants the body and germ cells have been shown to contain one or more chromosomes of a special kind (called *sex chromosomes; idiochromosomes; accessory chromosomes*) in addition to the ordinary paired autosomes. These special chromosomes serve to

determine sex. In the simplest case, the male germ cells are of two types, one with and one without a single extra chromosome (*X chromosome*, or *monosome*). The egg cells in this case all possess an *X chromosome*, and on fertilization by the two types of sperm, male and female zygotes result, of respective constitution *X*, and *XX*. In many other animals and plants (probably including man) the male organism produces two types of gametes, one possessing an *X chromosome*, the other a *Y chromosome*, these being visibly different members of a pair of chromosomes present in the diploid state. In this case also, the female organism is *XX*, the eggs *X*, and the zygotes respectively male (*XY*) and female (*XX*). In another type of sex determination, as in certain moths and possibly in the fowl, the female produces two kinds of eggs, the male only one kind of sperm. Each type of egg contains one member of a pair of differentiated chromosomes, called respectively *Z chromosomes* and *W chromosomes*, while all the sperm cells contain a *Z* chromosome. In fertilization, union of a *Z* with a *W* gives rise to a female, while union of two *Z* chromosomes produces a male. Cf. SECONDARY SEX CHARACTER.

3. a The sphere of behavior dominated by the relations between male and female. **b** *Psychoanalysis*. By extension, the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.

4. Phenomena of sexual instincts and their manifestations.

5. Sect;—a confused use.

Syn.—SEX, GENDER. SEX refers to physiological distinctions; GENDER, to distinctions in grammar.

—the sex. The female sex; women, in general.

sex, *adj*. Based on or appealing to sex.

sex, *v. t.* To determine the sex of, as skeletal remains.

Webster's Third New International Dictionary 2081 (1966):

[1]**sex** \'seks\ n –*ES often attrib* [ME, fr. L *sexus;* prob. akin to L *secare* to cut–more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2:** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union <agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney> **4:** the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what modern scientists have discovered about ~—*Time*>; *specif*: SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William

Empson>

²sex \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* <titles must be ~*ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* <watching you ~*ing* up that bar kitten—Oakley Hall>

9 Oxford English Dictionary 577–578 (1933):

Sex (seks), *sb*. Also 6–7 sexe, (6 seex, 7 pl. sexe, 8 *poss*. sexe's). [ad. L. *sexus* (*u*-stem), whence also F. *sexe* (12th c.), Sp., Pg. *sexo*, It. *sesso*. Latin had also a form *secus* neut. (indeclinable).]

1. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively.

1382 WYCLIF *Gen*. vi. 19 Of alle thingis hauynge sowle of ony flehs, two thow shalt brynge into the ark, that maal sex and femaal lyuen with thee. **1532** MORE *Confut. Tindale* II. 152, I had as leue he bare them both a bare cheryte, as wyth the frayle feminyne sexe fall to far in loue. **1559** ALYMER *Harborowe* E 4 b, Neither of them debarred the heires female .. as though it had ben .. vnnatural for that sexe to gouern. **1576** GASCOIGNE *Philomene* xcviii, I speake against my sex. *a* **1586** SIDNEY *Arcadia* II. (1912) 158 The sexe of womankind of all other is most bound to have regardfull eie to mens judgements. **1600** NASHE *Summer's Last Will* F 3 b, A woman they imagine her to be, Because that sexe keepes nothing close they heare. **1615** CROOKE *Body of Man* 274 If wee respect the .. conformation of both the Sexes, the Male is sooner perfected .. in the wombe. **1634** SIR T. HERBERT *Trav.* 19 Both sexe goe naked. **1667** MILTON *P. L.* IX, 822 To add what wants In Femal Sex. **1671**—*Samson* 774 It was a weakness In me, but incident to all our sex. **1679** DRYDEN *Troilus & Cr.* I. ii, A strange dissembling sex we women are. **1711** ADDISON *Spect.* No. 10 ¶ 6 Their Amusements .. are more adapted to the Sex than to the Species. **1730** SWIFT *Let. to Mrs. Whiteway* 28 Dec., You have neither the scrawl nor the spelling of your sex. **1742** GRAY *Propertius* II. 73 She .. Condemns her fickle Sexe's fond Mistake. **1763** G. WILLIAMS in Jesse *Selwyn & Contemp.* (1843) I. 265 It would

astonish you to see the mixture of sexes at this place. **1780** BENTHAM *Princ. Legisl.* VI. §35 The sensibility of the female sex appears .. to be greater than that of the male. **1814** SCOTT *Ld. of Isles* VI. iii, Her sex's dress regain'd. **1836** THIRLWALL *Greece* xi. II. 51 Solon also made regulations for the government of the other sex. **1846** *Ecclesiologist* Feb. 41 The propriety and necessity of dividing the sexes during the publick offices of the Church. **1848** THACKERAY *Van. Fair* xxv, She was by no means so far superior to her sex as to be above jealousy. **1865** DICKENS *Mut. Fr.* II. i, It was a school for both sexes. **1886** MABEL COLLINS *Prettiest Woman* ii, Zadwiga had not yet given any serious attention to the other sex.

b. *collect.* followed by plural verb. *rare.*

1768 GOLDSM. *Good. n. Man* IV. (Globe) 632/2 Our sex are like poor tradesmen. **1839** MALCOM *Trav.* (1840) 40/I Neither sex tattoo any part of their bodies.

c. *The fair(er), gentle(r), soft(er), weak(er) sex; the devout sex*; *the second sex*; † *the woman sex*: the female sex, women. *The* † *better, sterner sex*: the male sex, men.

[**1583** STUBBES *Anat. Abus.* E vij b, Ye magnificency & liberalitie of that gentle sex. **1613** PURCHAS *Pilgrimage* (1614) 38 Strong Sampson and wise Solomon are witnesses, that the strong men are slaine by this weaker sexe.]

1641 BROME *Jovial Crew* III. (1652) H 4, I am bound by a strong vow to kisse all of the woman sex I meet this morning. **1648** J. BEAUMONT *Psyche* XIV. I, The softer sex, attending Him And his still-growing woes. **1665** SIR T. HERBERT *Trav.* (1677) 22 Whiles the better sex seek prey abroad, the women (therein like themselves) keep home and spin. **1665** BOYLE *Occas. Refl.* v. ix. 176 Persons of the fairer Sex. a **1700** EVELYN *Diary* 12 Nov. an. 1644, The Pillar .. at which the devout sex are always rubbing their chaplets. **1701** STANHOPE *St. Aug. Medit.* I. xxxv. (1704) 82, I may .. not suffer my self to be outdone by the weaker Sex. **1732** [see FAIR a. I b]. **1753** HOGARTH *Anal. Beauty* x. 65 An elegant degree of plumpness peculiar to the skin of the softer sex. **1820** BYRON *Juan* IV. cviii, Benign Ceruleans of the second sex! Who advertise new poems by your looks. **1838** *Murray's Hand-bk. N. Germ.* 430 It is much frequented by the fair sex. **1894** C. D. TYLER in *Geog. Jrnl.* III. 479 They are beardless, and usually wear a shock of unkempt hair, which is somewhat finer in the gentler sex.

¶d. Used occas. with extended notion. *The third sex*: eunuchs. Also *sarcastically* (see quot. 1873).

1820 BYRON *Juan* IV. lxxxvi, From all the Pope makes yearly, 'twould perplex To find three perfect pipes of the third sex. *Ibid.* V. xxvi, A black old neutral personage Of the third sex stept up. [**1873** LD. HOUGHTON *Monogr.* 280 Sydney Smith .. often spoke with much bitterness of the growing belief in three Sexes of Humanity—Men, Women, and Clergymen.]

e. *The sex*: the female sex. [F. *le sexe*.] Now *rare.*

Appendix A to opinion of ALITO, J.

1589 PUTTENHAM *Eng. Poesie* III. xix. (Arb.) 235 As he that had tolde a long tale before certaine noble women, of a matter somewhat in honour touching the Sex. **1608** D. T[UVILL] *Ess. Pol. & Mor.* 101 b, Not yet weighing with himselfe, the weaknesse and imbecillitie of the sex. **1631** MASSINGER *Emperor East* I. ii, I am called The Squire of Dames, or Servant of the Sex. **1697** VANBRUGH *Prov. Wife* II. ii, He has a strange penchant to grow fond of me, in spite of his aversion to the sex. **1760-2** GOLDSM. *Cit. W.* xcix, The men of Asia behave with more deference to the sex than you seem to imagine. **1792** A. YOUNG *Trav. France* I. 220 The sex of Venice are undoubtedly of a distinguished beauty. **1823** BYRON *Juan* XIII. lxxix, We give the sex the *pas*. **1863** R. F. BURTON *W. Africa* I. 22 Going 'up stairs', as the sex says, at 5 a.m. on the day after arrival, I cast the first glance at Funchal.

f. Without *the*, in predicative quasi-adj. use=feminine. *rare.*

a **1700** DRYDEN *Cymon & Iph.* 368 She hugg'd th' Offender, and forgave th' Offence, Sex to the last!

2. Quality in respect of being male or female.

a. With regard to persons or animals.

1526 *Pilgr. Perf.* (W. de. W. 1531) 282 b, Ye bee, whiche neuer gendreth with ony make of his kynde, nor yet hath ony distinct sex. **1577** T. KENDALL *Flowers of Epigr.* 71 b, If by corps supposd may be her seex, then sure a virgin she. **1616** T. SCOTT *Philomythie* I. (ed. 2) A 3 Euen as Hares change shape and sex, some say Once euery yeare. **1658** SIR T. BROWNE *Hydriot.* iii. 18 A critical view of bones makes a good distinction of sexes. **a 1665** DIGBY *Chym. Secrets* (1682) II. 225 Persons of all Ages and Sexes. **1667** MILTON *P. L.* I. 424 For Spirits when they please can either Sex assume, or both. **1710-11** SWIFT *Jrnl. to Stella* 7 Mar., I find I was mistaken in the sex, 'tis a boy. **1757** SMOLLETT *Reprisal* IV. v, As for me, my sex protects me. **1825** SCOTT *Betrothed* xiii, I am but a poor and neglected woman, feeble both from sex and age. **1841** ELPHINSTONE *Hist. India* I. 349 When persons of different sexes walk together, the woman always follows the man. **1882** TENSION-WOODS *Fish N. S. Wales* 116 Oysters are of distinct sexes.

b. with regard to plants (see FEMALE *a.* 2, MALE *a.* 2).

1567 MAPLET *Gr. Forest* 28 Some seeme to haue both sexes and kindes: as the Oke, the Lawrell and such others. **1631** WIDDOWES *Nat. Philos.* (ed. 2) 49 There be sexes of hearbes .. namely, the Male or Female. **1720** P. BLAIR *Bot. Ess.* iv. 237 These being very evident Proofs of a necessity of two Sexes in Plants as well as in Animals. **1790** SMELLIE *Philos. Nat. Hist.* I. 245 There is not a notion more generally adopted, that that vegetables have the distinction of sexes. **1848** LINDLEY *Introd. Bot.* (ed. 4) II. 80 Change of Sex under the influence of external causes.

3. The distinction between male and female in general. In recent use often with more explicit notion: The 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; the class of phenomena with which these differences are concerned.

Organs of sex: the reproductive organs in sexed animals or plants.

***a* 1631** DONNE *Songs & Sonn., The Printrose* Poems 1912 I. 61 Should she Be more then woman, she would get above All thought of sexe, and think to move My heart to study her, and not to love. ***a* 1643** CARTWRIGHT *Siedge* III. vi, My Soul's As Male as yours; there's no Sex in the mind. **1748** MELMOTH *Fitzosborne Lett.* lxii. (1749) II. 119 There may be a kind of sex in the very soul. **1751** HARRIS *Hermes* Wks. (1841) 129 Besides number, another characteristic, visible in substances, is that of sex. **1878** GLADSTONE *Prim. Homer* 68 Athenè .. has nothing of sex except the gender, nothing of the woman except the form. **1887** K. PEARSON *Eth. Freethought* xv. (1888) 429 What is the true type of social (moral) action in matters of sex? **1895** CRACKANTHORPE in 19*th Cent.* Apr. 607 (art.) Sex in modern literature. *Ibid.* 614 The writers and readers who have strenuously refused to allow to sex its place in creative art. **1912** H. G. WELLS *Marriage* ii. § 6. 72 The young need .. to be told .. all we know of three fundamental things; the first of which is God, .. and the third Sex.

¶ 4. Used, by confusion, in senses of SECT (q. v. I, 4 b, 7, and cf. I d *note*).

1575-85 ABP. SANDYS *Serm.* xx. 358 So are all sexes and sorts of people called vpon. **1583** MELBANCKE *Philotimus* L iij b, Whether thinkest thou better sporte & more absurd, to see an Asse play on an harpe contrary to his sex, or heare [etc.]. **1586** J. HOOKER *Hist. Irel.* 180/2 in *Holinshed*, The whole sex of the Oconhours. **1586** T. B. *La Primaud. Fr. Acad.* I. 359 O detestable furie, not to be found in most cruell beasts, which spare the blood of their sexe. **a 1704** T BROWN *Dial. Dead, Friendship* Wks. 1711 IV. 56 We have had enough of these Christians, and sure there can be no worse among the other Sex of Mankind [i.e. Jews and Turks]? **1707** ATTERBURY *Large Vind. Doctr.* 47 Much less can I imagine, why a Jewish Sex (whether of Pharisees or Saducees) should be represented, as [etc.].

5. *attrib.* and *Comb.,* as *sex-distinction, function,* etc.; *sex-abusing, transforming* adjs.; sex-cell, a reproductive cell, with either male or female function; a sperm-cell or an egg-cell.

1642 H. MORE *Song of Soul* I. III. lxxi, Mad-making waters, sex trans-forming springs.

1781 COWPER *Expost.* 415 Sin, that in old time Brought fire from heav'n, the sex-abusing crime. **1876** HARDY *Ethelberta* xxxvii, You cannot have celebrity and sex-privilege both. **1887** *Jrnl. Educ.* No. 210. 29 If this examination craze is to prevail, and the sex-abolitionists are to have their way. **1889** GEDDES & THOMSON *Evol. Sex* 91 Very commonly the sex-cells originate in the ectoderm and ripen there. **1894** H. DRUMMOND *Ascent of Man* 317 The sex-distinction slowly gathers definition. **1897** J. HUTCHINSON *in Arch. Surg.* VIII. 230 Loss of Sex Function.

Sex (seks), *v.* [f. SEX *sb.*] *trans.* To determine the sex of, by anatomical examination; to label as male or female.

1884 GURNEY *Diurnal Birds Prey* 173 The specimen is not sexed, neither is the sex noted on the drawing. **1888** A. NEWTON in *Zoologist* Ser. 111. XII. 101 The .. barbarous phrase of 'collecting a specimen' and then of 'sexing' it.

Concise Oxford Dictionary of Current English 1164 (5th ed. 1964):

sĕx, n. Being male or female or hermaphrodite (*what is its ~?; ~ does not matter; without distinction of age or ~*), whence ~'LESS a., ~'**lèss**NESS n., ~'Y[2] a., immoderately concerned with ~; males or females collectively (*all ranks & both ~es; the fair, gentle, softer, weaker, ~,* & joc. *the ~,* women; *the sterner ~,* men; *is the fairest of her ~*); (attrib.) arising from difference, or consciousness, of ~ (*~ antagonism*, *~ instinct*, *~ urge*); *~ appeal*, attractiveness arising from difference of ~. [f. L *sexus –ūs;* partly thr. F]

Random House Dictionary of the English Language 1307 (1966):

sex (seks), *n.* **1.** The fact or character of being either male or female: *persons of different sex.* **2.** either of the two groups of persons exhibiting this character: *the stronger sex; the gentle sex.* **3.** the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **4.** the instinct or attraction drawing one sex toward another, or its manifestation in life and

conduct. **5.** coitus. **6. to have sex,** *Informal*. to engage in sexual intercourse. –*v.t.* **7.** to ascertain the sex of, esp. of newly hatched chicks. **8. sex it up,** *Slang*. to neck passionately: *They were really sexing it up last night*. **9. sex up,** *Informal*. **a.** to arouse sexually: *She certainly knows how to sex up the men*. **b.** to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes*. [ME < L *sex*(*us*), akin to *secus*, deriv. of *secāre* to cut, divide; see SECTION]

American Heritage Dictionary 1187 (1969):

sex (sĕks) *n.* **1. a.** The property or quality by which organisms are classified according to their reproductive functions. **b.** Either of two divisions, designated *male* and *female*, of this classification. **2.** Males or females collectively. **3.** The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female. **4.** The sexual urge or instinct as it manifests itself in behavior. **5.** Sexual intercourse. –*tr.v.* **sexed, sexing, sexes.** To determine the sex of (young chickens). [Middle English, from Old French *sexe*, from Latin *sexus*†.]

B

Webster's Third New International Dictionary 2081 (2002):

[1]**sex** \'seks\ n –ES *often attrib* [ME, fr. L *sexus*; prob. akin to L *secare* to cut—more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2:** the sum of the morphological, physiological, and behavioral

peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union <agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney> **4:** the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what modern scientists have discovered about ~—*Time*>; *specif*: SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William Empson>

²sex \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* <titles must be ~*ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* <watching you ~*ing* up that bar kitten—Oakley Hall>

Random House Webster's Unabridged Dictionary 1754 (2d ed. 2001):

Sex (seks), *n.* **1**. either the male or female division of a species, esp. as differentiated with reference to the reproductive functions. **2**. the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **3**. the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **4**. coitus. **5**. genitalia. **6**. **to have sex**, to engage in sexual intercourse. – *v.t.* **7**. to ascertain the sex of, esp. of newly-hatched chicks. **8**. **sex up**, *Informal*. **a**. to arouse sexually: *The only intent of that show was to sex up the audience*. **b**. to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes*. [1350–1400; ME < L *Sexus*, perh. akin to *secāre* to divide (see SECTION)]

American Heritage Dictionary 1605 (5th ed. 2011):

Sex (seks) *n.* **1a.** Sexual activity, especially sexual intercourse: *hasn't had sex in months*. **b**. The sexual urge or instinct as it manifests itself in behavior: *motivated by sex*. **2a**. Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions: *How do you determine the sex of a lobster?* **b**. The fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male: *the evolution of sex in plants; a study that takes sex into account*. See Usage Note at **gender. 3.** Females or males considered as a group: *dormitories that house only one sex*. **4**. One's identity as either female or male. **5**. The genitals. ✣ *tr.v.* **sexed, sex-ing, sex-es 1.** To determine the sex of (an organism). **2.** *Slang* **a.** To arouse sexually. Often used with *up*. **b**. To increase the

appeal or attractiveness of. Often used with *up* [Middle English < Latin *sexus*.]

C

Statutes Prohibiting Sex Discrimination

- 2 U. S. C. §658a(2) (Congressional Budget and Fiscal Operations; Federal Mandates)
- 2 U. S. C. §1311(a)(1) (Congressional Accountability; Extension of Rights and Protections)
- 2 U. S. C. §1503(2) (Unfunded Mandates Reform)
- 3 U. S. C. §411(a)(1) (Presidential Offices; Employment Discrimination)
- 5 U. S. C. §2301(b)(2) (Merit System Principles)
- 5 U. S. C. §2302(b)(1) (Prohibited Personnel Practices)
- 5 U. S. C. §7103(a)(4)(A) (Labor-Management Relations; Definitions)
- 5 U. S. C. §7116(b)(4) (Labor-Management Relations; Unfair Labor Practices)
- 5 U. S. C. §7201(b) (Antidiscrimination Policy; Minority Recruitment Program)

- 5 U. S. C. §7204(b) (Antidiscrimination; Other Prohibitions)
- 6 U. S. C. §488f(b) (Secure Handling of Ammonium Nitrate; Protection From Civil Liability)
- 7 U. S. C. §2020(c)(1) (Supplemental Nutrition Assistance Program)
- 8 U. S. C. §1152(a)(1)(A) (Immigration; Numerical Limitations on Individual Foreign States)
- 8 U. S. C. §1187(c)(6) (Visa Waiver Program for Certain Visitors)
- 8 U. S. C. §1522(a)(5) (Authorization for Programs for Domestic Resettlement of and Assistance to Refugees)
- 10 U. S. C. §932(b)(4) (Uniform Code of Military Justice; Article 132 Retaliation)
- 10 U. S. C. §1034(j)(3) (Protected Communications; Prohibition of Retaliatory Personnel Actions)
- 12 U. S. C. §302 (Directors of Federal Reserve Banks; Number of Members; Classes)
- 12 U. S. C. §1735f–5(a) (Prohibition Against Discrimination on Account of Sex in Extension of Mortgage Assistance)

- 12 U. S. C. §1821(d)(13)(E)(iv) (Federal Deposit Insurance Corporation; Insurance Funds)

- 12 U. S. C. §1823(d)(3)(D)(iv) (Federal Deposit Insurance Corporation; Corporation Moneys)

- 12 U. S. C. §2277a–10c(b)(13)(E)(iv) (Farm Credit System Insurance Corporation; Corporation as Conservator or Receiver; Certain Other Powers)

- 12 U. S. C. §3015(a)(4) (National Consumer Cooperative Bank; Eligibility of Cooperatives)

- 12 U. S. C. §§3106a(1)(B) and (2)(B) (Foreign Bank Participation in Domestic Markets)

- 12 U. S. C. §4545(1) (Fair Housing)

- 12 U. S. C. §5390(a)(9)(E)(v) (Wall Street Reform and Consumer Protection; Powers and Duties of the Corporation)

- 15 U. S. C. §631(h) (Aid to Small Business)

- 15 U. S. C. §633(b)(1) (Small Business Administration)

- 15 U. S. C. §719 (Alaska Natural Gas Transportation; Civil Rights)

- 15 U. S. C. §775 (Federal Energy Administration; Sex Discrimination; Enforcement; Other Legal Remedies)

- 15 U. S. C. §1691(a)(1) (Equal Credit Opportunity Act)
- 15 U. S. C. §1691d(a) (Equal Credit Opportunity Act)
- 15 U. S. C. §3151(a) (Full Employment and Balanced Growth; Nondiscrimination)
- 18 U. S. C. §246 (Deprivation of Relief Benefits)
- 18 U. S. C. §3593(f) (Special Hearing To Determine Whether a Sentence of Death Is Justified)
- 20 U. S. C. §1011(a) (Higher Education Resources and Student Assistance; Antidiscrimination)
- 20 U. S. C. §1011f(h)(5)(D) (Disclosures of Foreign Gifts)
- 20 U. S. C. §1066c(d) (Historically Black College and University Capital Financing; Limitations on Federal Insurance Bonds Issued by Designated Bonding Authority)
- 20 U. S. C. §1071(a)(2) (Federal Family Education Loan Program)
- 20 U. S. C. §1078(c)(2)(F) (Federal Payments To Reduce Student Interest Costs)
- 20 U. S. C. §1087–1(e) (Federal Family Education Loan Program; Special Allowances)

- 20 U. S. C. §1087–2(e) (Student Loan Marketing Association)
- 20 U. S. C. §1087–4 (Discrimination in Secondary Markets Prohibited)
- 20 U. S. C. §1087tt(c) (Discretion of Student Financial Aid Administrators)
- 20 U. S. C. §1231e(b)(2) (Education Programs; Use of Funds Withheld)
- 20 U. S. C. §1681 (Title IX of the Education Amendments of 1972)
- 20 U. S. C. §1701(a)(1) (Equal Educational Opportunities; Congressional Declaration of Policy)
- 20 U. S. C. §1702(a)(1) (Equal Educational Opportunities; Congressional Findings)
- 20 U. S. C. §1703 (Denial of Equal Educational Opportunity Prohibited)
- 20 U. S. C. §1705 (Assignment on Neighborhood Basis Not a Denial of Equal Educational Opportunity)
- 20 U. S. C. §1715 (District Lines)
- 20 U. S. C. §1720 (Equal Educational Opportunities; Definitions)

- 20 U. S. C. §1756 (Remedies With Respect to School District Lines)
- 20 U. S. C. §2396 (Career and Technical Education; Federal Laws Guaranteeing Civil Rights)
- 20 U. S. C. §3401(2) (Department of Education; Congressional Findings)
- 20 U. S. C. §7231d(b)(2)(C) (Magnet Schools Assistance; Applications and Requirements)
- 20 U. S. C. §7914 (Strengthening and Improvement of Elementary and Secondary Schools; Civil Rights)
- 22 U. S. C. §262p–4n (Foreign Relations and Intercourse; Equal Employment Opportunities)
- 22 U. S. C. §2304(a)(1) (Human Rights and Security Assistance)
- 22 U. S. C. §2314(g) (Furnishing of Defense Articles or Related Training or Other Defense Service on Grant Basis)
- 22 U. S. C. §2426 (Discrimination Against United States Personnel)
- 22 U. S. C. §2504(a) (Peace Corps Volunteers)
- 22 U. S. C. §2661a (Foreign Contracts or Arrangements; Discrimination)

- 22 U. S. C. §2755 (Discrimination Prohibited if Based on Race, Religion, National Origin, or Sex)
- 22 U. S. C. §3901(b)(2) (Foreign Service; Congressional Findings and Objectives)
- 22 U. S. C. §3905(b)(1) (Foreign Service; Personnel Actions)
- 22 U. S. C. §4102(11)(A) (Foreign Service; Definitions)
- 22 U. S. C. §4115(b)(4) (Foreign Service; Unfair Labor Practices)
- 22 U. S. C. §6401(a)(3) (International Religious Freedom; Findings; Policy)
- 22 U. S. C. §8303(c)(2) (Office of Volunteers for Prosperity)
- 23 U. S. C. §140(a) (Federal-Aid Highways; Nondiscrimination)
- 23 U. S. C. §324 (Highways; Prohibition of Discrimination on the Basis of Sex)
- 25 U. S. C. §4223(d)(2) (Housing Assistance for Native Hawaiians)
- 26 U. S. C. §7471(a)(6)(A) (Tax Court; Employees)

- 28 U. S. C. §994(d) (Duties of the United States Sentencing Commission)
- 28 U. S. C. §1862 (Trial by Jury; Discrimination Prohibited)
- 28 U. S. C. §1867(e) (Trial by Jury; Challenging Compliance With Selection Procedures)
- 29 U. S. C. §206(d)(1) (Equal Pay Act of 1963)
- 29 U. S. C. §§2601(a)(6) and (b)(4) (Family and Medical Leave; Findings and Purposes)
- 29 U. S. C. §2651(a) (Family and Medical Leave; Effect on Other Laws)
- 29 U. S. C. §3248 (Workforce Development Opportunities; Nondiscrimination)
- 30 U. S. C. §1222(c) (Research Funds to Institutes)
- 31 U. S. C. §732(f) (Government Accountability Office; Personnel Management System)
- 31 U. S. C. §6711 (Federal Payments; Prohibited Discrimination)
- 31 U. S. C. §6720(a)(8) (Federal Payments; Definitions, Application, and Administration)

- 34 U. S. C. §10228(c) (Prohibition of Federal Control Over State and Local Criminal Justice Agencies; Prohibition of Discrimination)

- 34 U. S. C. §11133(a)(16) (Juvenile Justice and Delinquency Prevention; State Plans)

- 34 U. S. C. §12161(g) (Community Schools Youth Services and Supervision Grant Program)

- 34 U. S. C. §12361 (Violent Crime Control and Law Enforcement; Civil Rights for Women)

- 34 U. S. C. §20110(e) (Crime Victims Fund; Administration Provisions)

- 34 U. S. C. §50104(a) (Emergency Federal Law Enforcement Assistance)

- 36 U. S. C. §20204(b) (Air Force Sergeants Association; Membership)

- 36 U. S. C. §20205(c) (Air Force Sergeants Association; Governing Body)

- 36 U. S. C. §21003(a)(4) (American GI Forum of the United States; Purposes)

- 36 U. S. C. §21004(b) (American GI Forum of the United States; Membership)

- 36 U. S. C. §21005(c) (American GI Forum of the United States; Governing Body)

- 36 U. S. C. §21704A (The American Legion)
- 36 U. S. C. §22703(c) (Amvets; Membership)
- 36 U. S. C. §22704(d) (Amvets; Governing Body)
- 36 U. S. C. §60104(b) (82nd Airborne Division Association, Incorporated; Membership)
- 36 U. S. C. §60105(c) (82nd Airborne Division Association, Incorporated; Governing Body)
- 36 U. S. C. §70104(b) (Fleet Reserve Association; Membership)
- 36 U. S. C. §70105(c) (Fleet Reserve Association; Governing Body)
- 36 U. S. C. §140704(b) (Military Order of the World Wars; Membership)
- 36 U. S. C. §140705(c) (Military Order of the World Wars; Governing Body)
- 36 U. S. C. §154704(b) (Non Commissioned Officers Association of the United States of America, Incorporated; Membership)
- 36 U. S. C. §154705(c) (Non Commissioned Officers Association of the United States of America, Incorporated; Governing Body)
- 36 U. S. C. §190304(b) (Retired Enlisted Association, Incorporated; Membership)

- 36 U. S. C. §190305(c) (Retired Enlisted Association, Incorporated; Governing Body)
- 36 U. S. C. §220522(a)(8) and (9) (United States Olympic Committee; Eligibility Requirements)
- 36 U. S. C. §230504(b) (Vietnam Veterans of America, Inc.; Membership)
- 36 U. S. C. §230505(c) (Vietnam Veterans of America, Inc.; Governing Body)
- 40 U. S. C. §122(a) (Federal Property and Administrative Services; Prohibition on Sex Discrimination)
- 40 U. S. C. §14702 (Appalachian Regional Development; Nondiscrimination)
- 42 U. S. C. §213(f) (Military Benefits)
- 42 U. S. C. §290cc–33(a) (Projects for Assistance in Transition From Homelessness)
- 42 U. S. C. §290ff–1(e)(2)(C) (Children With Serious Emotional Disturbances; Requirements With Respect to Carrying Out Purpose of Grants)
- 42 U. S. C. §295m (Public Health Service; Prohibition Against Discrimination on Basis of Sex)

- 42 U. S. C. §296g (Public Health Service; Prohibition Against Discrimination by Schools on Basis of Sex)

- 42 U. S. C. §300w–7(a)(2) (Preventive Health and Health Services Block Grants; Nondiscrimination Provisions)

- 42 U. S. C. §300x–57(a)(2) (Block Grants Regarding Mental Health and Substance Abuse; Nondiscrimination)

- 42 U. S. C. §603(a)(5)(I)(iii) (Block Grants to States for Temporary Assistance for Needy Families)

- 42 U. S. C. §708(a)(2) (Maternal and Child Health Services Block Grant; Nondiscrimination Provisions)

- 42 U. S. C. §1975a(a) (Duties of Civil Rights Commission)

- 42 U. S. C. §2000c(b) (Civil Rights; Public Education; Definitions)

- 42 U. S. C. §2000c–6(a)(2) (Civil Rights; Public Education; Civil Actions by the Attorney General)

- 42 U. S. C. §2000e–2 (Equal Employment Opportunities; Unlawful Employment Practices)

- 42 U. S. C. §2000e–3(b) (Equal Employment Opportunities; Other Unlawful Employment Practices)

- 42 U. S. C. §2000e–16(a) (Employment by Federal Government)

- 42 U. S. C. §2000e–16a(b) (Government Employee Rights Act of 1991)

- 42 U. S. C. §2000e–16b(a)(1) (Discriminatory Practices Prohibited)

- 42 U. S. C. §2000h–2 (Intervention by Attorney General; Denial of Equal Protection on Account of Race, Color, Religion, Sex or National Origin)

- 42 U. S. C. §3123 (Discrimination on Basis of Sex Prohibited in Federally Assisted Programs)

- 42 U. S. C. §3604 (Fair Housing Act; Discrimination in the Sale or Rental of Housing and Other Prohibited Practices)

- 42 U. S. C. §3605 (Fair Housing Act; Discrimination in Residential Real Estate-Related Transactions)

- 42 U. S. C. §3606 (Fair Housing Act; Discrimination in the Provision of Brokerage Services)

- 42 U. S. C. §3631 (Fair Housing Act; Violations; Penalties)

- 42 U. S. C. §4701 (Intergovernmental Personnel Program; Congressional Findings and Declaration of Policy)

- 42 U. S. C. §5057(a)(1) (Domestic Volunteer Services; Nondiscrimination Provisions)

- 42 U. S. C. §5151(a) (Nondiscrimination in Disaster Assistance)

- 42 U. S. C. §5309(a) (Community Development; Nondiscrimination in Programs and Activities)

- 42 U. S. C. §5891 (Development of Energy Sources; Sex Discrimination Prohibited)

- 42 U. S. C. §6709 (Public Works Employment; Sex Discrimination; Prohibition; Enforcement)

- 42 U. S. C. §6727(a)(1) (Public Works Employment; Nondiscrimination)

- 42 U. S. C. §6870(a) (Weatherization Assistance for Low-Income Persons)

- 42 U. S. C. §8625(a) (Low-Income Home Energy Assistance; Nondiscrimination Provisions)

- 42 U. S. C. §9821 (Community Economic Development; Nondiscrimination Provisions)

- 42 U. S. C. §9849 (Head Start Programs; Nondiscrimination Provisions)

- 42 U. S. C. §9918(c)(1) (Community Services Block Grant Program; Limitations on Use of Funds)

- 42 U. S. C. §10406(c)(2)(B)(i) (Family Violence Prevention and Services; Formula Grants to States)

- 42 U. S. C. §11504(b) (Enterprise Zone Development; Waiver of Modification of Housing and Community Development Rules in Enterprise Zones)

- 42 U. S. C. §12635(a)(1) (National and Community Service State Grant Program; Nondiscrimination)

- 42 U. S. C. §12832 (Investment in Affordable Housing; Nondiscrimination)

- 43 U. S. C. §1747(10) (Loans to States and Political Subdivisions; Discrimination Prohibited)

- 43 U. S. C. §1863 (Outer Continental Shelf Resource Management; Unlawful Employment Practices; Regulations)

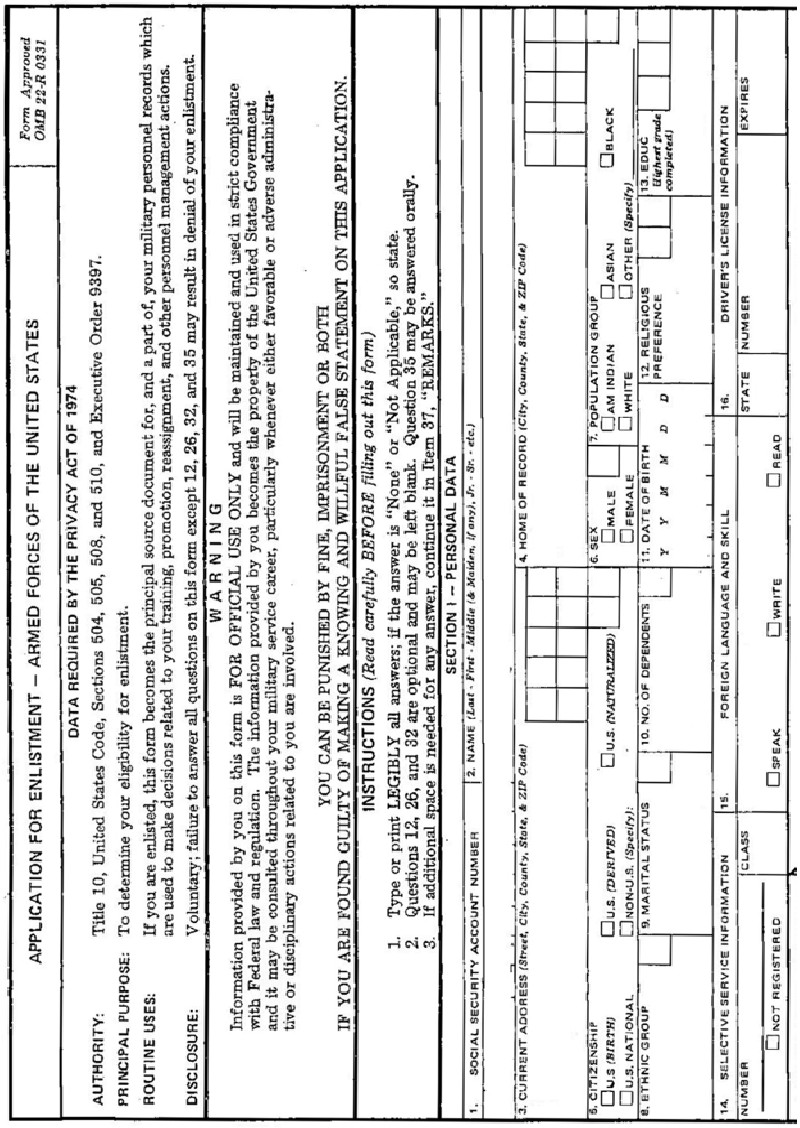
- 47 U. S. C. §151 (Federal Communications Commission)

- 47 U. S. C. §398(b)(1) (Public Broadcasting; Equal Opportunity Employment)

- 47 U. S. C. §§554(b) and (c) (Cable Communications; Equal Employment Opportunity)
- 47 U. S. C. §555a(c) (Cable Communications; Limitation of Franchising Authority Liability)
- 48 U. S. C. §1542(a) (Virgin Islands; Voting Franchise; Discrimination Prohibited)
- 48 U. S. C. §1708 (Discrimination Prohibited in Rights of Access to, and Benefits From, Conveyed Lands)
- 49 U. S. C. §306(b) (Duties of the Secretary of Transportation; Prohibited Discrimination)
- 49 U. S. C. §5332(b) (Public Transportation; Nondiscrimination)
- 49 U. S. C. §40127 (Air Commerce and Safety; Prohibitions on Discrimination)
- 49 U. S. C. §47123(a) (Airport Improvement; Nondiscrimination)
- 50 U. S. C. §3809(b)(3) (Selective Service System)
- 50 U. S. C. §4842(a)(1)(B) (Anti-Boycott Act of 2018)

Appendix D to opinion of ALITO, J.

D



APPLICATION FOR ENLISTMENT – ARMED FORCES OF THE UNITED STATES

Form Approved OMB 22-R 0331

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: Title 10, United States Code, Sections 504, 505, 508, and 510, and Executive Order 9397.

PRINCIPAL PURPOSE: To determine your eligibility for enlistment.

ROUTINE USES: If you are enlisted, this form becomes the principal source document for, and a part of, your military personnel records which are used to make decisions related to your training, promotion, reassignment, and other personnel management actions.

DISCLOSURE: Voluntary; failure to answer all questions on this form except 12, 26, 32, and 35 may result in denial of your enlistment.

WARNING

Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal law and regulation. The information provided by you becomes the property of the United States Government and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.

YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS APPLICATION.

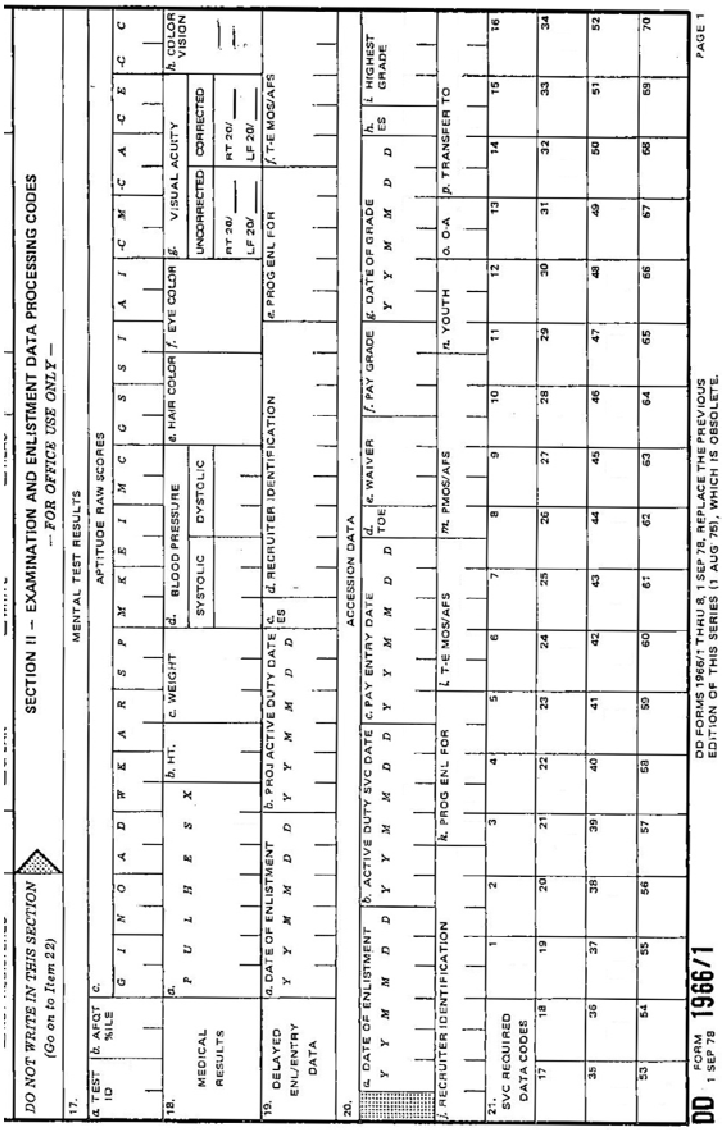
INSTRUCTIONS *(Read carefully BEFORE filling out this form.)*

1. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state.
2. Questions 12, 26, and 32 are optional and may be left blank. Question 35 may be answered orally.
3. If additional space is needed for any answer, continue it in Item 37, "REMARKS."

SECTION I – PERSONAL DATA

1. SOCIAL SECURITY ACCOUNT NUMBER
2. NAME *(Last - First - Middle (& Maiden, if any), Jr. - Sr. - etc.)*
3. CURRENT ADDRESS *(Street, City, County, State, & ZIP Code)*
4. HOME OF RECORD *(City, County, State, & ZIP Code)*
5. CITIZENSHIP
   - ☐ U.S. *(BIRTH)*
   - ☐ U.S. *(DERIVED)*
   - ☐ U.S. *(NATURALIZED)*
   - ☐ U.S. NATIONAL
   - ☐ NON-U.S. *(Specify)*:
6. SEX
   - ☐ MALE
   - ☐ FEMALE
7. POPULATION GROUP
   - ☐ AM INDIAN
   - ☐ ASIAN
   - ☐ BLACK
   - ☐ WHITE
   - ☐ OTHER *(Specify)*
8. ETHNIC GROUP
9. MARITAL STATUS
10. NO. OF DEPENDENTS
11. DATE OF BIRTH (Y Y M M D D)
12. RELIGIOUS PREFERENCE
13. EDUC *(Highest grade completed)*
14. SELECTIVE SERVICE INFORMATION
    - NUMBER
    - CLASS
    - ☐ NOT REGISTERED
15. FOREIGN LANGUAGE AND SKILL
    - ☐ SPEAK
    - ☐ WRITE
    - ☐ READ
16. DRIVER'S LICENSE INFORMATION
    - STATE
    - NUMBER
    - EXPIRES

Appendix D to opinion of ALITO, J.



DO NOT WRITE IN THIS SECTION (Go on to Item 22)

SECTION II — EXAMINATION AND ENLISTMENT DATA PROCESSING CODES
— FOR OFFICE USE ONLY —

17. MENTAL TEST RESULTS

a. TEST ID | b. AFQT %ILE | c. APTITUDE RAW SCORES: G I N O A D W E A R S P M K E I M C G S S I A I -C M -C A -C E -C C

18. MEDICAL RESULTS: d. F U L H E S X | e. WEIGHT | f. HT. | g. BLOOD PRESSURE: SYSTOLIC / DIASTOLIC | h. HAIR COLOR | i. EYE COLOR | j. VISUAL ACUITY: UNCORRECTED (RT 20/ ___ LF 20/ ___) CORRECTED (RT 20/ ___ LF 20/ ___) | k. COLOR VISION

19. DELAYED ENL/ENTRY DATA: a. DATE OF ENLISTMENT Y Y M M D D | b. PROJ ACTIVE DUTY DATE Y Y M M D D | c. YES | d. RECRUITER IDENTIFICATION | e. PROG ENL FOR | f. T-E MOS/AFS

20. ACCESSION DATA

a. DATE OF ENLISTMENT Y Y M M D D | b. ACTIVE DUTY SVC DATE Y Y M M D D | c. PAY ENTRY DATE Y Y M M D D | d. TOE | e. WAIVER | f. PAY GRADE | g. DATE OF GRADE Y Y M M D D | h. YES | i. HIGHEST GRADE

j. RECRUITER IDENTIFICATION | k. PROG ENL FOR | l. T-E MOS/AFS | m. PMOS/AFS | n. YOUTH | o. O-A | p. TRANSFER TO

21. SVC REQUIRED DATA CODES	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34
35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52
53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70

DD FORM 1 SEP 79 1966/1

DD FORMS 1966/1 THRU 8, 1 SEP 79, REPLACE THE PREVIOUS EDITION OF THIS SERIES (1 AUG 75), WHICH IS OBSOLETE.

PAGE 1

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

III. VERIFICATION OF PERSONAL DATA

23. If Preferred Enlistment Name (name given in block 1) is not the same as on your birth certificate and has not been changed by legal procedure prescribed by state law, complete the following:

a. NAME AS SHOWN ON BIRTH CERTIFICATE

_____

I hereby state that I have not changed my name through any court procedure; and that I prefer to use the name by which I am known in the community as a matter of convenience and with no criminal or fraudulent intent. I further state that I am the same person as the one whose name is shown in block 1.

b. WITNESS (Name, grade, and signature)

c. SIGNATURE OF APPLICANT

24. EDUCATION

YEAR & MONTH		NAME AND LOCATION OF SCHOOL	GRADUATE		DEGREE RECEIVED
FROM	TO		YES	NO	

25. CITIZENSHIP VERIFICATION (To be completed in presence of your recruiter).

a. PLACE OF BIRTH (City, State and (if not in USA) Country)

b. BIRTH CERTIFICATE ISSUED BY (County and State)

c. BIRTH CERTIFICATE FILE NUMBER

d. IF NATURALIZED, CERTIFICATE NO.

e. IF DERIVED, PARENTS' CERTIFICATE NO(S), DATE, PLACE AND COURT

f. IF ALIEN, ALIEN REGISTRATION NUMBER

g. NATIVE COUNTRY

h. DATE AND PORT OF ENTRY

26. MILITARY SERVICE					
a. Are you now or have ever been in the Regular, Reserve or National Guard of the United States? ☐ No ☐ Yes. If "yes", complete the following:					
b. PAY GRADE AND SERVICE NUMBER	c. SERVICE AND COMPONENT	d. DATE OF ENTRY	e. DATE OF DISCH	f. TYPE DISCH/REL	g. TIME LOST (NO. OF DAYS)
h. If you are now a member of a US Reserve or National Guard organization, fill in organization name and unit address:					

27a. PREVIOUS MILITARY SERVICE		Years	Months	Days	b. PEBD	c. ADSD
DO NOT WRITE IN THIS BLOCK	Total Active Military Service					
	Total Inactive Military Service					

IV. OTHER BACKGROUND DATA			
28a. RELATIVES	b. DATE AND PLACE OF BIRTH	c. PRESENT ADDRESS	d. CITIZENSHIP
FATHER			
MOTHER (Maiden-name)			
SPOUSE (Maiden-name)			
CHILDREN (Show Relationship)			
~~OTHER (relatives)~~			

DD FORM 1 AUG 75 1966/2 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 2

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

29. **COMMERCIAL LIFE INSURANCE POLICIES YOU OWN ON YOUR LIFE**—Optional entry; used to assist your survivors in filing claims should you die while on active duty.

a. NAME OF COMPANY ISSUING POLICY	b. POLICY NUMBER

30. **RELATIVES AND ALIEN FRIENDS LIVING IN FOREIGN COUNTRIES**—List anyone with whom you had or have a close relationship, who lives in a foreign country.

a. NAME AND RELATIONSHIP	b. AGE	c. OCCUPATION	d. ADDRESS	e. CITIZENSHIP

31. **RESIDENCES**—List all from 10th birthday.

YEAR & MONTH		NUMBER AND STREET	CITY	STATE	ZIP CODE
FROM	TO				

32. **EMPLOYMENT**—Show every employment you have had and all periods of unemployment.

a. YEAR & MONTH		b. Company name and address (Street, City, State, and Zip Code)	c. JOB TITLE	d. SUPERVISOR NAME
FROM	TO			

e. HAVE YOU EVER WORKED FOR A FOREIGN GOVERNMENT? ☐ NO ☐ YES *(If "yes" give dates of employment, Government you worked for, location and nature of your duties)*

33. MEMBERSHIP IN YOUTH PROGRAMS—Optional entry; you *may be* eligible for a higher paygrade, based on membership and participation in the youth programs listed below.

☐ No membership

ORGANIZATION	MEMBERSHIP HELD FROM	MEMBERSHIP HELD TO	CONDUCTED BY (SPONSOR)	LOCATION (SCHOOL AND ADDRESS)	YEARS COMPLETED OR LEVEL REACHED
ROTC					(YEARS)
JROTC					(YEARS)
CAP			AIR FORCE		(LEVEL)
SEA CADET			NAVY		(LEVEL)
OTHER (Specify)					

34. FOREIGN TRAVEL—Other than as a direct result of military service.

YEAR & MONTH FROM	YEAR & MONTH TO	COUNTRY VISITED	PURPOSE OF TRAVEL

35. DECLARATIONS—Explain "Yes" answers in item **41.**

a. HAVE YOU EVER BEEN REJECTED FOR ENLISTMENT, REENLISTMENT, OR INDUCTION INTO ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? ☐ NO ☐ YES

b. ARE YOU A CONSCIENTIOUS OBJECTOR? ☐ NO ☐ YES

c. ARE YOU NOW OR HAVE YOU EVER BEEN A DESERTER FROM ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? ☐ NO ☐ YES

d. ARE YOU NOW DRAWING, OR DO YOU HAVE AN APPLICATION PENDING OR APPROVAL FOR, RETIRED PAY, DISABILITY ALLOWANCE, OR SEVERANCE PAY OR A PENSION FROM THE GOVERNMENT OF THE UNITED STATES? ☐ NO ☐ YES

e. ARE YOU THE ONLY LIVING CHILD OF YOUR PARENTS? ☐ NO ☐ YES

36. UNDERSTANDINGS.

a. I understand that if I am rejected for enlistment because of a disqualification I have concealed, I may not be provided return transportation from the place of examination to my home. (INITIALS)

b. (For male applicants only). I understand that if I have not reached my 26th birthday that an original enlistment obligates me to serve in the Armed Forces for a period of six (6) years (active and reserve) unless sooner discharged. (INITIALS)

DD FORM 1 AUG 75 1966/3 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 3

Appendix D to opinion of ALITO, J.

LAST NAME:_____ SSN:_____

37. CHARACTER AND SOCIAL ADJUSTMENT: Read and consider the following instructions carefully **BEFORE** answering questions a through f.

1. If your answer to every question is truthfully "NO", please indicate in the appropriate space.
2. If your answer to any questions in this item is "YES", or you have reservations about answering questions of this nature, you are not required to answer, or explain any of these questions in writing. Instead, you may request a personal interview in which you may provide the required information for each question orally.
3. If you choose the personal interview, the information you give may be investigated; however, any written record of the interview itself will not be retained more than six months after entry upon active duty, and it will not become a part of your permanent military personnel service record.
4. If you enlist, this information may be requested from you again at some future date and may become a part of your security investigative file at that time. This could occur as a result of your being considered for duties involving access to classified information or other types of duty requiring a personnel security investigation.
5. A "YES" answer will not necessarily disqualify you for enlistment. It will depend on the circumstances surrounding the situation involved.

INITIAL HERE IF YOU PREFER A PERSONAL INTERVIEW: _____

APPLICANT HAS BEEN INTERVIEWED AND IS ☐ ELIGIBLE FOR ENLISTMENT, ☐ INELIGIBLE FOR ENLISTMENT

DATE OF INTERVIEW	NAME, ORGANIZATION & TITLE	SIGNATURE OF INTERVIEWER

EXPLAIN "YES" ANSWERS IN ITEM 41:	NO	YES
a. HAVE YOU EVER TAKEN ANY NARCOTIC SUBSTANCE, SEDATIVE, STIMULANT, OR TRANQUILIZER DRUGS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?		
b. HAVE YOU EVER INTENTIONALLY SNIFFED GLUE, PAINT, HAIRSPRAY, OR OTHER CHEMICAL FUMES?		
c. HAVE YOU EVER BEEN INVOLVED IN THE USE, PURCHASE, POSSESSION OR SALE OF MARIJUANA, LSD, OR ANY HARMFUL OR HABIT-FORMING DRUGS AND/OR CHEMICALS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?		
d. HAS YOUR USE OF ALCOHOLIC BEVERAGES (*SUCH AS LIQUOR, BEER, WINE*) EVER RESULTED IN THE LOSS OF A JOB, ARREST BY POLICE, or TREATMENT FOR ALCOHOLISM?		
e. HAVE YOU EVER BEEN A PATIENT (*WHETHER OR NOT FORMALLY COMMITTED*) IN ANY INSTITUTION PRIMARILY DEVOTED TO THE TREATMENT OF MENTAL, NERVOUS, EMOTIONAL, PSYCHOLOGICAL, OR PERSONALITY DISORDERS?		
f. HAVE YOU EVER ENGAGED IN HOMOSEXUAL ACTIVITY (SEXUAL RELATIONS WITH ANOTHER PERSON OF THE SAME SEX)?		

38. MARITAL STATUS AND DEPENDENCY	NO	YES
a. ARE YOU NOW, OR HAVE YOU EVER BEEN MARRIED?		
b. IF YOU HAVE BEEN MARRIED, ARE YOU NOW LIVING WITH YOUR SPOUSE?		
c. HAVE YOU EVER BEEN DIVORCED? (If yes, enter date, place and court which granted divorce or legal separation)		
d. IS ANY COURT ORDER OR JUDGEMENT DIRECTING SUPPORT FOR CHILDREN OF ALIMONY IN EFFECT? (Enter date, place, and court which granted alimony decree, or support as the result of a paternity suit)		
e. IS ANYONE OTHER THAN YOUR SPOUSE AND/OR CHILDREN SOLELY OR PARTIALLY DEPENDENT UPON YOU? (list name & address)		

39. Do you now have, or within the past ten years, have you had knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in any foreign or domestic organizations, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means?	NO	YES
If you answered "yes", give the names of the organizations and inclusive dates (month and year) of your membership; describe the nature of your activities as a member of the organization(s) in the "Remarks" section, Item 41.		

40. INVOLVEMENT WITH POLICE OR JUDICIAL AUTHORITIES **YOUR ANSWERS TO THE FOLLOWING QUESTIONS WILL BE VERIFIED WITH THE FEDERAL BUREAU OF INVESTIGATION (FBI), AND OTHER AGENCIES TO DETERMINE ANY PREVIOUS RECORDS OF ARREST OR CONVICTIONS OR JUVENILE COURT ADJUDICATIONS. IF YOU CONCEAL SUCH RECORDS AT THIS TIME, YOU MAY, UPON ENLISTMENT, BE SUBJECT TO DISCIPLINARY ACTION UNDER THE UNIFORM CODE OF MILITARY JUSTICE AND/OR DISCHARGE FROM THE MILITARY SERVICE WITH OTHER THAN AN HONORABLE DISCHARGE.**	NO	YES
a. Have you ever been arrested, charged, cited, or held by Federal, State, or other law enforcement or juvenile authorities regardless of whether the citation or charge was dropped or dismissed or you were found not guilty?		
b. As a result of being arrested, charged, cited, or held by law enforcement or juvenile authorities, have you ever been convicted, fined by or forfeited bond to a Federal, State, or other judicial authority or adjudicated a youthful offender or juvenile delinquent (regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record)?		
c. Have you ever been detained, held in, or served time in, any jail or prison, or reform or industrial school or any juvenile facility or institution under the jurisdiction of any City, County, State, Federal or foreign country?		
d. Have you ever been awarded, or are you now under suspended sentence, parole, or probation or awaiting any action on charges against you?		

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

40. Continued	NO	YES
e. HAVE YOU BEEN RELEASED FROM PAROLE, PROBATION, JUVENILE SUPERVISION, OR GIVEN A SUSPENDED SENTENCE OR RELIEVED OF CHARGES PENDING ON CONDITION THAT YOU APPLY FOR OR ENLIST IN THE US ARMED FORCES?		
f. ARE YOU NOW INVOLVED IN OR A PARTY TO OR CONNECTED WITH ANY COURT ACTION OR CIVIL SUIT? (EXPLAIN "YES" ANSWER IN ITEM 41)		

g. EXPLAIN BELOW "YES" ANSWERS IN "a" THROUGH "e". BE CAREFUL TO INCLUDE *ALL* INCIDENTS WITH LAW ENFORCEMENT AUTHORITIES THAT YOU DISCUSSED WITH YOUR RECRUITER.

OFFENSE	DATE/PLACE	AGE	DISPOSITION	COURT

41. REMARKS

I am interested in the following options or programs:

V. CERTIFICATION

42. BY APPLICANT: I UNDERSTAND THAT THE ARMED FORCES REPRESENTATIVE WHO WILL ACCEPT MY ENLISTMENT DOES SO IN RELIANCE ON THE INFORMATION PROVIDED BY ME IN THIS DOCUMENT; THAT IF ANY OF THE INFORMATION IS KNOWINGLY FALSE OR INCORRECT, I MAY BE PROSECUTED UNDER FEDERAL CIVILIAN OR MILITARY LAW OR SUBJECT TO ADMINISTRATIVE SEPARATION PROCEEDINGS AND, IN EITHER INSTANCE, I MAY RECEIVE A LESS THAN HONORABLE DISCHARGE WHICH COULD AFFECT MY FUTURE EMPLOYMENT OPPORTUNITIES. I CERTIFY THAT THE INFORMATION GIVEN BY ME IN THIS DOCUMENT IS TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

a. DATE	b. NAME (First, Middle, Last)	c. SIGNATURE OF APPLICANT

43. DATA VERIFICATION: To be completed by the recruiter who enters a description of the actual documents reviewed by him/her to verify:

NAME	AGE	CITIZENSHIP
EDUCATION	PRIOR MILITARY SERVICE	
OTHER (Specify)		

DD FORM 1 AUG 75 1966/5 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 5

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

44. RECRUITER: I certify that I have witnessed applicant's signature above and further certify that I have verified the data in Sections I, III, and IV of this document, and the documents listed above as prescribed by my directives. I understand my liability to trial by courts-martial under the Uniform Code of Military Justice should I effect or cause to be effected the enlistment of anyone known by me to be ineligible for enlistment.

a. DATE	b. NAME, GRADE, SSN, AND RECRUITER ID NO. (Type or Print)	c. SIGNATURE OF RECRUITER

VI. PARENTAL/GUARDIAN CONSENT FOR ENLISTMENT

45. I/we certify that the applicant named herein has no other legal guardian than me/us and I/we consent to his/her enlistment in the _____ subject to all the requirements and lawful commands of the officers who may, from time to time, be placed over him/her; and I/we certify that no promise of any kind has been made to me/us concerning assignment to duty, or promotion during his/her enlistment as an inducement to me/us to sign this consent. I/we hereby authorized the Armed Forces representatives concerned to administer medical examinations, mental and/or aptitude testing, and conduct records checks to determine applicant's enlistment eligibility. I/we relinquish all claim to his/her service and to any wage or compensation for such service.

46. *For enlistment in a Reserve Component:* I/we understand that as a member of a Reserve Component, he/she must serve minimum periods of active duty unless excused by competent authority. In the event he/she fails to fulfill the obligations of his/her Reserve commitment, he/she may be recalled to active duty as prescribed by law. I/we further understand that while the applicant is in the Ready Reserve, he/she may be ordered to extended active duty in time of war or national emergency declared by the Congress or the President or when otherwise authorized by law.

47. I/we certify that the applicant's birth date is:

NAME AND SIGNATURE OF WITNESSING OFFICIAL	SIGNATURE OF PARENT OR LEGAL GUARDIAN
NAME AND SIGNATURE OF WITNESSING OFFICIAL	SIGNATURE OF PARENT OR LEGAL GUARDIAN
VERIFICATION OF SINGLE SIGNATURE CONSENT	

VII. ENLISTMENT OPTIONS – Completed by guidance counsellor, career counsellor, recruiter, AFEES Liaison NCO, etc., as specified by sponsoring service.

ENL. COMP.	GRADE/RATE	DATE OF RANK	TERM ENL.	T-E MOS/AFS	PMOS/AFS	WAIVER INFO	OPT ANAL	PROG ENL FOR

Appendix D to opinion of ALITO, J.

SPECIFIC OPTIONS ENLISTED FOR

I certify that I have reviewed all information contained in this document and, to the best of my judgment and belief, applicant fulfills all legal and policy requirements for enlistment. I accept his/her enlistment on behalf of the _____
I further certify that service regulations governing such enlistment have been strictly complied with and any waivers required to effect applicant's enlistment have been secured and are attached to this document.

DATE	NAME, GRADE, AND SSN, ORGANIZATION OR RECRUITER ID (Type or Print)	SIGNATURE

VIII. RECERTIFICATION BY APPLICANT, AND CORRECTION OF DATA AT TIME OF ENLISTMENT

I HAVE REVIEWED ALL INFORMATION CONTAINED IN THIS DOCUMENT; THAT INFORMATION IS STILL CORRECT AND TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. IF CHANGES WERE REQUIRED, THE ORIGINAL ENTRY HAS BEEN MARKED. "SEE VIII" AND THE CORRECTED INFORMATION IS PROVIDED BELOW, KEYED TO THE APPROPRIATE QUESTION.

QUESTION	CHANGE REQUIRED

DATE	NAME, GRADE, SSN AND SIGNATURE OF WITNESS (Type or Print)	SIGNATURE OF APPLICANT

DD FORM 1966/6 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED
1 AUG 75

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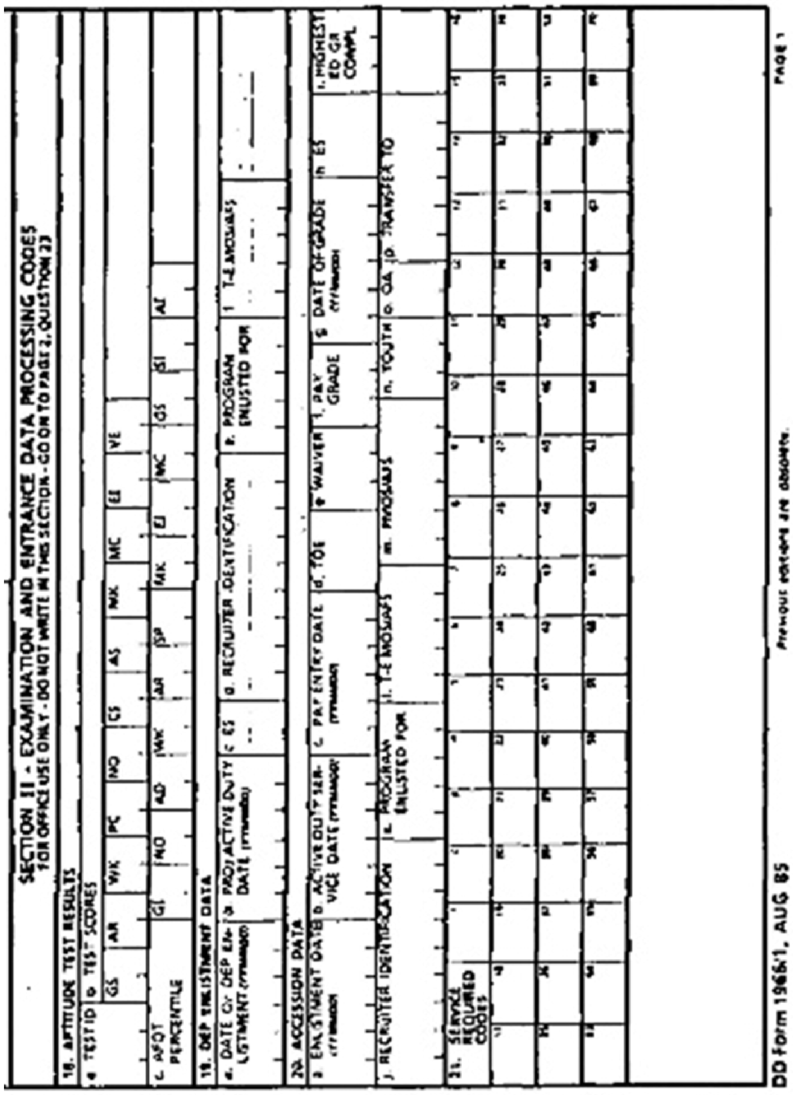
Appendix D to opinion of ALITO, J.

RECORD OF MILITARY PROC..SING - ARMED FORCES OF THE ..ITED STATES

SECTION I - PERSONAL DATA

Appendix D to opinion of ALITO, J.



SECTION II - EXAMINATION AND ENTRANCE DATA PROCESSING CODES
FOR OFFICE USE ONLY - DO NOT WRITE IN THIS SECTION - GO ON TO PAGE 2, QUESTION 23

18. APTITUDE TEST RESULTS

a. TEST ID | b. TEST SCORES: GS | AR | WK | PC | NO | CS | AS | MK | MC | EI | VE

c. AFQT PERCENTILE | GT | NO | AD | MK | AR | SP | MK | EI | MC | GS | SI | AI

19. DEP ENLISTMENT DATA

a. DATE OF DEP ENLISTMENT (YYMMDD) | b. PROJ ACTIVE DUTY DATE (YYMMDD) | c. ES | d. RECRUITER IDENTIFICATION | e. PROGRAM ENLISTED FOR | f. T-E MOS/AFS

20. ACCESSION DATA

a. ENLISTMENT DATE (YYMMDD) | b. ACTIVE DUTY SERVICE DATE (YYMMDD) | c. PAY ENTRY DATE (YYMMDD) | d. TOE | e. WAIVER | f. PAY GRADE | g. DATE OF GRADE (YYMMDD) | h. ES | i. HIGHEST ED GR COMPL

j. RECRUITER IDENTIFICATION | k. PROGRAM ENLISTED FOR | l. T-E MOS/AFS | m. PMOS/AFS | n. YOUTH | o. OA | p. TRANSFER TO

21. SERVICE REQUIRED CODES

DD Form 1966/1, AUG 85 Previous editions are obsolete. PAGE 1

Appendix D to opinion of ALITO, J.

DD Form 1966

RECORD OF MILITARY PROCESSING

ARMED FORCES OF THE UNITED STATES

Privacy Act Statement

AUTHORITY: Title 10, United States Code, Sections 504, 505, 508, 510, and 520a, and Title 50 USC Appendix 451 and following section.

PRINCIPAL PURPOSE: To determine your eligibility for military service.

ROUTINE USES: This form becomes the principal source document for, and part of, your military personnel records which are used to make decisions related to your training, promotion, assignments, and other personnel management actions.

DISCLOSURE: *(Applicants)* Voluntary; however, failure to answer all questions on this form, except "optional" items, may result in denial of your enlistment.

(Selective Service Registrants) Disclosure of requested information is mandatory except "optional" items, disclosure of which is voluntary.

WARNING

Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal laws and regulations. The information provided by you becomes the property of the United States Government, and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.

YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS DOCUMENT.

INSTRUCTIONS

(Read carefully BEFORE filling out this form.)

1. Read Privacy Act Statement above before completing form.

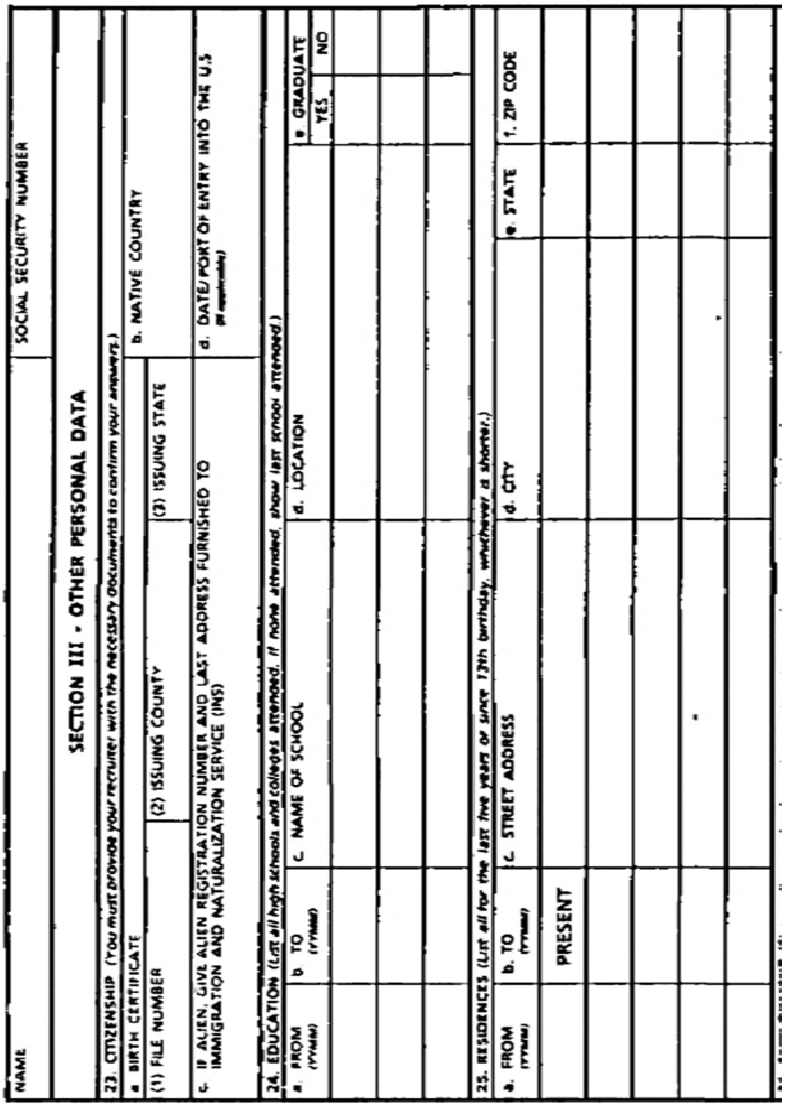
2. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state. "OPTIONAL" questions may be left blank.

3. List all responses requiring dates (schools, employment/residences) in chronological order beginning with present or the most recent and work backwards. Show all (employers/residences) for the last five years or since 13th birthday. Give inclusive dates for each period of residence/employment/school. If additional space is needed for any answer, continue it in item 39, "Remarks."

4. Unless otherwise specified, write all dates as 6 digits (with no spaces or marks) in YYMMDD fashion. February 13, 1985 is written 850213.

DD Form 1966/1R, AUG 85 Previous editions are obsolete . Reverse of Page 1

Appendix D to opinion of ALITO, J.



NAME | SOCIAL SECURITY NUMBER

SECTION III - OTHER PERSONAL DATA

23. CITIZENSHIP (You must provide your recruiter with the necessary documents to confirm your answers.)

a. BIRTH CERTIFICATE | b. NATIVE COUNTRY

(1) FILE NUMBER | (2) ISSUING COUNTY | (3) ISSUING STATE

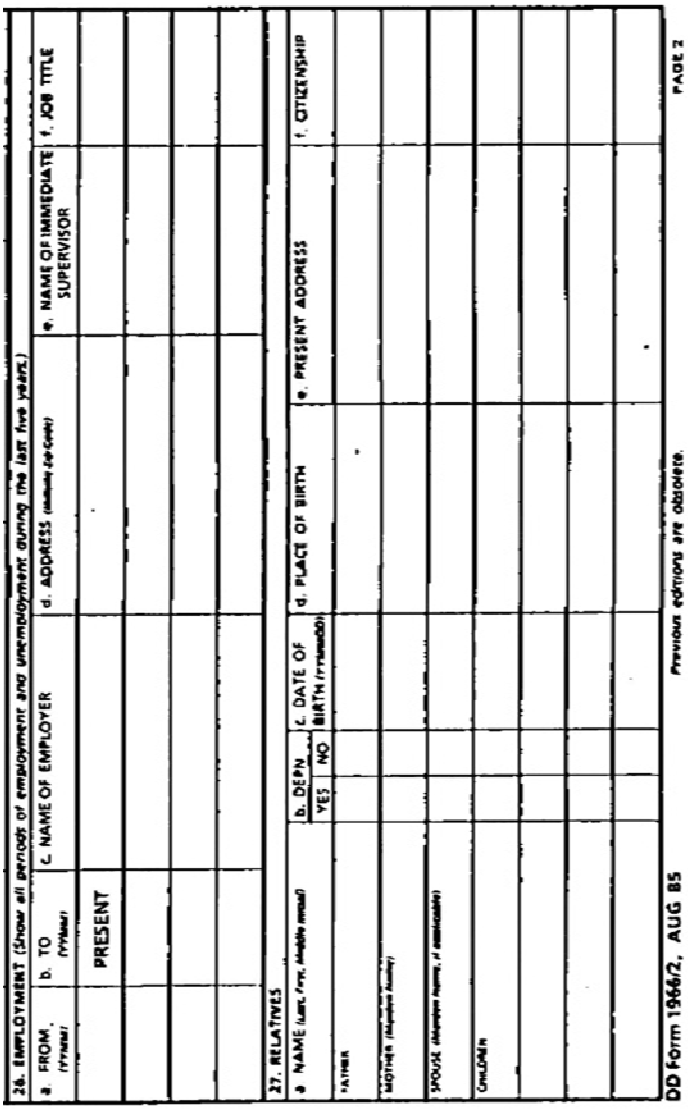
c. IF ALIEN, GIVE ALIEN REGISTRATION NUMBER AND LAST ADDRESS FURNISHED TO IMMIGRATION AND NATURALIZATION SERVICE (INS) | d. DATE/PORT OF ENTRY INTO THE U.S (If applicable)

24. EDUCATION (List all high schools and colleges attended. If none attended, show last school attended.)

a. FROM (YY/MM)	b. TO (YY/MM)	c. NAME OF SCHOOL	d. LOCATION	e. GRADUATE	
				YES	NO

25. RESIDENCES (List all for the last five years or since 13th birthday, whichever is shorter.)

a. FROM (YY/MM)	b. TO (YY/MM)	c. STREET ADDRESS	d. CITY	e. STATE	f. ZIP CODE
	PRESENT				



26. EMPLOYMENT (Show all periods of employment and unemployment during the last five years.)

a. FROM (YY/MM)	b. TO (YY/MM)	c. NAME OF EMPLOYER	d. ADDRESS (Include Zip Code)	e. NAME OF IMMEDIATE SUPERVISOR	f. JOB TITLE
	PRESENT				

27. RELATIVES

a. NAME (Last, First, Middle Initial)	b. DEPN		c. DATE OF BIRTH (YY/MM/DD)	d. PLACE OF BIRTH	e. PRESENT ADDRESS	f. CITIZENSHIP
	YES	NO				
FATHER						
MOTHER (Maiden Name)						
SPOUSE (Maiden Name, if applicable)						
CHILDREN						

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Appendix D to opinion of ALITO, J.

NAME	SOCIAL SECURITY NUMBER		
		YES	NO
28. Are you now or have you ever been in any regular or reserve branch of the Armed Forces or in the Army National Guard or the Air National Guard? *(Give your recruiter the appropriate DD Form 214 and/or DD Form 215 or NGB Form 22 for review.)*			
29. Are you now or have you ever been divorced or legally separated? If "YES," enter in item 39, "REMARKS," the date, place and court which granted divorce or legal separation			
30. Is any court order or judgment in effect that directs you to provide support for children or alimony? If "YES," enter in item 39, "REMARKS," the date, place, and court which granted alimony or support including orders resulting from paternity suits			
31. Have you ever been arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, regardless of whether the citation was dropped or dismissed or you were found not guilty? Include all courts-martial or non-judicial punishment while in military service. If "YES," enter details in item 35			
32. As a result of being arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, have you ever been convicted, fined by or forfeited bond to a Federal, State or other judicial authority or adjudicated a youthful offender or juvenile delinquent (regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record); or have you been released from parole, probation, juvenile supervision or given a suspended sentence or relieved of charges pending on condition that you apply for or enlist in the United States Armed Forces? If "YES," enter details in item 35			
33. Have you ever been detained, held in, or served time in any jail or prison, reform or industrial school, or a juvenile facility or institution under the jurisdiction of any city, state, Federal or foreign country? If "YES," enter details in item 35			
34. Have you ever been a ward, or are you now under suspended sentence, parole, or probation or awaiting any action on criminal/civil charges against you? If "YES," enter details in item 35			

35. **LAW VIOLATIONS.** Explain below "YES" answers given in items 31 through 34 above (include all incidents with law enforcement authorities even if the citation or charge was dropped or dismissed or you were found not guilty or you have been told by recruiting personnel or anyone else that the incident was not important enough to list.)

a. DATE (YY/MM/DD)	b. NATURE OF OFFENSE OR VIOLATION	c. PLACE OF OFFENSE	d. NAME AND LOCATION OF COURT	e. PENALTY IMPOSED OR OTHER DISPOSITION IN EACH CASE

36. CHARACTER AND SOCIAL ADJUSTMENT: If your answer to every question is truthfully "NO," indicate so in the appropriate space. If your answer is "YES," indicate so in the appropriate space and give details in Item 39, "REMARKS." A "YES" answer will not necessarily disqualify you for enlistment; it will depend on the circumstances surrounding the situation.

	YES	NO
a. Questions (1), (2), and (3) below concern possession, supply, use without a prescription of marijuana, narcotics, LSD or other dangerous drugs. A "Yes" answer to (3) has no bearing on your eligibility to enlist or be commissioned but is essential to accurate job classification. Additional screening will occur during basic training or officer training school		
(1) Have you ever used narcotics, LSD or other dangerous drugs?		
(2) Have you ever been a supplier of narcotics, LSD or other dangerous drugs or marijuana?		
(3) Have you used marijuana at any time in the past six months?		
b. Has your use of drugs or alcoholic beverages (such as liquor, beer, wine), ever resulted in your loss of a job, arrest by police, or treatment or alcoholism?		
Are you a homosexual or a bisexual? ("Homosexual" is defined as: sexual desire or behavior directed at a person(s) of one's own sex. "Bisexual" is defined as: a person sexually responsive to both sexes.)		
Do you intend to engage in homosexual acts (sexual relations with another person of the same sex)?		
c. Are you a conscientious objector? That is, do you have, or have you ever had, a firm, fixed, and sincere objection to participation in war in any form or to the bearing of arms because of religious training or belief?		
f. Have you ever been rejected for enlistment, reenlistment, or induction by any branch of the Armed Forces of the United States?		
g. Are you now, or have you ever been, a deserter from any branch of the Armed Forces of the United States?		
h. Are you now, or have you ever been, a member of the Communist Party or any Communist organization? Are you now, or have you ever been, affiliated with any organization, association, movement, group or combination of persons which advocates the overthrow of our constitutional form of government or which has adopted the policy of advocating the commission of acts of violence to deny other persons their rights under the Constitution of the United States or which seeks to alter the form of government of the United States by unconstitutional means? (If "YES," give details in Item 39, "REMARKS.")		

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Appendix D to opinion of ALITO, J.

NAME	SOCIAL SECURITY NUMBER

37. OTHER BACKGROUND DATA

		YES	NO
a.	Have you ever traveled to, or resided in, a foreign country except as a member of the United States Armed Forces (including dependent travel) performing official duties? *(If "YES," give details in Item 39, "REMARKS.")*		
b.	Are you the only living child of your parents?		
c.	Are you now drawing, or do you have an application pending, for disability retirement pay, disability allowance, severance pay, or a pension from the government of the United States?		
d.	Have you been enrolled in ROTC, Junior ROTC, Sea Cadet Program, or have you been a member of the Civil Air Patrol? *(If "YES," enter organization and its address in Item 39, "REMARKS.")*		

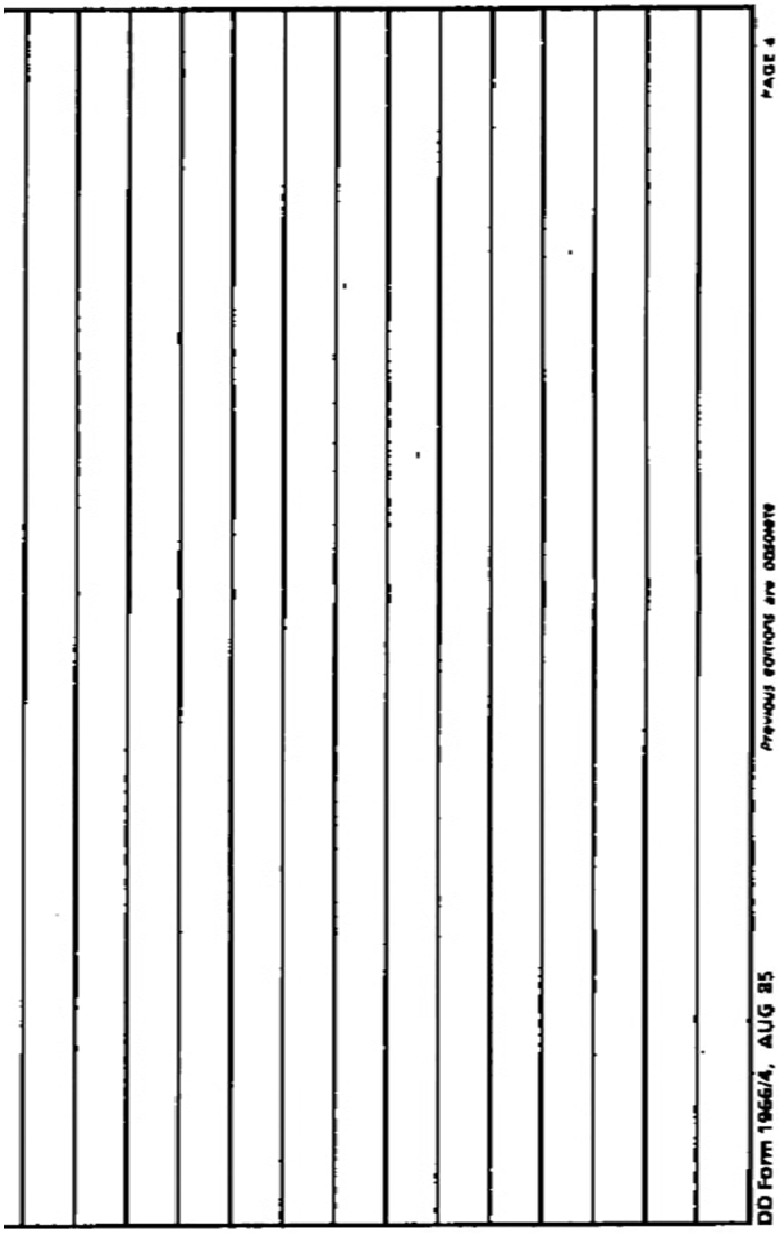
38. UNDERSTANDING

	b. APPLICANT'S INITIALS
a. I understand that an original enlistment obligates me to serve in the Armed Forces for a period of eight (8) years (active and inactive duty) unless sooner discharged.	

SECTION IV - REMARKS

39. REMARKS *(Enter item(s) being continued.)*

Appendix D to opinion of ALITO, J.



Appendix D to opinion of ALITO, J.

I fully understand that I will not be guaranteed any specific military skill or assignment to a geographic area except as known in Item 43.a above and annexes attached to my Enlistment/Reenlistment Document (DD Form 4)

44. CERTIFICATION OF REQUISITE QUALIFICATION

a. I certify that I have reviewed the information contained in this document and, to the best of my judgment and belief, the applicant fulfills all legal policy requirements for enlistment. I accept him/her for enlistment on behalf of the United States (date week of review) _____ and certify that I have not made any promises or guarantees other than those listed in Item 43 above. I further certify that service regulations governing such enlistments have been strictly complied with and any waivers required to effect applicant's enlistment have been secured and are attached to this document.

SECTION VI - RECERTIFICATION

45. RECERTIFICATION BY APPLICANT AND CORRECTION OF DATA AT THE TIME OF ACTIVE DUTY ENTRY

a. I have reviewed all information contained in this document this date. That information is still correct and true to the best of my knowledge and belief. If changes were required, the original entry has been marked "See Item 45" and the correct information is provided below:

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NAME | SOCIAL SECURITY NUMBER

NOTE
USE THIS DD FORM 1966 PAGE ONLY IF EITHER SECTION APPLIES TO THE APPLICANT'S RECORD OF MILITARY PROCESSING

SECTION VII - PARENTAL / GUARDIAN CONSENT FOR ENLISTMENT

26. PARENT / GUARDIAN STATEMENT(S) (Line out statement not applicable)

a. I/we certify that (Enter name of applicant) _____

has no other legal guardian other than me/us and I/we consent to his/her enlistment in the United States (Enter Branch of Service) _____

I/we certify that no promises or anything have been made to me/us concerning assignment to duty, training, or promotion during his/her enlistment as an inducement to me/us to sign this consent. I/we hereby authorize the Armed Forces representatives concerned to perform medical examinations, other examinations required, and to conduct records checks to determine his/her eligibility. I/we relinquish all claim to his/her service and to any wage or compensation for such service.

b. FOR ENLISTMENT IN A RESERVE COMPONENT

I/we understand that, as a member of a reserve component, he/she must serve minimum periods of active duty for training unless excused by competent authority. In the event he/she fails to fulfill the obligations of his/her reserve enlistment, he/she may be recalled to active duty as prescribed by law. I/we further understand that while he/she is in the ready reserve, he/she may be ordered to extended active duty in time of war or national emergency declared by the Congress or the President or when otherwise authorized by law.

c. PARENT

(1) TYPED OR PRINTED NAME (Last, First, Middle name) | (2) SIGNATURE | (3) DATE SIGNED (YYMMDD)

d. WITNESS

(1) TYPED OR PRINTED NAME (Last, First, Middle name) | (2) SIGNATURE | (3) DATE SIGNED (YYMMDD)

e. PARENT

(1) TYPED OR PRINTED NAME (Last, First, Middle Initial) | (2) SIGNATURE | (3) DATE SIGNED (YYYYMMDD)

f. WITNESS

(1) TYPED OR PRINTED NAME (Last, First, Middle Initial) | (2) SIGNATURE | (3) DATE SIGNED (YYYYMMDD)

47. VERIFICATION OF SINGLE SIGNATURE CONSENT

SECTION VIII - STATEMENT OF NAME FOR OFFICIAL MILITARY RECORDS

48. NAME CHANGE. If the preferred enlistment name (name given in item 2) is not the same as on your birth certificate, and it has not been changed by legal procedure prescribed by state law, and it is the same as on your social security number card, complete the following:

a. NAME AS SHOWN ON BIRTH CERTIFICATE | b. NAME AS SHOWN ON SOCIAL SECURITY NUMBER CARD

c. I hereby state that I have not changed my name through any court or other legal procedure; that I prefer to use the name of _____ by which I am known in the community as a matter of convenience and with no criminal intent. I further state that I am the same person as the person whose name is shown in item 2.

d. WITNESS

(1) TYPED OR PRINTED NAME | (2) PAY GRADE

(3) SIGNATURE

e. APPLICANT

(1) SIGNATURE | (2) DATE SIGNED (YYYYMMDD)

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SUPREME COURT OF THE UNITED STATES

Nos. 17–1618, 17–1623 and 18–107

GERALD LYNN BOSTOCK, PETITIONER
17–1618 *v.*
CLAYTON COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS
17–1623 *v.*
MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER
18–107 *v.*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 15, 2020]

JUSTICE KAVANAUGH, dissenting.

Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII

should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.

The political branches are well aware of this issue. In 2007, the U. S. House of Representatives voted 235 to 184 to prohibit employment discrimination on the basis of sexual orientation. In 2013, the U. S. Senate voted 64 to 32 in favor of a similar ban. In 2019, the House again voted 236 to 173 to outlaw employment discrimination on the basis of sexual orientation. Although both the House and Senate have voted at different times to prohibit sexual orientation discrimination, the two Houses have not yet come together with the President to enact a bill into law.

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___, ___ (2018) (slip op., at 9).

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. *Texas* v. *Johnson*, 491 U. S. 397, 420–421 (1989) (Kennedy, J., concurring). Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.[1]

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[1] Although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity.

I

Title VII makes it unlawful for employers to discriminate because of "race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1).[2] As enacted in 1964, Title VII did not prohibit other forms of employment discrimination, such as age discrimination, disability discrimination, or sexual orientation discrimination.

Over time, Congress has enacted new employment discrimination laws. In 1967, Congress passed and President Johnson signed the Age Discrimination in Employment Act. 81 Stat. 602. In 1973, Congress passed and President Nixon signed the Rehabilitation Act, which in substance prohibited disability discrimination against federal and certain other employees. 87 Stat. 355. In 1990, Congress passed and President George H. W. Bush signed the comprehensive Americans with Disabilities Act. 104 Stat. 327.

To prohibit age discrimination and disability discrimination, this Court did not unilaterally rewrite or update the

---

[2] In full, the statute provides:

"*It shall be an unlawful employment practice for an employer*—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a) (emphasis added).

As the Court today recognizes, Title VII contains an important exemption for religious organizations. §2000e–1(a); see also §2000e–2(e). The First Amendment also safeguards the employment decisions of religious employers. See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188–195 (2012). So too, the Religious Freedom Restoration Act of 1993 exempts employers from federal laws that substantially burden the exercise of religion, subject to limited exceptions. §2000bb–1.

law. Rather, Congress and the President enacted new legislation, as prescribed by the Constitution's separation of powers.

For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line.

In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway.

If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. As James Madison stated: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*." The Federalist No. 47, at 326 (citing Montesquieu). If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives.

Because judges interpret the law as written, not as they might wish it were written, the first 10 U. S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges

considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach. *Ante*, at 9–12.

For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must *also* establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of "discriminate because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

First, courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, "the good textualist is not a literalist." A. Scalia, A Matter of Interpretation 24 (1997). Or as Professor Eskridge stated: The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the *ordinary meaning* (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text is the anchor for statutory interpretation." W. Eskridge, Interpreting Law 33, 34–35 (2016) (footnote omitted). Or as Professor Manning put it, proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–2393 (2003). Or as Professor Nelson wrote: No "mainstream judge is interested solely in the literal definitions of a statute's words." Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 376 (2005). The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of "discriminate because of sex" was the same in 1964 as it is now.

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to

ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.

Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on "vehicles in the park" would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word "vehicle," in its ordinary meaning, does not encompass baby strollers.

The ordinary meaning principle is longstanding and well settled. Time and again, this Court has rejected literalism in favor of ordinary meaning. Take a few examples:

- The Court recognized that beans may be seeds "in the language of botany or natural history," but concluded that beans are not seeds "in commerce" or "in common parlance." *Robertson* v. *Salomon*, 130 U. S. 412, 414 (1889).
- The Court explained that tomatoes are literally "the fruit of a vine," but "in the common language of the people," tomatoes are vegetables. *Nix* v. *Hedden*, 149 U. S. 304, 307 (1893).
- The Court stated that the statutory term "vehicle" does not cover an aircraft: "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air . . . . But in everyday speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle* v. *United States*, 283 U. S. 25, 26 (1931).
- The Court pointed out that "this Court's interpretation of the three-judge-court statutes has frequently deviated from the path of literalism." *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 96 (1974).

- The Court refused a reading of "mineral deposits" that would include water, even if "water is a 'mineral,' in the broadest sense of that word," because it would bring about a "major . . . alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history." *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 610, 616 (1978).
- The Court declined to interpret "facilitating" a drug distribution crime in a way that would cover purchasing drugs, because the "literal sweep of 'facilitate' sits uncomfortably with common usage." *Abuelhawa* v. *United States*, 556 U. S. 816, 820 (2009).
- The Court rebuffed a literal reading of "personnel rules" that would encompass any rules that personnel must follow (as opposed to human resources rules *about* personnel), and stated that no one "using ordinary language would describe" personnel rules "in this manner." *Milner* v. *Department of Navy*, 562 U. S. 562, 578 (2011).
- The Court explained that, when construing statutory phrases such as "arising from," it avoids "uncritical literalism leading to results that no sensible person could have intended." *Jennings* v. *Rodriguez*, 583 U. S. ___, ___–___ (2018) (plurality opinion) (slip op., at 9–10) (internal quotation marks omitted).

Those cases exemplify a deeply rooted principle: When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning.

Next is a critical point of emphasis in this case. The difference between literal and ordinary meaning becomes especially important when—as in this case—judges consider *phrases* in statutes. (Recall that the shorthand version of the phrase at issue here is "discriminate because of sex.")[3]

[3] The full phrasing of the statute is provided above in footnote 2. This

Courts must heed the ordinary meaning of the *phrase as a whole*, not just the meaning of the words in the phrase. That is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase. Examples abound. An "American flag" could literally encompass a flag made in America, but in common parlance it denotes the Stars and Stripes. A "three-pointer" could literally include a field goal in football, but in common parlance, it is a shot from behind the arc in basketball. A "cold war" could literally mean any wintertime war, but in common parlance it signifies a conflict short of open warfare. A "washing machine" could literally refer to any machine used for washing any item, but in everyday speech it means a machine for washing clothes.

This Court has often emphasized the importance of sticking to the ordinary meaning *of a phrase*, rather than the meaning of words in the phrase. In *FCC* v. *AT&T Inc.*, 562 U. S. 397 (2011), for example, the Court explained:

> "AT&T's argument treats the term 'personal privacy' as simply the sum of its two words: the privacy of a person. . . . But two words together may assume a more particular meaning than those words in isolation. We understand a golden cup to be a cup made of or resembling gold. A golden boy, on the other hand, is one who is charming, lucky, and talented. A golden opportunity is one not to be missed. 'Personal' in the phrase 'personal privacy' conveys more than just 'of a person.' It suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T." *Id.,* at 406.

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opinion uses "discriminate because of sex" as shorthand for "discriminate . . . because of . . . sex." Also, the plaintiffs do not dispute that the ordinary meaning of the statutory phrase "discriminate" because of sex is the same as the statutory phrase "to fail or refuse to hire or to discharge any individual" because of sex.

Exactly right and exactly on point in this case.

Justice Scalia explained the extraordinary importance of hewing to the ordinary meaning of a phrase: "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism . . . loses sight of the forest for the trees.' The full body of a text contains implications that can alter the literal meaning of individual words." A. Scalia & B. Garner, Reading Law 356 (2012) (footnote omitted). Put another way, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes." *Helvering* v. *Gregory*, 69 F. 2d 809, 810–811 (CA2 1934) (L. Hand, J.). Judges must take care to follow ordinary meaning "when two words combine to produce a meaning that is not the mechanical composition of the two words separately." Eskridge, Interpreting Law, at 62. Dictionaries are not "always useful for determining the ordinary meaning of word clusters (like 'driving a vehicle') or phrases and clauses or entire sentences." *Id.*, at 44. And we must recognize that a phrase can cover a "dramatically smaller category than either component term." *Id.,* at 62.

If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. "Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the 'plain meaning' of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on such an approach." 883 F. 3d 100, 144, n. 7 (CA2 2018) (Lynch, J., dissenting).[4]

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[4]Another longstanding canon of statutory interpretation—the absurdity canon—similarly reflects the law's focus on ordinary meaning rather

In other words, this Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does. See *ante*, at 5–9. To reiterate Justice Scalia's caution, that approach misses the forest for the trees.

A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. For phrases as well as terms, the "linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan." Eskridge, Interpreting Law, at 81; see Scalia, A Matter of Interpretation, at 17.

Bottom line: Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

Second, in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

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than literal meaning. That canon tells courts to avoid construing a statute in a way that would lead to absurd consequences. The absurdity canon, properly understood, is "an implementation of (rather than . . . an exception to) the ordinary meaning rule." W. Eskridge, Interpreting Law 72 (2016). "What the rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sense* of the text." A. Scalia & B. Garner, Reading Law 235 (2012).

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.

As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The majority opinion acknowledges the common understanding, noting that the plaintiffs here probably did not tell their friends that they were fired because of their sex. *Ante*, at 16. That observation is clearly correct. In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.

Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how "most people" "would have understood" the text of a statute when enacted. *New Prime Inc.* v. *Oliveira*, 586 U. S. ___, ___–___ (2019) (slip op., at 6–7); see *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. ___, ___ (2017) (slip op., at 4) (using a conversation between friends to demonstrate ordinary meaning); see also *Wisconsin Central Ltd.* v. *United States*, 585 U. S. ___, ___–___ (2018) (slip op., at 2–3) (similar); *AT&T*, 562 U. S., at 403–404 (similar).

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. To treat one as a form of

the other—as the majority opinion does—misapprehends common language, human psychology, and real life. See *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339, 363 (CA7 2017) (Sykes, J., dissenting).

It also rewrites history. Seneca Falls was not Stonewall. The women's rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

Importantly, an overwhelming body of federal law reflects and reinforces the ordinary meaning and demonstrates that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. Since enacting Title VII in 1964, Congress has *never* treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination.

Many federal statutes prohibit sex discrimination, and many federal statutes also prohibit sexual orientation discrimination. But those sexual orientation statutes expressly prohibit sexual orientation discrimination in addition to expressly prohibiting sex discrimination. *Every single one.* To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.[5]

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[5] See 18 U. S. C. §249(a)(2)(A) (criminalizing violence because of "gender, sexual orientation"); 20 U. S. C. §1092(f)(1)(F)(ii) (requiring funding recipients to collect statistics on crimes motivated by the victim's "gender, . . . sexual orientation"); 34 U. S. C. §12291(b)(13)(A) (prohibiting discrimination on the basis of "sex, . . . sexual orientation"); §30501(1)

That longstanding and widespread congressional practice matters. When interpreting statutes, as the Court has often said, we "usually presume differences in language" convey "differences in meaning." *Wisconsin Central*, 585 U. S., at ___ (slip op., at 4) (internal quotation marks omitted). When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork. As Justice Scalia explained for the Court, "it is not our function" to "treat alike subjects that different Congresses have chosen to treat differently." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 101 (1991); see *id.,* at 92.

And the Court has likewise stressed that we may not read "a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept." Eskridge, Interpreting Law, at 415; see *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 357 (2013); *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 297–298 (2006); *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 341–342 (2005); *Custis* v. *United States*, 511 U. S. 485, 491–493 (1994); *West Virginia Univ. Hospitals*, 499 U. S., at 99.

(identifying violence motivated by "gender, sexual orientation" as national problem); §30503(a)(1)(C) (authorizing Attorney General to assist state, local, and tribal investigations of crimes motivated by the victim's "gender, sexual orientation"); §§41305(b)(1), (3) (requiring Attorney General to acquire data on crimes motivated by "gender . . . , sexual orientation," but disclaiming any cause of action including one "based on discrimination due to sexual orientation"); 42 U. S. C. §294e–1(b)(2) (conditioning funding on institution's inclusion of persons of "different genders and sexual orientations"); see also United States Sentencing Commission, Guidelines Manual §3A1.1(a) (Nov. 2018) (authorizing increased offense level if the crime was motivated by the victim's "gender . . . or sexual orientation"); 2E Guide to Judiciary Policy §320 (2019) (prohibiting judicial discrimination because of "sex, . . . sexual orientation").

So it is here. As demonstrated by all of the statutes covering sexual orientation discrimination, Congress knows how to prohibit sexual orientation discrimination. So courts should not read that specific concept into the general words "discriminate because of sex." We cannot close our eyes to the indisputable fact that Congress—for several decades in a large number of statutes—has identified sex discrimination and sexual orientation discrimination as two distinct categories.

Where possible, we also strive to interpret statutes so as not to create undue surplusage. It is not uncommon to find some scattered redundancies in statutes. But reading sex discrimination to encompass sexual orientation discrimination would cast aside as surplusage the numerous references to sexual orientation discrimination sprinkled throughout the U. S. Code in laws enacted over the last 25 years.

In short, an extensive body of federal law both reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

The story is the same with bills proposed in Congress. Since the 1970s, Members of Congress have introduced many bills to prohibit sexual orientation discrimination in the workplace. Until very recently, all of those bills would have expressly established sexual orientation as a separately proscribed category of discrimination. The bills did not define sex discrimination to encompass sexual orientation discrimination.[6]

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[6] See, *e.g.*, H. R. 14752, 93d Cong., 2d Sess., §§6, 11 (1974) (amending Title VII "by adding after the word 'sex'" the words "'sexual orientation,'" defined as "choice of sexual partner according to gender"); H. R. 451, 95th Cong., 1st Sess., §§6, 11 (1977) ("adding after the word 'sex,' . . . 'affectional or sexual preference,'" defined as "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such

The proposed bills are telling not because they are relevant to congressional intent regarding Title VII. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 186–188 (1994). Rather, the proposed bills are telling because they, like the enacted laws, further demonstrate the widespread usage of the English language in the United States: Sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

Presidential Executive Orders reflect that same common understanding. In 1967, President Johnson signed an Executive Order prohibiting sex discrimination in federal employment. In 1969, President Nixon issued a new order that did the same. Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.); Exec. Order No. 11478, *id.,* at 803. In 1998, President Clinton charted a new path and signed an Executive Order prohibiting sexual orientation discrimination in federal employment. Exec. Order No. 13087, 3 CFR 191 (1999). The Nixon and Clinton Executive Orders remain in effect today.

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attachment"); S. 1708, 97th Cong., 1st Sess., §§1, 2 (1981) ("inserting after 'sex' . . . 'sexual orientation,'" defined as "'homosexuality, heterosexuality, and bisexuality'"); H. R. 230, 99th Cong., 1st Sess., §§4, 8 (1985) ("inserting after 'sex,' . . . 'affectional or sexual orientation,'" defined as "homosexuality, heterosexuality, and bisexuality"); S. 47, 101st Cong., 1st Sess., §§5, 9 (1989) ("inserting after 'sex,' . . . 'affectional or sexual orientation,'" defined as "homosexuality, heterosexuality, and bisexuality"); H. R. 431, 103d Cong., 1st Sess., §2 (1993) (prohibiting discrimination "on account of . . . sexual orientation" without definition); H. R. 1858, 105th Cong., 1st Sess., §§3, 4 (1997) (prohibiting discrimination "on the basis of sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H. R. 2692, 107th Cong., 1st Sess., §§3, 4 (2001) (prohibiting discrimination "because of . . . sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H. R. 2015, 110th Cong., 1st Sess., §§3, 4 (2007) (prohibiting discrimination "because of . . . sexual orientation," defined as "homosexuality, heterosexuality, or bisexuality"); S. 811, 112th Cong., 1st Sess., §§3, 4 (2011) (same).

Like the relevant federal statutes, the 1998 Clinton Executive Order expressly added sexual orientation as a new, separately prohibited form of discrimination. As Judge Lynch cogently spelled out, "the Clinton Administration did not argue that the prohibition of sex discrimination in" the prior 1969 Executive Order "already banned, or henceforth would be deemed to ban, sexual orientation discrimination." 883 F. 3d, at 152, n. 22 (dissenting opinion). In short, President Clinton's 1998 Executive Order indicates that the Executive Branch, like Congress, has long understood sexual orientation discrimination to be distinct from, and not a form of, sex discrimination.

Federal regulations likewise reflect that same understanding. The Office of Personnel Management is the federal agency that administers and enforces personnel rules across the Federal Government. OPM has issued regulations that "govern . . . the employment practices of the Federal Government generally, and of individual agencies." 5 CFR §§300.101, 300.102 (2019). Like the federal statutes and the Presidential Executive Orders, those OPM regulations separately prohibit sex discrimination and sexual orientation discrimination.

The States have proceeded in the same fashion. A majority of States prohibit sexual orientation discrimination in

employment, either by legislation applying to most workers,[7] an executive order applying to public employees,[8] or

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[7] See Cal. Govt. Code Ann. §12940(a) (West 2020 Cum. Supp.) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Colo. Rev. Stat. §24–34–402(1)(a) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Conn. Gen. Stat. §46a–81c (2017) (prohibiting discrimination because of "sexual orientation"); Del. Code Ann., Tit. 19, §711 (2018 Cum. Supp.) (prohibiting discrimination because of "sex (including pregnancy), sexual orientation," etc.); D. C. Code §2–1402.11(a)(1) (2019 Cum. Supp.) (prohibiting discrimination based on "sex, . . . sexual orientation," etc.); Haw. Rev. Stat. §378–2(a)(1)(A) (2018 Cum. Supp.) (prohibiting discrimination because of "sex[,] . . . sexual orientation," etc.); Ill. Comp. Stat., ch. 775, §§5/1–103(Q), 5/2–102(A) (West 2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Iowa Code §216.6(1)(a) (2018) (prohibiting discrimination because of "sex, sexual orientation," etc.); Me. Rev. Stat. Ann., Tit. 5, §4572(1)(A) (2013) (prohibiting discrimination because of "sex, sexual orientation," etc.); Md. State Govt. Code Ann. §20–606(a)(1)(i) (Supp. 2019) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Mass. Gen. Laws, ch. 151B, §4 (2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Minn. Stat. §363A.08(2) (2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Nev. Rev. Stat. §613.330(1) (2017) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. H. Rev. Stat. Ann. §354–A:7(I) (2018 Cum. Supp.) (prohibiting discrimination because of "sex," "sexual orientation," etc.); N. J. Stat. Ann. §10:5–12(a) (West Supp. 2019) (prohibiting discrimination because of "sexual orientation, . . . sex," etc.); N. M. Stat. Ann. §28–1–7(A) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. Y. Exec. Law Ann. §296(1)(a) (West Supp. 2020) (prohibiting discrimination because of "sexual orientation, . . . sex," etc.); Ore. Rev. Stat. §659A.030(1) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); R. I. Gen. Laws §28–5–7(1) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Utah Code §34A–5–106(1) (2019) (prohibiting discrimination because of "sex; . . . sexual orientation," etc.); Vt. Stat. Ann., Tit. 21, §495(a)(1) (2019 Cum. Supp.) (prohibiting discrimination because of "sex, sexual orientation," etc.); Wash. Rev. Code §49.60.180 (2008) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.).

[8] See, *e.g.,* Alaska Admin. Order No. 195 (2002) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Ariz. Exec. Order No. 2003–22 (2003) (prohibiting public-employment discrimination because of "sexual orientation"); Cal. Exec. Order No. B–

both. Almost every state statute or executive order proscribing sexual orientation discrimination expressly prohibits sexual orientation discrimination separately from the State's ban on sex discrimination.

54–79 (1979) (prohibiting public-employment discrimination because of "sexual preference"); Colo. Exec. Order (Dec. 10, 1990) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Del. Exec. Order No. 8 (2009) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Ind. Governor's Pol'y Statement (2018) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Kan. Exec. Order No. 19–02 (2019) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Ky. Exec. Order No. 2008–473 (2008) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Mass. Exec. Order No. 526 (2011) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Minn. Exec. Order No. 86–14 (1986) (prohibiting public-employment discrimination because of "sexual orientation"); Mo. Exec. Order No. 10–24 (2010) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Mont. Exec. Order No. 04–2016 (2016) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); N. H. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "sex, sexual orientation," etc.); N. J. Exec. Order No. 39 (1991) (prohibiting public-employment discrimination because of "sexual orientation"); N. C. Exec. Order No. 24 (2017) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Ohio Exec. Order No. 2019–05D (2019) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Ore. Exec. Order No. 19–08 (2019) (prohibiting public-employment discrimination because of "sexual orientation"); Pa. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); R. I. Exec. Order No. 93–1 (1993) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Va. Exec. Order No. 1 (2018) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Wis. Exec. Order No. 1 (2019) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); cf. Wis. Stat. §§111.36(1)(d)(1), 111.321 (2016) (prohibiting employment discrimination because of sex, defined as including discrimination because of "sexual orientation"); Mich. Exec. Directive No. 2019–9 (2019) (prohibiting public-employment discrimination because of "sex," defined as including "sexual orientation").

That common usage in the States underscores that sexual orientation discrimination is commonly understood as a legal concept distinct from sex discrimination.

And it is the common understanding in this Court as well. Since 1971, the Court has employed rigorous or heightened constitutional scrutiny of laws that classify on the basis of sex. See *United States* v. *Virginia*, 518 U. S. 515, 531–533 (1996); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136–137 (1994); *Craig* v. *Boren*, 429 U. S. 190, 197–199 (1976); *Frontiero* v. *Richardson*, 411 U. S. 677, 682–684 (1973) (plurality opinion); *Reed* v. *Reed*, 404 U. S. 71, 75–77 (1971). Over the last several decades, the Court has also decided many cases involving sexual orientation. But in those cases, the Court never suggested that sexual orientation discrimination is just a form of sex discrimination. All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause. See *Bowers* v. *Hardwick*, 478 U. S. 186 (1986); *Romer* v. *Evans*, 517 U. S. 620 (1996); *Lawrence* v. *Texas*, 539 U. S. 558 (2003); *United States* v. *Windsor*, 570 U. S. 744 (2013); *Obergefell* v. *Hodges*, 576 U. S. 644 (2015).

Did the Court in all of those sexual orientation cases just miss that obvious answer—and overlook the fact that sexual orientation discrimination is actually a form of sex discrimination? That seems implausible. Nineteen Justices have participated in those cases. Not a single Justice stated or even hinted that sexual orientation discrimination was just a form of sex discrimination and therefore entitled to the same heightened scrutiny under the Equal Protection Clause. The opinions in those five cases contain no trace of such reasoning. That is presumably because everyone on this Court, too, has long understood that sexual orientation

discrimination is distinct from, and not a form of, sex discrimination.

In sum, all of the usual indicators of ordinary meaning—common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts.

Judge Sykes summarized the law and language this way: "To a fluent speaker of the English language—then and now—. . . discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here." *Hively*, 853 F. 3d, at 363 (dissenting opinion).

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory interpretation. And the second contradicts the widespread ordinary use of the English language in America.

II

Until the last few years, every U. S. Court of Appeals to address this question concluded that Title VII does not prohibit discrimination because of sexual orientation. As noted above, in the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out of 30

judges.[9]

The unanimity of those 30 federal judges shows that the question as a matter of law, as compared to as a matter of policy, was not deemed close. Those 30 judges realized a seemingly obvious point: Title VII is not a general grant of authority for judges to fashion an evolving common law of equal treatment in the workplace. Rather, Title VII identifies certain specific categories of prohibited discrimination. And under the separation of powers, Congress—not the courts—possesses the authority to amend or update the law, as Congress has done with age discrimination and disability discrimination, for example.

So what changed from the situation only a few years ago when 30 out of 30 federal judges had agreed on this question? Not the text of Title VII. The law has not changed. Rather, the judges' decisions have evolved.

To be sure, the majority opinion today does not openly profess that it is judicially updating or amending Title VII. Cf. *Hively*, 853 F. 3d, at 357 (Posner, J., concurring). But the majority opinion achieves the same outcome by seizing on literal meaning and overlooking the ordinary meaning of the phrase "discriminate because of sex." Although the majority opinion acknowledges that the meaning of a phrase and the meaning of a phrase's individual words *could* differ, it dismisses phrasal meaning for purposes of this case. The majority opinion repeatedly seizes on the meaning of the

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[9] See *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 258–259 (CA1 1999); *Simonton* v. *Runyon*, 232 F. 3d 33, 36 (CA2 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F. 3d 257, 261 (CA3 2001); *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F. 3d 138, 143 (CA4 1996); *Blum* v. *Gulf Oil Corp.*, 597 F. 2d 936, 938 (CA5 1979) (*per curiam*); *Ruth* v. *Children's Medical Center*, 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1084–1085 (CA7 1984); *Williamson* v. *A. G. Edwards & Sons, Inc.*, 876 F. 2d 69, 70 (CA8 1989) (*per curiam*); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F. 2d 327, 329–330 (CA9 1979); *Medina* v. *Income Support Div., N. M.*, 413 F. 3d 1131, 1135 (CA10 2005).

statute's individual terms, mechanically puts them back together, and generates an interpretation of the phrase "discriminate because of sex" that is literal. See *ante*, at 5–9, 17, 24–26. But to reiterate, that approach to statutory interpretation is fundamentally flawed. Bedrock principles of statutory interpretation dictate that we look to ordinary meaning, not literal meaning, and that we likewise adhere to the ordinary meaning of phrases, not just the meaning of words in a phrase. And the ordinary meaning of the phrase "discriminate because of sex" does not encompass sexual orientation discrimination.

The majority opinion deflects that critique by saying that courts should base their interpretation of statutes on the text as written, not on the legislators' subjective intentions. *Ante*, at 20, 23–30. Of course that is true. No one disagrees. It is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998).

But in my respectful view, the majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions. To briefly explain: In the early years after Title VII was enacted, some may have wondered whether Title VII's prohibition on sex discrimination protected male employees. After all, covering male employees may not have been the intent of some who voted for the statute. Nonetheless, discrimination on the basis of sex against women and discrimination on the basis of sex against men are both understood as discrimination because of sex (back in 1964 and now) and are therefore encompassed within Title VII. Cf. *id.,* at 78–79; see *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 682–685 (1983). So too, regardless of what the intentions of the drafters might have been, the ordinary meaning of the law demonstrates that harassing an employee because of her sex is discriminating against the employee because of her sex with respect

to the "terms, conditions, or privileges of employment," as this Court rightly concluded. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986) (internal quotation marks omitted).[10]

By contrast, this case involves sexual orientation discrimination, which has long and widely been understood as distinct from, and not a form of, sex discrimination. Until now, federal law has always reflected that common usage and recognized that distinction between sex discrimination and sexual orientation discrimination. To fire one employee because she is a woman and another employee because he is gay implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions.

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[10] An *amicus* brief supporting the plaintiffs suggests that the plaintiffs' interpretive approach is supported by the interpretive approach employed by the Court in its landmark decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). See Brief for Anti-Discrimination Scholars as *Amici Curiae* 4. That suggestion is incorrect. *Brown* is a correct decision as a matter of original public meaning. There were two analytical components of *Brown*. One issue was the meaning of "equal protection." The Court determined that black Americans—like all Americans—have an *individual* equal protection right against state discrimination on the basis of race. (That point is also directly made in *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500 (1954).) Separate but equal is not equal. The other issue was whether that racial nondiscrimination principle applied to public schools, even though public schools did not exist in any comparable form in 1868. The answer was yes. The Court applied the equal protection principle to public schools in the same way that the Court applies, for example, the First Amendment to the Internet and the Fourth Amendment to cars.

This case raises the same kind of inquiry as the *first* question in *Brown*. There, the question was what equal protection meant. Here, the question is what "discriminate because of sex" means. If this case raised the question whether the sex discrimination principle in Title VII applied to some category of employers unknown in 1964, such as to social media companies, it might be a case in *Brown*'s second category, akin to the question whether the racial nondiscrimination principle applied to public schools. But that is not this case.

To be sure, as Judge Lynch appropriately recognized, it is "understandable" that those seeking legal protection for gay people "search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice." 883 F. 3d, at 162 (dissenting opinion).

The majority opinion insists that it is not rewriting or updating Title VII, but instead is just humbly reading the text of the statute as written. But that assertion is tough to accept. Most everyone familiar with the use of the English language in America understands that the ordinary meaning of sexual orientation discrimination is distinct from the ordinary meaning of sex discrimination. Federal law distinguishes the two. State law distinguishes the two. This Court's cases distinguish the two. Statistics on discrimination distinguish the two. History distinguishes the two. Psychology distinguishes the two. Sociology distinguishes the two. Human resources departments all over America distinguish the two. Sports leagues distinguish the two. Political groups distinguish the two. Advocacy groups distinguish the two. Common parlance distinguishes the two. Common sense distinguishes the two.

As a result, many Americans will not buy the novel interpretation unearthed and advanced by the Court today. Many will no doubt believe that the Court has unilaterally rewritten American vocabulary and American law—a "statutory amendment courtesy of unelected judges." *Hively*, 853 F. 3d, at 360 (Sykes, J., dissenting). Some will surmise that the Court succumbed to "the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others."

Furman v. *Georgia*, 408 U. S. 238, 467 (1972) (Rehnquist, J., dissenting).

I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

* * *

In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand. After all, even back in 2007—a veritable lifetime ago in American attitudes about sexual orientation—the House voted 235 to 184 to prohibit sexual orientation discrimination in employment. H. R. 3685, 110th Cong., 1st Sess. In 2013, the Senate overwhelmingly approved a similar bill, 64 to 32. S. 815, 113th Cong., 1st Sess. In 2019, the House voted 236 to 173 to amend Title VII to prohibit employment discrimination on the basis of sexual orientation. H. R. 5, 116th Cong., 1st Sess. It was therefore easy to envision a day, likely just in the next few years, when the House and Senate took historic votes on a bill that would prohibit employment discrimination on the basis of sexual orientation. It was easy to picture a massive and celebratory Presidential signing ceremony in the East Room or on the South Lawn.

It is true that meaningful legislative action takes time—often too much time, especially in the unwieldy morass on

Capitol Hill. But the Constitution does not put the Legislative Branch in the "position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). The proper role of the Judiciary in statutory interpretation cases is "to apply, not amend, the work of the People's representatives," even when the judges might think that "Congress should reenter the field and alter the judgments it made in the past." *Henson*, 582 U. S., at ___–___ (slip op., at 10–11).

Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that way. The Court's ruling "comes at a great cost to representative self-government." *Hively*, 853 F. 3d, at 360 (Sykes, J., dissenting). And the implications of this Court's usurpation of the legislative process will likely reverberate in unpredictable ways for years to come.

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the

Court's judgment.

No. 23-1078 (L) (2:21-cv-00316)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

B.P.J., by her next friend and mother; HEATHER JACKSON,

Plaintiff - Appellant,

versus

WEST VIRGINIA STATE BOARD OF EDUCATION; HARRISON COUNTY BOARD OF EDUCATION; WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION; W. CLAYTON BURCH, in his official capacity as State Superintendent; DORA STUTLER, in her official capacity as Harrison County Superintendent,

Defendants - Appellees,

and

THE STATE OF WEST VIRGINIA; LAINEY ARMISTEAD,

Intervenors - Appellees.

On Appeal from the United States District Court for the Southern District of West Virginia (Charleston Division)
The Honorable Joseph R. Goodwin, District Judge
District Court Case No. 2:21-cv-00316

BRIEF OF PLAINTIFF-APPELLANT B.P.J., BY HER NEXT FRIEND AND MOTHER, HEATHER JACKSON

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1078 Caption: B.P.J. v. West Virginia State Board of Education, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

B.P.J., by her next friend and mother; HEATHER JACKSON
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Kathleen R. Hartnett Date: 3/27/2023

Counsel for: B.P.J.

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STATEMENT OF JURISDICTION

This action arises under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*; the Equal Protection Clause of the United States Constitution; and 42 U.S.C. § 1983. The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction under 28 U.S.C. § 1291. This is an appeal from a final judgment. On January 5, 2023, the District Court denied summary judgment for Plaintiff-Appellant/Cross-Appellee B.P.J. and Defendant-Appellee/Cross-Appellant West Virginia Secondary School Activities Commission ("WVSSAC"), and granted summary judgment for Defendants-Appellees and Intervenor-Appellee. (JA4256.) B.P.J. filed a timely notice of appeal on January 23, 2023. (JA4289.) WVSSAC filed a notice of appeal on February 1, 2023. (JA4291.)

ISSUES PRESENTED FOR REVIEW

1. Does H.B. 3293's categorical ban on transgender girls playing on girls' school sports teams violate the Equal Protection Clause as applied to B.P.J.?

2. Does H.B. 3293's categorical ban on transgender girls playing on girls' school sports teams violate Title IX as applied to B.P.J.?

INTRODUCTION

Plaintiff-Appellant B.P.J. is a 12-year-old girl from West Virginia who is transgender.[1] B.P.J. has known she is a girl for as long as she can remember. She has gone by the name B. and lived as a girl in all aspects of her life for years. Her elementary and middle schools created gender support plans to ensure she was fully recognized and supported as a girl at school, and the State of West Virginia amended her birth certificate to reflect her name as B. and her "sex" as "female." She receives puberty-delaying treatment as well as estrogen hormone therapy, ensuring that she has not and will not go through endogenous puberty. Like many kids her age, B.P.J. loves to run and play on sports teams with her friends. She relishes the peer relationships that team sports have allowed her to build and the personal satisfaction that comes from trying her best.

Two years ago, B.P.J. was preparing to start middle school and looking forward to trying out for the girls' cross-country team. But in April 2021, West Virginia enacted H.B. 3293, a law that categorically bars all transgender girls from playing on all school-sponsored girls' sports teams from middle school through college based solely on the fact that they were assigned a male sex at birth. The law was intentionally drafted in the most sweeping terms possible: its prohibition applies

[1] *See generally Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594-97 (4th Cir. 2020) (providing background information and terminology related to people who are transgender).

to every school-sponsored sport at every level, including club and intramural activities; and it applies to every girl who is transgender, regardless of whether, like B.P.J., they have never gone through endogenous puberty and therefore have never experienced any of the physiological changes consistent with puberty typical of cisgender boys (and instead have circulating testosterone levels typical of cisgender girls).

H.B. 3293 did not create sex-separated school sports teams. West Virginia has long divided its school sports teams into girls' teams and boys' teams. Rather, H.B. 3293 newly required that sex separation be based exclusively on "reproductive biology and genetics at birth," W. Va. Code § 18-2-25d(b)(1), so as to exclude transgender girls from girls' teams. Legislators openly acknowledged that this was the purpose of the law, even as they also candidly admitted that they lacked any evidence that transgender girls had ever sought to play sports in West Virginia, let alone that their participation was harming anyone.

B.P.J. was devastated at the prospect of not being able to play on her middle school's sports teams just because she is transgender. She brought an as-applied challenge to the law so she could have the opportunity to play sports just like every other girl at her school. In July 2021, the District Court, applying this Court's precedents, including *Grimm*, agreed that B.P.J. was likely to succeed on her claims under Title IX and the Equal Protection Clause and entered a preliminary injunction

preventing H.B. 3293 from being enforced against B.P.J—and only B.P.J. *See* Att'y. Gen. Morrisey Briefs Media Regarding Major Development in Transgender Sports Law Case at 1:53-2:05 (Mar. 9, 2023), https:/vimeo.com/805689352 (conceding that the preliminary injunction is "very narrow").

Because of the preliminary injunction, B.P.J. has been able to participate on the girls' cross-country and track teams for three, going on four, seasons—all with the support of her family, school, coaches, and teammates. (JA0483; JA0900; JA0905; JA3108; JA4285-4286.) Despite regularly finishing near the back of the pack, B.P.J. has experienced the benefits of school sports: her mother has "never seen [B.P.J.] happier" than when she "pick[s] her up from practices and takes her to meets" (JA4286), and B.P.J. has considered the past two years "the best of [her] life." (JA4281; *see also* JA0900.)

In January 2023, the District Court abruptly reversed course, entering summary judgment against B.P.J. and dissolving the preliminary injunction just as B.P.J. was gearing up for spring track-and-field at her middle school. (JA4256.) The District Court ruled against B.P.J. without ever having held a hearing, without resolving any of the pending *Daubert* and *in limine* motions, and largely without reference to the voluminous record amassed during discovery. Its decision is replete with analytic errors and stands in direct conflict with *Grimm* and other controlling precedent. In particular, instead of analyzing H.B. 3293 as a law that discriminates

specifically against transgender girls and therefore focusing on whether the law's specific exclusion of transgender girls is valid, the District Court analyzed H.B. 3293 as a law that discriminates against both transgender girls and cisgender boys as an undifferentiated group, and asked more generally whether separating that entire group from girls' sports teams is valid. The District Court compounded its error by refusing to consider B.P.J.'s as-applied challenge even though *Grimm* itself conducted an as-applied analysis.

When B.P.J.'s mother told B.P.J. about the summary judgment ruling, B.P.J. was crushed. She ran upstairs and "cried in [her] bed the whole night," because she "was terrified about not being able to continue doing the thing that she loves with her best friends." (JA4282; JA4287.) B.P.J. requested a stay pending appeal from the District Court, which denied the request but nonetheless emphasized that "not one child has been or is likely to be harmed by B.P.J.'s continued participation on her middle school's cross country and track teams." (JA4298.) This Court then granted B.P.J. an injunction pending appeal and stayed the District Court's dissolution of the preliminary injunction. (ECF No. 50.) Defendants (save the County Board of Education and Superintendent Stutler) filed an emergency application with the Supreme Court, seeking vacatur of this Court's interim order. *See West Virginia v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023). That application remains pending as of the time this brief was finalized.

H.B. 3293 violates both equal protection and Title IX as applied to B.P.J. This Court should reverse the District Court's deeply flawed summary decision, grant summary judgment to B.P.J., and remand with instructions to convert the preliminary injunction into a permanent one. Alternatively, the Court should vacate and remand for the District Court to evaluate B.P.J.'s as-applied claims under the proper standard.

STATEMENT OF THE CASE

I. Factual Background

A. B.P.J. Is A Middle School Girl Who Is Transgender.

B.P.J. is a 12-year-old girl who lives in Harrison County, West Virginia, and attends Bridgeport Middle School. This is B.P.J. and her mother (and next friend), Heather Jackson:

Additional photos of B.P.J. are included at JA0894.

B.P.J. is transgender. Despite being assigned a male sex at birth, she has known from a very young age that she is a girl. She has been diagnosed with gender

dysphoria, and has lived as a girl in all aspects of her life for many years, with the full support of her family. Between third and fourth grade, B.P.J. socially transitioned to living as a girl at school. (JA0876-0877; JA0898; JA0966; JA3086-JA3087; JA4256-4257.)

B.P.J.'s elementary and middle schools have acknowledged that B.P.J. is a girl and support her. (JA0482; JA0883; JA0888; JA1056- JA1057; JA3086-JA3087.) Her elementary school created a gender support plan designed to help "account[]" for and "support[]" B.P.J.'s "authentic gender" at school. (JA0482; JA0883; JA0898; JA3086.) Under this plan, school staff members were informed that B.P.J. is female; were instructed to refer to her with her new name and female pronouns; and were given tools to support B.P.J. should she face problems at school because she is transgender. (JA0883; JA3086.) B.P.J.'s middle school created a similar plan, which provided that all teachers, students, and multiple administrators and county staff would be made aware of her gender identity. (JA0888; JA3087.)

The State of West Virginia, contrary to its position in this litigation, likewise has acknowledged that B.P.J. is a girl. In summer 2022, West Virginia amended her birth certificate to recognize her name as B. and "sex" as "female" (JA4647),[2] after

[2] This Court may take judicial notice of B.P.J.'s amended birth certificate as a public record. *See Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 261 n.12 (3d Cir. 2012) (taking judicial notice of amended birth certificates); *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); Fed. R. Evid. 201(b).

a West Virginia court found that "conforming" her name "with her gender identity" would enable B.P.J. to "feel more accepted by the community as a whole" and enjoy "a safe and happy mental state." (JA4242.)

In June 2020, at the first signs of puberty—known as the "Tanner 2" stage of pubertal development—B.P.J. began receiving puberty-delaying (or "blocking") treatment, in accordance with clinical guidelines for treating gender dysphoria. (JA0877; JA4281.) Puberty-delaying treatment pauses endogenous puberty at whatever stage it is at when the treatment begins. (JA1742; JA3088.) When administered to transgender girls at the beginning of the "Tanner 2" stage, puberty-delaying medication prevents transgender girls from experiencing levels of circulating testosterone above what is typical for cisgender girls and women. (JA1742- JA1743; JA2104; JA2147; JA3088.)

In June 2022, B.P.J. was prescribed estradiol as gender-affirming hormone therapy. (JA3088; JA4281; JA4284-4285.) As a result, B.P.J. has not and will not go through endogenous puberty. (JA4257.) Instead, her levels of circulating testosterone will stay in a typical female range, and she will develop physiological characteristics consistent with a typical female hormonal puberty. (JA1743; JA2147; JA3088.)

B. B.P.J. Loves Sports And Wants The Chance To Play On Girls' Teams At School.

Like many young people, B.P.J. loves sports and participating on teams. School-sponsored athletics offer a range of benefits for children and young adults, including creating camaraderie and teaching teamwork, which are advanced when all athletes have the opportunity to play the sport they love. (JA0878; JA0898-0899; JA0998; JA3089-3090.) In elementary school, for example, B.P.J. participated on a recreational cheerleading team with other girls, an experience that helped her learn about responsibility, trust, and teambuilding. (JA0059; JA0878; JA0898-0899; JA0998; JA3089.)

B.P.J. has always especially liked running. (JA0878-0879; JA0898-0899; JA3089; JA3107-3108; JA4281.) She grew up running and watching her older brothers and mother run competitively and as part of a team. (JA0878-0879; JA0898; JA3089.) B.P.J. hoped that when she began middle school, she would have a chance to run on the girls' cross-country team that fall. (JA0060; JA0070.) But in April 2021, West Virginia enacted H.B. 3293 into law to prevent transgender girls from playing on girls' sports teams. The next month, B.P.J. and her mother met with the principal at Bridgeport Middle School to discuss the gender support plan for B.P.J., and the principal explained that B.P.J. would not be allowed to participate on the girls' cross-country team because of H.B. 3293. (JA0879; JA1434-1435; JA3103; JA4257.) "Knowing that [she] could not try out for the girls' cross-country and track

teams just because [she is] a transgender girl was horrible and made [B.P.J.] feel angry and sad." (JA0898.) As B.P.J. has explained: "I just want the opportunity to participate in school sports like any other girl." (JA3103-3104; JA4282.)

Because of the District Court's July 2021 as-applied preliminary injunction (detailed further below), B.P.J. was able to participate on the girls' cross-country and track-and-field teams at her middle school for three seasons over the last year-and-a-half. (JA0899; JA4285-4286.) She has played on these teams with the full support of her coaches and teammates (JA0899; JA4286.) B.P.J. regularly finishes near the back of the pack, and she was not fast enough to make the girls' running events in spring 2022, leading her to participate in girls' discus and shotput instead. (JA4285-4286 (collecting statistics of B.P.J.'s placement during events); JA0880; JA3107.) But regardless of how she places, B.P.J. loves to participate and try her best. (JA0899; JA4286.) Being on a team has allowed her to make many friends, show good sportsmanship towards her team and girls from other schools, and motivate herself and her teammates to push themselves at practices and meets. (JA0899; JA4281-4282.) If B.P.J. "had not been able to join the cross-country or track-and-field teams these last few years, [she] would have missed out on challenging [her]self with all the amazing friends [she] made and the time [they] got to spend together." (JA4281.)

This Court's stay order (ECF No. 50) allowed B.P.J. to again participate in discus and shot put when the Spring 2023 track-and-field season began in February 2023.

C. H.B. 3293's Transgender Exclusion.

Sex separation in school sports has long been the rule in West Virginia. (JA1443-1444; JA1448-1449; JA3091-3091; JA4214); W. Va. Code St. R. § 127-2-3 (3.8). Under this framework predating H.B. 3293, boys are prohibited from playing on girls' teams and girls are prohibited from playing on boys' teams if a girls' team is available (JA1443-1444; JA3091-3091); *Gregor v. W. Va. Secondary Sch. Activities Comm'n*, No. 2:20-cv-00654, 2020 WL 5997057, at *3 (S.D.W. Va. Oct. 9, 2020) (unsuccessful challenge to West Virginia policy barring a girl from playing on her school's boys' soccer team). There are very few co-ed school sports in public secondary schools; both cross-country and track-and-field are sex-separated. (JA0920; JA1448-1449; JA3091.)

Before H.B. 3293, West Virginia did not prohibit transgender students from playing on sex-separated teams consistent with their gender identity. (JA1443-1444; JA1448-1449; JA3091-3091); W. Va. Code St. R. § 127. Rather, Defendant-Appellee/Cross-Appellant WVSSAC had a policy that allowed transgender students to participate on teams consistent with their gender identity if their school allowed them to participate. (JA3091; JA4214.) Under the policy, if another school contested

the transgender student's eligibility to play, then WVSSAC would determine whether the student's participation threatened "competitive equity or the safety of teammates and opposing players." (JA3091; JA4214.) There are no known examples of this policy having been used, much less having been the source of any complaint. (JA1457-1458; JA3091.)

H.B. 3293 changed the status quo by requiring all public secondary school and college sports teams in West Virginia be "expressly designated" as either "males," "females," or "co-ed" based on "biological sex," and defined "[b]iological sex" based "solely on the individual's reproductive biology and genetics at birth." W. Va. Code § 18-2-25d(b)(1), (c)(1). Through its new definition of "biological sex," H.B. 3293 categorically bars all girls who are transgender from participating in school sports from middle school through college. Its prohibition applies to every school-sponsored sport at every level, including club and intramural activities, and to every girl who is transgender, regardless of whether they, like B.P.J., have never gone through endogenous puberty and therefore have circulating testosterone levels typical of cisgender girls.

H.B. 3293's requirement that teams be separated "based solely on the individual's reproductive biology and genetics at birth" is a stark departure not only from the prior policy in West Virginia but also from the standards of elite sporting organizations. Notably, no elite sporting organization prevents transgender girls and

women from participating if, like B.P.J., they have not gone through endogenous puberty. (JA2785; JA2797-2801; JA2805-2807.) That is because a person's sex chromosomes and reproductive anatomy alone are not useful indicators of athletic performance; indeed, they have not been used to determine participation in sex-separated elite sports for decades. (JA2096; JA3101.) Instead, medical consensus is that the largest known biological cause of average differences in athletic performance between cisgender men as a group and cisgender women as a group is their levels of circulating testosterone, which start to diverge between boys and girls beginning with puberty. (JA2096; JA2143-2144; JA2526-2527; A3101-3102.)[3] There was no evidence before the Legislature that transgender girls who receive puberty delaying treatment at the onset of puberty have average athletic performances as a group that are better than the average athletic performances of cisgender girls as a group. (JA2105-2106; JA2144-JA2145; JA2148; JA3102.)

H.B. 3293's stated purpose and only function was to overturn the WVSSAC's policy allowing participation by transgender students and, in its place, to install a regime that systematically excludes transgender girls from girls' teams. As the District Court found, "[t]he record . . . make[s] clear that, in passing the law, the

[3] For example, it has long been accepted—and Defendants do not dispute—that women with Complete Androgyn Insensitivity Syndrome ("CAIS") who have XY chromosomes but inactive testosterone receptors do not have an athletic advantage over other women simply by virtue of having XY chromosomes. (JA3101.)

legislature intended to prevent transgender girls from playing on girls' sports teams." (JA4270.) The Chief Counsel of H.B. 3293's originating committee referred to H.B. 3293 as a "[t]ransgender participation in secondary schools bill," a "[t]ransgender originating bill," and a "bill regarding transgender participation in sports." (JA3063; JA3094.) When asked how H.B. 3293 would change the status quo in West Virginia, counsel representing the bill replied that H.B. 3293 "would affect those that changed their sex after birth." (JA3094; JA0085.) The Chairman of the originating committee also described the "issue" that H.B. 3923 was designed to address as "two transgender girls" who "were allowed to compete in state track and field meetings in Connecticut." (JA0153-0154; JA3095.) And per a State Senator, "the bill" was "about transgenders." (JA0214; JA3095.)

Legislators were also clear that H.B. 3293 was the product of fear and dislike of transgender people. (JA4263-4264.) During the debate, one Senator favorably shared a constituent letter stating that the "trans movement is an attack upon womanhood." (JA0214; JA3095.) A House Delegate and co-sponsor of the bill stated that she did not "want all this mixing and matching and whatever" of transgender students with non-transgender students in "locker rooms." (JA0146.) And another House Delegate who co-sponsored the bill "liked" online comments (on his Facebook post announcing his co-sponsorship) that advocated for physical violence against girls who are transgender, compared girls who are transgender to

pigs, and called girls who are transgender by a pejorative term. (JA3068; JA3095.)

The District Court also recognized that H.B. 3293 was a "'solution' in search of a problem." (JA4264.) The District Court found that "[t]he record makes abundantly clear . . . that West Virginia had no 'problem' with transgender students playing school sports and creating unfair competition or unsafe conditions. In fact, at the time it passed the law, West Virginia had no known instance of any transgender person playing school sports." (JA4264.) Indeed, H.B. 3293's sponsors acknowledged during the legislative debate that they were not aware of any transgender athlete having competed on a secondary school or higher education sports team in West Virginia, let alone any "problem" from that participation. (JA0052; JA0054; JA3096.) The West Virginia Department of Education also provided legislative testimony that it had never received any complaints about transgender students participating in school athletics (JA3096; JA0087) and its general counsel characterized the bill as "much ado about nothing" (JA3063; JA3067; JA3097.) After signing the bill, Governor Justice admitted that he could not identify even "one example of a transgender child trying to get an unfair advantage" and stated that the issue was not "a priority" for him, as "we only have 12 kids maybe in our state that are transgender-type kids." (JA3067; JA3096-3097.) To this day, Defendants are not aware of any transgender student who wishes to participate in public school sports in West Virginia other than B.P.J. (JA0012 (ECF No. 1);

JA0413; JA3097.)

II. Procedural History

B.P.J. filed suit in May 2021, alleging that H.B. 3293's categorical exclusion of transgender girls from girls' sports violated the Equal Protection Clause and Title IX as applied to her. (JA0012 (ECF No. 1); JA0415.) As defendants, she named the West Virginia Board of Education and State Superintendent W. Clayton Burch, the Harrison County Board of Education and County Superintendent Dora Stutler, and the WVSSAC. (JA0012 (ECF No. 1); JA413.) The State of West Virginia then intervened to defend the law. (JA0015 (ECF No. 44).)

In July 2021, the District Court preliminarily enjoined Defendants from enforcing H.B. 3293 against B.P.J., concluding in a well-reasoned opinion that B.P.J. was likely to succeed on both of her claims and that the equities favored injunctive relief. (JA0439-0453.) The District Court then denied motions to dismiss filed by all Defendants except the State (JA0457-0464), which did not move to dismiss.

The District Court also granted permissive intervention to Lainey Armistead, then a college student in West Virginia. Armistead claimed that H.B. 3293 protected her from potentially having to play collegiate soccer against hypothetical women who are transgender (JA0457; JA0465), but when she was asked during her deposition whether she had had any objection to B.P.J. participating on her middle school's girls' teams, Armistead stated "I don't know." (JA1730; JA3108.)

Armistead graduated in 2022 and now lives in Florida. (JA0036 (ECF No. 353).) In light of that development, B.P.J. filed a motion asking the District Court to reconsider and revoke its grant of permissive intervention (JA0036 (ECF No. 353)), which the District Court never ruled on.

After extensive discovery, largely propounded by Armistead, the parties filed cross-motions for summary judgment. (JA0031-0032 (ECF Nos. 276, 283, 285, 286, 289.) In support of her motion for summary judgment, B.P.J. submitted evidence and expert reports confirming that H.B. 3293 did not advance any proffered state interests, including as applied to transgender girls like B.P.J. who have never experienced endogenous puberty and thus have levels of circulating testosterone akin to those of cisgender girls. (JA1742-1743; JA2104; JA2147; JA3088.) In contrast, Defendants' experts failed to identify any studies—or even anecdotal reports—finding athletic advantages in transgender girls who, like B.P.J., have received puberty-delaying medication since the onset of puberty. (JA0034 (ECF Nos. 316, 320, 324); JA2665; JA2525-2526.)

In January 2023, the District Court, in an unexplained about-face, granted summary judgment against B.P.J. and dissolved the preliminary injunction. (JA4256.) In so doing, it relied on Armistead's arguments without ever having resolved B.P.J.'s motion to reconsider and revoke her permissive intervention. The District Court also rejected B.P.J.'s claims as a matter of law without discussing—

or ruling on the admissibility of—the voluminous expert evidence submitted by both sides, each of which submitted multiple *Daubert* motions and motions *in limine*. B.P.J. timely noticed her appeal. (JA4289.)

B.P.J. sought a stay pending appeal from the District Court, which was denied. This Court then granted B.P.J. an injunction pending appeal and stayed the District Court's order dissolving its preliminary injunction. (ECF No. 50.) Defendants (save the County Board of Education and Superintendent Stutler) filed an emergency application with the Supreme Court, seeking vacatur of this Court's interim order. *See West Virginia v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023). The Supreme Court has not acted on the application as of the time this brief was finalized.

SUMMARY OF THE ARGUMENT

H.B. 3293 categorically excludes transgender girls—a tiny percentage of the population—from playing on all girls' school sports teams in West Virginia from middle school through college. The summary judgment record establishes as a matter of law that H.B. 3293 violates the Equal Protection Clause and Title IX as applied to B.P.J., a 12-year-old middle school girl who has "consistently and persistently" identified as a girl for years, *Grimm*, 972 F.3d at 619, and has not gone through (and will never go through) endogenous puberty. The District Court's holding to the contrary is deeply flawed, and its reasoning directly conflicts with *Grimm* and other binding precedent. It is also at odds with the reasoning of every

other federal court to analyze similar categorical bans. *See Hecox v. Little*, 479 F. Supp. 3d 930, 988 (D. Idaho 2020) (issuing preliminary injunction based on equal protection), *appeal filed*, No. 20-35815 (9th Cir. Sept. 17, 2020); *A.M. by E.M. v. Indianapolis Pub. Schs.*, No. 1:22-CV-01075-JMS-DLP, 2022 WL 2951430, at *14 (S.D. Ind. July 26, 2022), *appeal dismissed*, No. 22-*2332* (7th Cir. Jan. 19, 2023) (issuing preliminary injunction based on Title IX).

By its plain text, operation, and purpose, H.B. 3293 discriminates against transgender girls relative to their cisgender peers, and therefore is subject to heightened scrutiny under the Equal Protection Clause. *Grimm*, 972 F.3d at 607-10. To survive heightened scrutiny review, the State must provide an "exceedingly persuasive justification" for the law, and bears the "entire[]" "demanding" burden of showing that the specific "discriminatory means employed are substantially related to the achievement of" its proffered interests. *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 531, 533 (1996). The focus of that inquiry is on the persons against whom the law discriminates—here, transgender girls, and specifically B.P.J. *See id.* at 523-33. The District Court ran afoul of these precedents by failing to analyze H.B. 3293 as discrimination based on transgender status and by refusing to address the as-applied nature of B.P.J.'s claims. Instead, it analyzed H.B. 3293 as a law creating sex-separated sports teams, collapsed transgender girls and cisgender boys into a single group, and asked whether separating that entire group from

cisgender girls in sports is valid.

In attempting to satisfy heightened scrutiny, Defendants maintain that H.B. 3293 advances an interest in protecting cisgender girls from substantial displacement and physical harm, and Defendants seek to justify the law based on physiological characteristics that arise during male puberty. But Defendants have not satisfied their "demanding" burden under heightened scrutiny to justify the law's categorical ban on participation by transgender girls, let alone as applied to a girl like B.P.J., who has not undergone, and will never undergo, endogenous puberty and so has none of the characteristics Defendants maintain are of concern. H.B. 3293 therefore violates the Equal Protection Clause as applied to B.P.J.

Regarding B.P.J.'s as-applied Title IX claim, this Court's precedent makes clear that excluding transgender students from facilities and programs consistent with their gender identity constitutes unlawful discrimination because it treats transgender students worse than similarly situated students and harms them. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 129 (4th Cir. 2022) (en banc); *Grimm*, 972 F.3d at 617. In reaching a contrary conclusion, the District Court once again failed to properly analyze H.B. 3293's discrimination based on transgender status and failed to consider any of the circumstances specific to B.P.J. Because H.B. 3293 excludes B.P.J. from girls' school sports teams based on her transgender status, thereby harming her and treating her worse than similarly situated peers, it violates

Title IX as applied to B.P.J.

This Court should reverse the District Court's summary judgment order, grant summary judgment to B.P.J., and order the District Court to convert the preliminary injunction into a permanent injunction. Alternatively, this Court should vacate and remand for the District Court to evaluate B.P.J.'s as-applied claims under the proper standard.

STANDARD OF REVIEW

A district court's grant or denial of summary judgment is reviewed de novo. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Ret. Comm. of DAK Americas LLC v. Brewer*, 867 F.3d 471, 479 (4th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

Based on the undisputed material facts, H.B. 3293 violates the Equal Protection Clause and Title IX as applied to B.P.J. Accordingly, summary judgment should be entered for B.P.J., and the statute permanently enjoined as applied to her.

I. H.B. 3293 Violates The Equal Protection Clause As Applied To B.P.J.

By its text, operation, and design, H.B. 3293 classifies and excludes students from school sports based on their transgender status. As applied to B.P.J., that discrimination fails heightened scrutiny—or any level or scrutiny. The District Court's systemic analytic errors caused it to enter summary judgment against B.P.J. on her equal protection claim. This Court should direct entry of summary judgment in favor of B.P.J.

A. H.B. 3293 Discriminates Based On Transgender Status.

"In determining what level of scrutiny applies to a plaintiff's equal protection claim, we look to the basis of the distinction between the classes of persons." *Grimm*, 972 F.3d at 607. As the District Court correctly recognized in its preliminary injunction order (before inexplicably reversing itself at the summary judgment stage), the "conclusion that [H.B. 3293] discriminates on the basis of transgender status" is "inescapable." (JA0445.) The law's anti-transgender discrimination is clear from its text, function, and acknowledged purpose.

1. H.B. 3293 Facially Discriminates Based On Transgender Status By Explicitly Excluding Consideration of "Gender Identity."

H.B. 3293's anti-transgender discrimination is plain from the statutory text. The statute declares that "gender identity is separate and distinct from biological sex" and that "[c]lassifications based on gender identity serve no legitimate relationship to the State of West Virginia's interest in promoting equal athletic

opportunities." W. Va. Code § 18-2-25d(a)(4). To accomplish the stated goal of excluding consideration of gender identity, H.B. 3293 constrains participation on a girls' team to those with a "biological sex" of female, and newly defines "biological sex" as limited "solely" to a person's "reproductive biology and genetics at birth." W. Va. Code § 18-2-25d(b)(1). By definition, transgender people are people for whom "gender identity is separate and distinct" from their "reproductive biology and genetics at birth"; cisgender people are not encompassed or affected by H.B. 3293's distinction between the two.

Under this Court's precedent in *Grimm*, distinguishing between cisgender girls and transgender girls based on their sex assigned at birth discriminates based on transgender status. 972 F.3d at 608, 610. *Grimm* considered a school district policy stating that some students have "gender identity issues" and requiring students to use the restroom according to their "biological gender." *Id.* at 609. This Court explained that the policy—which would be enforced by "rely[ing] on the sex marker on the student's birth certificate," *id.* at 608— "privilege[d] sex-assigned-at-birth over" Grimm's male identity: "Grimm was similarly situated to other boys, but was excluded from using the boys['] restroom facilities based on his sex-assigned-at-birth." *Id.* at 610. This Court held that excluding Grimm on that basis constituted sex discrimination and discrimination based on transgender status. *Id*.

H.B. 3293's text operates just like the school district policy at issue in *Grimm*. Like the policy in *Grimm*, H.B. 3293 explicitly declares that its purpose is to distinguish between "gender identity" and "biological sex," a distinction that on its face is targeted at transgender students. Like the policy in *Grimm*, H.B. 3293 privileges sex assigned at birth over all other considerations and thereby separates transgender students from their similarly situated peers. Thus, the statute "on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender [girls and] women athletes, who may not compete on athletic teams consistent with their gender identity." *Hecox*, 479 F. Supp. 3d at 975.

Grimm further refuted the school district's assertion—echoed by Defendants here—that grouping Grimm, a transgender boy, with cisgender girls did not discriminate against him "because Grimm's 'choice of gender identity did not cause biological changes in his body, and Grimm remain[ed] biologically female.'" 972 F.3d at 610 (quoting school district brief). As this Court explained, "the Board's framing" of transgender boys as equivalent to cisgender girls was the product of "bias," "misconceptions," and a fundamental misunderstanding of "what it means for [Grimm] to be a transgender boy." *Id.* at 610, 610 n.10. Namely, the school district was treating "gender identity [as] a choice," and "privileg[ing]" his sex assigned at birth "over Grimm's medically confirmed, persistent and consistent

gender identity" as a boy, even though "the overwhelming thrust of everything in the record" demonstrated "that Grimm was similarly situated to other boys." *Id.* at 610.

So too here. B.P.J. is a girl who is transgender, who has for years lived and been recognized as a girl in all aspects of her life. *See supra* at 10-12. Attempting to equate B.P.J. with a cisgender boy through a "biological sex" classification denies the reality of who she is and treats her differently from cisgender girls because of her transgender status.

2. H.B. 3293's Only Function Is To Discriminate Against Transgender Girls.

H.B. 3293's facial discrimination against transgender girls is also reflected in the statute's "operation in practice," *United States v. Windsor*, 570 U.S. 744, 771 (2013): to exclude girls who are transgender—and only girls who are transgender—from girls' sports teams.

Although the entire point of H.B. 3293 was to exclude transgender girls from girls' teams, Defendants have sought to deny that H.B. 3293 discriminates based on transgender status, claiming that it merely creates sex-separated sports teams. (*See, e.g.*, JA0032 (ECF No. 288 at 7-9).) But that argument ignores, among other things, that school sports *already* were sex-separated in West Virginia before H.B. 3293. *See supra* at 14-15. B.P.J. does not challenge sex separation in sports, nor would a judgment in her favor prevent West Virginia from continuing to maintain separate

girls' and boys' teams. *Cf. Grimm*, 972 F.3d at 618 ("Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity."). B.P.J. simply wants to play on the girls' team like other girls.

What West Virginia lacked prior to H.B. 3293 was any law or policy prohibiting girls who are transgender from playing on girls' teams. Instead, prior to H.B. 3293, WVSSAC's policy *allowed* for transgender students to participate in school sports on a case-by-case basis. *See supra* at 15. Against that backdrop, H.B. 3293 *redefined* sex separation with a new classification to target transgender girls—and only transgender girls—for exclusion. By contrast, H.B. 3293 changes nothing for cisgender students. Cisgender girls were allowed to play on girls' teams (but not boys' teams) before H.B. 3293 and are still allowed to play on girls' teams (but not boys' teams) after H.B. 3293. Likewise, cisgender boys were prohibited from playing on girls' teams before H.B. 3293 and after H.B. 3293 was passed. That is because for cisgender students, the law's distinction between sex assigned at birth and gender identity is irrelevant. As the legislative counsel candidly acknowledged, the one and only group "affect[ed]" by H.B. 3293 is "those that changed their sex after birth." (JA3094); *cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1745 (2020) ("By discriminating against transgender persons, [H.B. 3293] unavoidably discriminates against persons with one sex identified at birth and another today.");

N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (striking down voting provisions that were crafted "with almost surgical precision" to target Black voters).

Defendants maintain that H.B. 3293 does not discriminate against transgender girls like B.P.J. because it "treats all" people assigned a male sex at birth "*the same*, whether they identify as females *or* males," and "prohibits *all*" people assigned male sex at birth "from participating in female sports." (JA0031-0032 (ECF Nos. 281, 287, 288).) The District Court properly recognized that argument as "misleading" at the preliminary injunction stage. (JA0445.) And it is foreclosed by *Grimm*, where the school district unsuccessfully advanced the same position. *See* 972 F.3d at 608-10. By classifying students based on "biological gender," the school district's policy did not treat students "the same" and instead ensured that "[t]ransgender students [were] singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go." *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444, 457 (E.D. Va. 2019), *aff'd*, 972 F.3d 586 (4th Cir. 2020). Specifically, the policy

> shunt[ed] individuals like Grimm—who *may not* use the boys' bathrooms because of their 'biological gender,' and who *cannot* use the girls' bathrooms because of their gender identity—to a third category of bathroom altogether: the 'alternative appropriate private facilit[ies]' established in the policy for 'students with gender identity issues.'

972 F.3d at 620 (Wynn, J., concurring).

H.B. 3293 likewise singles out transgender girls for disfavored treatment, because they are barred from girls' teams because of their "reproductive biology and genetics at birth" and unable to play on boys' teams because of their gender identity. The function of the law is to "entirely eliminate[] their opportunity to participate in school sports." *Hecox*, 479 F. Supp. 3d at 977.

3. The Stated Purpose Of H.B. 3293 Was To Discriminate Against Transgender Students.

H.B. 3293's facially discriminatory text is matched by an openly acknowledged discriminatory purpose. H.B. 3293 was passed "'because of,' not 'in spite of,' its adverse effects upon" girls who are transgender. *Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 279 (1979); *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (providing that "contemporary statements by members of the decisionmaking body" are relevant to assessing discriminatory purpose).

As the District Court agreed, "[t]he record . . . make[s] clear that, in passing this law, the legislature intended to prevent transgender girls from playing on girls' sports teams," (JA4270), and declared there was "no doubt that H.B. 3293 aimed to politicize participation in school athletics for transgender students." (JA4277); *cf. Alive Church of the Nazarene, Inc. v. Prince William Cty., Va.*, 59 F.4th 92, 104–05 (4th Cir. 2023) (explaining that in identifying discriminatory purpose, "a court can

consider contemporary statements by decisionmakers indicating bias" and "derisive comments made to lawmakers by members of the community").

Puzzlingly, however, the District Court still failed to analyze H.B. 3293 as a law that discriminates based on transgender status because the District Court concluded that the legislative history was insufficient to render the statute "unconstitutional under the Supreme Court's animus doctrine." (JA4264 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)).) But the existence of a discriminatory legislative purpose does not require a showing of animus or desire to harm. As long as a statute is passed "***at least in part*** 'because of,' not merely 'in spite of,' its adverse effects upon" girls who are transgender, *Feeney*, 442 U.S. at 279 (emphasis added), the statute must be analyzed as discriminating based on transgender status.

* * *

H.B. 3293 was not a mere effort to endorse long extant sex separation in sports, but was new discrimination based on transgender status. This is made clear, both independently and collectively, by: H.B. 3293's carefully crafted statutory definition of "biological sex," which operates to categorically exclude girls who are transgender from girls' sports teams; the status quo prior to H.B. 3293, which was that West Virginia already provided for sex separation in sport and for case-by-case inclusion of transgender girls in girls' sports; the reality that H.B. 3293 affects only

transgender girls and changes nothing for cisgender students; and H.B. 3293's legislative record, which "make[s] clear that, in passing this law, the legislature intended to prevent transgender girls from playing on girls' sports teams." (JA4270.)

B. Heightened Equal Protection Scrutiny Applies Here and Requires Analysis by Reference to the Excluded Class Of Transgender Girls—Not Cisgender Boys.

Laws that discriminate against transgender people by treating transgender girls differently from cisgender girls—or treating transgender boys differently from cisgender boys—are subject to heightened scrutiny under the Equal Protection Clause for several reasons. *Grimm*, 972 F.3d at 607-10. That differential treatment between transgender girls and cisgender girls "necessarily rests on a sex classification," *id.* at 608; "punish[es] transgender persons for gender non-conformity, thereby relying on sex stereotypes," *id.*; and discriminates based on transgender status, which independently "constitute[s] at least a quasi-suspect" classification, *id.* at 610.

The District Court at summary judgment claimed to apply heightened scrutiny to B.P.J.'s equal protection claim, but it analyzed the wrong classification. Instead of applying heightened scrutiny to H.B. 3293's discrimination against transgender girls, the District Court misperceived H.B. 3293 to be a sex-based classification distinguishing between boys and girls generally. (JA4269.) Adopting Defendants' framing of the question— "whether it's appropriate to separate the typical male from

the typical female in sports" (JA0033 (ECF No. 302))—the District Court asked whether distinguishing between boys and girls based on their "reproductive biology and genetics at birth" was substantially related to an important governmental interest. (JA4269; JA4272.) And because the District Court concluded that separating students based on "reproductive biology and genetics at birth" is constitutionally valid with respect to *cisgender* students who constitute more than 99% of the population (JA0451), it concluded that separating *all* students—both cisgender and transgender—on this basis is substantially related to the asserted government interest in "providing equal athletic opportunities for females" to satisfy heightened scrutiny. (JA4272; JA4274-4275.)

This analytic frame, and the District Court's resulting conclusion, were error. The proper question under heightened scrutiny here—a question unasked by the District Court—is whether the challenged classification is constitutionally valid with respect to the excluded group: transgender girls. That is because heightened scrutiny's substantial-relationship inquiry focuses on the persons against whom the law discriminates. The court must "focus[] on the differential treatment for denial of opportunity for which relief is sought" and determine whether the specific "discriminatory means employed are substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 533 (internal quotation marks omitted); *accord Peltier*, 37 F.4th at 125 (explaining that "we must evaluate whether there is an

exceedingly persuasive justification for the *sex-based classification being challenged*"). In other words, "[t]he proper focus of the constitutional inquiry is the group from whom the law is a restriction, not the group for whom the law is irrelevant." *City of L.A., Cal. v. Patel*, 576 U.S. 409, 418 (2015).

Here, as explained, *see supra* I.A, H.B. 3293 was not enacted to distinguish between cisgender boys and cisgender girls—West Virginia law and policy already did that. H.B. 3293's sole function—evidenced by its text, operation, and acknowledged purpose—is to distinguish students based on transgender status and to exclude transgender girls from girls' sports. Because H.B. 3293 is targeted at the very small percentage of girls who are transgender, it receives heightened scrutiny on that basis. *See, e.g.*, *Grimm*, 972 F.3d at 613 (noting that transgender people "represent approximately 0.6% of the United States adult population"); *Hecox*, 479 F. Supp. 3d at 977 (similar). And it is *that* transgender exclusion—not the differential treatment of all girls compared to all boys—that must pass constitutional muster.

C. B.P.J.'s As-Applied Equal Protection Claim Requires An As-Applied Analysis.

Because B.P.J. challenges H.B. 3293 only as applied to her, the equal protection question presented by this case is narrower still—whether Defendants have established that categorically excluding B.P.J. from girls' school sports because of her transgender status is substantially related to an important government interest. Essential to this as-applied equal protection inquiry are the facts that B.P.J. is a 12-

year-old middle schooler who (1) has "consistently and persistently" identified as a girl for years, *Grimm*, 972 F.3d at 619, and (2) has never gone through endogenous puberty and so has never had levels of circulating testosterone akin to those of cisgender boys but instead has levels of circulating testosterone typical of cisgender girls, *see supra* at 12.

Grimm itself was an as-applied case. There, this Court considered whether the school district's restroom policy was "substantially related to the important objective of protecting student privacy . . . as applied to Grimm." 972 F.3d at 607. This Court concluded "that bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms" and "[t]herefore, the Board's policy was not substantially related to its purported goal," *id.* at 614.

Just as this Court did in *Grimm*, the District Court properly conducted an as-applied analysis at the preliminary-injunction stage. The District Court found that B.P.J. "has lived as a girl for years" (JA0445) and "has not undergone and will not undergo endogenous puberty, the process that most young boys undergo that creates the physical advantages warned about by the State," (JA0448). Accordingly, the District Court held that, as applied to B.P.J., H.B. 3293 "is not substantially related to protecting girls' opportunities in athletics or their physical safety when participating in athletics." (JA0449.)

At summary judgment, however, the District Court refused to undertake the required as-applied analysis, and instead focused on hypothetical transgender girls generally, rather than B.P.J. specifically. The District Court explained that it would not take account of any of the facts of B.P.J.'s individual circumstances because they might differ from those of other transgender girls, noting that what "may be true for B.P.J." may not be true for "other transgender girls," and that "the social, medical, and physical transition of each transgender person is unique." (JA4263.)

Once again, that was error. *See Grimm*, 972 F.3d at 607, 609-10. Unlike a facial challenge, which "can be decided without regard to its impact on the plaintiff asserting the facial challenge," an "as-applied challenge is one which depends on the identity or circumstances of the plaintiff." *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 204 (4th Cir. 2022) (internal quotation marks omitted). The Supreme Court has explained that such as-applied challenges are "the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (holding that discrimination based on disability was unconstitutional only as applied and thus declining to consider whether the challenged policy was facially invalid); *cf. Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (explaining that laws allowing unmarried mothers—but not unmarried fathers—from vetoing a child's adoption are constitutional as applied to

fathers who never establish a substantial relationship with the child, but unconstitutional as applied to fathers who have established that relationship).

The District Court stated—without citing any authority for its position and without acknowledging that *Grimm* was an as-applied challenge—that it could not focus on facts specific to B.P.J. because doing so would be the equivalent of importing strict scrutiny's "narrowly-tailored" requirement into heightened scrutiny. (JA4274.) But the alternative to "narrow tailoring" is not "no tailoring." Under intermediate scrutiny, even when generalizations "have 'statistical support,' [the Supreme Court's] decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*, 582 U.S. 47, 64 n.13 (2017) (quoting *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 139 n.11 (1994)). Indeed, the fundamental role of heightened equal protection scrutiny is to ensure individuals have "equal opportunity to aspire, achieve, participate in and contribute to society based on their *individual* talents and capacities." *VMI*, 518 U.S. at 532 (emphasis added). Group-based generalizations about sex may not be used to "deny[] opportunit[ies]" to people "outside the average description." *Id.* at 550. Courts can—and indeed, must—consider plaintiff-specific facts in an as-applied challenge under intermediate scrutiny to determine whether a proffered justification is "exceedingly persuasive." *VMI*, 518 U.S. at 533.

D. H.B. 3293's Categorical Exclusion Is Not Substantially Related To The State's Proffered Interests, As Applied To B.P.J.

To survive heightened scrutiny, the government must provide an "exceedingly persuasive justification" for H.B. 3293's discriminatory classification. *VMI*, 518 U.S. at 531. "The burden of justification is demanding and [] rests entirely on the State"—*not* B.P.J. *Id.* at 533. Any asserted justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

The sole justification offered for H.B. 3293 in the legislative text is "promot[ing] equal athletic opportunities for the female sex" by reference to avoiding the "substantial" displacement of female athletes. W. Va. Code § 18-2-25d(a)(3)-(5). During the discovery period and in its summary-judgment briefing, the State also proffered a *post hoc* rationalization: "protect[ing] women's safety in female athletic sports." (JA0903; JA3096.) *Post hoc* justifications proffered "in response to litigation" should not be credited. *VMI*, 518 U.S. at 533. But in any event, Defendants have not shown that categorically excluding B.P.J. from all girls' sports substantially advances either interest. (*See, e.g.*, JA1699-1700.)

1. Categorically Excluding B.P.J. From All Girls' Sports Is Not Substantially Related To "Protecting Women's Sports."

Defendants have not demonstrated an "exceedingly persuasive" connection between barring B.P.J. from girls' sports pursuant to a categorical exclusion of transgender girls and protecting against the substantial displacement of cisgender female athletes. *VMI*, 518 U.S. at 534. Rather, Defendants' arguments—and the District Court's summary-judgment reasoning (JA4270-4273)—all rest on the notion that, as a general matter, cisgender boys athletically outperform cisgender girls, and therefore, as a general matter, transgender girls athletically outperform cisgender girls. But Defendants have not met their burden to show that the latter is true. And they certainly have not made that showing with respect to transgender girls who—like B.P.J.—have never gone through and will not go through endogenous puberty.

In H.B. 3293 itself, the only legislative finding concerning substantial displacement provides that "[b]iological males would displace biological females to a substantial extent if permitted to compete on [girls'] teams . . ., as recognized in *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (9th Cir. 1982)." W. Va. Code § 18-2-25d(a)(3) (full case citation added). But *Clark* had nothing to do with transgender student athletes and its logic does not support their categorical exclusion. *Clark* concerned a policy preventing cisgender boys from playing volleyball on the girls' team in a school district that did not sponsor a boys'

volleyball team but provided "overall [athletic] opportunit[ies]" to boys that were "not inferior" to those provided to girls. 695 F.2d at 1131-32. There, the parties *stipulated* that boys would "on average be potentially better volleyball players than girls," thus creating an "undue advantage." *Id.* at 1127, 1131. Based on those stipulated facts, *Clark* concluded that the district's policy of excluding cisgender boys from girls' volleyball survived heightened scrutiny because the boys and girls at the school had an equal number of overall athletic opportunities, and (per the stipulation) "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Id.* at 1131. Those same factors all weigh in favor of *allowing* B.P.J. to play girls' sports, not categorically excluding her.[4]

First, whereas the cisgender boys excluded from participating in girls' volleyball in *Clark* still had an equal number of overall athletic opportunities, 695 F.2d at 1127, transgender girls who are excluded pursuant to H.B. 3293 do *not* have the same number of overall athletic opportunities as their peers. They are prohibited from playing on girls' teams, cannot play on boys' teams, and have extremely

[4] *Clark* also noted women had historically been deprived of athletic opportunities compared to men. 695 F.2d at 1131. Transgender girls too have historically been discriminated against. *See Grimm*, 972 F.3d at 611-12.

limited co-ed options, leaving them with virtually *no* school-sponsored athletic opportunities.[5] (JA0920-0921; JA1448-1449; JA3091.)

Second, H.B. 3293 conditions participation on girls' teams on factors that themselves have no bearing on the "average physiological differences" that were stipulated in *Clark* as providing an athletic advantage to cisgender boys as compared to cisgender girls. 695 F.3d at 1131. It is undisputed that the largest known biological driver of average differences between the athletic performance of males and females is circulating testosterone levels, which begin to diverge between males and females beginning at puberty. (JA2096; JA2143-2144; JA2526-2527; JA3101-3102.) But H.B. 3293 defines "biological sex" "*solely*" in terms of "reproductive biology and genetics at birth," W. Va. Code § 18-2-25d(b)(1) (emphasis added). There is no evidence that those factors alone, however, have any demonstrated effect on athletic ability. (JA2104; JA3101.)

Moreover, B.P.J. does not have any of the "average physiological differences" stipulated to in *Clark*. 695 F.3d at 1131. Because B.P.J. has been receiving puberty-delaying treatment since the first signs of puberty, she has never experienced circulating testosterone levels typical of cisgender boys following the onset of

[5] Because the record shows that there are no co-ed cross-county or track-and-field teams, (JA0920-0921; JA1448-1449; JA3091), the Court does not have to decide whether co-ed teams would provide girls who are transgender with comparable and non-stigmatizing opportunities.

puberty; rather, her circulating testosterone levels are consistent with those typical for cisgender girls. (JA0877; JA0898; JA4511-4512; JA1742-1743; JA3087-3088.) And now that she has begun gender-affirming hormone therapy in addition to her puberty-delaying treatment, she will develop the same changes to bone size, skeletal structure, pelvis shape, fat distribution, and secondary sex characteristics that are typically experienced by cisgender girls who go through a typically female puberty. (JA2147.)[6]

Wholly unlike the stipulated record of athletic advantage and substantial displacement in *Clark*, here Defendants presented no evidence (and the District Court cited none) that, as a group, transgender girls like B.P.J. who receive puberty-delaying treatment followed by gender-affirming hormone therapy have average athletic performances that are better than the average athletic performances of cisgender girls as a group. Indeed, Defendants did not identify any studies at all examining the athletic performance of transgender girls and women who received puberty-delaying medication and did not experience endogenous puberty. (JA2665 (admission by Dr. Brown that he is unaware of any studies purporting to measure the athletic performance or physical fitness of transgender girls); JA2525-2526

[6] Even as to transgender girls and women who have already gone through endogenous puberty, Defendants failed to justify H.B. 3293's sweeping categorical exclusion, including when transgender girls and women who have gone through endogenous puberty suppress their circulating testosterone. (JA3088.)

(admission by Dr. Brown that he is unaware of any research concerning the athletic performance of transgender women who received puberty-delaying medication).) Instead, Defendants' proffered expert Dr. Gregory Brown—who is the subject of an unresolved *Daubert* motion—cited studies involving testosterone suppression by individuals who had already begun or had completed puberty. (*See, e.g.*, JA2526; JA2531.) These are not B.P.J.'s circumstances. Simply put, there is no evidence in the record to suggest that transgender girls in B.P.J.'s position have or would substantially displace cisgender girls in sports.[7]

Nor is there any evidence of substantial displacement caused by transgender girls in West Virginia prior to H.B. 3293, *see supra* at 18-19, or by B.P.J. herself during her three seasons of competition over the last year-and-a-half under the preliminary injunction. B.P.J. regularly finishes towards the back of the pack at her cross-country meets, and in spring 2022, did not even qualify for the running events on her track team so instead competed in shotput and discus, where she again placed near the bottom. *See supra* at 14. Even Intervenor Lainey Armistead could not

[7] Defendants' expert contended that cisgender boys perform better than cisgender girls in some fitness contests even before puberty (*see* JA2512-2525), but admitted that these alleged differences are "modest," that no studies have examined the performance of transgender girls, and that no studies have addressed whether the "modest" differences in athletic performance between pre-pubertal cisgender boys and pre-pubertal cisgender girls are attributable to innate biological causes rather than social causes, such as greater encouragement of athleticism in young boys. (JA3102; JA2266; JA2144.)

identify "any specific fairness issue" related to B.P.J.'s participation in girls' cross-country when she was asked during her deposition. (JA1703; JA1730; JA3108.) As the District Court found, "not one child has been or is likely to be harmed by B.P.J.'s continued participation on her middle school's cross country and track teams." (JA4298.)

2. Categorically Excluding B.P.J. From All Girls' Sports Is Not Substantially Related To "Protecting Women's Safety."

Defendants also have not demonstrated an "exceedingly persuasive" connection between barring B.P.J. from girls' sports under H.B. 3293 and protecting the safety of cisgender girls. *VMI*, 518 U.S. at 534. As the District Court recognized at the preliminary injunction stage, "[c]ross country and track are not contact sports. The physical ability of one athlete does not put another in danger." (JA0449.) Accordingly, it held that, "as applied to B.P.J., this law cannot possibly protect the physical safety of other girl athletes." (JA0449.)

At summary judgment, the District Court correctly found that "West Virginia had no 'problem' from transgender students playing school sports and creating . . . unsafe conditions" when it passed H.B. 3293. (JA4264.) However, the District Court did not expressly address whether Defendants had met their burden to show that excluding B.P.J. substantially advanced the safety of cisgender girls. They have not. No Defendant attempted to advance a connection between the asserted safety justification and the sports B.P.J. plays, let alone an exceedingly persuasive one.

Defendants' putative expert, Dr. Carlson, who is the subject of an unresolved *Daubert* motion, focused only on contact sports involving a risk of collision, and expressly disclaimed having any expert opinion concerning cross-country or track and field. (JA2861-2862; JA2908; JA2953-2954.) Intervenor could not identify any safety concern resulting from B.P.J.'s participation on her middle school girls' cross-country team (JA1699-1700; JA3109), and the State admitted it is not aware of any middle school girl who was physically harmed by B.P.J.'s participation on the cross-country team. (JA0906; JA3109.) Heightened equal protection scrutiny is not satisfied by an interest rooted in "fears" that have not "materialized." *Grimm*, 972 F.3d at 614. "[S]ufficient probative evidence" is required. *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010). Defendants have not carried their burden to show that categorically barring B.P.J. from girls' sports teams advances any asserted interest in protecting the safety of cisgender girls.

* * *

Because Defendants failed to provide any "exceedingly persuasive justification" for categorically excluding B.P.J. from all girls' sports on the basis of her transgender status, B.P.J. is entitled to summary judgment on her as-applied equal protection claim.

E. H.B. 3293 Fails Any Level Of Scrutiny As Applied To B.P.J.

Although heightened scrutiny applies and is dispositive, *see supra* I.D, H.B. 3293 fails any level of scrutiny as applied to B.P.J. The law's sweeping exclusion—reaching every sport at every level between middle school and college, and every transgender girl regardless of whether she has gone through endogenous puberty or has circulating testosterone levels typical of cisgender girls—"is so far removed from [the] particular justifications" claimed to support it that it is "impossible to credit them." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

Defendants maintain that cisgender girls are substantially displaced when a single transgender girl places anything other than absolute last. (JA0032 (ECF No. 287, 288); Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Cir., *State of W. Va., et al. v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023) at 36-37; Reply in Support of Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Cir., *State of W. Va., et al. v. B.P.J.*, No. 22A800 (U.S. Mar. 22, 2023) at 12-13.) The District Court correctly rejected such an extreme and unreasonable notion. (JA4298) ("I am unpersuaded, as Defendants have argued, that B.P.J. finishing ahead of a few other children, would have placed one spot higher without her participation constitutes a substantial injury."). Indeed, that Defendants claim displacement even when B.P.J. finishes at the back of the pack reveals that Defendants' real objection is to B.P.J.'s

mere presence on a girls' team at all. Plainly, "excluding transgender women and girls from women's sports entirely" is "an invalid interest." *Hecox*, 479 F. Supp. 3d at 984-85. Accordingly, H.B. 3293 fails under any level of equal protection scrutiny.

II. H.B. 3293 Violates Title IX As Applied to B.P.J.

To prevail on her Title IX claim, B.P.J. must show "(1) that [she] was excluded from participation in an education[al] program 'on the basis of sex'; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused [her] harm," which may include "emotional and dignitary harm." *Grimm*, 972 F.3d at 616, 618; *accord Peltier*, 37 F.4th at 129. As with its assessment of B.P.J.'s equal protection claim, the District Court's Title IX analysis and conclusion were wrong and contrary to precedent. Because H.B. 3293 excludes B.P.J. from school sports on the basis of sex and this improper discrimination harms her, B.P.J. is entitled to summary judgment on her Title IX claim.

A. H.B. 3293 Excludes B.P.J. On The Basis of Sex.

It is undisputed that school athletic programs are "educational programs" for purposes of Title IX. *See Mercer v. Duke Univ.*, 401 F.3d 199, 207 (4th Cir. 2005) 34 C.F.R. § 106.41. As Defendants acknowledge, participating in sports yields myriad educational benefits, including cooperation, leadership, teamwork, watching

out for fellow players, trust, physical fitness, perseverance, sportsmanship, and discipline. (JA0924-0926; JA0919; JA0455-0456; JA3089-3090.)

It is also undisputed that H.B. 3293 excludes B.P.J. from athletic teams on the basis of "sex." The Supreme Court held in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that discrimination against transgender employees is discrimination because of sex under Title VII, and this Court had repeatedly held that *Bostock*'s reasoning applies to Title IX. *See Peltier*, 37 F.4th at 130 n.22; *Grimm*, 972 F.3d at 616. "By discriminating against transgender persons, [H.B. 3293] unavoidably discriminates against persons with one sex identified at birth and another today," *Bostock*, 140 S. Ct. at 1746, and punishes B.P.J. for "not conforming to [her] sex-assigned-at-birth." *Grimm*, 972 F. 3d at 617 n.15.

B. Defendants Receive Federal Funds.

The State Board and County Board both admit to being federally funded (JA0476-0477; JA0484; JA0915; JA3106) and the State of West Virginia does not dispute that it is subject to Title IX.

The only Title IX Defendant that claims not to receive federal funding is WVSSAC, but WVSSAC is subject to Title IX because it exercises control over federally funded athletic programs. (JA2975-2980; JA3106-3107); W. Va. Code § 18-2-25. "[A]ny entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient

of federal aid." *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 735 (W.D. Mich. 2000); *accord Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007).

In West Virginia, WVSSAC was given controlling authority over secondary school athletics by the State and County Boards of Education. (JA0483-484; JA2975-2980; JA3106); W. Va. Code § 18-2-25. For example, member schools must follow WVSSAC's rules and regulations when "conducting interscholastic athletic[s]" and when determining whether a student is eligible to play secondary school sports, and WVSSAC's Board of Directors has "the power to decide all cases of eligibility of students and participants in interscholastic athletic[s]." (JA2976; JA1400-1401; JA1412; JA2979; JA3106-3107.) Indeed, WVSSAC explicitly acknowledges in its own athletic handbook that it must comply with Title IX. (JA3983.)

C. H.B. 3293 Harms B.P.J. Through Unlawful Discrimination.

Under both Title VII and Title IX, unlawful discrimination entails more than mere differential treatment. It "mean[s] treating that individual worse than others who are similarly situated" and employing "distinctions or differences in treatment that injure protected individuals," *Bostock* 140 S. Ct. at 1740, 1753 (incorporating standard from *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)); *see Grimm*, 972 F.3d at 618 (adopting *Bostock* and *Burlington* standard for Title IX).

For example, in *Grimm*, this Court held that a school policy discriminated against a transgender boy within the meaning of Title IX by excluding him from using the boys' restrooms. In so doing, this Court recognized that Grimm, a transgender boy, was similarly situated to other boys, *see* 972 F.3d at 609-10, 618, and "was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender," *id.* at 618. This Court also had "no difficulty holding that Grimm was harmed" by this discrimination because being excluded from the boys' restrooms made Grimm feel "stigmatized and isolated" and "invite[d] more scrutiny and attention from other students." *Id.* at 617-18 (internal quotations omitted).

Grimm's reasoning and holding apply equally here. *First*, just as Grimm was similarly situated to other boys because of his "persistent and consistent gender identity," *id.* at 610, B.P.J. is similarly situated to her the other girls at her school. For years, B.P.J. has lived as a girl and been recognized as a girl at school. (JA0482; JA0876-0877; JA0883; JA0888; JA0898; JA3086-3087.) As the District Court correctly concluded at the preliminary-injunction stage, in light of the reality of B.P.J.'s day-to-day life, "Plaintiff is not most similarly situated with cisgender boys; she is similarly situated to other girls." (JA0445.)

Defendants argue—and the District Court on summary judgment wrongly agreed—that B.P.J. is not similarly situated to other girls and is instead similarly

situated to cisgender boys because of "physical characteristics relevant to athletic performance." (JA4272); *see also* W. Va. Code § 18-2-25d(a)(3) (asserting as legislative finding that "biological males and biological females are not in fact similarly situated . . . [i]n the context of sports involving competitive skill or contact"). The District Court reasoned that people "with male chromosomes, regardless of their gender identity, naturally undergo male puberty, resulting in an increase in testosterone in the body," and "there is a medical consensus that the largest known biological cause of average differences in athletic performance between males and females is circulating testosterone beginning with puberty." (JA4272.)

Defendants and the District Court ignore, however, that this case is an as-applied challenge on behalf of a transgender girl who has never gone through male puberty. B.P.J. has been receiving puberty-delaying medication since the onset of puberty, and is receiving gender-affirming hormone therapy to allow her to go through a typically female puberty and develop typically female physical characteristics. There are no "physical characteristics relevant to athletic performance" (JA4272) that distinguish B.P.J. from her cisgender teammates.

Second, just as in *Grimm*, H.B. 3293 does not merely treat B.P.J. differently from people who are similarly situated. It treats her worse. Unlike other girls, B.P.J. alone is prohibited from participating on the girls' sports team, and, by excluding

her from the team consistent with her gender identity, H.B. 3293 treats B.P.J. worse than *all* her peers. *See Grimm*, 972 F.3d at 618 (noting that Grimm "alone could not use the restroom corresponding with his gender"). "All other students in West Virginia secondary schools—cisgender girls, cisgender boys, [and] transgender boys . . .—are permitted to play on sports teams that best fit their gender identity." (JA0450.) B.P.J. alone may not.

The exclusion from the girls' team not only prevents B.P.J. from participating in school sports with other girls, but it prohibits her from participating in school athletics entirely. As the District Court recognized in its preliminary injunction decision, "[f]orcing a girl to compete on the boys' team when there is a girls' team available would cause her unnecessary distress and stigma [and] would be confusing to coaches and teammates." (JA0451); (*see also* JA0880-0881; JA3104); *Grimm*, 972 F.3d at 610 n.10 (forcing Grimm to use the girls' restrooms "fails to meaningfully reckon with what it means for [Grimm] to be a transgender boy") (quotation marks omitted). B.P.J. also does not have the option of running on a co-ed team, as there is no co-ed cross-country or track team at Bridgeport Middle School or at any other public secondary school in West Virginia. (JA0920-0921; JA3104.)

Losing the ability to participate in school athletics would deprive B.P.J. of a wide range of educational and social benefits. (JA0455; JA2447-2453; JA3089-3090.) B.P.J.'s own experience during the past two years illustrates the positive

impact of athletics. B.P.J.'s friends on the "cross-country and track-and-field teams have become [her] second family over the last two years." (JA0900; JA4282.) B.P.J.'s mother has "never seen [B.P.J.] happier" than when she "pick[s] her up from practices and take her to meets." (JA4286.) Being able to participate on a team has allowed her to make many friends, show sportsmanship towards her team and girls from other schools, and motivate herself and her teammates to try their hardest at practices and meets. (JA0900; JA4281-4282.) If B.P.J. "had not been able to join the cross-country or track-and-field teams these last few years, [she] would have missed out on challenging [her]self with all the amazing friends [she] made and the time [they] got to spend together." (JA0900; JA4281.)

Excluding B.P.J. from school sports also inflicts dignitary harm by stigmatizing B.P.J. and isolating her from other students. (JA0880-0881; JA0899-0900; JA3104-3105.) As in *Grimm*, B.P.J.'s exclusion "very publicly brand[s]" her and "all transgender students with a scarlet 'T'"— marking them, publicly, as different from their peers. 972 F.3d at 617-18 (internal quotation marks and alterations omitted); *cf. J.E.B.*, 511 U.S. at 142 (explaining that when a juror is excluded based on sex "[t]he message it sends to all those . . . who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"). The stigma of different treatment "is an invitation to subject" B.P.J. and other girls who are transgender to further "discrimination both

in the public and in the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

D. Excluding B.P.J. From Girls' Teams Is Not The Same As Excluding A Cisgender Boy From Girls' Teams.

Despite the overwhelming evidence of how B.P.J. is harmed by H.B. 3293, Defendants disingenuously assert that there is no meaningful distinction between B.P.J.'s Title IX claim and a claim that could be brought by a hypothetical cisgender boy with low testosterone. But Title IX requires courts to look beyond facile comparisons when determining whether "discrimination" exists and to focus on "[t]he real social impact" of a particular action. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998). Whether disparate treatment amounts to discrimination under that standard "depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Burlington*, 548 U.S. at 71 (quoting *Oncale*, 523 U.S. at 85).

"All the circumstances" includes the reality—otherwise recognized by the State, which has revised her birth certificate to reflect as much—that B.P.J. is a girl. "Context matters," and being forced to play on a boys' team is "immaterial in some situations"—*i.e.*, for cisgender boys—but "material in others"—*i.e.*, for transgender girls. *Burlington*, 548 U.S. at 69 (citations omitted). A hypothetical cisgender boy with low testosterone experiences no cognizable emotional and dignitary harm from

participating on the boys' team instead of the girls' team because he is a boy; his participation on the boys' team is thus consistent with his gender identity. By contrast, B.P.J. is a girl, not a boy. Forcing her to compete on a boys' team would deny who she is. (JA0880-0881; JA3104); *cf.* Transcript of Oral Argument at 15:2-6, *Bostock v. Clayton County, Georgia*, No. 17-1618, and *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Gorsuch, J.) ("[T]here are male and female bathrooms, there are dress codes that are otherwise innocuous, right, most—most people would find them innocuous. But the affected communities will not. And they will find harm."). Far from equating transgender girls with cisgender boys, Title IX requires that courts take these differences into account.

E. Title IX's Athletic Regulations Do Not Authorize Discrimination Against Transgender Students.

The District Court also wrongly concluded that "Title IX authorizes sex separate sports in the same manner as H.B. 3293," offering only the cursory conclusion that "[t]here is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex." (JA4276-4277.) But H.B. 3293's exclusion of girls who are transgender is not authorized by Title IX's athletic regulations. The District Court's conclusion to the contrary, lacking in any citation to legal authority, was error.

Under Title IX's athletic regulations, schools are generally prohibited from "provid[ing] athletics separately" "on the basis of sex," but "may" do so "where

selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(a)-(b). And regardless of whether a school provides sex-separated teams or mixed teams, schools are still required to provide "equal athletic opportunity for members of both sexes." *Id.* § 106.41(c).

Title IX's athletic regulations closely resemble the statute's restroom regulation analyzed in *Grimm*. The restroom regulation, 34 C.F.R. § 106.33, interprets Title IX to allow for "separate toilet, locker room, and shower facilities on the basis of sex," so long as they are "comparable" to each other. But as this Court explained in *Grimm*, the restroom regulation did not authorize a school board to exclude Grimm from the sex-separated restroom consistent with his gender identity. *Grimm* held that the regulation merely indicates "that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what 'sex' means." 972 F.3d at 618.

The same is true here. Title IX's athletic regulations indicate that the act of creating sex-separated teams in and of itself is not discriminatory—not that the West Virginia legislature can use whatever sex-based criteria is wishes to completely exclude B.P.J. from school sports. As in *Grimm*, the permissibility of separating teams by sex does not answer the question presented here: whether a statute may categorically exclude B.P.J. from all sex-separated sports because of the

incongruence between her gender identity and sex assigned at birth.

Without acknowledging *Grimm*'s analysis of Title IX's restroom regulation, the District Court assumed that Title IX's athletic regulations allowed sex separation solely because of biological differences. (JA4276-4277.) As demonstrated above, that is wrong.[8] Moreover, "transgender individuals often defy binary categorization on the basis of physical characteristics alone." *Grimm*, 972 F.3d at 621 (Wynn, J., concurring). Thus, Title IX regulations "shed[] little light on how exactly to determine the 'character of being either male or female' where those indicators diverge." *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). In any event, there is nothing in Title IX or its regulations that authorizes the West Virginia legislature to cherry-pick criteria designed to exclude transgender girls while ignoring the physiological characteristics that are actually relevant to athletic performance.

[8] Title IX's allowance for sex separation did not solely "depend on the assertion of innate biological differences between the sexes, but rather on the historic and societal reality that girls and women have not had the benefit of anywhere near the same opportunities as boys and men to develop their athleticism." Deborah Brake, *Title IX's Trans Panic*, 29 William & Mary J. of Race, Gender, & Soc. Just. 41, 70 (2023) (footnotes omitted). Title IX's legislative history repeatedly attributes the lack of equal athletic opportunities to the socialization of girls and women to conform to sex stereotypes. *See, e.g.*, *Sex Discrimination Reguls. Hearings Before the Subcomm. On Postsecondary Educ. of the Comm. On Educ. & Labor, House of Representatives*, 98th Cong. 179, 179 (1975) (Statement of Sen. Birch Baye); *id.* at 197 (Statement of Rep. Stewart McKinney).

* * *

Because H.B. 3293 discriminates against B.P.J. on the basis of sex in a federally funded education program and causes her harm in the process, the District Court's judgment against B.P.J. should be reversed and this Court should grant summary judgment to B.P.J. on her Title IX claim.

III. The Court Should Instruct The District Court To Enter A Permanent Injunction.

In addition to granting summary judgment for B.P.J., this Court should remand to the District Court with instructions to convert the preliminary injunction barring enforcement of H.B. 3293 against B.P.J. into a permanent one.[9] As the District Court explained—and as this Court recognized in its interim order staying the dissolution of the preliminary injunction (ECF No. 50)—the equities in this case overwhelmingly favor B.P.J. Enforcing H.B. 3293 against B.P.J. will profoundly harm her during "a memorable and pivotal time in [her] life" and relegate her to "watch[ing] her teams compete from the sidelines." (JA4298.) By contrast, "not one child has been or is likely to be harmed by B.P.J.'s continued participation on her

[9] Each named Defendant is a proper subject of injunctive relief because each Defendant is obliged to implement H.B. 3293 and enforce it against B.P.J. (*See* JA0462 (holding that "each defendant will take some action that will cause [B.P.J.'s] asserted harm," that "each defendant can redress her claims," and that B.P.J.'s "[c]laims are ripe against each defendant," and thus denying motions to dismiss filed by the State Board Defendants, County Board Defendants, and WVSSAC); JA0483; JA0486; JA0922; JA3105-3106.)

middle school's cross country and track teams" with her friends. (*Id.*) "It is in the public interest that all children who seek to participate in athletics have a genuine opportunity to do so." (*Id.*) Indeed, protecting politically unpopular groups from legislators' unfounded fears are some of "[t]he proudest moments of the federal judiciary." *Grimm*, 972 F.3d at 620.

CONCLUSION

For the foregoing reasons, B.P.J. respectfully requests that this Court reverse the District Court's Order denying Plaintiff's motion for summary judgment and granting Defendants' and Intervenor's motions for summary judgment; enter judgment in favor of Plaintiff-Appellant; and remand to the District Court to enter permanent injunctive relief. Alternatively, the Court should vacate and remand for the District Court to evaluate B.P.J.'s as-applied claims under the proper standard.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests oral argument pursuant to Local Rule 34(a).

Dated: March 27, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g), I certify that this motion complies with applicable type-volume and length limitations because this motion contains 12,993 words, excluding the items exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f).

This motion complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(4)-(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

Dated: March 27, 2023

/s/ Kathleen Hartnett
Kathleen Hartnett

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Plaintiff-Appellant B.P.J., by Her Next Friend and Mother, Heather Jackson, with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on March 27, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 27, 2023

/s/ Kathleen Hartnett
Kathleen Hartnett

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

B. P. J., et al.,

Plaintiffs,

v. CIVIL ACTION NO. 2:21-cv-00316

WEST VIRGINIA STATE BOARD OF EDUCATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

West Virginia passed a law that defines "girl" and "woman," for the purpose of secondary school sports, as biologically female. Under the law, all biological males, including those who identify as transgender girls, are ineligible for participation on girls' sports teams. B.P.J., a transgender girl who wants to play girls' sports, challenges the law. The question before the court is whether the legislature's chosen definition of "girl" and "woman" in this context is constitutionally permissible. I find that it is.

I. Relevant Facts

A. B.P.J.

B.P.J. is an eleven-year-old transgender girl. This means that although B.P.J.'s biological sex is male, she now identifies and lives as a girl. According to her First Amended Complaint, B.P.J. began expressing her female gender identity when she

was three years old. [ECF No. 285-2]. By the end of third grade, B.P.J. expressed herself fully—both at home and otherwise—as a girl. In 2019, B.P.J. was diagnosed with gender dysphoria and, at the first signs of puberty, she began taking puberty blocking medications to treat that condition. [ECF No. 289-21]. As a result, B.P.J. has not undergone endogenous male puberty.

In 2021, as she prepared to enter middle school, B.P.J. expressed interest in trying out for the girls' cross-country and track teams. When her mother, Plaintiff Heather Jackson, asked the school to allow B.P.J. to participate on the girls' teams, the school initially informed her that whether B.P.J. would be permitted to play on the girls' teams depended on the outcome of House Bill ("H.B.") 3293, which was then pending in the West Virginia legislature. When the law passed, the school informed Ms. Jackson that B.P.J. would not be permitted to try out for the girls' teams.

B. The "Save Women's Sports Bill"

H.B. 3293, entitled the "Save Women's Sports Bill," was introduced in the West Virginia House of Delegates on March 18, 2021. The bill passed and was codified as West Virginia Code Section 18-2-25d, entitled "Clarifying participation for sports events to be based on biological sex of the athlete at birth." The law, which was clearly carefully crafted with litigation such as this in mind, begins with the following legislative findings:

> (1) There are inherent differences between biological males and females, and that these differences are cause for celebration, as determined by the Supreme Court of the United States in *United States v. Virginia* (1996);

> (2) These inherent differences are not a valid justification for sex-based classifications that make overbroad generalizations or perpetuate the legal, social, and economic inferiority of either sex. Rather, these inherent differences are a valid justification for sex-based classifications when they realistically reflect the fact that the sexes are not similarly situated in certain circumstances, as recognized by the Supreme Court of the United States in *Michael M. v. Sonoma County, Superior Court* (1981) and the Supreme Court of Appeals of West Virginia in *Israel v. Secondary Schools Act. Com'n* (1989);
>
> (3) In the context of sports involving competitive skill or contact, biological males and biological females are not in fact similarly situated. Biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females, as recognized in *Clark v. Ariz. Interscholastic Ass'n* (9th Cir. 1982);
>
> (4) Although necessarily related, as concluded by the United States Supreme Court in *Bostock v. Clayton County* (2020), gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of West Virginia's interest in promoting equal athletic opportunities for the female sex; and
>
> (5) Classifications of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex.

W. Va. Code § 18-2-25d(a)(1)–(5).

After making these findings, the law sets forth definitions of "biological sex," "female," and male" as follows:

> (1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.

> (2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
>
> (3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

Id. § 18-2-25d(b)(1)–(3).

Finally, the law requires that each athletic team that is "sponsored by any public secondary school or a state institution of higher education" "be expressly designated as" either male, female, or coed, "based on biological sex." *Id.* § 18-2-25d(c). Teams that are designated "female" "shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 18-2-25d(c)(2).

C. Procedural History

On May 26, 2021, B.P.J., through her mother, filed this lawsuit against the West Virginia State Board of Education and its then-Superintendent W. Clayton Burch, the Harrison County Board of Education and its Superintendent Dora Stutler, and the West Virginia Secondary Schools Activities Commission ("WVSSAC"). The State of West Virginia moved to intervene, and that motion was granted. Plaintiff then amended her complaint, [ECF No. 64], naming the State of West Virginia and Attorney General Patrick Morrisey as defendants. Mr. Morrisey has since been dismissed as a party from this lawsuit.

In her amended complaint, B.P.J. alleges that Defendants Burch, Stutler, and the WVSSAC deprived her of the equal protection guaranteed to her by the

Fourteenth Amendment and that the State, the State Board of Education, the Harrison County Board of Education, and the WVSSAC have violated Title IX. B.P.J. seeks a declaratory judgment that Section 18-2-25d of the West Virginia Code violates Title IX and the Equal Protection Clause; an injunction preventing Defendants from enforcing the law against her; a waiver of the requirement of a surety bond for preliminary injunctive relief; nominal damages; and reasonable attorneys' fees.

B.P.J. initially requested a preliminary injunction to allow her to compete on the girls' track and cross-country teams during the pendency of this case. Finding that B.P.J. had a likelihood of success on the merits of her as-applied challenge to the law, I granted the preliminary injunction. All defendants moved to dismiss, and those motions were denied. Lainey Armistead, a cisgender[1] female college athlete then moved to intervene as a defendant and that motion was granted. All parties have now moved for summary judgment.

II. Legal Standard

Summary judgment is appropriate where the "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a), (c)(1)(A).

[1] "Cisgender" means a person whose gender identity aligns with her biological sex. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

III. Analysis

B.P.J. alleges that H.B. 3293 violates the Constitution's Equal Protection Clause and Title IX. I will address each argument in turn. Before turning to the merits of those arguments, however, I find it important to address some preliminary matters.

A. The WVSSAC's Motion

The WVSSAC does not argue the merits of Plaintiff's Equal Protection or Title IX claims. Rather, the WVSSAC only argues that it is not a state actor and is therefore not subject to scrutiny under either the Equal Protection Clause or Title IX. I disagree. Defendant WVSSAC's motion [ECF No. 276] is **DENIED**.

A court may only apply equal protection scrutiny to state action. U.S. Const. amend. XIV, § 1, cl. 4.; *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 923–24 (1982). Likewise, only a party acting under the color of state law is subject to suit pursuant to 42 U.S.C. § 1983. Despite differing terms, the color-of-law requirement in a § 1983 claim and the state action requirement under the Fourteenth Amendment are synonymous and are analyzed the same way. *See Lugar*, 457 U.S. at 923–24; *United States v. Price*, 383 U.S. 787, 794 (1966).

"[T]he character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 931 (2001) (citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995)). For example, an ostensibly

private actor can become a state actor when it is "controlled by an 'agency of the State,'" or "entwined with governmental policies[,]" or the government is "entwined in [its] management or control." *Pennsylvania v. Bd. of Dir. of City Trs. of Phila.*, 353 U.S. 230, 231 (1957); *Evans v. Newton*, 382 U.S. 296, 299 (1966). There is, however, no rigid test to determine when a challenged action becomes a state action. *Brentwood Acad.*, 531 U.S. at 295. No single fact nor set of conditions will definitively confer state action because there may be a better "countervailing reason against attributing activity to the government." *Id.* at 295–96. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Lugar*, 457 U.S. at 939 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 860 (1961); *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022) ("[T]he inquiry is highly fact-specific in nature.").

After considering its composition, rulemaking process, obligations under state law, and other rules for student eligibility, I find the WVSSAC is a state actor. Like in *Brentwood Acad.*, the WVSSAC's nominally private character "is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." 531 U.S. at 298. I find that the WVSSAC is a state actor for several reasons. Though county boards of education have the statutory authority to supervise and control interscholastic athletic events, they have delegated that authority to the WVSSAC. [ECF No. 285-1]. Every public secondary school in

West Virginia is a member of the WVSSAC, and the school principals sit on the WVSSAC's Board of Control to propose and vote on sports rules and regulations. *Id.* Any rule the WVSSAC passes is then subject to approval by the State Board of Education, and the State Board of Education requires that any coach who is not also a teacher be trained by the WVSSAC and certified by the State Board of Education. *Id.* And the WVSSAC Board of Directors—the entity that enforces the rules—includes representatives of the State Superintendent and the State Board of Education, among other governmental entities. *Id.*; 127 C.S.R. § 127-1-8.2. Here, it appears that the WVSSAC cannot exist without the state, and the state cannot manage statewide secondary school activities without the WVSSAC. The WVSSAC is pervasively entwined with the state.

The WVSSAC's motion for summary judgment [ECF No. 276] is therefore **DENIED**.

B. Animus

In her Amended Complaint, B.P.J. alleges that H.B. 3293 was introduced in the legislature "as part of a concerted, nationwide effort to target transgender youth for unequal treatment." [ECF No. 64, ¶ 45]. B.P.J. alleges that the law was "targeted at, and intended only to affect, girls who are transgender." *Id.* ¶ 46. In support of these contentions, B.P.J. points to the actions of bill co-sponsor Delegate Jordan Bridges. According to the Amended Complaint, Delegate Bridges made a Facebook post announcing the introduction of the bill and then "'liked' comments on his post that advocated for physical violence against girls who are transgender, compared

girls who are transgender to pigs, and called girls who are transgender by a pejorative term." *Id.* ¶ 47. In her summary judgment motion, B.P.J. again points the court to the actions of Delegate Bridges and points to several instances where legislators made clear that the purpose of the bill was to address transgender participation in sports.

Notwithstanding these statements, B.P.J. does not argue that the law is unconstitutional under the Supreme Court's animus doctrine, and the record lacks sufficient legislative history to make such a finding. The record makes abundantly clear, however, that West Virginia had no "problem" with transgender students playing school sports and creating unfair competition or unsafe conditions. In fact, at the time it passed the law, West Virginia had no known instance of any transgender person playing school sports. While the legislature did take note of transgender students playing sports in other states, it is obvious to me that the statute is at best a solution to a potential, but not yet realized, "problem."

Even so, the law is only unconstitutional under the animus doctrine if the reason for its passage was the "bare desire" to harm transgender people. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973). While the record before me does reveal that at least one legislator held or implicitly supported private bias against, or moral disapproval of, transgender individuals, it does not contain evidence of that type of animus more broadly throughout the state legislature. Therefore, I cannot find unconstitutional animus on the record before me.

C. Other Matters

Next, before proceeding to the merits of the case, I find it important to briefly discuss what this case is *not*.

First, despite the politically charged nature of transgender acceptance in our culture today, this case is *not* one where the court needs to accept or approve B.P.J.'s existence as a transgender girl. B.P.J., like all transgender people, deserves respect and the ability to live free from judgment and hatred for simply being who she is. But for the state legislature, creating a "solution" in search of a problem, the courts would have no reason to consider eligibility rules for youth athletics. Nevertheless, I must do so now.

This is also *not* a case where B.P.J. challenges the entire structure of school sports. B.P.J. does not challenge, on a broad basis, sex-separation in sports. B.P.J. wants to play on a girls' team. And she admits that there are benefits associated with school athletics, "including when such athletics are provided in a sex-separated manner." [ECF No. 286-1, at 1445]. Ultimately, B.P.J.'s issue here is not with the state's offering of girls' sports and boys' sports. It is with the state's definitions of "girl" and "boy." The state has determined that for purposes of school sports, the definition of "girl" should be "biologically female," based on physical differences between the sexes. And the state argues that its definition is appropriate here because it is substantially related to an important government interest. B.P.J., for her part, seeks a legal declaration that a transgender girl is "female."

I will not get into the business of defining what it means to be a "girl" or "woman." The courts have no business creating such definitions, and I would be hard-pressed to find many other contexts where one's sex and gender are relevant legislative considerations. But I am forced to consider whether the state's chosen definition passes constitutional muster in this one discrete context.

D. Equal Protection

Having addressed those matters, I now turn to the merits of B.P.J.'s claim that H.B. 3293 violates the Constitution's Equal Protection Clause.

1. Legal Standard

The Equal Protection Clause of the Fourteenth Amendment provides that no state may deny any person within its jurisdiction "equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. In other words, "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Realistically, though, every law impacts people differently, and the Fourteenth Amendment does not prohibit that outcome. *Reed v. Reed*, 404 U.S. 71, 75 (1971). But the Equal Protection Clause does forbid a statute from placing people into different classes and treating them unequally for reasons "wholly unrelated to the objective of that statute." *Id.* at 75–76. Ultimately, if a law seeks to treat different groups of people differently, it must do so "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

In general, courts presume that a law is constitutional. Based on that presumption, courts may only overturn a law if the challenger can show that the law's classification is not rationally related to *any* government interest. *Moreno*, 413 U.S. at 533. This general review is known as rational basis review. However, the court's inquiry becomes more searching if the law disadvantages a group of people who have historically been discriminated against and whose identity has nothing to do with their ability to participate in society. Race-based laws, for example, are "immediately suspect" because "they threaten to stigmatize individuals by reason of their membership in a racial group." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Laws based on race, or other suspect classifications such as alienage and national origin, are subject to strict scrutiny and will only be upheld "upon an extraordinary justification." *Id.* at 643–44 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)). Under strict scrutiny, the law must be "narrowly tailored to serve a compelling governmental interest." *Cleburne*, 473 U.S. at 440.

In the middle of rational basis review and strict scrutiny lies intermediate scrutiny. Intermediate scrutiny applies to laws that discriminate on the basis of a quasi-suspect classification, like sex, *United States v. Virginia*, 518 U.S. 515, 533 (1996), and transgender status, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) ("Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class."). Sex discrimination receives intermediate scrutiny because while states have historically used sex as a basis for invidious discrimination,

we recognize that there are some "real differences" between males and females that could legitimately form the basis for different treatment. *Virginia*, 518 U.S. at 533.

The Supreme Court has long "viewed with suspicion laws that rely on 'overbroad generalizations about the different talents, capacities, or preferences of males and females.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quoting *Virginia*, 518 U.S. at 533). Therefore, laws that discriminate based on sex must be backed by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 513. That is to say, the law's proponents must show that it "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Even if the law's objective is to protect the members of one sex, that "objective itself is illegitimate" if it relies on "fixed notions concerning [that sex's] roles and abilities." *Morales-Santana*, 137 S. Ct. at 1692.

The party defending the statute must "present[] sufficient probative evidence in support of its stated rationale for enacting a [sex] preference, i.e., . . . the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010) (quoting *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.*, 122 F.3d 895, 910 (11th Cir. 1997)); *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 959 (10th Cir. 2003) ("[T]he gender-based measures . . . [must be] based on 'reasoned analysis rather than [on] the mechanical application of

traditional, often inaccurate, assumptions.'" (quoting *Miss. Univ. for Women*, 458 U.S. at 726)).

2. Discussion

There is no debate that intermediate scrutiny applies to the law at issue here—H.B. 3293 plainly separates student athletes based on sex. And even B.P.J. agrees that the state has an important interest in providing equal athletic opportunities for female students. [ECF No. 291, at 24]. As discussed earlier, B.P.J. does not challenge sex-separation in sports on a broad basis; she does not argue that teams should be separated based on some other factor or not separated at all. Rather, B.P.J. recognizes the benefits of sex-separated athletics and takes issue only with the state's definitions of "girl" and "woman" as based on biological sex.

B.P.J. argues that "H.B. 3293 excludes students from sports teams based on 'biological sex' and defines 'biological sex' solely in terms of 'reproductive biology and genetics at birth.'" *Id.* at 19. According to B.P.J., H.B. 3293 uses this "'ends-driven definition[] of "biological sex"' to 'guarantee a particular outcome': Barring girls who are transgender from qualifying as girls for purposes of school sports and thereby categorically excluding them from girls' teams and therefore from school sports altogether." *Id.* (quoting *Grimm*, 972 F.3d at 626 (Wynn, J., concurring)). B.P.J. argues that this definition of "biological sex," and the related definitions of "girl" and "woman," are not substantially related to the government interest in providing equal athletic opportunities for females.

The State of West Virginia, the State Board defendants, the Harrison County defendants, and Intervenor Lainey Armistead all argue that the state's classification based on "biological sex" is substantially related to its important interest in providing equal athletic opportunities for females. The state points to a longstanding recognition in the courts that "'[p]hysical differences between men and women . . . are enduring' and render 'the two sexes . . . not fungible.'" [ECF No. 305, at 13–14 (quoting *Virginia*, 518 U.S. at 533)]. And the state argues that in order to preserve athletic opportunities for females, it is necessary to exclude biological males from female teams because males as a group have significant athletic advantage over females and thus the two groups are not similarly situated. [ECF No. 287, at 6–8].

The record does make clear that, in passing this law, the legislature intended to prevent transgender girls from playing on girls' sports teams. In making that decision, the legislature considered an instance in Connecticut where two transgender girls ran on the girls' track team and won at least one event. Cisgender girls there sued, claiming the state's policy allowing the transgender girls to play on girls' teams violated Title IX. *Id.* at 5. But acting to prevent transgender girls, along with all other biological males, from playing on girls' teams is not unconstitutional if the classification is substantially related to an important government interest. The state's interest in providing equal athletic opportunity to females is not at issue here, and B.P.J. does not argue that sex-separate sports in general are not substantially related to that interest. Rather, B.P.J. argues that she and other transgender girls

should be able to play on girls' teams despite their male sex, because their gender identity is "girl."

While sex and gender are related, they are not the same. *See e.g., PFLAG, PFLAG National Glossary of Terms* (June 2022), http://pflag.org/glossary (defining "biological sex" as the "anatomical, physiological, genetic, or physical attributes that determine if a person is male, female, or intersex . . . includ[ing] both primary and secondary sex characteristics, including genitalia, gonads, hormone levels, hormone receptors, chromosomes, and genes" and explaining that "[b]iological sex is often conflated or interchanged with gender, which is more societal than biological, and involves personal identity factors"). It is beyond dispute that, barring rare genetic mutations not at issue here, a person either has male sex chromosomes or female sex chromosomes. Gender, on the other hand, refers to "a set of socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate." *Id.* Gender identity, then, is "[a] person's deeply held core sense of self in relation to gender." *Id.* For most people, gender identity is in line with biological sex. *See Grimm*, 972 F.3d at 594. That is, most females identify as girls or women, and most males identify as boys or men. But gender is fluid. There are females who may prefer to dress in a style that is more typical of males (or vice versa), and there are males who may not enjoy what are considered typical male activities. These individuals may, however, still identify as the gender that aligns with their sex. Others may not. When one's gender identity is incongruent with their sex, that person is transgender. To be transgender, one must have a deeply held "consistent[], persistent[], and insistent[]"

conviction that their gender is, "on a binary, . . . opposite to their" biological sex. *Id.* I recognize that being transgender is natural and is not a choice. But one's sex is also natural, and it dictates physical characteristics that are relevant to athletics.

Whether a person has male or female sex chromosomes determines many of the physical characteristics relevant to athletic performance. Those with male chromosomes, regardless of their gender identity, naturally undergo male puberty, resulting in an increase in testosterone in the body. B.P.J. herself recognizes that "[t]here is a medical consensus that the largest known biological cause of average differences in athletic performance between [males and females] is circulating testosterone beginning with puberty." [ECF No. 291, at 28]. While some females may be able to outperform some males, it is generally accepted that, on average, males outperform females athletically because of inherent physical differences between the sexes. This is not an overbroad generalization, but rather a general principle that realistically reflects the average physical differences between the sexes. Given B.P.J.'s concession that circulating testosterone in males creates a biological difference in athletic performance, I do not see how I could find that the state's classification based on biological sex is not substantially related to its interest in providing equal athletic opportunities for females.

In parts of her briefing, B.P.J. asks me to find that specifically excluding transgender girls from the definition of "girl" in this context is unconstitutional because transgender girls can take puberty blockers or other hormone therapies to mitigate any athletic advantage over cisgender females. B.P.J., for example, is

biologically male, but she identifies as a girl. To express her gender identity, she goes by a traditionally feminine name, wears her hair long, uses female pronouns, and in all other respects lives as a girl. Before the first signs of puberty, B.P.J. made no other changes as a result of her transgender identity. But, once she started showing signs of male puberty, B.P.J. began taking puberty blocking medications, pausing the male puberty process. In that respect, B.P.J. argues that she has not gained the physical characteristics typical of males during and after puberty.

While this may be true for B.P.J., other transgender girls may not take those medications. They may not even come to realize or accept that they are transgender until after they have completed male puberty. Even if a transgender girl wanted to receive hormone therapy, she may have difficulty accessing those treatment options depending on her age and the state where she lives. And, as evidenced by the thousands of pages filed by the parties in this case, there is much debate over whether and to what extent hormone therapies after puberty can reduce a transgender girl's athletic advantage over cisgender girls. Additionally, of course, there is no requirement that a transgender person take any specific medications or undergo hormone therapy before or after puberty. A transgender person may choose to only transition socially, rather than medically. In other words, the social, medical, and physical transition of each transgender person is unique.

The fact is, however, that a transgender girl is biologically male and, barring medical intervention, would undergo male puberty like other biological males. And biological males generally outperform females athletically. The state is permitted to

legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.

Could the state be more inclusive and adopt a different policy, as B.P.J. suggests, which would allow transgender individuals to play on the team with which they, as an individual, are most similarly situated at a given time? Of course. But it is not for the court to impose such a requirement here. Sex-based classifications fall under intermediate scrutiny and therefore do not have a "narrowly-tailored" requirement. As intervenor, Lainey Armistead, points out, "[s]ome boys run slower than the average girl . . . [and] [s]ome boys have circulating testosterone levels similar to the average girl because of medical conditions or medical interventions," but B.P.J. denies that the latter "would be similarly situated [to cisgender girls] for purposes of Title IX and the Equal Protection Clause," and does not argue that they should be allowed to play on girls' teams. [ECF No. 288, at 17 (citing ECF No. 286-1, at 1473)]. This is inconsistent with her argument that the availability of hormone therapies makes transgender girls similarly situated to cisgender girls. In fact, after reviewing all of the evidence in the record, including B.P.J.'s telling responses to requests for admission, it appears that B.P.J. really argues that transgender girls are similarly situated to cisgender girls for purposes of athletics at the moment they verbalize their transgender status, regardless of their hormone levels.

The legislature's definition of "girl" as being based on "biological sex" is substantially related to the important government interest of providing equal athletic

opportunities for females. B.P.J.'s motion for summary judgment on this basis is **DENIED**.

E. Title IX

Finally, I address B.P.J.'s claim that H.B. 3293 violates Title IX. B.P.J. brings this claim against the State of West Virginia, the State Board of Education, the County Board of Education, and the WVSSAC.

1. Legal Standard

Title IX provides that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To succeed on a Title IX claim, a plaintiff must prove that she was (1) excluded from an educational program on the basis of sex; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that "improper discrimination caused [her] harm." *Grimm*, 972 F.3d at 616 (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). "In the Title IX context, discrimination 'mean[s] treating [an] individual worse than others who are similarly situated.'" *Id.* at 618 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020)). Title IX permits sex-separate athletic teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b).

2. Discussion

B.P.J. argues that H.B. 3293 violates Title IX because it excludes transgender girls from participation on girls' sports teams. B.P.J. argues that this amounts to complete exclusion from school sports altogether, and that it is discrimination because she and other transgender girls are similarly situated to cisgender girls. [ECF No. 291, at 17]. The state responds that the law does not violate Title IX because it does not exclude B.P.J. from school athletics. "To the contrary, it simply designates on which team [she] shall play." [ECF No. 287, at 22]. And, the County Defendants argue that Title IX authorizes sex separation in sports in the same scenarios outlined in H.B. 3293—"where selection for such teams is based upon competitive skill or the activity involved is a contact sport." W. Va. Code § 18-2-25d(c)(2). All Defendants[2] argue that while it did not define the term, Title IX used "sex" in the biological sense because its purpose was to promote sex equality. Therefore, they argue that H.B. 3293 furthers, not violates, Title IX. I agree.

Title IX authorizes sex separate sports in the same manner as H.B. 3293, so long as overall athletic opportunities for each sex are equal. 34 C.F.R. § 106.41(b)–(c). As other courts that have considered Title IX have recognized, although the regulation "applies equally to boys as well as girls, it would require blinders to ignore that the motivation for the promulgation of the regulation" was to increase opportunities for women and girls in athletics. *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993). There is no serious debate that Title IX's

[2] Excluding the WVSSAC.

endorsement of sex separation in sports refers to biological sex. Nevertheless, B.P.J. argues that transgender girls are similarly situated to cisgender girls, and therefore their exclusion from girls' teams is unlawful discrimination. But as I have already discussed, transgender girls are biologically male. Short of any medical intervention that will differ for each individual person, biological males are not similarly situated to biological females for purposes of athletics. And, despite her repeated argument to the contrary, transgender girls are not excluded from school sports entirely. They are permitted to try out for boys' teams, regardless of how they express their gender.

I do not find that H.B. 3293, which largely mirrors Title IX, violates Title IX. B.P.J.'s motion for summary judgment on this basis is **DENIED.**

IV. Conclusion

I have no doubt that H.B. 3293 aimed to politicize participation in school athletics for transgender students. Nevertheless, there is not a sufficient record of legislative animus. Considering the law under the intermediate scrutiny standard, I find that it is substantially related to an important government interest. B.P.J.'s motion for summary judgment is **DENIED**. Defendant WVSSAC's motion for summary judgment [ECF No. 276] is **DENIED**. The motions for summary judgment filed by the State of West Virginia [ECF No. 285], the Harrison County defendants [ECF No. 278], the State Board defendants [ECF No. 283], and Intervenor Lainey Armistead [ECF No. 286] are **GRANTED** to the extent they argue that H.B. 3293 is constitutional and complies with Title IX. The preliminary injunction is **DISSOLVED**. All other pending motions are **DENIED as moot.**

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party. The court further **DIRECTS** the Clerk to post a copy of this published opinion on the court's website, www.wvsd.uscourts.gov.

ENTER: January 5, 2023

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

Doe v. Boyertown Area Sch. Dist.

897 F.3d 518 (3d Cir. 2018)
Decided Jul 26, 2018

No. 17-3113

07-26-2018

Joel DOE, a Minor, BY AND THROUGH his Guardians John DOE and Jane Doe; Macy Roe; Mary Smith; Jack Jones, a minor, by and through his Parents John Jones and Jane Jones, Chloe Johnson, a minor by and through her Parent Jane Johnson; James Jones, a Minor by and through his Parents John Jones and Jane Jones, Appellants v. BOYERTOWN AREA SCHOOL DISTRICT; Dr. Brett Cooper, In his official capacity as Principal; Dr. E. Wayne Foley, In his official capacity as Assistant Principal ; David Krem, Acting Superintendent Pennsylvania Youth Congress Foundation (Intervenor in D.C.)

Cathy R. Gordon, Jacob F. Kratt, Litchfield Cavo, 420 Fort Duquesne Boulevard, One Gateway Center, Suite 600, Pittsburgh, PA 15222, Randall L. Wenger [ARGUED], Jeremy L. Samek, Independence Law Center, 23 North Front Street, Harrisburg, PA 17101, Kellie M. Fiedorek, Christiana M. Holcomb, Alliance Defending Freedom, 440 First Street, N.W., Suite 600, Washington, D.C. 20001, Gary S. McCaleb, Alliance Defending Freedom, 15100 North 90th Street, Scottsdale, AZ 85260, Counsel for Appellants Matthew J. Clark, Foundation for Moral Law, 1 Dexter Avenue, Montgomery, AL 36104, L. Theodore Hoppe, Jr., 2 South Orange Street, Suite 215, Media, PA 19063, Counsel for Amicus Appellants' Michael I. Levin [ARGUED], David W. Brown, Levin Legal Group, P.C., 1800 Byberry Road, Suite 1301, Huntingdon Valley, PA 19006, Attorneys for Appellees Mary Catherine Roper, American Civil Liberties Union of Pennsylvania, P.O. Box 60173, Philadelphia, PA 19102, Ria Tabacco Mar [ARGUED], Leslie Cooper, American Civil Liberties Union, 125 Broad Street, 18th Floor, New York, NY 10004, Amanda L. Nelson, Cozen O'Connor, 45 Broadway, 16th Floor, New York, NY 10006, Harper Seldin, Cozen O'Connor, 1650 Market Street, One Liberty Place, Suite 2800, Philadelphia, PA 19103, Attorneys for Intervenor–Appellee Alice O. Brien, National Education Association, Office of General Counsel, 1201 16th Street, N.W., Washington, DC 20036, Omar Gonzalez-Pagan, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005, Cynthia C. Robertson, Pillsbury WinthropShaw Pittman, 1200 17th Street, N.W., Washington, DC 20036, Aaron M. Panner, Kellogg Hansen Todd Figel & Frederick, 1615 M. Street N.W., Suite 400, Washington, DC 20036, Maureen P. Alger, Kara C. Wilson, Cooley, 3175 Hanover Street, Palo Alto, CA 94304, Shannon P. Minter, Amy Whelan, National Center for Lesbian Rights, 870 Market Street, Suite 370, San Francisco, CA 94102, Nicholas S. Feltham, Drinker Biddle & Reath, One Logan Square, Suite 2000, Philadelphia, PA 19103, Terry L. Fromson, Women's Law Project, 125 South 9th Street, Suite 300, Philadelphia, PA 19107, Mary J. Eaton, Wesley R. Powell, Willkie, Farr & Gallagher, 787 Seventh Avenue, New York, NY 10019, Ryan M. Moore, Dechert, 2929 Arch Street, 18th Floor, Cira Centre, Philadelphia, PA 19104, Jesse R.

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McKEE, Circuit Judge.

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Before: McKEE, SHWARTZ and NYGAARD, Circuit Judges.

OPINION OF THE COURT

521 McKEE, Circuit Judge.*521 This appeal requires us to decide whether the District Court correctly refused to enjoin the defendant School District from allowing transgender students to use bathrooms and locker rooms that are consistent with the students' gender identities as opposed to the sex they were determined to have at birth. The plaintiffs—a group of high school students who identify as being the same sex they were determined to have at birth (cisgender)—believe the policy violated their constitutional rights of bodily privacy, as well as Title IX, and Pennsylvania tort law. As we shall explain, we conclude that, under the circumstances here, the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs' rights under Title IX.

In an exceedingly thorough, thoughtful, and well-reasoned opinion, the District Court denied the requested injunction based upon its conclusion that the plaintiffs had not shown that they are likely to succeed on the merits and because they had not shown that they will be irreparably harmed absent the injunction. Although we amplify the District Court's reasoning because of the interest in this issue, we affirm substantially for the reasons set forth in the District Court's
522 opinion.*522 **I. BACKGROUND**

A. The Setting.

Because such seemingly familiar terms as "sex" and "gender" can be misleading in the context of the issues raised by this litigation, we will begin by explaining and defining relevant terms. Our explanation is based on the District Court testimony of Dr. Scott Leibowitz, an expert in gender dysphoria and gender-identity issues in children and adolescents, and the findings that the District Court made based upon that expert's testimony.

"Sex" is defined as the "anatomical and physiological processes that lead to or denote male or female."[1] Typically, sex is determined at birth based on the appearance of external genitalia.[2]

[1] App. 500.

[2] App. 375.

"Gender" is a "broader societal construct" that encompasses how a "society defines what male or female is within a certain cultural context."[3] A person's gender identity is their subjective, deep-core sense of self as being a particular gender.[4] As suggested by the parenthetical in our opening paragraph, "cisgender" refers to a person who identifies with the sex that person was determined to have at birth.[5] The term "transgender" refers to a person whose gender identity does not align with the sex that person was determined to have at birth.[6] A transgender boy is therefore a person who has a lasting, persistent male gender identity, though that person's sex was determined to be female at birth.[7] A transgender girl is a person who has a lasting, persistent female gender identity though that person's sex was determined to be male at birth.[8]

[3] App. 500.

[4] App. 375.

[5] App. 393, 550.

[6] App. 375.

[7] App. 2107.

[8] App. 2107.

Approximately 1.4 million adults—or 0.6 percent of the adult population of the United States—identify as transgender.[9] Transgender individuals may experience "gender dysphoria," which is characterized by significant and substantial distress as a result of their birth-determined sex being different from their gender identity.[10] Treatment for children and adolescents who experience gender dysphoria includes social gender transition and physical interventions such as puberty blockers, hormone therapy, and sometimes surgery.[11]

[9] App. 376.

[10] App. 376-77, 379.

[11] App. 2110.

"Social gender transition" refers to steps that transgender individuals take to present themselves as being the gender they most strongly identify with.[12] This typically includes adopting a different name that is consistent with that gender and using the corresponding pronoun set, wearing clothing and hairstyles typically associated with their gender identity rather than the sex they were determined to have at birth, and using sex-segregated spaces and engaging in sex-segregated activities that correspond to their gender identity rather than their birth-determined sex.[13] For transgender individuals, an important part of

social gender transition is having others perceive them as being the gender the transgender
523 individual most strongly identifies with.[14] *523 Social gender transition can help alleviate gender dysphoria and is a useful and important tool for clinicians to ascertain whether living in the affirmed gender improves the psychological and emotional function of the individual.[15]

12 App. 2110.

13 App. 2110.

14 App. 2110.

15 App. 2111.

Policies that exclude transgender individuals from privacy facilities that are consistent with their gender identities "have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals."[16] These exclusionary policies exacerbate the risk of "anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes."[17] The risk of succumbing to these conditions is already very high in individuals who are transgender. In a survey of 27,000 transgender individuals, 40% reported a suicide attempt (a rate nine times higher than the general population).[18] Yet, when transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students "reflect the same, healthy psychological profile as their peers."[19]

16 Br. for Amici Curiae American Academy of Pediatrics, American Medical Association, et al., 17.

17 *Id.* at 18 (quoting Am. Psychol. Ass'n & Nat'l Ass'n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* 4 (2015)).

18 *Id.* at 18–19 (citing Sandy E. James et al., Nat'l Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 114 (2016)).

19 Br. for Amici Curiae of the National PTA, GLSEN, et al., 7 (citing Lily Durwood et al., *Mental Health and Self Worth in Socially Transitioned Transgender Youth* , 56 J. of the Am. Academy of Child & Adolescent Psychiatry 116, 116 (2017)).

Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes "severe psychological distress often leading to attempted suicide."[20] The result is that those students "avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the day."[21] This behavior can lead to medical problems and decreases in academic learning.[22]

20 Br. for Amici Curiae of the National PTA, GLSEN, et al., 18 (citing Max Kutner, *Denying Transgender People Bathroom Access Is Linked to Suicide* , NEWSWEEK (Dec. 16, 2016); Kristen Clements-Nolle, et al., *Attempted Suicide Among Transgender Persons : The Influence of Gender-Based Discrimination and Victimization* , 51 Journal of Homosexuality 53, 63-65 (2006)).

21 Br. for Amici Curiae of the National PTA, GLSEN, et al., 18 (citing Joseph Kosciw, et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, & Queer Youth in Our Nation's Schools* 12-13, GLSEN (2016)).

22 *Id.* at 18–19 (citing Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives* , 19 J. of Pub. Mgmt. & Soc. Pol'y 65, 74–75 (2013)).

We appreciate that there is testimony on this record that the cisgender plaintiffs have also reduced water intake, fasted, etc. in order to reduce the number of times they need to visit the bathroom so they can minimize or avoid encountering transgender students there. For reasons we discuss below, we do not view the level of stress that cisgender students may experience because of appellees' bathroom and locker room policy as comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity. 524 Given the majority *524 of the testimony here and the District Court's well-supported findings, those situations are simply not analogous.

Dr. Leibowitz testified that forcing transgender students to use facilities that are not aligned with their gender identities "chips away and erodes at [the individual's] psychological wellbeing and wholeness."[23] It can exacerbate gender dysphoria symptoms by reinforcing that the "world does not appreciate or understand" transgender students.[24] In short, it is "society reducing them to their genitals."[25] Dr. Leibowitz also noted that "hundreds of thousands of physicians in the United States ... take the position that individuals with gender dysphoria should not be forced to use a restroom that is not in accordance with their gender identity."[26] We have already noted the disparate suicide rates between transgender and cisgender students.

23 App. 395.

24 App. 395.

25 App. 396.

26 App. 397.

Prior to the 2016–17 school year, Boyertown Area School District required students at Boyertown Area Senior High School ("BASH") to use locker rooms and bathrooms that aligned with their birth-determined sex.[27] BASH changed this policy in 2016 and for the first time permitted transgender students to use restrooms and locker rooms consistent with their gender identity. In initiating this policy, BASH adopted a very careful process that included student-specific analysis. Permission was granted on a case-by-case basis.[28]

27 App. 625.

28 App. 604.

The District required the student claiming to be transgender to meet with counselors who were trained and licensed to address these issues and the counselors often consulted with additional counselors, principals, and school administrators.[29] Once a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity, the student was required to use only those facilities. The student could no longer use the facilities corresponding to that student's sex at birth.[30]

29 App. 638, 923–25.

30 App. 931–32.

BASH has several multi-user bathrooms.[31] Each has individual toilet stalls.[32] Additionally, BASH has between four and eight single-user restrooms that are available to all students, depending on the time of day.[33] Four of these restrooms are always available for student use.[34]

31 App. 612.

32 App. 612–13.

33 App. 613.

34 App. 616.

The locker rooms at BASH consist of common areas, private "team rooms," and shower facilities.[35] Over the past (approximately) two years, BASH has renovated its locker rooms. The "gang showers" were replaced with single-user showers which have privacy curtains.[36] BASH does not require a student to change in the locker room prior to gym class, although the student must

change into gym clothes.[37] A student who is uncomfortable changing in the locker room can
525 change privately in *525 one of the single-user facilities, the private shower stalls, or team rooms.[38]

35 App. 617–19.

36 App. 619–20.

37 App. 618–19

38 App. 618–19.

B. The Litigation.

Four plaintiffs—proceeding pseudonymously under the names Joel Doe, Jack Jones, Mary Smith, and Macy Roe—sued the District after it changed its bathroom and locker room policy to the policy we have described above.[39] Their claims were based on encounters between some of the plaintiffs and transgender students in locker rooms or multi-user bathrooms. The plaintiffs sought to enjoin BASH's policy of permitting transgender students to use the bathrooms and locker rooms that aligned with their gender identities. They sought a preliminary injunction on three grounds. First, the plaintiffs alleged that the School District's policy violated their constitutional right to bodily privacy. Next, they claimed that the School District's policy violated Title IX of the Education Amendments of 1972 (Title IX).[40] Finally, they alleged that the policy was contrary to Pennsylvania tort law. After discovery and evidentiary hearings, the District Court filed the extensive and well-reasoned opinion we have already referred to, in which it explained that the plaintiffs had not demonstrated that they were likely to succeed on the merits of any of their claims and that plaintiffs had not shown that they would be irreparably harmed absent an injunction.

39 The plaintiffs included parents and guardians of some of the anonymous students. The District Court provided a detailed recitation of the factual background of this suit, including the particular conduct each plaintiff alleges as the basis for the alleged violation of a privacy interest. *See Doe by Doe v. Boyertown Area Sch. Dist.* , 276 F.Supp.3d 324, 335–64 (E.D. Pa. 2017).

40 86 Stat. 373, as amended 20 U.S.C. § 1681 *et. seq*.

For reasons the court identified, it concluded that even if the School District's policy implicated the plaintiffs' constitutional right to privacy, the state had a compelling interest in not discriminating against transgender students. The court also determined that the School District's policy was narrowly tailored to serve that interest. Accordingly, the District Court ruled that even if a cisgender plaintiff had been viewed by a transgender student, it would not have violated the cisgender student's constitutional right to privacy. We agree.

The District Court rejected the plaintiffs' Title IX claim for two reasons. First, it found that the School District's policy did not discriminate on the basis of sex, because it applied equally to all students—cisgender male and cisgender female, as well as transgender male and transgender female students—alike. The court also concluded that the plaintiffs had not identified any conduct that was sufficiently serious to constitute Title IX harassment. The mere presence of a transgender student in a locker room should not be objectively offensive to a reasonable person given the safeguards of the school's policy.

For essentially the reasons described above, the District Court also declined to issue an injunction based on the Pennsylvania tort of intrusion upon seclusion. It found that there was insufficient evidence in the record to demonstrate that a transgender student ever viewed a partially clothed plaintiff, and that the presence of a transgender student would not be highly offensive to a reasonable person.

The District Court rejected the plaintiffs' theory of irreparable harm that posited that the plaintiffs were being forced to give up a constitutional right to use segregated locker rooms and bathrooms. It noted that the School District permitted the *526 students to use the locker room facilities "without limitation."[41] Any student who was uncomfortable being in a state of undress or going to the bathroom with transgender students could use the single-user bathrooms or team rooms that BASH has made available.

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41 *Doe v. Boyertown Area Sch. Dist.* , 276 F.Supp.3d at 410.

Having found that the plaintiffs had no likelihood of success on the merits and did not face irreparable harm, the District Court entered an order on August 25, 2017 denying the injunction. This appeal followed.[42]

42 Numerous amici filed briefs on behalf of the appellees, and one group filed a brief on behalf of the appellants. At the conclusion of briefing we heard argument. Recognizing the time-sensitive nature of this appeal and the concerns of all of the parents and students in the School District, as well as the District itself, we adjourned to conference to determine if a ruling could be made from the bench. After conferencing, the panel voted to unanimously affirm the ruling of the District Court. We announced that decision and entered an accompanying order. We now supplement that order with this opinion.

II. DISCUSSION [43]

43 The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

Preliminary injunctive relief is an "extraordinary remedy."[44] It may be granted only when the moving party shows "(1) a likelihood of success on the merits; (2) that [the movant] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief."[45] The movants must establish entitlement to relief by clear evidence.[46] We review the denial of a preliminary injunction for "an abuse of discretion, an error of law, or a clear mistake in the consideration of proof."[47] We exercise plenary review of the lower court's conclusions of law but review its findings of fact for clear error.[48]

44 *Kos Pharm., Inc. v. Andrx Corp.* , 369 F.3d 700, 708 (3d Cir. 2004).

45 *Id* .

46 *Winter v. Natural Res. Def. Council,* 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

47 *Kos Pharm.* , 369 F.3d at 708 (citation omitted).

48 *Id* . (citations omitted).

A. Likelihood of Success on the Merits

The District Court correctly concluded that the appellants were not entitled to an injunction because none of their claims are likely to succeed on the merits.

1. The District Court correctly concluded that the appellants' constitutional right to privacy claim was unlikely to succeed on the merits.

The appellants contend that the District Court erroneously concluded they were unlikely to succeed on their claim that the School District's policy violated their constitutional right to privacy. They assert that the District Court (1) failed to recognize the "contours" of the right to privacy; (2) failed to recognize that a policy opening up facilities to persons of the opposite sex necessarily violates that right; (3) erroneously concluded that the School District's policy advanced a compelling

interest; and (4) incorrectly found that the policy was narrowly tailored to serve that interest. We reject each of these arguments in turn.

The appellants' challenge to the School District's
527 policy was brought as a *527 civil rights claim pursuant to 42 U.S.C. § 1983. Section 1983 claims can succeed only if the underlying act—here, the alleged exposure of the appellants' partially clothed bodies to transgender students whose birth-determined sex differed from the appellants—violated a constitutional right.[49] When a plaintiff's § 1983 claim is premised on a violation of the constitutional right to privacy, it will succeed only if it is "limited to those rights of privacy which are fundamental or implicit in the concept of ordered liberty."[50]

49 *Doe v. SEPTA* , 72 F.3d 1133, 1137 (3d Cir. 1995) ("A § 1983 action cannot be maintained unless the underlying act violates a plaintiff's [c]onstitutional rights.").

50 *Id* . (quoting *Paul v. Davis* , 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (alterations and internal quotation marks omitted)).

The touchstone of constitutional privacy protection is whether the information at issue is "within an individual's reasonable expectations of confidentiality."[51] The Supreme Court has acknowledged two types of constitutional privacy interests rooted in the Fourteenth Amendment—"the individual interest in avoiding disclosure of personal matters" and the "interest in independence in making certain kinds of important decisions."[52] Based on the first principal described above, we have held that a person has a constitutionally protected privacy interest in his or her partially clothed body.[53]

51 *Doe v. Luzerne County* , 660 F.3d 169, 175 (3d Cir. 2011) (quoting *Malleus v. George* , 641 F.3d 560, 564 (3d Cir. 2011)).

52 *Id.* (citations omitted).

53 *Id.* at 177. Other Circuits have come to the same conclusion. *Brannum v. Overton Cty. School Bd.* , 516 F.3d 489, 494, 498 (6th Cir. 2008) (finding a violation of the Fourth Amendment right to privacy when a school surveilled partially clothed middle school students in their locker room, and further noting that this is the "same privacy right ... located in the Due Process clause"); *Poe v. Leonard* , 282 F.3d 123, 136 (2d Cir. 2002) ("[T]here is a right to privacy in one's unclothed or partially clothed body."); *York v. Story* , 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed [figure] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."). The District Court noted that *Doe v. Luzerne County* did not explicitly hold there was a constitutional right to privacy in an individual's unclothed or partially clothed body. However, by concluding that Doe had a reasonable expectation of privacy and remanding the case to determine the exact contours of that right, we implicitly recognized that such a privacy right exists. The District Court assumed the existence of the right, and the parties seemingly agreed that the right exists. If there were any doubt after *Doe v. Luzerne County* that the constitution recognizes a right to privacy in a person's unclothed or partially clothed body, we hold today that such a right exists.

The appellants advance two main arguments in support of their contention that their right to privacy was violated by the School District's policy of permitting transgender students to use bathrooms and locker rooms that aligned with their gender identities. Neither is persuasive.

First, the appellants claim that their right to privacy was violated because the policy permitted them to be viewed by members of the opposite sex

while partially clothed.[54] Regardless of the degree of the appellants' undress at the time of the encounters, the District Court correctly found that this would not give rise to a constitutional violation because the School District's policy served a compelling interest—preventing
528 discrimination against *528 transgender students—and was narrowly tailored to that interest.

54 *See* Br. for Appellants, 18 ("The privacy interest is vitiated when a member of one sex is viewed by a member of the opposite sex." (citation omitted)).

The constitutional right to privacy is not absolute.[55] It must be weighed against important competing governmental interests.[56] Only unjustified invasions of privacy by the government are actionable in a § 1983 claim.[57] That is, the constitution forbids governmental infringement on certain fundamental interests unless that infringement is sufficiently tailored to serve a compelling state interest.[58] The District Court found that the School District's policy served "a compelling state interest in not discriminating against transgender students" and was narrowly tailored to that interest.[59] We agree.

55 *Doe v. SEPTA* , 72 F.3d at 1138.

56 *Doe v. Luzerne County* , 660 F.3d at 178 ; *Sterling v. Borough of Minersville* , 232 F.3d 190, 195 (3d Cir. 2000) ("In examining right to privacy claims, we, therefore, balance a possible and responsible government interest in disclosure against the individual's policy interest.").

57 *See Doe v. SEPTA* , 72 F.3d at 1138 (citing *Whalen v. Roe* , 429 U.S. 589, 602, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)); *see also Olmstead v. United States* , 277 U.S. 438, 478–79, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandies, J., dissenting) ("every *unjustifiable* intrusion upon the privacy of an individual ... must be deemed a [constitutional] violation" (emphasis added)).

58 *Reno v. Flores* , 507 U.S. 292, 301–02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The District Court found that this "compelling interest" analysis was the appropriate level to review BASH's policy. *Doe v. Boyertown Area Sch. Dist.* , 276 F.Supp.3d at 390 (citing *Reno* , 507 U.S. at 302, 113 S.Ct. 1439). The parties do not explicitly challenge this choice. Br. for Appellants, 27-33; Br. for Appellees, 30; Br. for Intervenor-Appellee, 36. In other privacy-rights contexts, we have found that an "intermediate standard of review" was appropriate, and that the "more stringent 'compelling interest analysis' would be used when the intrusion on an individual's privacy was severe." *Doe v. SEPTA* , 72 F.3d at 1139–40. Because we hold that BASH's policy survives the more stringent standard of review, we need not decide which standard of review is appropriate here.

59 *Doe v. Boyertown Area Sch. Dist.* , 276 F.Supp.3d at 390.

As set forth in detail above, transgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination. There can be "no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."[60] The risk of experiencing substantial clinical distress as a result of gender dysphoria is particularly high among children and may intensify during puberty.[61] The Supreme Court has regularly held that the state has a compelling interest in protecting the physical and psychological well-being of minors.[62] We have similarly found that the government has a
529 compelling interest in protecting and *529 caring for children in various contexts.[63] Mistreatment of transgender students can exacerbate gender

dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior. When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening. This record clearly supports the District Court's conclusion that the School District had a compelling state interest in protecting transgender students from discrimination.

60 *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

61 App. 2276–78.

62 *See Sable Commc'ns of Cal., Inc. v. F.C.C.* , 492 U.S. 115, 125, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *Ginsberg v. New York,* 390 U.S. 629, 640, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (a state "has an independent interest in the well-being of its youth"); *New York v. Ferber,* 458 U.S. 747, 756–57, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' " (quoting *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982))).

63 *See, e.g.* , *Croft v. Westmoreland Cty. Children & Youth Servs.* , 103 F.3d 1123, 1125 (3d Cir. 1997) (noting that the government has a compelling interest in the "protection of children," and in protecting children from abuse).

Moreover, the School District's policy fosters an environment of inclusivity, acceptance, and tolerance. As the appellees' amicus brief from the National Education Association convincingly explains, these values serve an important educational function for both transgender and cisgender students.[64] When a school promotes diversity and inclusion, "classroom discussion is livelier, more spirited, and simply more enlightening and interesting [because] the students have the greatest possible variety of backgrounds."[65] Students in diverse learning environments have higher academic achievement leading to better outcomes for all students.[66] Public education "must prepare pupils for citizenship in the Republic,"[67] and inclusive classrooms reduce prejudices and promote diverse relationships which later benefit students in the workplace and in their communities.[68] Accordingly, the School District's policy not only serves the compelling interest of protecting transgender students, but it benefits all students by promoting acceptance.

64 Br. for Amicus Curiae National Education Association, 7–11.

65 *Grutter v. Bollinger* , 539 U.S. 306, 330, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

66 Br. for Amicus Curiae National Education Association, 9–10 (citing Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School-Level Assessment of Climate, Cultural Pluralism and School Safety* , 95 J. Educ. Psychol. 570, 571 (2003); John Rosales, *Positive School Cultures Thrive When Support Staff Included* , NEA Today (Jan. 10, 2017); N. Eugene Walls et al. *Gay-Straight Alliances and School Experiences of Sexual Minority Youth* , 41 Youth & Soc'y 307, 323-25 (2010); Stephen T. Russell, *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers' Perspectives* , 54 J. Sch. Psychol. 29 (2016)).

67 *Bethel Sch. Dist. No. 403 v. Fraser* , 478 U.S. 675, 681, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (citation omitted).

68 Br. for Amicus Curiae National Education Association, 10 (citing Jeanne L. Reid & Sharon Lynn Kagan, *A Better Start: Why Classroom Diversity Matters in Early Education* 9 (Apr. 2015)).

As we have already noted, we do not intend to minimize or ignore testimony suggesting that some of the appellants now avoid using the restrooms and reduce their water intake in order to reduce the number of times they need to use restrooms under the new policy. Nor do we discount the surprise the appellants reported feeling when in an intimate space with a student they understood was of the opposite biological sex.[69] We cannot, however, equate the situation the
530 appellants now *530 face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns. Moreover, as we have mentioned, those cisgender students who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school.

69 App. 276, 1943. To the extent that the appellants' claim for relief arises from the embarrassment and surprise they felt after seeing a transgender student in a particular space, they are actually complaining about the implementation of the policy and the lack of pre-implementation communication. That is an administrative issue, not a constitutional one. To the extent that the appellants are expressing discomfort being around students whom they define as different from themselves, that discomfort does not implicate a privacy interest, even when viewed through the lens of strict scrutiny.

Assuming the policy is subject to strict scrutiny, it must advance a compelling state interest and the means of achieving that interest must be "specifically and narrowly framed to accomplish that purpose."[70] Having correctly identified a compelling state interest, the District Court correctly held that the School District's policy was narrowly tailored. The appellants contend that "a much more tailored solution is to provide single-user accommodations."[71] They reason that "all students would be allowed to access the individual facilities, [so] no stigma would attach to the professed transgender students' using them, and preserving the sex-specific communal facilities to single-sex use would resolve all privacy concerns."[72]

70 *Grutter* , 539 U.S. at 333, 123 S.Ct. 2325 (quoting *Shaw v. Hunt* , 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996)).

71 Br. for Appellants, 32.

72 *Id.*

This argument is not only unpersuasive, it fails to comprehend the depths of the problems the School District's policy was trying to remedy or the steps taken to address them. The School District already provides single-user accommodations for all students. Any student who is uncomfortable changing around their peers in private spaces, whether transgender or cisgender, may change in a bathroom stall, single-user bathroom, or the private team rooms.[73] The appellants seemingly admit that these accommodations "resolve all privacy concerns."[74] Yet they insist that the policy should be changed to require that transgender students use individual bathrooms if they do not wish to use the communal facilities that align with their birth-determined sex. Not only would forcing transgender students to use single-user facilities or those that correspond to their birth sex not serve the compelling interest that the School District has identified here, it would significantly undermine it.[75] As the Court of Appeals for the Seventh Circuit has recognized, a school district's policy that required a transgender student to use single-user facilities "actually invited more scrutiny and attention from his peers."[76] Adopting the appellants' position would very publicly brand all

transgender students with a scarlet "T," and they should not have to endure that as the price of attending their public school.

73 App. 618–19.

74 Br. for Appellants, 32.

75 *See* Br. for Amici Curiae American Academy of Pediatrics et al., 17–18. ("[F]orcing transgender students to use separate facilities sends a stigmatizing message that can have a lasting and damaging impact on the health and well-being of the young person.").

76 *Whitaker* , 858 F.3d at 1045.

Nothing in the record suggests that cisgender students who voluntarily elect to use single-user facilities to avoid transgender students face the same extraordinary consequences as transgender students would if they were forced to use them. As we explain more fully below, requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination.

It is therefore clear that the District Court was correct in concluding that the appellants are unlikely to succeed in establishing a violation of their right to privacy based on a transgender student potentially *531 viewing them in a state of undress in a locker room or restroom. The challenged policy is narrowly tailored to serve a compelling governmental interest. There is no constitutional violation.

The appellants also urge us to recognize constitutional privacy protections for alleged violations that resulted from conduct other than being viewed by transgender students in a locker room or bathroom. They assert that "government actors cannot force minors to endure *the risk* of unconsented intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy."[77] They claim that their constitutional privacy rights were violated "when the sexes intermingle[d]" in the bathrooms and locker rooms.[78] They also argue that the female appellants' privacy rights are violated if they are forced to attend to their menstrual hygiene in a facility where members of the opposite sex may potentially be present.[79] In other words, they contend that their constitutional right to privacy is necessarily violated because they are forced to share bathrooms and locker rooms with transgender students whose gender identities correspond with the sex-segregated space, but do not do not align with their birth sex.

77 Br. for Appellants, 18 (emphasis added).

78 *Id.* at 27.

79 *Id.* at 26. We note that the appellants do not allege that the female plaintiffs ever actually tended to their periods in the presence of a transgender female student.

We reject the premise of this argument because BASH's policy does not force any cisgender student to disrobe in the presence of any student—cisgender or transgender. BASH has provided facilities for any student who does not feel comfortable being in the confines of a communal restroom or locker room. BASH has installed privacy stalls and set some bathrooms aside as single-user facilities so that any student who is uneasy undressing or using a restroom in the presence of others can take steps to avoid contact. BASH's policy does not compel a privacy violation for any student.

In any event, we decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so. As counsel for the School District noted during oral argument, the appellants are claiming a very broad right of personal privacy in a space that is, by definition and common usage, just not that private. School locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected. The facilities exist so that

students can attend to their personal biological and hygienic needs and change their clothing. As the Supreme Court has stated, "[p]ublic school locker rooms ... are not notable for the privacy they afford."[80]

80 *Vernonia Sch. Dist. 47J v. Acton* , 515 U.S. 646, 657, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

Thus, we are unpersuaded to the extent that the appellants' asserted privacy interest requires protection from the risk of encountering students in a bathroom or locker room whom appellants identify as being members of the opposite sex. As the Seventh Circuit noted in *Whitaker* "[a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."[81] *532 None of the cases cited by the appellants is to the contrary.[82] For example, in their brief and at argument, they placed substantial reliance on *Faulkner v. Jones* [83] for the proposition that "society [has] undisputed[ly] approv[ed] separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation ...."[84] But that case did not recognize a constitutional mandate that bathrooms and locker rooms must be segregated by birth-determined sex. Although it acknowledged that privacy concerns *may* justify separate facilities for men and women in certain circumstances,[85] it did not hold that the Constitution *compels* separate bathroom facilities. Moreover, as we have explained and as the District Court more thoroughly described, BASH has carefully crafted a policy that attempts to address the concerns that some cisgender students may have. To its credit, it has done so in a way that recognizes those concerns as well as the needs, humanity, and decency of transgender students.

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81 *Whitaker* , 858 F.3d at 1052.

82 Br. for Appellee, 15–31.

83 10 F.3d 226 (4th Cir. 1993).

84 Br. for Appellants, 17 (alterations added) (quoting *Faulkner* , 10 F.3d at 232).

85 *Faulkner* , 10 F.3d at 232 ("In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.").

The appellants' reliance on *Chaney v. Plainfield Healthcare Center* [86] is similarly unconvincing. That was an appeal from a Title VII suit brought against a nursing home after a Black nursing assistant was fired for protesting a patient's demand that he receive care only from White nursing aids.[87] The court distinguished medical care based on race from medical care based on sex, noting that just as "the law tolerates same-sex restrooms or same-sex dressing rooms ... to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race providers."[88] Like *Faulkner* , *Chaney* held that the Constitution *tolerates* single-sex accommodations. It did not hold that the constitution *demands* it.

86 612 F.3d 908, 913 (7th Cir. 2010).

87 *Chaney* , 612 F.3d at 910–12.

88 *Id.* at 913.

Equally unpersuasive is the appellants' reliance on cases discussing far more intrusive invasions of privacy than allowed by BASH's policy. Cases about strip searches[89] and a criminal conviction for voyeurism after a person repeatedly looked at women in the stalls of public restrooms[90] are wholly unhelpful to our analysis. Those cases involve inappropriate conduct as well as conduct that intruded into far more "intimate aspects of human affairs" than here.[91] There is simply

nothing inappropriate about transgender students using the restrooms or locker rooms that correspond to their gender identity under the policy BASH has initiated, and we reject appellants' attempt to argue that there is. Appellants do not contend that transgender Students A or B did anything remotely out of the ordinary while using BASH's facilities. Indeed, the appellants' *533 privacy complaint is not with transgender students' conduct, but with their mere presence. We have already explained that the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces.

89 *Canedy v. Boardman* , 16 F.3d 183, 185–86, 188 (7th Cir. 1994).

90 *State v. Lawson* , 185 Wash.App. 349, 340 P.3d 979 (2014).

91 *Doe v. Luzerne County* , 660 F.3d at 176 (quoting *Nunez v. Pachman* , 578 F.3d 228, 232 (3d Cir. 2009)).

In an argument that completely misses (or deliberately ignores) the reason for the disputed policy or the circumstances it addresses, the appellants insist that it is improper to consider a student's transgender status when conducting this privacy analysis and that we must only look at the student's anatomy.[92] We disagree. Constitutional right to privacy cases "necessarily require fact-intensive and context-specific analyses."[93] Bright line rules cannot be drawn.[94] Put simply—the facts of a given case are critically important when assessing whether a constitutional right to privacy has been violated. A case involving transgender students using facilities aligned with their gender identities after seeking and receiving approval from trained school counselors and administrators implicates different privacy concerns than, for example, a case involving an adult stranger sneaking into a locker room to watch a fourteen year-old girl shower. The latter scenario—taken from a case the appellants rely upon[95] — is simply not analogous to the circumstances here.

92 Br. for Appellants, 10–12.

93 *Doe v. Luzerne County* , 660 F.3d at 176.

94 *Id.*

95 *People v. Grunau* , No. H015871, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009) (unpublished memorandum opinion).

2. The District Court correctly concluded that the appellants' Title IX claim was unlikely to succeed on the merits.

The District Court rejected the appellants' Title IX claim because the School District's policy treated all students equally and therefore did not discriminate on the basis of sex, and because the appellants had failed to meet the elements of a "hostile environment harassment" claim. We again agree. We also agree with the School District's position that barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.

Title IX prohibits discrimination based on sex in all educational programs that receive funds from the federal government.[96] However, discrimination with regard to privacy facilities is exempt from that blanket prohibition. An institution "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[97] This exception is permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes.

96 20 U.S.C. § 1681(a).

97 34 C.F.R. § 106.33.

Title IX also supports a cause of action for "hostile environment harassment."[98] To recover on such a claim, a plaintiff must establish sexual harassment that is so severe, pervasive, or objectively

offensive and that "so undermines and detracts from the victims' educational experience that [he or she] is effectively denied equal access to an institution's resources and opportunities."[99] To
534 support a claim of *534 hostile environment harassment, a plaintiff must demonstrate that the offensive conduct occurred because of his or her sex.[100]

98 *DeJohn v. Temple Univ.* , 537 F.3d 301, 316 n.14 (3d Cir. 2008) (citation omitted).

99 *Id.* (alterations in original) (citation omitted). We recently noted that we have not always been consistent in stating whether a plaintiff claiming sexual harassment must prove the harassment was "severe *or* pervasive" or "severe *and* pervasive." *Castleberry v. STI Grp.* , 863 F.3d 259, 263–64 (3d Cir. 2017) (emphasis added). Much of the confusion stems from the fact that the Supreme Court has used both the conjunctive and the disjunctive to describe the plaintiff's burden. *Compare Meritor Sav. Bank, FSB v. Vinson* , 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive ...."), *with Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.* , 526 U.S. 629, 633, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (concluding that an action for Title IX harassment "will lie 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"). In *Castleberry* , we concluded that the "correct standard is severe *or* pervasive. *Castleberry* , 863 F.3d at 264. Accordingly, we will proceed using the disjunctive inquiry here.

100 *Oncale v. Sundowner Offshore Servs., Inc.* , 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding, in the Title VII context, that a plaintiff "must always prove that the conduct at issue ... constituted *discrimination* because of ... sex." (internal quotations omitted)).

Title IX's "hostile environment harassment" cause of action originated in a series of cases decided under Title VII of the Civil Rights Act of 1964 ("Title VII").[101] The Supreme Court has "extended an analogous cause of action to students under Title IX."[102] Title VII cases are therefore instructive.[103]

101 42 U.S.C. § 2000e *et seq.*

102 *Saxe v. State College Area Sch. Dist* ., 240 F.3d 200, 205 (3d Cir. 2001).

103 *Id.* Courts have frequently looked to Title VII authority for guidance with Title IX cases. *See, e.g.* , *Olmstead v. L.C. ex rel. Zimring* , 527 U.S. 581, 616 n.1, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX." (collecting cases)).

Title VII prohibits employers from discriminating based on sex.[104] In *Oncale* , the Supreme Court considered whether Title VII prohibited "discrimination because of sex" when the harasser and the harassed employee were the same sex.[105] In concluding that Title VII could support such a claim, the Court held that Title VII is concerned only with "discrimination because of sex."[106] It noted that the Court had never held that "workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[107] Rather, "the critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[108] The plaintiffs in a Title VII action must therefore always "prove that the conduct at issue was not merely tinged

with offensive sexual connotations, but actually constituted discrimination because of sex."[109] The same requirement holds true for Title IX claims.

104 42 U.S.C. § 2000e-2.

105 *Oncale* , 523 U.S. at 76, 118 S.Ct. 998.

106 *Id.* at 80, 118 S.Ct. 998.

107 *Id.*

108 *Id.* (quoting *Harris v. Forklift Sys., Inc.* , 510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring)).

109 *Id.* at 81, 118 S.Ct. 998 (internal alterations, emphasis, and quotation marks omitted).

The appellants have not provided any authority—either in the District Court or on appeal—to suggest that a sex-neutral policy can give rise to a Title IX claim. Instead, they simply hypothesize that "harassment" that targets both sexes equally would violate Title IX; that is simply not the
535 law.[110] The touchstone of both *535 Title VII and Title IX claims is disparate treatment *based on sex* .[111] The School District's policy allows all students to use bathrooms and locker rooms that align with their gender identity. It does not discriminate based on sex, and therefore does not offend Title IX.

110 *See Pasqua v. Metro. Life Ins. Co.* , 101 F.3d 514, 517 (7th Cir. 1996) ("Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex."); *Henson v. City of Dundee* , 682 F.2d 897, 904 (11th Cir. 1982) ("[T]here may be cases in which a supervisor makes sexual overtures of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, [the] harassment would not be based on sex because men and women are accorded like treatment ... and the plaintiff would have no remedy under Title VII.").

111 *Oncale* , 523 U.S. at 80, 118 S.Ct. 998.

The District Court also correctly found that the appellants had not met their burden of establishing that the mere presence of transgender students in bathrooms and locker rooms constitutes sexual harassment so severe, pervasive, or objectively offensive and "that so undermines and detracts from the victims' educational experience that [the plaintiff] is effectively denied equal access to an institution's resources and opportunities."[112] That is particularly true given the many safeguards the School District put in place as part of the challenged policy.

112 *DeJohn* , 537 F.3d at 316 n.14 (citations omitted).

Rather than relying on relevant legal authority to establish that the mere presence of a transgender student in a locker room or bathroom rises to the level of harassment, the appellants again cite inapposite cases that involve egregious harassment. That is not surprising since we have found no authority that supports the appellants' claims. Two cases that the appellants attempt to analogize to their situation are particularly illustrative of the weakness of their position—*Lewis v. Triborough Bridge and Tunnel Authority* [113] and *Schonauer v. DCR Entertainment Inc* .[114] *Lewis* involved harassment that is worlds apart from anything in the present record. There, cisgender men not only entered a locker room while cisgender female employees were changing, they "leer[ed]" at them, "crowd[ed] the entrance to the locker room, forcing [them] to 'run the gauntlet[,]' and brush[ed] up against them."[115] When a supervisor was informed, he referred to the female employees as "cunts" and "the biggest bunch of fucking crybabies."[116] Any comparison to the circumstances the appellants face here is patently frivolous.

113 77 F.Supp.2d 376, 377–78 (S.D.N.Y. 1999).

114 79 Wash.App. 808, 905 P.2d 392, 396–97, 400–01 (1995).

115 77 F.Supp.2d at 377.

116 *Id* . at 378.

Schonauer is also distinguishable. There, the plaintiff was employed as a beverage server at a topless nightclub and alleged that she had been harassed by a manager.[117] In addition to entering the women's changing facility, the manager repeatedly encouraged the plaintiff to enter nude dance contests, asked questions about her sexual fantasies, and probed her sexual history.[118] When the plaintiff resisted these advances, she was fired.[119] The Washington Court of Appeals found that this behavior could constitute harassment not
536 simply because the manager entered *536 the changing facility, but because he pressed the plaintiff to "provide sexually explicit information and to dance on stage in a sexually provocative way."[120]

117 *Schonauer* , 905 P.2d at 396.

118 *Id.* at 396–97.

119 *Id.* at 397.

120 *Id.* at 400.

The District Court no doubt realized that the appellants' attempt to seize upon *Lewis* and *Schonauer* demonstrated the weakness of their arguments. Here, there are no allegations of harassment, let alone any that are even remotely as "severe, pervasive, [or] objectively offensive."[121] Still, the appellants unconvincingly try to equate mere presence in a space with harassing activity.

121 *DeJohn* , 537 F.3d at 316 n.14 ; *Castleberry* , 863 F.3d at 264.

This case is far more analogous to *Cruzan v. Special School Dist., No. 1* ,[122] a Title VII case from the Court of Appeals for the Eighth Circuit. *Cruzan* held that a transgender individual in a bathroom did not create a hostile environment because there was no evidence that the individual "engaged in any inappropriate conduct other than merely being present in the women's faculty restroom."[123] That is, a transgender person in a restroom did not create an environment that was "permeated with discriminatory intimidation, ridicule, and insult" as required to sustain a harassment claim under Title VII.[124] We agree with the Eight Circuit's conclusion. As we have emphasized, the appellants' real objection is to the presence of transgender students, not to any "environment" their presence creates. Indeed, the allegations here include an assertion that a cisgender student was harassed merely by a transgender student washing that student's own hands in a bathroom or changing in a locker room. That is not the type of conduct that supports a Title IX hostile environment claim.[125] The District Court recognized this and correctly ruled that this claim was unlikely to succeed.

122 294 F.3d 981, 984 (8th Cir. 2002).

123 *Id.*

124 *Id.* (citation omitted).

125 This is not to say that the transgender students could not engage in conduct that would rise to the level of harassment. It would be the same conduct required for cisgender students to harass someone.

The School District, on the other hand, contends that barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination under a sex-stereotyping theory in violation of Title IX.[126] We need not decide that very different issue here. We note only that in 2017, the Seventh Circuit held that a school district's policy of prohibiting transgender students from using bathrooms and locker rooms consistent with their gender identity violated Title IX because it discriminated against transgender students by

subjecting them to "different rules, sanctions, and treatment than non-transgender students."[127] The injunction that the plaintiffs have requested here would essentially replicate the policy used by the school district in *Whitaker by Whitaker v. Kenosha Unified School District* . Hence, BASH can hardly be faulted for being proactive in adopting a policy that avoids the issues that may otherwise have occurred under Title IX.

126 Br. for Appellees, 38–40.

127 *Whitaker* , 858 F.3d at 1050.

We therefore hold that the District Court correctly declined to issue an injunction based on the
537 appellants' Title IX claim.*537 3. The District Court correctly concluded that the appellants' state law tort claim was unlikely to succeed on the merits.

Finally, the appellants contend that the District Court erred in denying the injunction as to their Pennsylvania-law tort claim for intrusion upon seclusion. Pennsylvania has adopted the Second Restatement of Torts' definition of intrusion upon seclusion:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[128]

128 *Tagouma v. Investigative Consultant Servs, Inc* ., 4 A.3d 170, 174 (Pa. Super. Ct. 2010) (quoting Restatement (Second) of Torts § 652B (1965)).

In denying this claim, the District Court concluded that the mere presence of a transgender individual in a bathroom or locker room is not the type of conduct that would be highly offensive to a reasonable person. As we have noted, students in a locker room expect to see other students in varying stages of undress, and they expect that other students will see them in varying stages of undress. We will affirm the District Court's rejection of the appellants' tort claim.

B. Irreparable Harm

In addition to finding that the appellants were unlikely to succeed on the merits of their claims, the District Court denied injunctive relief because they had not demonstrated that the failure to issue an injunction would result in irreparable harm. The District Court found that:

> On a practical level ... the privacy protections that are in place at BASH, which include the bathroom stalls and shower stalls in the locker rooms, the bathroom stalls in the multi-user bathrooms, the availability of a number of single-user bathrooms (a few of which will have lockers for storing items), the [ability] of students to store personal items in their locker or leave those items with the gym teacher, and the availability of the team rooms in the locker rooms (which would not involve students passing through the common area of the locker room), and the overall willingness of the [appellees] to work with the students and their families to assure that the students are comfortable at BASH, mitigates against a finding of irreparable harm. ... The privacy protections available to students in 2017-18 are more than suitable to address any privacy concerns relating to the presence of transgender students in the locker rooms and bathrooms at BASH.[129]

129 *Doe v. Boyertown Area Sch. Dist.* , 276 F.Supp.3d at 410.

We agree that the appellants did not demonstrate irreparable harm would result from denying an injunction. The School District has provided adequate privacy facilities for the appellants to use during this litigation. Even if the appellants could

otherwise succeed on one or more of their claims (and, as explained above, we do not suggest that they can), the single-user facilities ensure that no appellant faces irreparable harm in the meantime.

III. CONCLUSION

The Boyertown Area School District has adopted a very thoughtful and carefully tailored policy in an attempt to address some very real issues while faithfully discharging its obligation to maintain a safe and respectful environment in which
538 everyone can both learn and thrive.*538 The District Court correctly concluded that the appellants' attempt to enjoin that policy based on an alleged violation of their privacy rights and their rights under Title IX and Pennsylvania tort law is not likely to succeed on the merits. The District Court was also correct in deciding that denying the injunction would not irreparably harm the appellants. For the reasons set forth above and in the well-reasoned District Court opinion, we will affirm the District Court's denial of the requested preliminary injunction.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1952

GAVIN GRIMM,

Plaintiff – Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellant.

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.; INTERACT: ADVOCATES FOR INTERSEX YOUTH; FAIRFAX COUNTY SCHOOL BOARD; ALEXANDRIA CITY SCHOOL BOARD; ARLINGTON SCHOOL BOARD; FALLS CHURCH CITY SCHOOL BOARD; TREVOR PROJECT; NATIONAL PARENT TEACHER ASSOCIATION; GLSEN; AMERICAN SCHOOL COUNSELOR ASSOCIATION; NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS; PFLAG, INC.; TRANS YOUTH EQUALITY FOUNDATION; GENDER SPECTRUM; GENDER DIVERSITY; CAMPAIGN FOR SOUTHERN EQUALITY; HE SHE ZE AND WE; SIDE BY SIDE; GENDER BENDERS; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY; AMERICAN ACADEMY OF PHYSICIAN ASSISTANTS; AMERICAN COLLEGE OF PHYSICIANS; AMERICAN MEDICAL ASSOCIATION; AMERICAN MEDICAL STUDENTS ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; AMERICAN NURSES ASSOCIATION; AMERICAN PSYCHIATRIC ASSOCIATION; AMERICAN PUBLIC HEALTH ASSOCIATION; ASSOCIATION OF MEDICAL SCHOOL PEDIATRIC DEPARTMENT CHAIRS; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; LBGT PA CAUCUS; PEDIATRIC ENDOCRINE SOCIETY; SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; SOCIETY FOR PHYSICIAN ASSISTANTS IN PEDIATRICS; WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; LEAH FREGULIA; ADELITA

GRIJALVA; DAVID VANNASDALL, Ed.D.; LOS ANGELES UNIFIED SCHOOL DISTRICT; JUDY CHIASSON, Ph. D.; MONICA GARCIA; WENDY RANCK-BUHR, Ph. D.; SAN DIEGO UNIFIED SCHOOL DISTRICT; ELDRIDGE GREER, Ph. D.; GREGORY R. MEECE; FRANKLIN NEWTON, Ed.D.; DIANA K. BRUCE; DANIEL F. GOHL; DENISE PALAZZO; JEREMY MAJESKI; KAREN CARNEY; SARAH SHIRK; BETH BAZER, Ed.D.; PAULA INSLEY MILLER, Ed.D.; THOMAS WEBER; THOMAS A. ABERLI, Ed.D.; HOWARD COLTER; MATTHEW HANEY; KEN KUNIN; ROBERT A. MOTLEY; CATHERINE FROM; ROGER BOURGEOIS; CYNDY TAYMORE; LIZBETH DESELM; DYLAN PAULY; DELOIS COOKE SPRYSZAK; CRAIG MCCALLA; MARY DORAN; WASHOE COUNTY SCHOOL DISTRICT; JAMES C. MORSE, SR., Ed.D.; THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD; THOMAS SMITH, Ed.D.; CRAIG VAUGHN; ARTHUR DIBENEDETTO; LAS CRUCES PUBLIC SCHOOLS; WENDI MILLER-TOMLINSON, M.D., Ph.D.; JOHN O'REILLY; HEIDI CARTER; ANTHONY GATTO; ERIC DOSS; PEYTON CHAPMAN; ZIAD W. MUNSON, Ph. D.; RACHEL SANTA, Ed.D.; KELLIE M. HARGIS, Ed.D.; LINDSEY POLLOCK, Ed.D.; BRIAN SCHAFFER; THE WASHINGTON CENTRAL UNIFIED UNION SCHOOL DISTRICT; WILL BAKER; LISA LOVE; SHERIE HOHS; SHERRI CYRA; LAURA H. LOVE, Ed.D.; JILL GURTNER; MONICA SCHOMMER; BRYAN DAVIS, Ph. D.; PARU SHAH, Ph. D.; TIM KENNEY; STATE OF NEW YORK; STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; DISTRICT OF COLUMBIA,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge. (4:15-cv-00054-AWA-RJK)

Argued: May 26, 2020 Decided: August 26, 2020

Amended: August 28, 2020

Before NIEMEYER, WYNN, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Floyd wrote the majority opinion, in which Judge Wynn joined. Judge Wynn wrote a concurring opinion. Judge Niemeyer wrote a dissenting opinion.

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FLOYD, Circuit Judge:

At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender. We join a growing consensus of courts in holding that the answer is resoundingly yes.

Now a twenty-year-old college student, Plaintiff-Appellee Gavin Grimm has spent the past five years litigating against the Gloucester County School Board's refusal to allow him as a transgender male to use the boys restrooms at Gloucester County High School. Grimm's birth-assigned sex, or so-called "biological sex," is female, but his gender identity is male. Beginning at the end of his freshman year, Grimm changed his first name to Gavin and expressed his male identity in all aspects of his life. After conversations with a school counselor and the high school principal, Gavin entered his sophomore year living fully as a boy. At first, the school allowed him to use the boys bathrooms. But once word got out, the Gloucester County School Board (the "Board") faced intense backlash from parents, and ultimately adopted a policy under which students could only use restrooms matching their "biological gender."

The Board built single-stall restrooms as an "alternative" for students with "gender identity issues." Grimm suffered from stigma, from urinary tract infections from bathroom avoidance, and from suicidal thoughts that led to hospitalization. Nevertheless, he persevered in his transition; he underwent chest reconstruction surgery, received a state-court order stating that he is male, and amended his birth certificate to accurately

reflect his gender. But when he provided the school with his new documentation, the Board refused to amend his school records.

Grimm first sued in 2015, alleging that, as applied to exclude him from the boys bathrooms, the Board's policy violated the Equal Protection Clause of the Fourteenth Amendment and constituted discrimination on the basis of sex, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). Since then, Grimm amended his complaint to add that the Board's refusal to amend his school records similarly violates both equal protection and Title IX. In 2019, after five winding years of litigation, the district court finally granted Grimm summary judgment on both claims. It awarded Grimm nominal damages, declaratory relief, attorney's fees, and injunctive relief from the Board's refusal to correct his school records. The Board timely appealed. Agreeing with the district court's considered opinion, we affirm.

I. Background

A.

To be sure, many of us carry heavy baggage into any discussion of gender and sex. With the help of our amici and Grimm's expert, we start by unloading that baggage and developing a fact-based understanding of what it means to be transgender, along with the implications of gendered-bathroom usage for transgender students.

Given a binary option between "Women" and "Men," most people do not have to think twice about which bathroom to use. That is because most people are cisgender, meaning that their gender identity—or their "deeply felt, inherent sense" of their gender—

aligns with their sex-assigned-at-birth. *See* Br. of Amici Curiae Med., Pub. Health, & Mental Health Orgs. in Supp. of Pl.-Appellee 4–5 (hereinafter "Br. of Medical Amici") (primarily relying on Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832 (2015)).[1] But there have always been people who "consistently, persistently, and insistently" express a gender that, on a binary, we would think of as opposite to their assigned sex. *See id*. at 8; *see also* J.A. 174–75 (Dr. Penn Expert Report & Decl. at 3–4).

Such people are transgender, and they represent approximately 0.6% of the United States adult population, or 1.4 million adults. *See* Br. of Medical Amici 5. Just like being cisgender, being transgender is natural and is not a choice. *See id*. at 7.

Being transgender is also not a psychiatric condition, and "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *See id*. at 6 (quoting Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (2012)); *see also* Br. of Amicus Curiae the Trevor Project in Supp. of Pl.-Appellee 4 (hereinafter "Br. of Trevor Project") (explaining that the World Health Organization also declassified being transgender as a mental illness).

[1] Amici curiae party to this brief include the following seventeen leading medical, public health, and mental health organizations: American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Academy of PAs, American College of Physicians, American Medical Association, American Medical Students Association, American Medical Women's Association, American Nurses Association, American Psychiatric Association, American Public Health Association, Association of Medical School Pediatric Department Chairs, GLMA: Health Professionals Advancing LGBTQ Equality, LBGT PA Caucus, Pediatric Endocrine Society, Society for Adolescent Health and Medicine, Society for Physician Assistants in Pediatrics, and World Professional Association for Transgender Health.

However, transgender people face major mental health disparities: they are up to three times more likely to report or be diagnosed with a mental health disorder as the general population, Am. Med. Ass'n & GLMA: Health Professionals Advancing LGBTQ Equality, *Issue Brief: Transgender Individuals' Access to Public Facilities* 2 (2018), and nearly *nine times* more likely to attempt suicide than the general population, *see* Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 114 (Dec. 2016) (hereinafter "USTS Report").

Moreover, many transgender people are clinically diagnosed with gender dysphoria, "a condition that is characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex." Br. of Medical Amici 9; *see also Edmo v. Corizon, Inc.*, 935 F.3d 757, 768–69 (9th Cir. 2019). Gender dysphoria is defined in the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders. "[T]o be diagnosed with gender dysphoria, the incongruence [between gender identity and assigned sex] must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning." *See* J.A. 175 (Dr. Penn Expert Report & Decl. at 4); *see also* Br. of Medical Amici 9 (citing Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451–53 (5th ed. 2013) (hereinafter "DSM-5")). Incongruence between gender identity and assigned sex must be manifested by at least two of the following markers:

> (1) "[a] marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics";

(2) "[a] strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender";

(3) "[a] strong desire for the primary and/or secondary sex characteristics of the other gender";

(4) "[a] strong desire to be of the other gender";

(5) "[a] strong desire to be treated as the other gender"; or

(6) "[a] strong conviction that one has the typical feelings and reactions of the other gender."

See DSM-5 at 452 (J.A. 1117).

Puberty is a particularly difficult time for transgender children, who "often experience intensified gender dysphoria and worsening mental health" as their bodies diverge further from their gender identity. Br. of Medical Amici 10. Left untreated, gender dysphoria can cause, among other things, depression, substance use, self-mutilation, other self-harm, and suicide. *Id*. at 11. Being subjected to prejudice and discrimination exacerbates these negative health outcomes. *Id*. at 11.

For many years, mental health practitioners attempted to convert transgender people's gender identity to conform with their sex assigned at birth, which did not alleviate dysphoria, but rather caused shame and psychological pain. *Id*. at 11–12. Fortunately, we now have modern accepted treatment protocols for gender dysphoria. Developed by the World Professional Association for Transgender Health (WPATH), the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th Version 2012) (hereinafter "WPATH Standards of Care") represent the consensus approach of the medical and mental health community, Br. of Medical Amici 13, and have

been recognized by various courts, including this one, as the authoritative standards of care, *see De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013); *see also Edmo*, 935 F.3d at 769; *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1294 (N.D. Fla. 2018), *vacated sub nom. Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257 (11th Cir. 2020).[2] "There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups." *Edmo*, 935 F.3d at 769 (quoting *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103, 1125 (D. Idaho 2018)).[3]

[2] To be sure, some courts have held in the Eighth Amendment deliberate-indifference context that there remains medical disagreement as to the necessity of sex reassignment surgery (SRS), which the WPATH Standards of Care include as a treatment necessary for *some* patients. *See Gibson v. Collier*, 920 F.3d 212, 219–20 (5th Cir. 2019); *Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) (discussing one expert's dismissal of the WPATH Standards of Care as they pertain to SRS, and later holding that prison officials were not deliberately indifferent when presented with "two alternative treatment plans" by "competent professionals"). *But see Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1017 (W.D. Wis. 2019) (explaining that the record in *Kosilek* was developed in 2006, "at which time medical experts disagreed" as to the necessity of SRS for Kosilek, and that the Fifth Circuit in *Gibson* was not presented with new record evidence, but rather relied on the same 2006 evidentiary record in *Kosilek*). We need not offer an opinion one way or the other.

[3] That did not prevent the Board from finding an expert, Dr. Quentin Van Meter, who disagrees with the WPATH Standards of Care, and who treats transgender youth by encouraging them to live in accordance with their sex assigned at birth. It goes without saying that one can always find a doctor who disagrees with mainstream medical professional organizations on a particular issue. Aspects of Dr. Van Meter's report blatantly contradict the views of Grimm's expert, as well as the American Academy of Pediatrics and our other medical amici. On appeal, however, the Board relies on Dr. Van Meter's testimony only for its assertion that Grimm remained biologically female. *See* Opening Br. 12, 27, 46. The Board does not assert that Dr. Van Meter's report creates any genuine factual questions that would impact our legal analysis below. Therefore, we need not consider the remainder of his assertions, and may rely on the overwhelming evidence regarding the accepted standards of care.

The WPATH Standards of Care outline appropriate treatments for persons with gender dysphoria, including "[c]hanges in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity)," hormone treatment therapy, sex reassignment surgery, "[s]urgery to change primary and/or secondary sex characteristics," and psychotherapy "for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience." *See* J.A. 200–01 (WPATH Standards of Care 9–10). "The number and type of interventions applied and the order in which these take place may differ from person to person," J.A. 200 (WPATH Standards of Care 9), and special considerations are taken before adolescents are provided with physical transition treatments such as hormone therapy, J.A. 209–212 (WPATH Standards of Care 18–21).

There is no question that there are students in our K-12 schools who are transgender. For many of us, gender identity is established between the ages of three and four years old. Br. of Medical Amici 7. Thus, some transgender students enter the K-12 school system as their gender; others, like Grimm, begin to live their gender when they are older. By the time youth are teenagers, approximately 0.7% identify as transgender. That means that there are about 150,000 transgender teens in the United States. That is not to suggest that people are either cisgender or transgender, and that everyone identifies as a binary gender of male or female. Of course, there are other gender-expansive youth who may identify as nonbinary, youth born intersex who do or do not identify with their sex-

assigned-at-birth, and others whose identities belie gender norms. *See generally PFLAG, PFLAG National Glossary of Terms* (July 2019), http://pflag.org/glossary (explaining that "transgender" is "also used as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression"). But today's question is limited to how school bathroom policies implicate the rights of transgender students who "consistently, persistently, and insistently" express a binary gender.

Transgender students face unique challenges in the school setting. In the largest nationwide study of transgender discrimination, the 2015 U.S. Transgender Survey (USTS), 77% of respondents who were known or perceived as transgender in their K-12 schools reported harassment by students, teachers, or staff. Br. of Amici Curiae Sch. Adm'rs from Twenty-Nine States & D.C. in Supp. of Pl.-Appellee 6 (hereinafter "Br. of School Administrator Amici") (citing USTS Report at 132–35). For such students who were known or perceived to be transgender:

- 54% reported verbal harassment;
- 52% reported that they were not allowed to dress in a way expressing their gender;
- 24% reported being physically attacked because people thought they were transgender;
- 20% believed they were disciplined more harshly because teachers or staff thought they were transgender;
- 13% reported being sexually assaulted because people thought they were transgender; and
- 17% reported having left a school due to severe mistreatment.

USTS Report at 11. Unsurprisingly, then, harassment of transgender students is also correlated with academic success: students who experienced greater harassment had significantly lower grade point averages. Br. of School Administrator Amici 11. And harassment at school is similarly correlated with mental health outcomes for transgender students. The opposite is also true, though: transgender students have better mental health outcomes when their gender identity is affirmed. *See* Br. of Trevor Project 8.

Using the school restrooms matching their gender identity is one way that transgender students can affirm their gender and socially transition, but restroom policies vary. In one survey, 58% of transgender youth reported being discouraged from using the bathroom that corresponds with their gender. *See id*. When being forced to use a special restroom or one that does not align with their gender, more than 40% of transgender students fast, dehydrate, or find ways not to use the restroom. Br. of Amici Curiae the Nat'l PTA, GLSEN, Am. Sch. Counselor Ass'n, and Nat'l Assoc. of Sch. Psychologists in Support of Pl.-Appellee 5 (hereinafter "Br. of Education Association Amici") (citing Joseph Kosciw et al., GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 14 (2018)). Such restroom avoidance frequently leads to medical problems. *See id*. at 16 (citing Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 74–75 (2013)). To respond to the needs of transgender students, school districts across the country have implemented policies that allow transgender students to use the restroom matching their gender identity, and they have done so without incident. *See generally* Br.

of School Administrator Amici; Br. of Education Association Amici; Br. of Fairfax Cty. Sch. Bd. & Other Va. Sch. Bds. as Amici Curiae in Support of Appellee and in Favor of Affirmance (hereinafter "Br. of Virginia School Board Amici").

B.

With that essential grounding, we turn to the facts of this case. In so doing, we recount the district court's factual findings, adding only undisputed facts from the record when helpful to our analysis.

When Gavin Grimm was born, he was identified as female, and his sex so indicated on his birth certificate. But Grimm always knew that he was a boy. For example, when given the choice, he would opt to wear boys' clothing. He recounts how uncomfortable he was when made to wear a dress to a sibling's wedding. Grimm also related to male characters, and he felt joy whenever he was "mis"-identified as a male—whether by an adult lining children up in "boy-girl" fashion, or by a good friend who recognized that Grimm was male. At the time, though, Grimm did not have the language to describe himself as transgender.

In September 2013, Grimm began attending Gloucester High School, a public high school in Gloucester County, Virginia. He was enrolled as a female.

In April 2014, during Grimm's freshman year, he disclosed to his mother that he was transgender. At Grimm's request, he began therapy the following month with Dr. Lisa Griffin, Ph.D., a psychologist with experience counseling transgender youth. Dr. Griffin diagnosed Grimm with gender dysphoria. Dr. Griffin then prepared a treatment

documentation letter stating that Grimm had gender dysphoria, that he should present as a male in his daily life, that he should be considered and treated as a male, and that he should be allowed to use restrooms consistent with that identity. Dr. Griffin also referred Grimm to an endocrinologist for hormone treatment.

By the end of his freshman year, Grimm was out to his whole family, had changed his first name to Gavin, and was expressing his male identity in all aspects of his life. He used male pronouns to describe himself. He even used men's restrooms when in public, with no incidents or questions asked.

In August 2014, before the beginning of Grimm's sophomore year, Grimm and his mother met with a school guidance counselor, Tiffany Durr, to discuss his transition. They gave Durr a copy of Dr. Griffin's treatment documentation letter and requested that Grimm be treated as a boy at school. At the time, the student bathrooms were all multi-stalled and single-sex—i.e., boys and girls bathrooms. Those bathrooms were located throughout the school. The only other options were apparently a restroom located in the nurse's office, and the faculty restrooms. Grimm agreed to use the restroom in the nurse's office. But once school started, he "soon found it stigmatizing to use a separate restroom" and "began to feel anxiety and shame surrounding [his] travel to the nurse's office." J.A. 113 (Gavin Grimm Decl. at ¶ 29). He also realized that using the restroom in the nurse's office caused him to be late to class because of its location in the school.

After a few weeks of using the nurse's office, Grimm met with Durr again and asked for permission to use the boys restrooms. Durr asked the high school principal, Principal Collins, who spoke with the Superintendent, Dr. Clemons. The Superintendent deferred to

Principal Collins's judgment, and Principal Collins allowed Grimm to use the male restrooms. At that time, the Board was not yet involved. Grimm was given permission to complete his physical education courses online and never needed to use the locker rooms at school.

For seven weeks, Grimm used the boys restrooms at Gloucester County High School without incident. Despite that smooth transition, adults in the community caught wind of the arrangement and began to complain. Superintendent Clemons, Principal Collins, and Board members began receiving numerous complaints via email and phone not only from adults within that school district but also from adults in neighboring communities and even other states. Only one student personally complained to Principal Collins, and that student did so before the restroom privacy improvements discussed below.

Following these complaints, Board member Carla Hook, who had expressed her opposition to having a transgender male in the boys bathrooms, proposed the following policy at the Board's public meeting on November 11, 2014:

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

J.A. 775. Neither the Board nor the school informed either Grimm or his family that Grimm's bathroom usage would be up for debate at that Board meeting. Rather, news of the topic for the meeting spread on Facebook, and Grimm's mother found out from a friend the day before. Grimm and his parents attended the meeting, at which twenty-four other community members spoke.

Although some community members supported creating a separate restroom for Grimm, by and large, they vehemently opposed allowing Grimm to use the boys restrooms. Two common themes arose: (1) that the "majority" must be protected from such minority intrusion, *see, e.g.*, *School Board Meeting*, Gloucester County School Board (Nov. 11, 2014), at 14:48–15:20 (hereinafter, "November Meeting"), http://gloucester.granicus.com/player/clip/1065?view_id=10 ("It is a disruption. . . . [W]e have more to consider than just the rights of one student. . . . what about the rights of other students, the majority of the students at Gloucester High School."), *cited by* Opening Br. 11 n.2; *id.* at 18:57–19:06 ("While we have an obligation to provide minority rights, we still are a majority rule country . . . ."), and (2) that allowing transgender students to use the bathroom matching their gender identity would open the door to predatory behavior, particularly by male students pretending to be transgender in order to use the girls bathroom, *see, e.g.*, *id*. at 14:27–14:39 ("When we have a situation with a young man that says they want to identify themselves as a young lady and they go in . . . the ladies' room with ill intent, where does it end?"); *id.* at 20:57–21:02 ("A young man can come up and say, 'I'm a girl, I need to use the ladies' rooms now.' And they'd be lying through their teeth.").

The Board was set to vote on the proposed policy at that very meeting but voted 4-3 to delay the vote. Come the next meeting, held on December 9, 2014, the comment period was even uglier. One person called Grimm a "freak" and likened him to a dog, asking: "must we use tax dollars to install fire hydrants where you can publicly relieve yourselves?" *School Board Meeting*, Gloucester County School Board (Dec. 9, 2014), at 1:22:54–1:23:34, http://gloucester.granicus.com/ player/clip/1090?view_id=10, *cited by* Opening Br. 11 n.3. Another likened Grimm to a "European" asking for a "bidet." *Id.* at 1:40:45–1:40:48. More than one person talked about Grimm's gender identity as a choice. *See id.* at 1:13:58–1:14:09 ("Is it morally right for us to kneel or bow to the very few who demand that they receive a special identification to meet needs of their own perceived body functions?"); *id.* at 1:18:48–1:19:49 (woman discussing her "former" lesbianism as an "addiction" from which "Jesus Christ set [her] free"). And more than one citizen stated that they would vote out the Board members if they allowed Grimm to use the boys restroom. *See id.* at 42:21–42:32, 50:53–50:56, 1:18:00–1:18:05.

At both meetings, Grimm and his parents spoke out against the proposed policy. Grimm explained in part how "alienating" and "humiliating" it had been to use the nurse's office, and that it "took a lot of time away from [his] education." November Meeting at 24:36–24:58. He also explained that he was currently using the men's public restrooms in Gloucester County without "any sort of confrontation of any kind." *Id.* at 25:05–25:26.

The Board passed the proposed policy on December 9, 2014 by a 6-1 vote. The following day, Principal Collins sent a letter to Grimm explaining that he was no longer

allowed to use the boys bathrooms, effective immediately, and that his further use of those bathrooms would result in disciplinary consequences.

As a corollary to the policy, the Board approved a series of updates to the school's restrooms to improve general privacy for all students. The updates included the addition or expansion of partitions between urinals in male restrooms, the addition of privacy strips to the doors of stalls in all restrooms, and the construction of three single-stall unisex restrooms available to all students.

At the same time that the bathroom policy was going into place in December 2014, Grimm began hormone therapy. Hormone therapy "deepened [his] voice, increased [his] growth of facial hair, and [gave him] a more masculine appearance." J.A. 120 (Gavin Grimm Decl. ¶ 60). But until the single-stall bathrooms were completed, Grimm's only option was to use the girls bathrooms or the restroom in the nurse's office. Grimm recalls an incident when he stayed after school for an event, realized the nurse's office was locked, and broke down in tears because there was no restroom he could use comfortably. A librarian witnessed this and drove him home. In a similar vein, and even after the single-user restrooms had been built, Grimm could not use those restrooms when at football games. He recounts a friend having to drive him to a hardware store to use the restroom; on another occasion, his mother had to come pick him up early.

The single-stall restrooms were completed on December 16, 2014, one week after the Board enacted the policy. Once completed, however, they were located far from classes that Grimm attended. A map of the school confirms that no single-user restrooms were located in Hall D, where Grimm attended most classes.

Moreover, the single-stall restrooms made Grimm feel "stigmatized and isolated." J.A. 117 (Gavin Grimm Decl. ¶ 47). He never saw any other student use these restrooms. J.A. 117 (Gavin Grimm Decl. ¶ 48). Principal Collins testified at his deposition that he never saw a student use the single-user restrooms, but that he assumed that they were used because they were cleaned daily.

As commonly occurs for transgender students prohibited from using the restroom matching their gender identity, *see supra* Part I.A, Grimm practiced restroom avoidance. This caused Grimm to suffer from recurring urinary tract infections, for which his mother kept medication "always stocked at home." J.A. 133 (Deirdre Grimm Decl. ¶ 26).

During his junior year, Grimm was hospitalized for suicidal ideation resulting from being in an environment where he felt "unsafe, anxious, and disrespected." J.A. 119 (Gavin Grimm Decl. ¶ 54). In a moment of affirmation, the hospital admitted him to the boys ward. The situation at Gloucester County High School had proved untenable for him, and he sought other schooling options. Grimm spent his junior year in a Gloucester County High School program in a separate building. But that program was cancelled, and he had to return to the same restroom situation for his senior year. Having collected credits in the prior program, he spent as little time at the high school as possible during his senior year.

At the same time, Grimm's gender transition progressed. In June 2015, before his junior year, the Virginia Department of Motor Vehicles issued Grimm state identification reflecting that he was male. In June 2016, Grimm underwent chest reconstruction surgery

(a double mastectomy).[4] The Gloucester County Circuit Court found this to be a type of "gender reassignment surgery," and on September 9, 2016, it issued an order declaring that Grimm is "now functioning fully as a male" and directing the Virginia Department of Health to issue him a birth certificate accordingly. Grimm's new birth certificate was issued on October 27, 2016.

Shortly thereafter, Grimm and his mother provided Gloucester County High School with his new birth certificate and asked that his school records be updated to reflect his gender as male. The decision of whether to amend Grimm's records accordingly, though, lay with the Board. In January 2017, through legal counsel, the Board informed Grimm in a letter that it declined to update his records. The Board did not provide a reason, but did inform Grimm of his right to a hearing, which Grimm did not request.

As part of this litigation, the Board's 30(b)(6) witness, Troy Andersen, testified that the Board refused to update Grimm's records because, in its view, Grimm's amended birth certificate was not issued in accordance with Virginia law and because it was marked "void." Grimm submitted a declaration from State Registrar and Director of the Division of Vital Records Janet Rainey, who administers Virginia's vital records. Rainey affirmed the validity of Grimm's birth certificate, stating: "On October 27, 2016, I issued a birth certificate to Gavin Elliot Grimm. The birth certificate states his sex as male." J.A. 982 (Decl. of Janet M. Rainey).

[4] The parties agree that Grimm could not have undergone gender confirmation surgery of the genitalia until he was at least eighteen years old.

Grimm graduated high school on June 10, 2017. He now attends community college in California and intends to transfer to a four-year university. To do so, he will need to provide his high school transcript, which still identifies him as female.

II. Procedural History

The procedural history of this case is winding and has outlasted Grimm's high school career, shaping both the claims and relief sought. Grimm first sued the Board on June 11, 2015, at the end of his sophomore year. Grimm alleged that the Board's restroom policy impermissibly discriminated against him in violation of both Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. As relief, he sought compensatory damages and an injunction allowing him to use the boys restrooms. Although the Board's policy similarly applies to locker room facilities, Grimm did not need to use the locker rooms and never challenged that aspect of the policy. Because he only challenges his exclusion from the boys restrooms, we refer to the policy as the "bathroom" or "restroom" policy throughout.

The Board filed a motion to dismiss Grimm's claims. In the first ruling in Grimm's case, the district court denied Grimm's motion for a preliminary injunction and dismissed his Title IX claim, holding that it would not defer to a Guidance Document issued by the Department of Education's Office for Civil Rights (OCR), which, at that time, directed in part that "[u]nder Title IX, a recipient must generally treat transgender students consistent with their gender identity . . . ." *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132

F. Supp. 3d 736, 746 (E.D. Va. 2015). The district court held that an implementing regulation of Title IX, 34 C.F.R. § 106.33, "clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth of biological sex." *Id*.

Grimm filed an interlocutory appeal, and this Court reversed, holding that the Guidance Document was entitled to deference. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016). However, after that decision, the Department of Education and Department of Justice withdrew its prior Guidance Document, issuing a new one. Accordingly, the Supreme Court, which had granted the Board's petition for writ of certiorari and had scheduled oral arguments, summarily vacated this Court's decision and remanded for reconsideration in light of the shift in agency perspective. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

Having graduated from high school, Grimm then filed an amended complaint, which was assigned to a different district court judge. The amended complaint did not seek compensatory damages—only nominal damages and declaratory relief.[5] It also adjusted Grimm's Title IX claim in time to extend throughout his time at Gloucester County High School. Finally, it incorporated more recent factual developments, including that Grimm underwent chest reconstruction surgery, had his sex legally changed under Virginia law by the Gloucester County Circuit Court, and received a new birth certificate from the Department of Health, listing his sex as male. The Board once again filed a motion to dismiss for failure to state a claim. In an opinion that would build the basis for summary

[5] Initially, the amended complaint retained Grimm's request for a permanent injunction, but Grimm voluntarily dismissed that request.

judgment, the district court denied the Board's motion to dismiss. As to Grimm's Title IX claim, the district court held that "claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory," and that Grimm had sufficiently pleaded sex discrimination that harmed him. *See Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 746–47 (E.D. Va. 2018) (quoting *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018)). As to his equal protection claim, the district court held that heightened scrutiny applied both because "transgender individuals constitute at least a quasi-suspect class," and because Grimm pleaded a sex-stereotyping claim. *Id*. at 749–50. And the policy could not withstand heightened scrutiny, the district court reasoned, because it was not substantially related to the government's interest in protecting the privacy of other students. *See id*. at 751 (explaining that Grimm used the boys bathroom without incident until adults complained, that transgender students are not more likely than others to peep, and that pre-pubescent and post-pubescent children share bathrooms without issue). Students enjoyed the added privacy of partitions installed in the boys bathroom, and if any students felt that the partitions were insufficient, *they* could use the single-stalled bathrooms. *See id*. But to tell Grimm alone that he could not use the multi-stalled boys bathrooms "singled out and stigmatized" him. *Id*.

After this win, Grimm filed a second amended complaint, adding a claim that the Board's refusal to update his gender on his school transcripts violates Title IX and equal protection. Grimm and the School Board then filed cross-motions for summary judgment. Again, the district court ruled in Grimm's favor, granting him summary judgment on both his Title IX and equal protection claims.

Grimm filed various exhibits in support of his motion, including medical treatment records and letters documenting his treatment. The district court rejected the Board's Motion to Strike these exhibits, holding that the authoring doctors were not being treated as expert witnesses, and that they were business records falling within a hearsay exception. The district court did grant the Board's Motion to Strike as to one piece of evidence, however. In February 2019, the Board had considered a new policy "that would allow transgender students to use restrooms consistent with their gender identity if certain criteria were met." *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 455–56 (E.D. Va. 2019). The district court found that this policy was inadmissible because it was considered as a part of settlement negotiations. *Id.*

On the merits, and applying its prior Title IX holding as further supported by additional intervening caselaw, the district court granted Grimm's Motion for Summary Judgment on the Title IX claim. In doing so, it rejected the Board's contention that Grimm failed to prove harm, *see infra* Section V, because Grimm's declaration under oath explained that going to the bathroom was like a "walk of shame," and because he suffered urinary tract infections from trying to avoid the bathroom and was even hospitalized for suicidal thoughts. *See id.* at 458. This was enough to prove that he was harmed; he did not need expert testimony. *See id.*

The district court also granted Grimm's Motion for Summary Judgment on his equal protection claim, again finding more intervening support for its prior holding. The Board had presented a witness by deposition, Troy Andersen, who testified that using the toilet or urinal implicates students' privacy concerns. However, "[w]hen asked why the

expanded stalls and urinal dividers could not fully address those situations, Mr. Andersen responded that he 'was sure' the policy also protected privacy interests in other ways, but that he "[couldn't] think of any other off the top of [his] head.'" *See id*. at 461 (alterations in original). Therefore, the district court found that the Board's privacy argument was "based upon sheer conjecture and abstraction.'" *See id*. (quoting *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017)).

Regarding Grimm's school records, the Board had argued that Grimm's amended birth certificate did not comply with Virginia law. But according to the district court, any question of compliance was "dispelled by the Declaration of Janet M. Rainey," the State Registrar and Director of the Division of Vital Records, who issued Grimm's amended birth certificate. *See id*. at 458. The court went on to declare that the Board's "continued recalcitrance" to fix his school records violated both Title IX and equal protection, and it issued a permanent injunction ordering the Board to correct Grimm's school records. *Id*.

In addition to declaratory relief, the district court awarded nominal damages to Grimm in the amount of one dollar for the Board's Title IX and equal protection violations, as well as attorney's fees. The Board timely appealed.

III. The Board's Threshold Challenges to Grimm's Claims

At the outset, we reject the Board's two threshold challenges to Grimm's claims on appeal: (1) that his claims pertaining to the restroom policy are moot, and (2) that his claims pertaining to his school records must be administratively exhausted.

A. Mootness of Challenge to Restroom Policy

First, the Board contends that we lack jurisdiction over Grimm's challenges to the restroom policy because those claims are mooted by his own amendments to the complaint, which removed his request for injunctive relief and compensatory damages. As characterized by the Board, by only seeking nominal damages and declaratory relief as to the restroom policy, "Grimm seeks nothing more than a judicial stamp of approval, which is not a proper remedy." Reply Br. 1. Finding a live controversy, we reject this argument.

Our jurisdiction is restricted by Article III of the Constitution to "Cases" and "Controversies." *See Chafin v. Chafin*, 568 U.S. 165, 171 (2013). A case becomes moot and jurisdiction is lost if, at any time during federal judicial proceedings, "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *See id*. at 172 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). But the bar for maintaining a legally cognizable claim is not high: "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *See id.* (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000,* 567 U.S. 298, 307 (2012)). Naturally, then, plausible claims for damages defeat mootness challenges. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019) ("If there is any chance of money changing hands, [the] suit remains live."); *see also* 13C Charles Alan Wright et al., Federal Practice and Procedure § 3533.3 (3d ed. April 2020 Update) (hereinafter "Wright & Miller").

That is true even when the claim is for nominal damages. *See* Wright & Miller § 3533.3, n.47 (collecting cases); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. City of*

New York, 140 S. Ct. 1525, 1536 (2020) (Alito, J., dissenting) (same). Under this Circuit's precedent, "even if a plaintiff's injunctive relief claim has been mooted, the action is not moot if the plaintiff may be 'entitled to at least nominal damages.'" *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009) (quoting *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007)). And the implications are particularly important in the civil rights context, because such rights are often vindicated through nominal damages. *See N.Y. State Rifle & Pistol Ass'n, Inc.*, 140 S. Ct. at 1535 (Alito, J., dissenting) (citing *Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion)); *see also Riverside*, 477 U.S. at 574 (plurality opinion) ("Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.").[6]

Nevertheless, the Board analogizes to an Eleventh Circuit en banc decision, *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs*, 868 F.3d 1248, 1263 (11th Cir. 2017). But *Flanigan's Enterprises* is unpersuasive because it is not on point.

In *Flanigan's Enterprises*, the Eleventh Circuit held that the plaintiff-appellants' request for declaratory and injunctive relief from a city ordinance became moot when the City repealed that ordinance "unambiguously and unanimously, in open session," with

[6] Additionally, winning nominal damages under 42 U.S.C. § 1983 allows for a recovery of attorney's fees under 42 U.S.C. § 1988, thereby allowing plaintiffs with insufficient funds to hire an attorney at market rate, and with little prospect of a great recovery, to be matched with a civil rights attorney. *See generally Riverside*, 477 U.S. at 576–80 (plurality opinion) (discussing the importance of the § 1988 framework for vindicating civil rights). Holding that claims for nominal damages are moot would undermine this framework by discouraging attorneys from taking cases such as Grimm's.

"persuasive reasons for doing so." 868 F.3d at 1263. The City had "expressly, repeatedly, and publicly disavowed any intent to reenact [the challenged] provision," which it had "*never* enforced in the first place." *Id*. (emphasis added). The Eleventh Circuit then turned to the appellants' "lone" remaining request, nominal damages. It explained that, in some situations, nominal damages have a "practical effect" or are the "appropriate remedy"; in others, nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." *Id*. at 1264. *Flanigan's Enterprises* was "squarely of that last variety," the court said, because the appellants had "already won." *Id*.

Flanigan's Enterprises is distinct at every turn. Whereas the ordinance at issue in that case had never been enforced, and had been publicly retracted, here the Board unquestionably applied its policy against Grimm. To this day, the Board and Grimm "vigorously contest" the legality of the bathroom policy as applied to Grimm. *See Chafin*, 133 S. Ct. at 1024 (holding that a case was not moot when the parties continued to "vigorously contest the question of where their daughter w[ould] be raised"). Unlike the Eleventh Circuit in *Flanigan's Enterprise*, we are presented with a "live controversy," *Hall v. Beals*, 396 U.S. 45, 48 (1969), that is "likely to be redressed by a favorable judicial decision," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). As seen by this drawn-out litigation, it will *only* be redressed by a favorable judicial decision.

B. Administrative Exhaustion of School Records Decision

Second, the Board asserts that Grimm was required to exhaust his administrative remedies by requesting a hearing after he learned of the Board's final decision. "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993). The Board is correct that the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, under which Grimm requested that his records be amended, provides for a hearing. *See* 34 C.F.R. § 99.20(c) ("If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21."). When read together with broader agency principles, the Board believes that FERPA's regulatory hearing provision demands exhaustion.

In sharp contrast to a statute like the Prison Litigation Reform Act of 1995 (PLRA), which demands "proper exhaustion," *see Woodford v. Ngo*, 548 U.S. 81, 93 (2006), the FERPA says nothing about exhausting administrative remedies. *Cf.* PLRA, 42 U.S.C. § 1997e(a) ("No action shall be brought . . . until such administrative remedies as are available are exhausted."). Facing Congressional silence, rather than an express exhaustion provision, "sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded on other grounds by statute*, 42 U.S.C. § 1997e(a).

Even when considering a different education statute with an *explicit* exhaustion requirement, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(l),

the Supreme Court held that its exhaustion requirement is not implicated when the gravamen of the suit is disability discrimination in violation of other federal laws, rather than a more direct violation of the IDEA itself. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017). And here, the "gravamen" of Grimm's suit is discrimination, rather than technical violations of the FERPA. *See Fry*, 137 S. Ct. at 755.[7] Grimm is not complaining that the Board failed to follow the FERPA, but rather that it acted in a discriminatory manner when it refused to amend his records.

We may ask ourselves what benefit a hearing could have provided Grimm, when the Board continues to deny his request in the face of both a court order stating that his sex is male and a declaration from the State Registrar affirming the validity of his new birth certificate. If the FERPA ever *implicitly* demands such complete exhaustion, it does not do so in a discrimination case such as this one.

IV. Grimm's Equal Protection Claim

Holding that Grimm's challenges to the bathroom policy are not moot, and that he need not have strictly exhausted his administrative remedies as to his school records, we turn to the merits of his claims, beginning with his constitutional claim that both the

[7] The Board cites one case that, in its view, suggests that FERPA has an exhaustion requirement. But that case holds only that the student must at least provide the school with documentation of a gender change before suing. *See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 663 (W.D. Pa. 2015) (rejecting transgender student's claims arising out of the school's failure to amend his records because the student had not presented a court order or birth certificate, and never followed through).

restroom policy and the failure to amend his school records violated equal protection, as applied to him.

We address the Board's two challenged actions in turn. In doing so, we review the district court's grant of summary judgment to Grimm de novo. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). Summary judgment is only appropriate when there is "no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." *Ret. Comm. of DAK Ams. LLC v. Brewer*, 867 F.3d 471, 479 (4th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)).

A. The Board's Restroom Policy

To analyze Grimm's as-applied constitutional challenge to the Board's restroom policy, we must begin with the equal protection framework. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause protects us not just from state-imposed classifications, but also from "intentional and arbitrary discrimination." *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (quoting *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 445 (1923)); *see also* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9 (2003) (explaining that the Equal Protection Clause contains both anticlassification and antisubordination principles). Put another way,

state action is unconstitutional when it creates "arbitrary or irrational" distinctions between classes of people out of "a bare . . . desire to harm a politically unpopular group." *Cleburne*, 473 U.S. at 446–47 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also United States v. Virginia*, 518 U.S. 515, 534 (1996) (sex-based classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women" (citation omitted)).

When considering an equal protection claim, we first determine what level of scrutiny applies; then, we ask whether the law or policy at issue survives such scrutiny. For the reasons that follow, we conclude that heightened scrutiny applies to Grimm's claim because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class. Therefore, to withstand judicial scrutiny, the Board's bathroom policy must be "substantially related to a sufficiently important governmental interest." *See Cleburne*, 473 U.S. at 441. Because we hold that the Board's policy as applied to Grimm is not substantially related to the important objective of protecting student privacy, we affirm summary judgment to Grimm.

1.

In determining what level of scrutiny applies to a plaintiff's equal protection claim, we look to the basis of the distinction between the classes of persons. *See generally United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Representing two ends of the scrutiny spectrum, most classifications are generally benign and are upheld so long as they are "rationally related to a legitimate state interest," *Cleburne*, 473 U.S. at 440,

whereas race-based classifications are "inherently suspect" and must be "strictly scrutinized," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223–24 (1995) (internal quotation mark omitted).

Sex is somewhere in the middle, constituting a quasi-suspect class. Sex[8] is only *quasi*-suspect because, although it "frequently bears no relation to the ability to perform or contribute to society,'" *Cleburne*, 473 U.S. at 440–41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)), the Supreme Court has recognized "inherent differences" between the biological sexes that might provide appropriate justification for distinctions, *see Virginia*, 518 U.S. at 534 (citing, as examples of appropriate sex-based distinctions, "compensat[ing] women for particular economic disabilities" and "promot[ing] equal employment opportunity" (internal quotation marks omitted)); *see also Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) (holding that less burdensome citizenship application requirements for the child of a citizen mother than that of a citizen father withstands intermediate scrutiny, in part because "[t]o 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").

[8] We acknowledge that the Supreme Court has, in certain equal protection cases, used both the terms "gender" and "sex" interchangeably. *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Virginia*, 518 U.S. at 515. Therefore, Grimm has preserved an argument that transgender individuals necessarily fall under this line of cases based on gender discrimination. Because we need not reach this question in order to resolve Grimm's appeal, we treat this line of cases on perhaps its narrower terms—that is, as referring to classifications based on biological sex.

Because sex-based classifications are quasi-suspect, they are subject to a form of heightened scrutiny. *Cleburne*, 473 U.S. at 440–41. Specifically, they are subject to intermediate scrutiny, meaning that they "fail[] unless [they are] substantially related to a sufficiently important governmental interest." *See id*. at 441. To survive intermediate scrutiny, the state must provide an "exceedingly persuasive justification" for its classification. *See Virginia*, 518 U.S. at 534.

a.

On its face, the Board's policy creates sex-based classifications for restrooms. It states that the school district will "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." J.A. 775. The only logical reading is that "corresponding biological genders" refers back to "male and female." And, although the Board did not define "biological gender," it has defended its policy by taking the position that it will rely on the sex marker on the student's birth certificate. We agree with the Seventh and now Eleventh Circuits that when a "School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate," the policy necessarily rests on a sex classification. *See Whitaker*, 858 F.3d at 1051 (applying heightened scrutiny to a transgender student's equal protection claim regarding a bathroom policy); *see also Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2020 WL 4561817, at *5 (11th Cir. Aug. 7, 2020) (same). As in *Whitaker*, such a policy "cannot be stated without

referencing sex." *See id*.; *accord M.A.B.*, 286 F. Supp. 3d at 719. On that ground alone, heightened scrutiny should apply.

Moreover, and as the district court held, "Grimm was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by the Policy." *Grimm*, 302 F. Supp. 3d at 750. Many courts, including the Seventh and Eleventh Circuits, have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes. *See, e.g.*, *Whitaker*, 858 F.3d at 1051 (holding that the School District's bathroom policy "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently"); *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) ("Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes."); *Smith v. City of Salem*, 378 F.3d 566, 573–75; 578 (6th Cir. 2004) (applying a sex-stereotyping theory, albeit without mentioning a level of scrutiny, and holding that the transgender plaintiff stated a sex discrimination claim in violation of equal protection); *M.A.B.*, 286 F. Supp. 3d at 719 (holding that a school locker room policy was subject to heightened scrutiny because it "classifie[d] [the plaintiff] differently on the basis of his transgender status, and, as a result, subject[ed] him to sex stereotyping"); *see also Doe 1 v. Trump*, 275 F. Supp. 3d 167, 210 (D.D.C. 2017) (military bans on transgender persons subject to heightened scrutiny because they "punish individuals for failing to adhere to

gender stereotypes"), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (adopting *Doe 1* rationale); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (holding that discrimination on the basis of transgender status is subject to intermediate scrutiny in part under sex-stereotyping theory).[9] In so holding, these courts have recognized a central tenet of equal protection in sex discrimination cases: that states "must not rely on overbroad generalizations" regarding the sexes. *See Virginia*, 518 U.S. at 533; *see also Miss. Univ. for Women*, 458 U.S. at 724–25 ("Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females.").

For each of these independent reasons, we hold that the Board's policy constitutes sex-based discrimination as to Grimm and is subject to intermediate scrutiny. And although the Board raises two related counterarguments in an effort to convince us otherwise, we reject them both.

First, the Board contends that all students are treated the same, regardless of sex, because the policy applies to everyone equally. *See* Reply Br. 16 (noting that any student may use a "private, single-stall restroom," and "[n]o student is permitted to use the

[9] As relied on by the Board, one 2015 district court case goes the other way, *Johnston*, 97 F. Supp. 3d at 671, but the same district court later chose not to follow that decision, *see Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017) ("Johnston also acutely recognized that cases involving transgender status implicate a fast-changing and rapidly-evolving set of issues that must be considered in their own factual contexts. To be sure, Johnston's prognostication of that reality was profoundly accurate." (citation omitted)).

restroom of the opposite sex"). But that is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race. No one would suppose that also providing a "race neutral" bathroom option would have solved the deeply stigmatizing and discriminatory nature of racial segregation; so too here. Rather, the Board said what it meant: "students with gender identity issues shall be provided an alternative appropriate private facility." J.A. 775. The single-stall restrooms were created *for* "students with gender identity issues." And by "students," the Board apparently meant Grimm, as, per its own deposition witness, it "only ha[d] a sample size of one." J.A. 458. The Board suggests that this purpose insulates its policy from intermediate scrutiny, because it shows that the policy "relies solely on transgender status." *See* Opening Br. 46. But again, how does the Board determine transgender status, if not by looking to what it calls "biological gender"?

Second, the Board contends that even if the policy necessarily involves sex-based discrimination, it cannot violate equal protection because Grimm is not similarly situated to cisgender boys. Instead, it asks us to compare Grimm's treatment under the policy to the treatment of students it would consider to be "biological" girls, because Grimm's "choice of gender identity did not cause biological changes in his body, and Grimm remain[ed] biologically female." Opening Br. 46. But embedded in the Board's framing is its own bias: it believes that Grimm's gender identity is a choice, and it privileges sex-assigned-at-birth over Grimm's medically confirmed, persistent and consistent gender identity. The policy itself "recognizes that some students question their gender identities," and states that such students have "gender identity issues." J.A. 775. Grimm, however,

did not question his gender identity at all; he knew he was a boy. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1317 (M.D. Fla. 2018) ("There is no evidence to suggest that [the transgender plaintiff's] identity as a boy is any less consistent, persistent and insistent than any other boy."). The overwhelming thrust of everything in the record—from Grimm's declaration, to his treatment letter, to the amicus briefs—is that Grimm was similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth. Adopting the Board's framing of Grimm's equal protection claim here would only vindicate the Board's own misconceptions, which themselves reflect "stereotypic notions." *See Miss. Univ. for Women*, 458 U.S. at 725 ("Care must be taken in ascertaining whether the [state's] objective itself reflects archaic and stereotypic notions.").[10]

b.

Alternatively, and as held by the district court in this case, we conclude that heightened scrutiny applies because transgender people constitute at least a quasi-suspect class.

Although the Seventh Circuit declined to reach the question of whether heightened scrutiny applies to transgender persons in *Whitaker*, many district courts, including the

[10] Our dissenting colleague's opinion reveals why this is so. To avoid a conclusion that Grimm was similarly situated to other boys, the dissent fails to "meaningfully reckon with what it means for [Grimm] to be a transgender boy." *See Adams*, 2020 WL 4561817, at *2 n.2; *see also* Dissenting Op. at 93–94. We have been presented with a strong record documenting the modern medical understanding of what it means to be transgender, and considering that evidence is definitively the role of this Court.

district court here, have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class. *See Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (holding that transgender people constitute a quasi-suspect class); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (same); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ*., 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (same); *M.A.B.*, 286 F. Supp. 3d at 718–19 (same); *Norsworthy*, 87 F. Supp. 3d at 1119 (same); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (same); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018) (explaining in a ruling on a preliminary injunction why heightened scrutiny would likely apply to transgender persons).[11] As articulated by one district court, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Flack*, 328 F. Supp. 3d at 953. Moreover, the Ninth Circuit recently joined the many district courts in holding that transgender people constitute a quasi-suspect class. *See Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (affirming the district court's reasoning as to why transgender people are a quasi-suspect class). Only one court of appeals decision holding otherwise remains good law, but it reluctantly followed a since-overruled Ninth Circuit opinion. *See Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (noting that "[r]ecent research concluding

[11] The Eleventh Circuit was not presented with this question in *Adams* because the parties agreed that heightened scrutiny applied to the plaintiff's claim based on that Circuit's precedent in *Glenn*, 663 F.3d at 1319. *See Adams*, 2020 WL 4561817, at *4.

that sexual identity may be biological suggests reevaluation of [*Holloway v. Arthur Andersen & Co.* 566 F.2d 659 (9th Cir. 1977),]" but following it regardless because the plaintiff's allegations were "too conclusory to allow proper analysis").

Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class. We consider four factors to determine whether a group of people constitutes a suspect or quasi-suspect class. First, we consider whether the class has historically been subject to discrimination. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Second, we determine if the class has a defining characteristic that bears a relation to its ability to perform or contribute to society. *Cleburne*, 473 U.S. at 440–41. Third, we look to whether the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics. *Bowen*, 483 U.S. at 602. And fourth, we consider whether the class is a minority lacking political power. *Id*. Each factor is readily satisfied here.

First, take historical discrimination. Discrimination against transgender people takes many forms. Like the district court, we provide but a few examples to illustrate the broader picture. *See Grimm*, 302 F. Supp. 3d at 749 ("[T]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." (collecting cases)). As explained in the Brief of the Medical Amici, being transgender was pathologized for many years. As recently as the DSM-3 and DSM-4, one could receive a diagnosis of "transsexualism" or "gender identity disorder," "indicat[ing] that the clinical problem was the discordant gender identity." *See* John W. Barnhill, *Introduction*, *in DSM-5 Clinical Cases* 237–38 (John W. Barnhill ed.,

2014). Whereas "homosexuality" was removed from the DSM in 1973, "gender identity disorder" was not removed until the DSM-5 was published in 2013. *See* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 509–10, 517 (2016). What is more, even though being transgender was marked as a mental illness, coverage for transgender persons was excluded from the Americans with Disabilities Act of 1990 (ADA) after a floor debate in which two senators referred to these diagnoses as "sexual behavior disorders." *See* Barry et al., *supra*, at 510; *see also* 42 U.S.C. § 12211(b)(1). The following year, Congress added an identical exclusion to the Rehabilitation Act of 1973, "stripping transgender people of civil rights protections they had enjoyed for nearly twenty years." Barry et al., *supra*, at 556; *see also* H.R. Rep. No. 102-973, at 158 (1992).

The transgender community also suffers from high rates of employment discrimination, economic instability, and homelessness. According to the National Transgender Discrimination Survey (NTDS),[12] people who are transgender are twice as likely as the general population to have experienced unemployment. When employed, 97% of NTDS respondents reported experiencing some form of mistreatment at work, or "hiding their gender transition to avoid such treatment." Barry et al., *supra*, at 552. NTDS respondents were "four times more likely than the general population to have a household

[12] The NTDS is a major national survey on transgender discrimination. Along with its successor, the USTS, the NTDS has been relied upon by many amici to this case, as well as other courts. *See, e.g.*, *Whitaker*, 858 F.3d at 1051 (citing to the NTDS); *M.A.B.*, 286 F. Supp. 3d at 720 (citing to both the NTDS and the USTS); *Adkins*, 143 F. Supp. 3d at 139 (relying on the NTDS).

income of less than $10,000 per year," and two and a half times more likely to have experienced homelessness. *Id*.

That is not all. Transgender people frequently experience harassment in places such as schools (78%), medical settings (28%), and retail stores (37%), and they also experience physical assault in places such as schools (35%) and places of public accommodation (8%). *See id*. at 553. Indeed, transgender people are more likely to be the victim of violent crimes. *Id*. So, in 2009, Congress expanded federal protections against hate crimes to include crimes based on gender identity. *Id*. at 555. In so doing, the House Judiciary Committee recognized the "extreme bias against gender nonconformity" and the "particularly violent" crimes perpetrated against transgender persons. *See id*.

Of course, current measures and policies continue to target transgender persons for differential treatment. Without opining on the *legality* of such measures, we note that policies precluding transgender persons from military service, even after the repeal of "Don't Ask, Don't Tell," *see* Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States* 1 (2014), have recently been re-implemented as to most transgender service members. And this year, the Governor of Idaho signed into law a bill that would ban transgender individuals from changing the gender marker on their birth certificates, as Virginia law allowed Grimm to do. Further still, the Department of Health and Human Services recently issued a final rule redefining "sex discrimination" for purposes of Section 1557 of the Affordable Care Act to encompass only biological sex, and not gender identity. The list surely goes on.

Next, we turn to the second factor—whether the class has a defining characteristic that "bears [a] relation to ability to perform or contribute to society.'" *Cleburne*, 473 U.S. at 440–41 (quoting *Frontiero*, 441 U.S. at 677). Being transgender bears no such relation. Seventeen of our foremost medical, mental health, and public health organizations agree that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *See* Br. of Medical Amici 6 (quoting Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* 1 (2012)). Although some transgender individuals experience gender dysphoria, and that could cause some level of impairment, not all transgender persons have gender dysphoria, and gender dysphoria is treatable. *See id*. "Importantly, 'transgender' and 'impairment' are not synonymous." Barry et al., *supra*, at 558.

That leaves the third and fourth factors. As to the third factor, transgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice. Rather, it is as natural and immutable as being cisgender. Br. of Medical Amici 7. But unlike being cisgender, being transgender marks the group for different treatment.

Fourth and finally, transgender people constitute a minority lacking political power. Comprising approximately 0.6% of the adult population in the United States, transgender individuals are certainly a minority. Even considering the low percentage of the population that is transgender, transgender persons are underrepresented in every branch of government. It was not until 2010 that the first openly transgender judges took their place

on their states' benches, *see First Two Openly Transgender Judges in the U.S. Appointed Last Month*, Women's Law Project (Dec. 7, 2010), https://www.womenslawproject.org/2010/12/07/first-two-openly-transgender-judges-in-the-u-s-appointed-last-month/, and we know of no openly transgender federal judges. There is a similar dearth of openly transgender persons serving in the executive and legislative branches. In 2017, nine openly transgender individuals were elected to office—more than doubling the total number of transgender individuals in *any* elected office across the country. *See* Brooke Sopelsa, *Meet 2017's Newly Elected Transgender Officials*, NBC News (Dec. 28, 2017, 9:06 AM EST), https://www.nbcnews.com/feature/nbc-out/meet-2017-s-newly-elected-transgender-officials-n832826; *see also* Logan S. Casey, *Transgender Candidates*, https://www.loganscasey.com/trans-candidates-project. And the examples of discrimination cited under the first factor affirm what we intuitively know: Transgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process.

The Board does not, and truly cannot, contend that transgender people do not constitute a quasi-suspect class under these four factors. Instead, it counsels judicial modesty, suggesting that we are admonished not to name new suspect classes. *See Cleburne*, 473 U.S. at 441–42 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."); *see also Johnston*, 97 F. Supp.

3d at 668–69. But no hard-and-fast rule prevents this Court from concluding that a quasi-suspect class exits, nor have *Cleburne*'s dicta prevented many other courts from so concluding.

For the foregoing reasons, we hold that the Board's restroom policy constitutes sex-based discrimination and, independently, that transgender persons constitute a quasi-suspect class.

2.

Whether because the policy constitutes sex-based discrimination or because transgender persons are a quasi-suspect class, we apply heightened scrutiny to hold that the Board's policy is not substantially related to its important interest in protecting students' privacy.[13]

No one questions that students have a privacy interest in their body when they go to the bathroom. But the Board ignores the reality of how a transgender child uses the bathroom: "by entering a stall and closing the door." *Whitaker*, 858 F.3d at 1052; *see also Adams*, 318 F. Supp. 3d at 1296, 1314 ("When he goes into a restroom, [the transgender student] enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves."). Grimm used the boys restrooms for *seven weeks* without incident. When the community became aware that he was doing so, privacy in the boys restrooms actually increased, because the Board installed privacy strips and screens between the urinals. Given these additional precautions, the Board's Rule 30(b)(6) deposition witness

[13] Grimm argues on appeal that he wins even under rational basis review. In light of our holding above, we need not analyze his claim under that level of review.

could not identify any other privacy concern. The Board does not present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student. Put another way, the record demonstrates that bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms. Therefore, the Board's policy was not substantially related to its purported goal.

The insubstantiality of the Board's fears has been borne out in school districts across the country, including other school districts in Virginia. Nearly half of Virginia's public-school students attend schools prohibiting discrimination or harassment based on gender identity. *See* Br. of Virginia School Board Amici 4. Although community members espoused similar fears at school board meetings before the anti-discrimination measures, none of those fears have materialized. *Id*. at 17–19. Those Virginia school boards have had no difficulty implementing trans-inclusive bathroom policies and explain that they "have seen none of the negative consequences predicted by opponents of such policies." *Id*. at 5.

The same can be said across the country. *See* Br. of School Administrator Amici 18–24 (explaining that in amici's states, the concerns raised by the Board have not materialized). One school administrator in Kentucky, who was previously against allowing transgender students to use the bathroom corresponding to their gender, explained that his experience with shifting the policy demonstrated that all the concerns were "philosophical." *Id.* at 17. In these administrators' experiences, "showing respect for each student's gender identity supports the dignity and worth of all students by affording them

equal opportunities to participate and learn." *Id*. at 32. And the National PTA, GLSEN, American School Counselor Association, and National Association of School Psychologists similarly assure us that the experiences of schools and school districts across the country "put the lie to supposed legitimate justifications for restroom discrimination: preventing students who pretend to be transgender from obtaining access to opposite-gender restrooms and protecting privacy." Br. of Education Association Amici 6.

We thus agree with the district court's apt conclusion that "the Board's privacy argument 'is based upon sheer conjecture and abstraction.'" *Grimm*, 400 F. Supp. 3d at 461 (quoting *Whitaker*, 858 F.3d at 1052). The Board cites to no incident, either in Gloucester County or elsewhere. It ignores the growing number of school districts across the country who are successfully allowing transgender students such as Grimm to use the bathroom matching their gender identity, without incident. And it ignores its own seven-week experience with doing the same in Gloucester County High School. Notably, both the Third and Ninth Circuits have now rejected privacy-related challenges brought by cisgender students to the shared use of restrooms with transgender students of the opposite biological sex. *See Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018). And before this opinion was filed, the Eleventh Circuit, applying heightened scrutiny to a transgender student's equal protection challenge to his high school's bathroom policy, similarly held that application of the policy did not withstand such scrutiny due, in part, to the hypothetical nature of the asserted privacy concerns. *See Adams*, 2020 WL 4561817, at *4–5, 7.

Moreover, we conclude that the Board's policy is "marked by misconception and prejudice" against Grimm. *See Tuan Anh Nguyen*, 533 U.S. at 73. The Board's proposed policy was concocted amidst a flurry of emails from apparently concerned community members and adopted in the context of two heated Board meetings filled with vitriolic, off-the-cuff comments, such as referring to Grimm as a "freak." Parents threatened to vote out the Board members if they allowed Grimm to continue to use the boys restrooms. One would be hard-pressed to look at the record and think that the Board sought to understand Grimm's transgender status or his medical need to socially transition, as identified by his treating physician. Rather, in a moment when he was finally able to affirm his gender, the Board treated Grimm as "questioning" his identity and lumped his in with what it considered to be "gender identity issues."

By relying on so-called "biological gender," the Board successfully excluded Grimm from the boys restrooms. But it did not create a policy that it could apply to other students, such as students who had fully transitioned but had not yet changed their sex on their birth certificate. As demonstrated by the record and amici such as interACT, the Board's policy is not readily applicable to other students who, for whatever reason, do not have genitalia that match the binary sex listed on their birth certificate—let alone that matches their gender identity. *See* Br. for Amicus Curiae interACT: Advocates for Intersex Youth in Supp. of Pl.-Appellee 20–23. Instead, the Board reacted to what it considered a problem, Grimm's presence, by isolating him from his peers.

B. The Board's Failure to Amend Grimm's School Records

Having held that the Board's bathroom policy violated Grimm's equal protection rights, we easily conclude that the Board's continued refusal to update his school records similarly violates those rights.[14] Unlike students whose gender matches their sex-assigned-at-birth, Grimm is unable to obtain a transcript indicating that he is male. The Board's decision is not substantially related to its important interest in maintaining accurate records because Grimm's legal gender in the state of Virginia is male, not female.

The Board's only rebuttal is that Grimm did not provide a lawfully obtained amended birth certificate. Recall that Grimm received a state-court order changing his gender to "male," and he then presented the school with his amended birth certificate. The Board complains that the copy said "VOID," that it did not say the word "amended," and that the Gloucester County Circuit Court granted Grimm's motion to change his sex to male based on chest reconstruction surgery. As found by the district court, however: "It is obvious from the face of the amended birth certificate that the photocopy presented to the Board was marked 'void' because it was a copy of a document printed on security paper, not because it was fabricated." *Grimm*, 400 F. Supp. 3d at 458 n.6. Moreover, while the Board may disagree with the Gloucester County Circuit Court's order granting Grimm's motion to change his sex to male because it believes that chest reconstruction does not

[14] The dissent does not address Grimm's school records, presumably because it would hold that Grimm is not similarly situated to other boys—full stop. Yet Virginia recognized Grimm as male and *amended his birth certificate*. Although preserving sex-assigned-at-birth separated restrooms may rouse more sentiment, the less-contentious school records issue sheds light on why application of such a restroom policy to transgender students is problematic.

classify as gender reassignment surgery under Virginia law, we must give full faith and credit to that state court's order, which cannot be collaterally attacked in this appeal. *See* 28 U.S.C. § 1738. And in the face of the declaration of State Registrar and Director of the Division of Vital Records assuring that she issued Grimm a valid amended birth certificate, we grow weary of the Board's repeated arguments that it received anything less than an official document.

* * *

For the foregoing reasons, we affirm the district court's grant of summary judgment to Grimm on his equal protection claim.

V. Grimm's Title IX Claim

We next address Grimm's claim that the Board's restroom policy and refusal to amend his school records also violated Title IX. Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To grant summary judgment to Grimm on his Title IX claim, we must find (1) that he was excluded from participation in an education program "on the basis of sex"; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused him harm. *See Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994). There is no question that the Board received federal funding or that restrooms are part of the

education program. At issue in this case is whether the Board acted "on the basis of sex," and if so, whether that was unlawful discrimination that harmed Grimm.

A. The Board's Restroom Policy

We first address the restroom policy. After the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex." Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *cf. Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citation omitted)). In *Bostock*, the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex." As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions. *See id*. at 1741–42. As explained above in the equal protection discussion, the Board could not exclude Grimm from the boys bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or

applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys restrooms "on the basis of sex."[15]

We similarly have no difficulty holding that Grimm was harmed. As the district court found:

> In his Declaration, Mr. Grimm described under oath feeling stigmatized and isolated by having to use separate restroom facilities. His walk to the restroom felt like a "walk of shame." He avoided using the restroom as much as possible and developed painful urinary tract infections that distracted him from his class work. This stress "was unbearable" and the resulting suicidal thoughts he suffered led to his hospitalization at Virginia Commonwealth University Medical Center Critical Care Hospital.

Grimm, 400 F. Supp. 3d at 458 (citations omitted). Grimm also "broke down sobbing" when a restroom was unavailable after school, and he could not attend football games without worrying about where he would use the restroom. *See id*. at 459.

[15] We pause to note another theory under which Grimm may have been discriminated "on the basis of sex." In *Price Waterhouse v. Hopkins*, the Supreme Court held that sex stereotyping constitutes discrimination on the basis of gender for purposes of Title VII. *See* 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). Various circuits have applied *Price Waterhouse* to Title VII gender stereotyping claims in the LGBTQ+ context, although we have not. Most notably, in *Hively v. Ivy Tech Community College*, the Seventh Circuit applied the logic of *Price Waterhouse* and held in an en banc opinion that a lesbian woman who was fired could state a Title VII gender-stereotyping claim. *See* 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc). The district court similarly relied on *Price Waterhouse* below. *Grimm*, 302 F. Supp. at 750. For the reasons discussed above in the equal protection section of our opinion, we agree that the policy punished Grimm for not conforming to his sex-assigned-at-birth. But having had the benefit of *Bostock*'s guidance, we need not address whether Grimm's treatment was also "on the basis of sex" for purposes of Title IX under a *Price Waterhouse* sex-stereotyping theory.

The Board does not provide evidence contradicting Grimm's or his mother's declarations. Rather, it has quibbled with the amount of harm Grimm felt, asserting below, for example, that he needed a medical expert to prove urinary tract infections. But in a nominal damages case, Grimm's harm need not be precisely calculated. For summary judgment purposes, it matters only that there is no genuine issue of material fact as to whether the bathroom policy harmed Grimm. There is no question that Grimm suffered legally cognizable harm for at least two reasons.

First, on a practical level, the physical locations of the alternative restrooms were inconvenient and caused Grimm harm. The nurse's room was far from his classes, as were the three single-user restrooms. The distance caused him to be late for class or away from class for longer than students and teachers perceived as normal. And when he attended after-school events, he had to be driven away just to use the restroom.

Second, in a country with a history of racial segregation, we know that "[s]egregation not only makes for physical inconveniences, but it does something spiritually to an individual." Martin Luther King, Jr., "Some Things We Must Do," Address Delivered at the Second Annual Institute on Nonviolence and Social Change at Holt Street Baptist Church (Dec. 5, 1957); *see also* Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Supp. of Pl.-Appellee 7 (outlining the harms and erroneous rationales of racial segregation). The stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX, as it "invite[s] more scrutiny and attention" from other students, "very publicly brand[ing] all transgender students with a scarlet 'T'." *Boyertown*, 897 F.3d at 530 (quoting *Whitaker*, 858 F.3d at 1045); *see also*

id. (rejecting the suggestion that transgender students be offered single-stall restrooms, rather than be allowed to use the regular restrooms matching their gender identity). Even Grimm's high school principal "understood [Grimm's] perception" that the policy sent the following message: Gavin was not welcome. J.A. 405–06. Although the principal assumed some students may have used that restroom, Grimm never saw anyone else use the restrooms created for students with "gender identity issues." The resulting emotional and dignitary harm to Grimm is legally cognizable under Title IX. *See Adams*, 2020 WL 4561817, at *13, 16 (holding that a transgender student's "psychological and dignitary harm" caused by a school bathroom policy was legally cognizable under Title IX).

Having determined that Grimm was harmed, we finally turn to the heart of the Title IX question in this case: whether the policy unlawfully discriminated against Grimm. *Bostock* expressly does not answer this "sex-separated restroom" question. 140 S. Ct. at 1753. In the Title IX context, discrimination "mean[s] treating that individual worse than others who are similarly situated." *Id.* at 1740 (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)). In light of our equal protection discussion above, this should sound familiar: Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender. Unlike the other boys, he had to use either the girls restroom or a single-stall option. In that sense, he was treated worse than similarly situated students.

Nevertheless, the Board emphasizes a Department of Education implementing regulation, 34 C.F.R. § 106.33, which interprets Title IX to allow for "separate toilet, locker room, and shower facilities on the basis of sex," so long as they are "comparable" to each

other. But Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity. *See also Adams*, 2020 WL 4561817, at *14 (holding that § 106.33 did not preclude a transgender student's Title IX claim, because he was not challenging sex-separated restrooms, but "simply seeking access to the boys' restroom as a transgender boy."). And the implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what "sex" means.[16] *See Adams*, 2020 WL 4561817, at *15 (holding that "nothing in *Bostock* or the language of § 106.33 justifie[d] the School Board's discrimination" against a male transgender student seeking access to the boys restrooms).[17]

[16] So too for the more generic Title IX provision allowing for sex-separated living facilities. *See* 20 U.S.C. § 1686 (Title IX shall not "be construed to prohibit any educational institution" to which it applies "from maintaining separate living facilities for the different sexes."). Again, this is a broad statement that sex-separated living facilities are not unlawful—not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities. In any event, because 34 C.F.R. § 106.33 is more specific to bathrooms, it is where the parties have focused their attention.

[17] The dissent suggests that Grimm should have challenged Title IX as unconstitutional, because Grimm's use of the boys restrooms would somehow upend sex-separated restrooms in schools. *See* Dissenting Op. at 90. But Grimm does not think that sex-separated restrooms are unconstitutional, and neither do we. The dissent's feared loss of sex-separated restrooms has not been borne out in any of the many school districts that allow transgender students to use the sex-separated restroom matching their gender identity. So it cannot be the physical loss of sex-separated restrooms that the dissent laments, but some emotional, intangible loss wrought by the mere presence of transgender persons. This type of argument calls to mind recent arguments against gay marriage, to (Continued)

As explained above, Grimm consistently and persistently identified as male. He had been clinically diagnosed with gender dysphoria, and his treatment provider identified using the boys restrooms as part of the appropriate treatment. Rather than contend with Grimm's serious medical need, the Board relied on its own invented classification, "biological gender," for which it turned to the sex on his birth certificate. And even when Grimm provided the school with his amended birth certificate, the Board *still* denied him access to the boys restrooms.

For these reasons, we hold that the Board's application of its restroom policy against Grimm violated Title IX.[18]

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the effect that allowing gay people to marry would "harm marriage as an institution." *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015). With no "foundation for the conclusion" that such "harmful outcomes" would occur, *see id.*, we similarly reject this institutional-harm type argument.

[18] Noting that Title IX was passed under the Spending Clause, the Board also asserts that, if ambiguous, we must construe Title IX to allow application of its bathroom policy to Grimm in order to give the Board fair notice. *See generally Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But *Bostock* forecloses that "on the basis of sex" is ambiguous as to discrimination against transgender persons, and notes that Title VII "has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them." *See Bostock*, 140 S. Ct. at 1753 ("Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time."). So too Title IX. And the Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination. We reject the Board's *Pennhurst* argument.

B. The Board's Failure to Amend Grimm's School Records

Applying the same framework to the Board's refusal to update Grimm's school records, we hold that it too violated Title IX. Again, the Board based its decision not to update Grimm's school records on his sex—specifically, his sex as listed on his original birth certificate, and as it presupposed him to be. This decision harmed Grimm because when he applies to four-year universities, he will be asked for a transcript with a sex marker that is incorrect and does not match his other documentation. And this discrimination is unlawful because it treats him worse than other similarly situated students, whose records reflect their correct sex.

Accordingly, we affirm the district court's grant of summary judgment on Grimm's Title IX claim, and the relief granted, in full.

VI. Conclusion

Grimm's four years of high school were shaped by his fight to use the restroom that matched his consistent and persistent gender identity. In the face of adults who misgendered him and called him names, he spoke with conviction at two Board meetings. The solution was apparent: allow Grimm to use the boys restrooms, as he had been doing without incident. But instead, the Board implemented a policy that treated Grimm as "questioning" his identity and having "issues," and it sent him to special bathrooms that might as well have said "Gavin" on the sign. It did so while increasing privacy in the boys bathrooms, after which its own deposition witness could not cite a remaining privacy concern. We are left without doubt that the Board acted to protect cisgender boys from

Gavin's mere presence—a special kind of discrimination against a child that he will no doubt carry with him for life.

The Board did so despite advances in the medical community's understanding of the nature of being transgender and the importance of gender affirmation. It did so after a major nationwide survey, the NTDS, put stark numbers to the harmful discrimination faced by transgender people in many aspects of their lives, including in school.

It also did so while schools across Virginia and across the country were successfully implementing trans-inclusive bathroom policies, again, without incident. Those schools' experiences, as outlined in three amicus briefs, demonstrate that hypothetical fears such as the "predator myth" were merely that—hypothetical. Perhaps unsurprisingly, those schools also discovered that their biggest opponents were not students, but adults. *See* Br. of School Administrator *Amici* 10–11. One administrator noted:

> As to the students, I am most impressed. They are very understanding and accepting of their classmates. It feels like the adult community is struggling with it more.

Id. at 10. As another explained, "Young people are pretty savvy and comfortable, and can understand and empathize with someone who just wants to use the bathroom." *Id*.

The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. *Compare Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *and Bowers v. Hardwick*, 478 U.S. 186 (1986), *with Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955), *and Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). How shallow a promise of equal protection

that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.

It is time to move forward. The district court's judgment is

AFFIRMED.

WYNN, Circuit Judge, concurring:

I fully concur in Judge Floyd's opinion and write separately to emphasize several particularly troublesome aspects of the Board's policy. In particular, the Board's classification on the basis of "biological gender"—defined in this appeal as the sex marker on a student's birth certificate—is arbitrary and provides no consistent reason to assign transgender students to bathrooms on a binary male/female basis. Rather, the Board's use of "biological gender" to classify students has the effect of shunting individuals like Grimm—who *may not* use the boys' bathrooms because of their "biological gender," and who *cannot* use the girls' bathrooms because of their gender identity—to a third category of bathroom altogether: the "alternative appropriate private facilit[ies]" established in the policy for "students with gender identity issues."

That is indistinguishable from the sort of separate-but-equal treatment that is anathema under our jurisprudence. No less than the recent historical practice of segregating Black and white restrooms, schools, and other public accommodations, the unequal treatment enabled by the Board's policy produces a vicious and ineradicable stigma. The result is to deeply and indelibly scar the most vulnerable among us—children who simply wish to be treated as equals at one of the most fraught developmental moments in their lives—by labeling them as unfit for equal participation in our society. And for what gain? The Board has persisted in offering hypothetical and pretextual concerns that have failed to manifest, either in this case or in myriad others like it across our nation. I am left to conclude that the policy instead discriminates against transgender students out of a bare dislike or fear of those "others" who are all too often marginalized in our society for the

mere fact that they are different. As such, the policy grossly offends the Constitution's basic guarantee of equal protection under the law.

I.

A.

First, the Board's policy provides no consistent basis for assigning transgender students—who often possess a mix of male and female physical characteristics—to a particular bathroom. The policy, which was drafted by a Board member without consulting medical professionals, purports to classify students based on their "biological gender." J.A. 775. As the district court noted, this term has no standard meaning (to say nothing of widespread acceptance) in the medical field. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444, 457 (E.D. Va. 2019) (citing Wylie C. Hembree et al., *Endocrine Treatment of Gender-dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11), J. CLIN. ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017)). Rather, "biological gender," on its face, conflates two medical concepts: a person's biological sex (a set of physical traits) and gender (a deeply held sense of self). *Id.*

Given that the Board seemingly created the concept of "biological gender" *sua sponte*, it comes as no surprise that it has struggled to define the term in a way that provides any consistent reason to assign a given transgender student to a male or female restroom.

Broadly, the Board claims that "biological gender" is defined solely in terms of physiological characteristics.[1]

That suggests that the Board can identify some set of physical characteristics that fully identify someone as "male" or "female"—and thus neatly partition transgender students into those two categories. Yet the Board has offered no set of physical characteristics determinative of its "biological gender" classification in the five-year pendency of this case.

Nor could it, given that transgender individuals often defy binary categorization on the basis of physical characteristics alone. For instance, although Grimm was born physically female and had female genitals during his time at Gloucester High, he also had physical features commonly associated with the male sex: he lacked breasts (due to his chest reconstruction surgery); had facial hair, a deepened voice, and a more masculine appearance (due to hormone therapy); and presented as male through his haircut. The Board conveniently ignores all these facts, other than to claim that Grimm's chest reconstruction surgery "did not create any biological changes in Grimm, but instead, only a physical change." Opening Br. at 46.

Rather than address this reality, the Board has instead narrowed its definition of "biological gender" to refer to the sex marker on a student's birth certificate—which, unless updated during a transgender individual's transition, merely tells the Board what

[1] I note that the Board's use of the term "gender" in "biological gender," along with the policy's reference to students with "gender identity issues," suggests that Grimm's gender identity played a part in the Board's bathroom designation, despite the Board's protestations to the contrary. J.A. 775.

physical sex characteristics a person was born with. But, as this case shows, a person's birth sex is not dispositive of their actual physiology.

Moreover, by focusing on an individual's birth certificate, the Board ensures the policy lacks a basic consistency: it fails to treat *even transgender* students alike. Specifically, the policy targets transgender students whose birth certificates do not match their outward physical characteristics while ignoring those transgender students whose birth certificates are consistent with their outward physiology.

Consider a student physically identical to Grimm in every respect—that is, a student who appeared outwardly male, but who had female genitals. If, unlike Grimm, this hypothetical student had obtained a birth certificate identifying him as male prior to enrolling at Gloucester High, then that student *would* have been able to use the boys' restrooms under the Board's current interpretation of its own policy. It is arbitrary that this hypothetical transgender student would not be subject to the policy, whereas Grimm would. *See Adams By & Through Kasper v. Sch. Bd. of St. Johns Cnty.*, No. 18-13592, 2020 WL 4561817, at *5 (11th Cir. Aug. 7, 2020) ("To pass muster under the Fourteenth Amendment, a governmental gender classification must 'be reasonable, not arbitrary.'" (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quotation marks omitted)).

Such a student would, of course, have female genitals. But genital characteristics are immaterial if, as the Board claims, it is solely concerned with the sex marker on a student's birth certificate. However, the record shows that the Board was *not* only concerned with birth certificates below.

Apparently taking issue with the fact that Grimm's genitals did not match his birth certificate, the Board attempted to extend its sex-assigned-at-birth definition of "biological gender" in its summary judgment briefing at the district court. The Board claimed that if a student were using the restroom associated with the sex listed on their birth certificate, but the school learned that the student had some as-yet-unspecified set of anatomical characteristics of the opposite sex, it would require the student to switch bathrooms on the basis of those physiological differences.

The Board wisely abandoned that argument on appeal, given its inability to specify what set of physiological characteristics suffices to push an individual across its imagined line of demarcation between male and female classifications. But its shifting definitions of "biological gender" suggest that the policy is ends-driven and motivated more by discomfort with the presence of someone who appeared as a boy (but nonetheless had female genitals) using the boys' bathroom than concerns for a person's designation at birth.

B.

That suggestion is bolstered by another disturbing inconsistency in the policy: it produces the very privacy harms it purportedly seeks to avoid. Despite appearing wholly male except for his genitals, Grimm could have used the girls' restroom under the policy. Female students would thus have found themselves in a private situation in front of someone with the physiology of the opposite biological sex—the exact harm to male students posited by the Board and my dissenting colleague, Judge Niemeyer. *See* Niemeyer Dis. Op. at 88-89, 93.

Specifically, the Board claims the policy protects the privacy interests of students who do not wish to be exposed to, or in a state of undress in front of, those with physical characteristics of the opposite sex. That is undoubtedly a long-recognized and important government interest, as Judge Niemeyer points out. Niemeyer Dis. Op. at 88-89. But, as Judge Floyd notes, the Board can identify no instance of such harms to the privacy interests of its students—a result consistent with the experiences of numerous school boards nationwide. Maj. Op. at 46-48.

That is unsurprising because, as a matter of common sense, any individual's appropriate use of a public bathroom does not involve exposure to nudity—an observation that is particularly true given the privacy enhancements installed in the bathrooms at Gloucester High. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017) ("Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.").

Judge Niemeyer in dissent suggests that the "*mere presence*" of someone with female genitals in a male bathroom would create an untenable intrusion on male privacy interests. Niemeyer Dis. Op. at 89. That assertion is debatable at the least, in the context of both male and female bathrooms. And it echoes the sort of discomfort historically used to justify exclusion of Black, gay, and lesbian individuals from equal participation in our society, as discussed *infra*. But it is ultimately beside the point, because the Board identified only three scenarios of concern in which boys would have felt unduly exposed to Grimm: when they used the stalls, when they used the urinals, and when they opened

their pants to tuck in their shirts. The Board has identified no instances where such exposure occurred.

Crucially, even if were we to accept the Board's contention that the alleged infringements on student bodily privacy were in fact present, then the policy would, on balance, harm student privacy interests more than it helped them. Unlike his clothed genitals, Grimm's male characteristics—no breasts, masculine features and voice timbre, facial hair, and a male haircut—would have been readily apparent to any person using the girls' restroom. Put simply, Grimm's entire outward physical appearance was male. As such, there can be no dispute that had he used the girls' restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students. The Board's stated privacy interests thus cannot be said to be an "exceedingly persuasive" justification of the policy. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Further, if the Board's concern were truly that individuals might be exposed to those with differing physiology, it would presumably have policies in place to address differences between pre-pubescent and post-pubescent students, as well as intersex individuals who possess some mix of male and female physical sex characteristics and who comprise a greater fraction of the population than transgender individuals. *See Whitaker*, 858 F.3d at 1052-53; Br. for Amicus Curiae interACT: Advocates for Intersex Youth in Supp. of Pl.-Appellee 5 (noting that 2% of all children born worldwide have variations in sex organs, chromosomes, and hormones that do not fit within binary anatomical gender classifications); Maj. Op. at 7 (noting that .6% of the United States adult population is

transgender). That the Board's policy does not address those circumstances further suggests that its privacy justification is a post-hoc rationalization based on mere hypotheticals. *Virginia*, 518 U.S. at 533.

C.

One final note. Under the Board's policy, Grimm should have been able to use the boys' restroom if he had provided an updated birth certificate listing him as male. Of course, *he did just that*. But the Board baldly refused to apply its own policy, instead assembling a variety of post-hoc administrative justifications for its noncompliance—justifications that were ultimately meritless. *See* Maj. Op. at 30-31.

II.

The above problems notwithstanding, the Board audaciously invites us to ignore the policy's poorly formulated, arbitrary character, claiming that "[e]very student can use a restroom associated with their physiology, whether they are boys or girls. If students choose not to use the restroom associated with their physiology, they can use a private, single-stall restroom." Opening Br. at 44. But that choice is no choice at all because, its above-described physiological misunderstandings and omissions aside, the Board completely misses the reality of what it means to be a transgender boy.

As Judge Floyd thoroughly notes, historical experience and decades of scientific inquiry have established that transgender individuals have an innate conception of themselves as belonging to one gender. Maj. Op. at 7-14. A transgender person's awareness of themselves as male or female is no less foundational to their essential personhood and sense of self than it is for those born with female genitals to identify as female, or for those

born with male genitals to identify as male. History demonstrates that this self-conception is unshakeable indeed. Transgender individuals have persisted despite the significant harms that arose from living in societies that did not recognize them: cultural marginalization and disregard at best, and horrific oppression and lethal violence at worst.

So, despite the Board's contention that there is no problem because Grimm could have used the girls' bathrooms or the single-stall bathrooms, we must take a careful and practical look at the options he realistically faced. Grimm was of course barred from the boys' restrooms because of his Board-defined "biological gender." And despite the Board's assurances, he effectively could not use the girls' restrooms. His gender identity has always been male. *He could no more easily use the girls' restrooms than a cisgender boy.*[2] The Board pointedly ignores this basic fact.

So, Grimm was effectively left with one option: the single-stall restrooms. But he did not use those restrooms at all because doing so "made [him] feel even more stigmatized and isolated than using the nurse's office" to which he had been previously relegated. Gavin Grimm Decl. ¶ 47. Specifically, "everyone knew that they were installed for [him] in particular, so that other boys would not have to share the same restroom as [him]." *Id.* Indeed, the Board does not controvert Grimm's assertion that no other students used the single-stall restrooms.

[2] Grimm had, of course, used girls' restrooms before his transition. But that fact says nothing about the harm he suffered from doing so. Grimm suffered from gender dysphoria as a result of living as a girl (including use of girls' bathrooms) despite identifying as a boy.

This problem is all too familiar. Forced segregation of restrooms and schools along racial lines—a blight on this country's history—occurred well within living memory. *See* Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Supp. of Pl.-Appellee 7-8 (hereinafter "Br. of NAACP") (describing various laws passed to segregate restroom facilities and schools on the basis of race). Such segregation was infamously justified on the ground that no harm could inhere if separate but equal facilities were provided to African American schoolchildren. We now know that to be untrue: it is axiomatic that discriminating against students on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 494 (1954).

I see little distinction between the message sent to Black children denied equal treatment in education under the doctrine of "separate but equal" and transgender children relegated to the "alternative appropriate private facilit[ies]" provided for by the Board's policy. The import is the same: "the affirmation that the very being of a people is inferior." Martin Luther King, Jr., "The Other America," Remarks Given at Stanford University (Apr. 14, 1967) (transcript available at https://www.rev.com/blog/transcripts/the-other-america-speech-transcript-martin-luther-king-jr); *see also Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3rd Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (holding that a policy forcing transgender students to use separate single-user facilities "would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school").

Judge Niemeyer in dissent notes that Title IX and equal protection permit separate but equal accommodations in schools on a male/female basis. Niemeyer Dis. Op. at 93-94. But that observation says nothing about what happened in this case: separation of transgender students from their cisgender counterparts through a policy that ensures that transgender students may use *neither* male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned-at-birth. That segregation generates harmful stigma, which was exacerbated in this case by the fact that the facilities were separate, but not even equal—there were no single-stall restrooms at football games, and the single-stall restrooms in the school building were located much farther from Grimm's classes than the boys' and girls' restrooms.

Moreover, it is important to note that the harm arising from the policy's message—that transgender students like Grimm should exist only at the margins of society, even when it comes to basic necessities like bathrooms—although foreign to the experiences of many, is not hypothetical. Nor does the policy merely engender discomfort or embarrassment for transgender students. Instead, the pain is overwhelming, unceasing, and existential. In an experience all too common for transgender individuals (particularly children), early in his junior year at Gloucester High, Grimm was hospitalized for suicidal thoughts resulting from being in an environment of "unbearable" stress where "every single day, five days a week" he felt "unsafe, anxious, and disrespected." Gavin Grimm Decl. ¶ 54.

Furthermore, putting aside the specific harm to Grimm, the Board's policy perpetuates a harmful and false stereotype about transgender individuals; namely, the "transgender predator" myth, which claims that students (usually male) will pretend to be

transgender in order to gain access to the bathrooms of the opposite sex—thus jeopardizing student safety. Indeed, the policy expresses concern that the presence of transgender students in school bathrooms endangers students. Although not relied upon by the Board on appeal, one of the policy's stated purposes is to "provide a safe learning environment for all students." J.A. 775.

The "transgender predator" myth echoes similar arguments used to justify segregation along racial lines. In the 1950s, segregationists spread false rumors that Black women would spread venereal diseases to toilet seats, and that Black men would sexually prey upon white women if public swimming pools were integrated. *See* Br. of NAACP 13-14, 16-17. Although history eventually proved the lie of such claims, the injustice was severe.

Even more recently, privacy concerns similar to those championed by the Board were invoked by opponents of gay and lesbian equality. These opponents argued that such individuals, especially gay men, must not be allowed to come into contact with young children or adolescents. They justified such claims by pointing either to a supposed uncontrollable, predatory sexual attraction among gay men toward children, or to an insidious desire to convert young people to an immoral (which is to say, non-heterosexual) lifestyle. *See id.* at 21-22 (citing *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children [or] as teachers in their children's schools[.]")).

The "transgender predator" myth—although often couched in the language of ensuring student privacy and safety—is no less odious, no less unfounded, and no less harmful than these race-based or sexual-orientation-based scare tactics. As one of our sister Circuits noted during the era of racial segregation: "[t]he law can never afford to bend in this direction again. The Constitution of the United States recognizes that every individual . . . is considered equal before the law. As long as this principle is viable, full equality of educational opportunity must prevail over theoretical sociological and genetical arguments which attempt to persuade to the contrary." *Haney v. Cnty. Bd. of Educ. of Sevier Cnty.*, 410 F.2d 920, 926 (8th Cir. 1969).

III.

In sum, the picture that emerges from this case is damning.

The Board drafted a policy so arbitrary that it cannot provide consistent treatment among the very individuals it discriminates against. In so doing, the Board pursued shifting and ends-driven definitions of "biological gender" that guaranteed a particular outcome: that one student would be unable to use the boys' restroom. The policy bears an eerie similarity to stigmatic discrimination in the separate-but-equal context—which produces deeply corrosive, irreversible harm across a human life. Against that injury to Grimm, the Board offers a set of purported privacy injuries that *have not occurred*, while ignoring concomitant greater harms that would have resulted were Grimm to have followed the policy and used female school restrooms. And most tellingly, when Grimm attempted to comply with the policy by submitting an updated birth certificate, the Board resorted to procedural roadblocks.

In light of this history, I have little difficulty concluding that the Board's policy is orthogonal to its stated justifications. Far from ensuring student privacy, it has been applied to marginalize and demean Grimm for the mere fact that he, like other transgender individuals, is different from most. Even worse, it did so to a child at school.

Common experience teaches that high school is a challenging environment, in which every child perceives significant pressure to belong within their peer group while also defining their own personal identity and sense of self. Even the most trivial differences from others may take on outsized significance to an adolescent. How harrowing it must be for transgender individuals like Grimm to navigate that fraught setting while facing an unceasing daily reminder that they are not wanted, and that circumstances for which they are blameless render them members of a second class.

Of course, deriding those who are different—whether due to discomfort or dislike—is not new. But the Constitution's guarantee of equal protection prohibits the law from countenancing such discrimination. "The Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (holding that policies enacted with "a bare . . . desire to harm a politically unpopular group" cannot be upheld under equal protection (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

For that reason, I disagree with Judge Niemeyer's assertion that the panel majority attempts to "effect policy rather than simply apply law." Niemeyer Dis. Op. at 95. That

argument is meritless because "[t]he Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). Ensuring the Constitution's mandate of equal protection is satisfied for marginalized and minority groups, separate from the "vicissitudes of political controversy," is one of our most vital and solemn duties. *Id.* at 2606 (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

Discrimination like that faced by Grimm has reared its ugly head throughout American history. Yet, for most Americans, time has rendered it an embarrassment to the legacies of the individuals inflicting it. With that observation, I join in the thorough and well-reasoned opinion of my colleague, Judge Floyd.

NIEMEYER, Circuit Judge, dissenting:

Gavin Grimm, a transgender male, commenced this action in 2015 while a student attending Gloucester High School in Gloucester, Virginia, to require the school to permit him to use the male restrooms. The High School provided male restrooms and female restrooms and, under school policy, "limited [those restrooms] to the corresponding biological genders." It also provided unisex restrooms and made them available to everyone, with the particular goal of accommodating transgender students. In his complaint, Grimm contended that the High School's policy discriminated against him "based on his gender," in violation of the Equal Protection Clause of the Fourteenth Amendment, and "on the basis of sex," in violation of Title IX. He sought among other things injunctive relief requiring the High School "to allow [him] to use the boys' restrooms at school." After graduating from the High School, Grimm filed a second amended complaint, seeking only declaratory relief and nominal damages.

Contrary to Grimm's claim, Title IX and its regulations explicitly authorize the policy followed by the High School. While the law prohibits discrimination on the basis of sex in the provision of educational benefits, it allows schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, including "toilet, locker room, and shower facilities," 34 C.F.R. § 106.33. Gloucester High School followed these provisions precisely, going yet further by providing unisex restrooms for those not wishing to use the restrooms designated on the basis of sex. Moreover, in complying with Title IX, which Grimm has not challenged as unconstitutional, the High School did not deliberately discriminate against him in violation of the Equal Protection Clause of the Fourteenth

Amendment. To the contrary, the High School's classifications for restroom usage — which accord with longstanding and widespread practice — were appropriately justified by the needs of individual privacy, as has been recognized by law. At bottom, Gloucester High School reasonably provided separate restrooms for its male and female students and accommodated transgender students by also providing unisex restrooms that any student could use. The law requires no more of it.

The majority opinion, pursuing the public policy that it deems best, rules that separating restrooms on the basis of biological sex is discriminatory. In doing so, it overlooks altogether and therefore does not address the reasons for such separation. Rather, it blithely orders that the High School allow both transgender males and biological males to use the same restrooms, thus abolishing any separation of restrooms on the basis of biological sex. Indeed, its ruling that male includes transgender males and likewise that female includes transgender females renders on a larger scale any separation on the basis of sex nonsensical. In effect, the majority opinion does no more than express disagreement with Title IX and its underlying policies, which is not, of course, the role of courts tasked with deciding cases and controversies.

I cast no doubt on the genuineness of Gavin Grimm's circumstances, and I empathize with his adverse experiences. But judicial reasoning must not become an outcome-driven enterprise prompted by feelings of sympathy and personal views of the best policy. The judiciary's role is simply to construe the law. And the law, both statutory and constitutional, prohibits discrimination only with respect to those who are *similarly* situated. Here, Grimm was born a biological female and identifies as a male, and therefore

his circumstances are different from the circumstances of students who were born as biological males. For purposes of restroom usage, he was not similarly situated to students who were born as biological males.

Accordingly, I would conclude that Grimm's complaint failed to state a claim on which relief can be granted.

I

At birth, Grimm was identified as female, and there was concededly no ambiguity about his sex. Thus, when it came time to enroll him in the Gloucester County School System, Grimm's parents indicated that he was female.

Beginning at an early age, however, Grimm "saw [himself] as a boy" and "did not want to be perceived as feminine in any way." At around the age of 12, he started presenting himself as a boy. He got a traditional male haircut, wore clothing exclusively from the boys' section of stores, and eventually began using a compression garment to flatten his developing breasts. Around the time of his 15th birthday, in the spring of 2014, Grimm came out to his parents as a transgender boy and, at his request, began therapy with a psychologist. His psychologist diagnosed him with "gender dysphoria," a condition of clinically significant distress experienced by some transgender people resulting from the incongruence between the gender with which they identify and their sex as identified at birth. Soon thereafter, Grimm obtained a court order legally changing his name from the female name he was given at birth to Gavin Elliot Grimm.

In advance of his 10th grade year, Grimm and his mother met with a guidance counselor at the High School to explain that Grimm was transgender and intended, as part of his treatment for gender dysphoria, to socially transition at school. Both Grimm and his mother found the school counselor to be supportive. The High School changed its records to reflect Grimm's new name, and Grimm and the school counselor agreed that Grimm would send an email to his teachers explaining that he was to be addressed by his new male name and referred to by male pronouns. Grimm chose to continue completing his physical education classes through an online program so he did not need to use the school's locker rooms. And with respect to restrooms, he and the school counselor agreed that he could use a private restroom in the nurse's office.

As the school year began, however, Grimm found that using the separate restroom was stigmatizing as well as inconvenient, causing him at times to be late for classes. After a few weeks, he expressed his concerns to the Principal and asked for permission to use the male restrooms instead. The Principal gave Grimm permission to do so. But within a few days, school officials began receiving complaints from parents, and a student met with the Principal to express his concerns. These members of the school community felt strongly that allowing a student with female anatomical features to use the male restrooms would infringe on the privacy interests of the male students.

In response to this input from the community, the Gloucester County School Board conducted public meetings, after which it adopted the following policy:

> Whereas the [Gloucester County Public Schools ("GCPS")] recognizes that some students question their gender identities, and

> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> 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.

Following adoption of the policy, the Principal advised Grimm that he was no longer permitted to use the High School's male restrooms. And about a week later, the school completed construction of three single-stall, unisex restrooms that were made available to all students.

Grimm felt stigmatized by the new policy and chose not to use the new unisex restrooms. He also felt uncomfortable using the female restrooms. As a result, he tried to avoid the use of restrooms at school, and when he could not avoid doing so, he used the restroom in the nurse's office. Nonetheless, he felt that by doing so, he called attention to his transgender status, making him uncomfortable.

At the end of Grimm's 11th grade year, when he was 17 years old, Grimm underwent a chest reconstruction surgery as part of his treatment for gender dysphoria. He also continued hormone therapy, which he had begun more than a year earlier and which deepened his voice, caused him to grow facial hair, and gave him a more masculine appearance overall.

Near the start of his 12th grade year in 2016, the Gloucester County Circuit Court granted Grimm's petition for an order directing the State Registrar to amend his birth

certificate. Pursuant to that order, the Registrar issued a birth certificate to Grimm that listed his sex as male. Thereafter, Grimm requested that the High School change the gender listed on his school records to conform to his new birth certificate. Pursuant to the advice of counsel, the School Board advised Grimm that it had decided not to change the official school records. Grimm graduated from the High School in June 2017.

* * *

In June 2015, at the end of his 10th grade year, Grimm commenced this action against the Gloucester County School Board, alleging that the School Board's policy of assigning students to male and female restrooms based on their biological sex rather than their gender identity violated his rights under the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. Among other things, he sought a preliminary and permanent injunction requiring the School Board to allow him to use the male restrooms at the school.

The district court granted the School Board's motion to dismiss Grimm's Title IX claim for failure to state a claim, relying primarily on a regulation implementing the statute that expressly permits schools to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. The court also denied Grimm's motion for a preliminary injunction.

On appeal from the denial of the injunction, we reversed the district court's order and remanded the case. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016). We reasoned that the Title IX regulation permitting schools to provide separate restrooms and other similar facilities for male and female students was ambiguous

with respect to "how a school should determine whether a transgender individual is a male or female for the purpose of access to [these] sex-segregated" facilities. *Id.* at 720. We then relied on a guidance document issued by the U.S. Department of Education stating that schools were generally required to "treat transgender students consistent with their gender identity," *id.* at 718, and concluded that the interpretation was "entitled to *Auer* deference and . . . controlling weight," *id.* at 723. In addition, we vacated the district court's order denying a preliminary injunction, concluding that the court had used the wrong evidentiary standard in evaluating Grimm's motion. *Id.* at 724–26.

The School Board filed a petition for a writ of certiorari in the Supreme Court, as well as a motion for a stay of our judgment. During the same period, the district court, based on our analysis, granted Grimm's motion for a preliminary injunction. The Supreme Court, however, stayed the district court's preliminary injunction, *see* 136 S. Ct. 2442 (Aug. 3, 2016), and it subsequently granted the School Board's certiorari petition, *see* 137 S. Ct. 369 (Oct. 28, 2016).

While the case was pending before the Supreme Court, a new Administration rescinded the previously issued guidance document regarding transgender students, which prompted the Supreme Court to vacate our April 2016 decision and to remand the case to us for further consideration. *See* 137 S. Ct. 1239 (Mar. 6, 2017). We, in turn, granted an unopposed motion to vacate the district court's preliminary injunction. *See* 853 F.3d 729 (4th Cir. 2017).

After Grimm graduated from high school, he withdrew his request for a preliminary injunction and filed an amended complaint that continued to challenge the legality of the

School Board's restroom policy as applied to transgender students, seeking a permanent injunction, declaratory relief, and nominal damages. But after the district court requested supplemental briefing regarding mootness in light of Grimm's graduation, Grimm agreed to dismiss his requests for prospective relief. He argued, however, that his graduation did not moot his challenge to the legality of the School Board's restroom policy because he was seeking only a retrospective remedy in the form of nominal damages and declaratory relief. The district court agreed.

Thereafter, in a memorandum opinion and order dated May 22, 2018, the district court denied the School Board's motion to dismiss Grimm's amended complaint for failure to state a claim, concluding that Grimm had plausibly alleged that, by excluding him from the set of restrooms that corresponded to his gender identity, the School Board had subjected him to discrimination on the basis of sex, in violation of Title IX, and had also discriminated against him in violation of the Equal Protection Clause. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018).

Roughly nine months later, the district court granted Grimm's motion to file a second amended complaint, which, for the first time, alleged that the School Board's decision not to change the gender listed on Grimm's school records from female to male also constituted a violation of Title IX and the Equal Protection Clause.

After completing discovery, the parties filed cross-motions for summary judgment. By order dated August 9, 2019, the district court granted Grimm's motion and denied the School Board's motion. *See Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019). For relief, the court (1) entered a declaratory judgment "that the Board's policy

violated Mr. Grimm's rights under the Fourteenth Amendment . . . and Title IX . . . on the day the policy was first issued and throughout the remainder of his time as a student at Gloucester High School;" (2) entered a declaratory judgment "that the Board's refusal to update Mr. Grimm's official school transcript to conform to the 'male' designation on his birth certificate violated and continues to violate his rights under the Fourteenth Amendment . . . and Title IX"; (3) awarded Grimm nominal damages "in the amount of one dollar"; (4) entered a permanent injunction "requiring the Board to update Mr. Grimm's official school records to conform to the male designation on his updated birth certificate"; and (5) awarded Grimm "reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988."

From the district court's order, the School Board filed this appeal.

II

At the heart of his claim, Grimm contends that in denying him, as a transgender male, permission to use the male restrooms because those restrooms were designated for biologically male students, Gloucester High School discriminated against him "on the basis of sex," in violation of Title IX and the Equal Protection Clause. This claim does not challenge the High School's provision of separate restrooms but rather asserts that treating transgender males differently than biological males in permitting access to those restrooms constitutes illegal discrimination. This argument thus rests on the proposition that transgender males and biological males are similarly situated with respect to using male restrooms.

The School Board, however, determined that the physical differences between transgender males and biological males were material with respect to the use of restrooms and locker rooms, and accordingly it provided unisex restrooms in addition to its male and female restrooms to accommodate transgender persons such as Grimm. In having done so, the School Board maintains that it complied fully with Title IX and its implementing regulations, which, while prohibiting discrimination on the basis of sex in any education program or activity, nonetheless expressly allow educational institutions receiving federal assistance to provide separate restrooms for the different sexes.

I agree with the School Board's position. Any requirement that schools treat male, female, and transgender students differently from the way the High School treated them would be a matter for Congress to address. But, until then, the High School comported with what both Title IX and the Equal Protection Clause require. I begin with Title IX.

III

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). But the statute contains several exceptions to its nondiscrimination provision, one of which specifies that "[n]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, *from maintaining separate living facilities for the different sexes*." *Id.* § 1686 (emphasis added). And the applicable regulations give further detail,

permitting schools to provide "separate housing on the basis of sex," as long as the housing is "[p]roportionate" and "[c]omparable," 34 C.F.R. § 106.32(b), and "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex shall be comparable to such facilities provided for students of the other sex," *id.* § 106.33. We must therefore determine what it means to provide separate toilet, locker room, and shower facilities *on the basis of sex* in a situation where a student's gender identity diverges from the sex manifested by the student's biological characteristics.

As several sources make clear, the term "sex" in this context must be understood as referring to the traditional biological indicators that distinguish a male from a female, not the person's internal sense of being male or female, or their outward presentation of that internally felt sense.

Title IX was enacted in 1972, and its implementing regulations were promulgated shortly thereafter. And during that period of time, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females — particularly with respect to their reproductive functions. *See, e.g.*, *The Random House College Dictionary* 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the

morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . ."). Indeed, even today, the word "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g.*, *Webster's New World College Dictionary* 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures").

Given this uniformity in dictionary definitions, it is no surprise that, in the context of interpreting Title VII's nondiscrimination provision enacted in 1964, the Supreme Court's recent decision in *Bostock v. Clayton County* relied on this same understanding of the word "sex." To be sure, the *Bostock* Court determined that its resolution of the parties' dispute did not require it to determine definitely the meaning of the term. *See Bostock*, 140 S. Ct. 1731, 1739 (2020). But its analysis proceeded on the assumption that, in 1964, the term sex "referr[ed] only to biological distinctions between male and female" and did not include "norms concerning gender identity." *Id.*

Moreover, that the word "sex" in Title IX refers to biological characteristics, not gender identity, becomes all the more plain when one considers the privacy concerns that explain why, in the first place, Title IX and its regulations allow schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex." *See* 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33. To state the obvious, what bathroom, locker room, shower, and living facilities all have in common is that they are places where people are, at some point, in a state of partial or complete undress to engage in matters of highly personal hygiene. An individual has a legitimate and important interest in bodily privacy that is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present, as courts have long recognized. *See, e.g.*, *Doe v. Luzerne Cty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in

their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating"). Moreover, these privacy interests are broader than *the risks of actual* bodily exposure. *They include the intrusion created by mere presence*. In short, we want to be alone — to have our privacy — when we "shit, shower, shave, shampoo, and shine."

In light of the privacy interests that arise from the physical differences between the sexes, it has been commonplace and universally accepted — across societies and throughout history — to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time. Indeed, both the Supreme Court and our court have previously indicated that it is this type of physiological privacy concern that has led to the establishment of such sex-separated facilities. *See United States v. Virginia*, 518 U.S. 515, 533, 550 n.19 (1996) (recognizing that "[p]hysical differences between men and women" are "enduring" and render "the two sexes . . . not fungible" and acknowledging, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex" (cleaned up)); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns").

In short, the physical differences between males and females and the resulting need for privacy is what the exceptions in Title IX are all about.

The issue in this case arises from the fact that Grimm is a transgender male who was born a biological female. Thus, we must determine in this context what it means to provide him separate toilet, locker room, and shower facilities on the basis of sex. Grimm does not challenge the constitutionality of Title IX or the legitimacy of its regulations, nor does he challenge the statute's underlying policy interests. He argues simply that because he identifies as male, he must be allowed to use the male restrooms and that denying him that permission discriminates against him on the basis of his sex.

Grimm's argument, however, is facially untenable. While he accepts the fact that Title IX authorizes the separation of restrooms — indeed, he seeks to use the male restrooms so separated from female restrooms — the implementation of his position would allow him to use restrooms contrary to the basis for separation. Gloucester High School maintains male restrooms, female restrooms, unisex restrooms, and under its policy, Grimm would be entitled to use either the female or the unisex restrooms. But requiring the school to allow him, a biological female who identifies as male, to use the male restroom compromises the separation as explicitly authorized by Title IX.

Seeking to overcome this logical barrier, the majority maintains that the School Board applied "its own discriminatory notions of what 'sex' means." *Ante* at 56. But the School Board did no such thing. In implementing its policy, it relied on the commonly accepted definition of the word "sex" as referring to the anatomical and physiological differences between males and females and concluded that, for purposes of access to its sex-separated facilities, Grimm's sex remained female during the time he was a student at Gloucester High School.

Not to be persuaded, the majority further states that the regulation permitting schools to provide separate toilets on the basis of sex "cannot override the statutory prohibition against *discrimination* on the basis of sex." *Ante* at 56. But strikingly, this overlooks the fact that Congress expressly provided *in the statute* that nothing in its prohibition against discrimination "shall be construed to prohibit" schools "from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The majority's oversight can only be taken as a way to reach conclusions on how schools *should* treat transgender students, rather than a determination of what the statute requires of them.

In short, Gloucester High School did not deny Grimm suitable restrooms. It created three new unisex restrooms that allowed him, as well as the other students, the privacy protected by separating bathrooms on the basis of sex.

IV

Grimm also contends that, even if the School Board did not discriminate against him on the basis of sex in violation of Title IX, it discriminated against him in violation of the Equal Protection Clause of the Fourteenth Amendment. He does so without arguing that Title IX violates the Equal Protection Clause in allowing educational institutions to separate restrooms on the basis of sex.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. As long recognized by the Supreme Court, the Clause is "essentially a direction that all persons *similarly situated* should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*,

473 U.S. 432, 439 (1985) (emphasis added). In this manner, the provision "simply keeps governmental decisionmakers from treating differently persons *who are in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). As such, a plaintiff asserting a violation of the Equal Protection Clause must "demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (noting that the Equal Protection Clause "secure[s] every person within the State's jurisdiction against intentional and arbitrary discrimination" (cleaned up)).

In general, a state-created classification will be "presumed to be valid and will be sustained if [it] is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. The Supreme Court has recognized, however, that legislative classifications based on sex "call for a heightened standard of review." *Id.* Thus, when state actors treat people differently on the basis of sex, they must show "that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (cleaned up). "The justification must be genuine," and it may not "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* Nonetheless, "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001).

Here, Grimm appears to acknowledge that a public school may, consistent with the Equal Protection Clause, establish one set of restrooms for its male students and another set for its female students, as long as the two sets of facilities are comparable — a "separate but equal" arrangement that would obviously be unconstitutional if the factor used to assign students to restrooms was instead race. And the reason it is constitutional for a school to provide separate restrooms for its male and female students — but not, for example, to its Black and White students — is because there are biological differences between the two sexes that are relevant with respect to restroom use in a way that a person's skin color is demonstrably not. As noted above, all individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in personal hygiene, and this privacy interest is heightened when persons of the opposite sex are present. Indeed, this privacy interest is heightened yet further when children use communal restrooms and similar spaces, because children, as the School Board notes, "are still developing, both emotionally and physically."

It is thus plain that a public school may lawfully establish, consistent with the Constitution, separate restrooms for its male and female students in order to protect bodily privacy concerns that arise from the anatomical differences between the two sexes. In light of this rationale, Grimm cannot claim that he was discriminated against when he was denied access to the male restrooms because he was not, in fact, similarly situated to the biologically male students who used those restrooms. While he no doubt identifies as male and also has taken the first steps to transition his body, at all times relevant to the events in this case, he remained anatomically different from males. Because such anatomical

differences are at the root of why communal restrooms are generally separated on the basis of sex, I conclude that by adopting a policy pursuant to which Grimm was not permitted to use male student restrooms, the School Board did not "treat[] differently persons who are in all *relevant* respects alike," *Nordlinger*, 505 U.S. at 10 (emphasis added), and therefore did not violate the Equal Protection Clause. And there is no claim or evidence in the record that Grimm was treated differently from any other transgender student.

In reaching the opposite conclusion, the majority imputes to the School Board an illegal bias based *solely* on the decision it made to separate restrooms. It reasons that "[t]he overwhelming thrust of everything in the record . . . is that Grimm was similarly situated to other boys" with respect to the use of restroom facilities, and it further asserts that, by "privileg[ing] sex-assigned-at-birth over Grimm's medically confirmed, persistent and consistent gender identify," the School Board revealed "its own bias." *Ante* at 38–39. But in employing such an analysis, the majority fails to address why it is permissible for schools to provide separate restrooms to their male and female students to begin with. Such consideration would have demonstrated that it was not "bias" for a school to have concluded that, in assigning a student to either the male or female restrooms, the student's biological sex was relevant.

At bottom, I conclude that the School Board, in denying Grimm the use of male restrooms, did not violate the Equal Protection Clause.

* * *

The majority opinion devotes over 20 pages to its discussion of Grimm's transgender status, both at a physical and psychological level. Yet, the mere fact that it felt necessary to do so reveals its effort to effect policy rather than simply apply law.

I readily accept the facts of Grimm's sex status and gender identity and his felt need to be treated with dignity. Affording all persons the respect owed to them by virtue of their humanity is a core value underlying our civil society. At the same time, our role as a court is limited. We are commissioned to apply the law and must leave it to Congress to determine policy. In this instance, the School Board offered its students male and female restrooms, legitimately separating them on the basis of sex. It also provided safe and private unisex restrooms that Grimm, along with all other students, could use. These offerings fully complied with both Title IX and the Equal Protection Clause.

Accordingly, I would reverse and remand with instructions to dismiss Grimm's complaint.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 24 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; et al.,

Defendants-Appellants,

and

MADISON KENYON; MARY MARSHALL,

Intervenors.

No. 20-35813

D.C. No. 1:20-cv-00184-DCN
District of Idaho,
Boise

ORDER

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; et al.,

Defendants,

and

MADISON KENYON; MARY

No. 20-35815

D.C. No. 1:20-cv-00184-DCN

MARSHALL,

Intervenors-Appellants.

Before: KLEINFELD, WARDLAW, and GOULD, Circuit Judges.

This case is remanded to the district court for the limited purpose of determining whether Lindsay Hecox's claim is moot in light of her changed enrollment status at Boise State University (BSU).[1]

We cannot maintain jurisdiction over a case "where no actual or live controversy exists." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (citation omitted). However, because "[i]t is no small matter to deprive a litigant of the rewards of its efforts," we dismiss a case for mootness "only if it [is] *absolutely clear* that the litigant no longer ha[s] any need of the judicial protection" sought. *United States v. Larson*, 302 F.3d 1016, 1020 (9th Cir. 2002) (emphasis added) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam)). Hecox is not currently enrolled at BSU, but declared she plans to re-enroll in January 2022, after achieving in-state residency. Whether an actual case or controversy remains in these circumstances is a close question. *Compare*

[1] The parties agree that Jane Doe's claim is now moot because she graduated from high school and is planning to attend college out of state. *See, e.g.*, *Bd. of Sch. Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (case moot where all plaintiffs had graduated); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797–99 (9th Cir. 1999) (same).

Jacobs, 420 U.S. 128, 129 (case moot where students graduated) *and Fox v. Bd. of Trustees of State Univ. of New York*, 42 F.3d 135, 137, 142–43 (2d Cir. 1994) (case moot where students no longer attending and could not show they were actually planning or able to return) *with Clark v. City of Lakewood*, 259 F.3d 996, 1006, 1011–12 (9th Cir. 2001), *as amended* (Aug. 15, 2001) (case not moot even where business was not currently operating, because of expressed intent to re-start operation in the future).

The post-argument briefing and declarations by the parties on the question of mootness failed to resolve the issue, and served only to raise further questions. There are currently too many open factual questions to determine "cautiously and with care," *Larson*, 302 F.3d at 1020, whether we can grant Hecox "any effectual relief whatever," *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). In particular, it is essential to know whether Hecox would be eligible to play for BSU if she re-enrolled and made the team. In a May 12, 2021, declaration, Hecox asserted, without explanation or support, that she remains eligible to play under NCAA rules. The Defendants argue, based on their interpretation of the NCAA rules, that Hecox is not eligible because she did not take enough credits in her first two years at BSU. Neither side provided evidence regarding how the NCAA rules apply in Hecox's specific situation. For instance, does the fact that she withdrew from classes before the deadline to drop classes

impact her status for NCAA eligibility purposes? Has the NCAA created any COVID-related exceptions to its requirements that apply to Hecox? It would be best to hear from a school administrator, NCAA representative, or other authority on NCAA eligibility.

The mootness analysis would also be aided by more information regarding the BSU re-enrollment process, the steps Hecox has taken toward re-enrollment, and the availability of BSU women's sports outside of NCAA teams. Is Hecox still an admitted student who can re-enroll at BSU whenever she desires, or are there barriers to re-enrollment? Does she have evidence of savings, discussions with administrators, or anything else that shows a concrete plan to re-enroll? That Hecox dropped out of BSU within a week of not making the track or cross-country teams is also troubling. It would be useful to know what the Fall 2020 deadline for dropping classes was, and the penalty for dropping out after that deadline. And if Hecox is not eligible to play on the NCAA teams or does not make those teams, are there BSU women's club teams that she plans to join instead?

We are not well positioned to answer these questions, or any other issues of fact regarding Hecox's enrollment status or NCAA eligibility. We remand so that the district court can develop the record, resolve any factual disputes, and apply the required caution and care to the initial mootness determination. *See Larson*, 302 F.3d at 1020.

This court otherwise retains jurisdiction over this appeal. Submission of this case is vacated, and further proceedings are held in abeyance pending the district court's decision on the remanded issue. The parties shall advise this court within seven (7) days of the district court's decision. *See* FRAP 12.1(b).

IT IS SO ORDERED.

Appeal Nos. 20-35813, 20-35815

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX and JANE DOE with her next friends Jean Doe and John Doe,
Plaintiffs-Appellees,

v.

BRADLEY LITTLE, *et al.*,
Defendants-Appellants,

and

MADISON KENYON and MARY MARSHALL,
Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
District Court Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

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INTRODUCTION

This case is not about men and boys playing on sports teams for women and girls. Nor is it about protecting women's athletic competitions from men. Rather, this case is about a sweeping Idaho law that changes the long-standing status quo to ban a subset of women and girls from school sports on the basis of their transgender status, implemented by imposing an unequal and unfair burden on all women and girl athletes. The new law is more extreme than any rule governing women's athletics anywhere in the world, and was passed in the middle of a global pandemic without any evidence of an existing problem under the prior Idaho rules.

Specifically, in March 2020, the Idaho Legislature enacted House Bill 500a ("H.B. 500" or the "Act") to categorically bar all women and girls who are transgender, and many who are intersex, from playing school sports on girls' teams in Idaho at any level—from kindergarten to college, from intramural to Division 1 athletics. To enforce that ban, H.B. 500 subjects all women and girl athletes to invasive and medically unnecessary testing if anyone "disputes" their sex using criteria—reproductive anatomy, genetic makeup (chromosomes), and endogenous testosterone levels—that were chosen

because they ensure women and girls who are transgender cannot qualify to participate on women's teams.

Idaho stands alone in creating this categorical exclusion and corresponding testing regime. All states have sex separation in school sports—including Idaho before H.B. 500's enactment. But no other state wholly prevents girls who are transgender from playing on girls' teams, and no other state enforces a sex-separation rule with invasive examinations of reproductive anatomy, chromosomes, and endogenous testosterone. Indeed, even the most elite athletic competitions worldwide—including the Olympics and World Athletics—permit women who are transgender to compete in women's events. H.B. 500 overrides Idaho's previous policy that allowed inclusion of transgender women and girls on girls' teams following testosterone suppression and contradicts the National Collegiate Athletic Association ("NCAA") rules governing college athletics across the country. The Idaho Legislature adopted this first-of-its-kind categorical bar without any evidence that any problems had arisen under the State's prior rules, enacting H.B. 500 as part of a package of bills targeting transgender individuals in Idaho for discriminatory treatment.

In a carefully reasoned 87-page opinion, the District Court preliminarily enjoined H.B. 500, finding that the law likely violates the Equal Protection Clause and that its enforcement would irreparably harm all women and girl athletes in Idaho, including those who are transgender. (1-ER-1-87.) The District Court found it "inescapable" that H.B. 500 "discriminates on the basis of transgender status" and sex. (1-ER-61, 79-80.) Applying heightened scrutiny, the District Court further found that the State had failed to carry its burden to show that the Act is substantially related to the asserted interest of providing opportunities for women athletes. The Court emphasized "the absence of any empirical evidence" that this interest is "threatened by transgender women athletes in Idaho" and credited the "compelling evidence that equality in sports is *not* jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women's teams"—the standard that had governed in Idaho prior to the passage of the Act. (1-ER-69 (emphasis in original).) Nor could the State justify the sex-verification process, which "subject[s] women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examination." (1-ER-83.)

In seeking to reverse the preliminary injunction, the State and Intervenors (collectively, "Appellants") principally defend H.B. 500 on the ground that sex separation in sport is permissible under this Court's decision in *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) ("*Clark*"). But their various arguments—which all hinge on their claim that women and girls who are transgender are indistinguishable from men and boys—are wrong as a matter of law, science, and basic dignity. As the District Court properly recognized based on the extensive record, this case is not about a general sex-separation rule, and *Clark* does not control the entirely different question of whether girls who are transgender may be categorically excluded from girls' teams. (1-ER-62-66.) Indeed, the District Court's order *retains* the general rule of sex separation in sport, which no party challenged, by restoring "the status quo in Idaho"—where "[e]xisting rules already prevented boys from playing on girls' teams" but allowed "transgender girls to play on girls' teams after one year of hormone suppression." (1-ER-73-74.)

Appellants fail to identify any reversible error in the District Court's conclusion that H.B. 500 discriminates based on both transgender status and sex. Nor did the District Court err in evaluating the scientific and medical

evidence to conclude that H.B. 500 likely cannot survive heightened scrutiny. Against Appellants' arguments that girls who are transgender can be categorically excluded from school sports, backed up by an enforcement mechanism that threatens all girl athletes with invasive examinations, the District Court correctly recognized that "the Constitution must always prevail." (1-ER-86.) The preliminary injunction should be affirmed.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. After the District Court granted a preliminary injunction, Appellants appealed. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the District Court abused its discretion in granting a preliminary injunction enjoining a law that categorically bars women and girls who are transgender from playing school sports on girls' teams and subjects all women and girl athletes, but not men or boy athletes, to the threat of invasive sex-verification testing to enforce that exclusionary policy.

STATEMENT OF THE CASE

A. Transgender Status And Transgender Participation In Sports

This case involves a categorical ban on allowing women and girls who are transgender to play school sports, using a test to verify sex based on reproductive anatomy, chromosomes, and endogenous testosterone, *i.e.*, hormone levels the body produces without medical intervention. Those limited factors ignore that "[a] person's sex encompasses the sum of several different biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics, and gender identity"—and all these attributes "are not always aligned in the same direction." (5-ER-703; *see* 1-ER-4 ("[S]uch seemingly familiar terms as 'sex' and 'gender' can be misleading." (internal citations omitted)).)

"'Gender identity' is a medical term for a person's internal, innate sense of belonging to a particular sex." (5-ER-701 (citation omitted).) Everyone has a gender identity, and it is a key component of sex that is durable and cannot be changed by medical intervention. (4-ER-570-71.) "Although the detailed mechanisms are unknown, there is a medical consensus that there is a

significant biologic component underlying gender identity." (1-ER-5; *see* 5-ER-702 (gender identity is "largely a biologic phenomenon").)

A "transgender" person has a gender identity that does not align with the sex they were assigned at birth. (1-ER-5.)[1] The lack of alignment can cause "gender dysphoria," which is a serious medical condition involving "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (1-ER-6 (citation omitted).) If left untreated, gender dysphoria can result in "severe anxiety and depression, suicidality, and other serious mental health issues." (1-ER-6.) Gender dysphoria is treated by recognizing the patient's gender identity, having the person live consistently with that gender identity in all aspects of life, and following appropriate treatment protocols to affirm gender identity, which alleviates distress. (4-ER-573; *see* Br. of Amici Curiae American Medical Association, et al., Point I.)

With respect to athletic competition, elite athletic regulatory bodies around the world, including World Athletics, the International Olympic

[1] A "cisgender" person has a gender identity that aligns with the sex they were assigned at birth. (1-ER-5.) An "intersex" person has variations in certain physiological characteristics associated with sex, such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, and/or hormone production or response. (4-ER-577.)

Committee ("IOC"), and the NCAA, have policies that allow women and girls who are transgender to participate on women's teams. (1-ER-72-73.) World Athletics allows women who are transgender to compete as long as their circulating testosterone levels are below a threshold level. (5-ER-704-05.) The IOC follows a similar rule, recognizing that "[i]t is necessary to ensure insofar as possible that trans athletes are not excluded from the opportunity to participate in sporting competition." (5-ER-777.) And the NCAA, which sets policies for member colleges and universities across the United States, likewise allows women and girls who are transgender to compete in women's athletics after one year of testosterone suppression as part of gender transition. (1-ER-72-73; 5-ER-707-08.) The NCAA's policy was implemented after consultation with medical, legal, and sports experts, (5-ER-781-82), and "millions of student-athletes have competed" under the policy "with no reported examples of any disturbance to women's sports as a result of transgender inclusion." (1-ER-73.)

With respect to school sports, "every other state in the nation [except Idaho following H.B. 500's enactment] permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation." (1-ER-73.) That was the rule in

Idaho, too, before H.B. 500: Girls who are transgender were eligible to participate on girls' teams after one year of testosterone suppression pursuant to rules set by the Idaho High School Activities Association ("IHSAA"). (1-ER-73-74.) The IHSAA provides for separate sports teams for boys and girls, which is not challenged here. (1-ER-73.) In other words, "general sex separation on athletic teams for men and women . . . preexisted [H.B. 500] and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act." (1-ER-73 (citing IHSAA Non-Discrimination Policy).) The preliminary injunction returns Idaho to this status quo, with Appellants able to "rely on the NCAA policy for college athletes and the IHSAA policy for high school athletes, as they did for nearly a decade prior to [H.B. 500]." (1-ER-85.)

B. Idaho Enacts H.B. 500 To Bar Women And Girls Who Are Transgender From Playing School Sports

On March 16, 2020, the Idaho Legislature passed H.B. 500, which altered the existing rules by categorically barring women and girls who are transgender from playing school sports on girls' teams at any level and creating a sex-dispute mechanism that applies only to players on girls' teams. H.B. 500 was passed at the height of the initial COVID-19 outbreak when many states had adjourned their legislative sessions indefinitely in response

to the pandemic. (1-ER-78.) The Idaho Legislature, however, stayed in session to pass H.B. 500 and another bill that targets transgender individuals by preventing them from changing the gender marker on their birth certificates to match their gender identity. (1-ER-78.)[2]

H.B. 500 requires school sports in Idaho to be "expressly designated" as male, female, or co-ed "based on biological sex." Idaho Code § 33-6203(1). The Act further provides that girls' teams "shall not be open to students of the male sex," with no parallel provision for boys' teams. *Id.* § 33-6203(2). H.B. 500 additionally "creates a dispute process for an undefined class of individuals who may wish to 'dispute' any transgender or cisgender female athlete's sex." (1-ER-12 (citing Idaho Code § 33-6203(3).) That provision states:

> A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. The state board of education shall promulgate rules for schools and institutions to

[2] Idaho's implementation of the gender-marker bill has been enjoined in a separate case. *F.V. v. Jeppesen*, ___ F. Supp. 3d ___, No. 1:17-cv-00170, 2020 WL 4726274 (D. Idaho Aug. 7, 2020).

> follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

Id. § 33-6203(3). Finally, H.B. 500 includes an "enforcement mechanism to ensure compliance with its provisions[,]" creating a private cause of action against schools for any student who claims to be "deprived of an athletic opportunity or suffers any harm, whether direct or indirect, due to the participation of a woman who is transgender on a woman's team." (1-ER-3, 1-ER-12 (citing Idaho Code § 33-6205(1)) (internal quotation marks omitted).)

The three criteria H.B. 500 enumerates as the "only" bases for verifying "biological sex"—reproductive anatomy, genetic makeup, and endogenous testosterone levels—intentionally exclude women and girls who are transgender. (*See* 1-ER-77.)[3] Because many transgender girls cannot obtain gender-affirming genital surgery to treat gender dysphoria—either because it is not consistent with their individualized treatment plan or because they cannot afford it—these girls will not have external "reproductive anatomy" typical of women and girls. (1-ER-77.) And even after surgery, women who are transgender will not have ovaries. (4-ER-576.) Likewise, because the

[3] H.B. 500 also excludes many women and girls with intersex traits who would not be considered "biological" women based on the listed sex-verification criteria. (1-ER-77.)

"overwhelming majority of women who are transgender have XY chromosomes, they cannot meet the second criteria" of "genetic makeup." (1-ER-77-78.) Finally, by focusing on "endogenous" testosterone levels, H.B. 500 ensures that women who are transgender cannot qualify to play sports even if they are undergoing medical treatment and have "circulating testosterone levels [that] are within the range typical for cisgender women." (1-ER-77-78.)

None of the criteria H.B. 500 specifies to verify a student's sex "are tested for in any routine sports' physical examination." (1-ER-81.) Student sports physicals are brief examinations designed to ensure students have no health conditions that could result in serious injury or death. (5-ER-748-49.) "If a health care provider was to verify a patient's sex related to their reproductive anatomy, genes, or hormones, none of that testing is straightforward or ethical without medical intervention." (1-ER-81.) Nor would any of the three criteria actually "verify biological sex, either alone or in any combination, as this would not be consistent with medical science." (1-ER-81 (internal quotations omitted).)

The Idaho Legislature adopted H.B. 500's categorical bar and sex-verification mechanism for the express purpose of barring girls who are transgender from being eligible to play school sports. The lead sponsor of the

bill, Representative Barbara Ehardt, described the "threat" that H.B. 500 was designed to address as two transgender high school girls who ran track in Connecticut and one transgender college woman who ran track in Montana. (1-ER-10.) Legislators discussing the bill repeatedly described women and girls who are transgender as "biological male[s]" and "biological boys." (4-ER-601-12.) One of H.B. 500's legislative findings specifically referred to "a man [sic] who identifies as a woman and is taking cross-sex hormones." Idaho Code § 33-6202(11). The entirety of H.B. 500's hearings and legislative debates focused on women and girls who are transgender and not cisgender men and boys.

Despite the asserted "threat" posed by transgender athletes, the legislative debates did not actually identify any transgender athletes in Idaho competing in women's sports at all. During the hearings, the IHSAA's Executive Director observed that "no Idaho student had ever complained of participation by transgender athletes, and no transgender athlete had ever competed under the IHSAA policy regulating inclusion of transgender athletes." (1-ER-9.) Representative Ehardt "admitted during the hearing that she had no evidence any person in Idaho had ever challenged an athlete's eligibility based on gender." (1-ER-9.) Indeed, "the legislative record reveals

no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar against transgender female athlete[s'] participation in sports [wa]s required in order to promote 'sex equality' or to 'protect athletic opportunities for females.'" (1-ER-67 (citing Idaho Code § 33-6202(12)).)

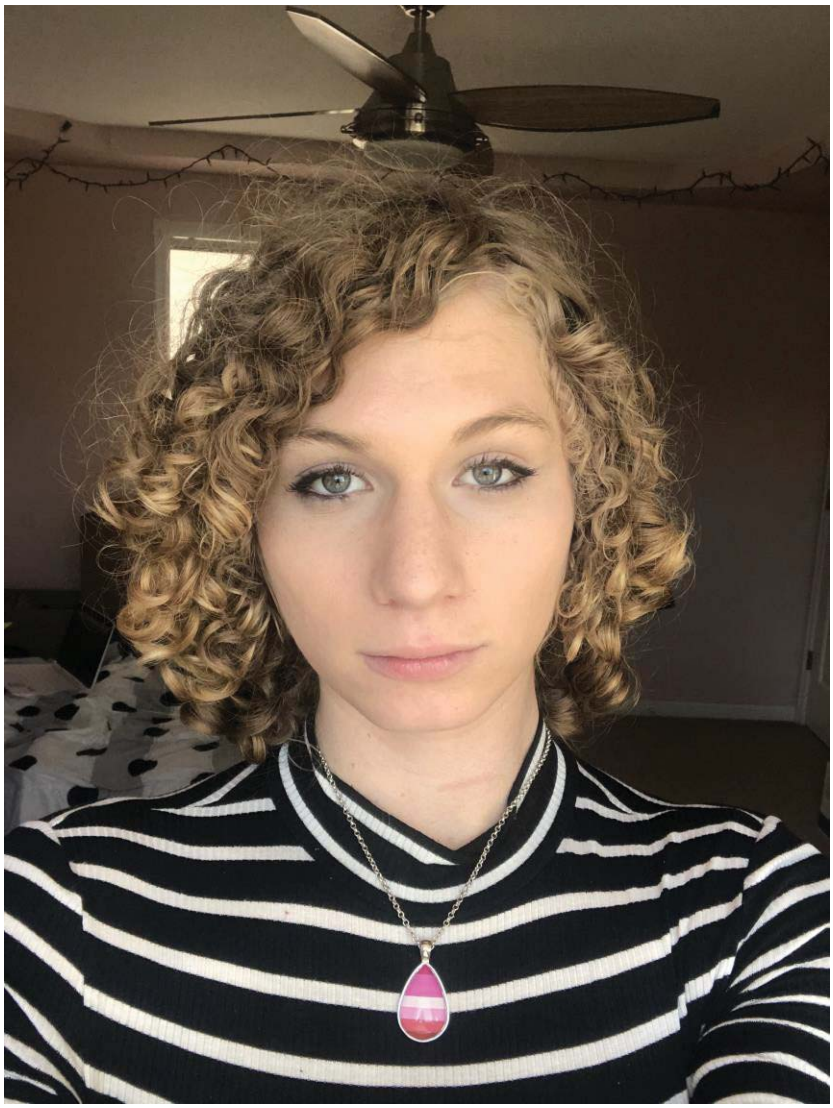
Prior to H.B. 500's enactment, the Idaho Attorney General wrote an opinion warning that the bill "raised serious constitutional and other legal concerns due to the disparate treatment and impact it would have on both transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes." (1-ER-9-10); (Letter from Attorney General Lawrence Wadsen to Representative Ilana Rubel (Feb. 25, 2020), at 4, https://www.idahopress.com/attorney-generals-opinion-hb-500/pdf_4ebb604a-83eb-5bd4-a232-b13a64f4be47.html ("AG Letter").) In addition, the opinion letter noted that "[t]he issue of a transgender female wishing to participate on a team with other women requires considerations beyond those considered in *Clark* and presents issues that courts have not yet resolved." (*Id.*) Former Idaho Attorneys General likewise urged Idaho Governor Little to veto the bill "to keep a legally infirm statute off the books." (1-ER-11; *see* Br. *Amicus*

Curiae of Three Former Idaho Attorneys General.) And "Professor [Doriane] Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings," similarly "urged Governor Little to veto the bill, explaining that her research was misused" and did not support a categorical bar. (1-ER-10.) Despite these warnings, H.B. 500 was enacted and signed into law on March 30, 2020. (1-ER-11.)

C. Plaintiffs Lindsay Hecox And Jane Doe Sue To Prevent H.B. 500 From Harming Them And All Women And Girl Athletes In Idaho

Plaintiffs Lindsay Hecox and Jane Doe, like most avid athletes, love participating and competing on teams and have gained immense benefits from those experiences. Facing irreparable harm from H.B. 500, they filed this suit alleging that the law violates their constitutional and statutory rights.

Lindsay is a woman athlete living in Idaho who is transgender. (4-ER-678.) Lindsay loves running, and she ran track and cross-country on co-ed teams in high school. (4-ER-678.) At the time this lawsuit was filed, Lindsay was a freshman at Boise State University ("BSU") who wished to run on the women's cross-country and track teams. (4-ER-681.) A picture of Lindsay is below. (5-ER-768.)



Since September 2019, as part of her treatment for gender dysphoria, Lindsay has been treated with testosterone suppression and estrogen, which lowers her circulating testosterone levels and affects her bodily systems and secondary sex characteristics. (4-ER-680-81.) Lindsay's health and well-being depend on being able to live and express herself as a woman; running on a men's team is not an option for her and would be contrary to her medical

treatment for gender dysphoria. (4-ER-684.) Lindsay is eligible to compete in women's sports under existing NCAA rules, but is barred by H.B. 500. (*See* 1-ER-37.)[4]

Jane Doe is a 17-year-old cisgender girl attending Boise High School who competes on the varsity soccer and track teams. (5-ER-688-89.) "Because most of [Jane's] closest friends are boys, she has an athletic build, rarely wears skirts or dresses, and has at times been thought of as 'masculine,' Jane worries that one of her competitors may dispute her sex." (1-ER-7; *see* 5-ER-689.) Under H.B. 500, Jane could be subject to a "sex" dispute at any time and have to undergo invasive testing to verify her eligibility, with her athletic career on the line if she fails to comply.

D. The District Court Grants A Preliminary Injunction Enjoining H.B. 500

On August 17, 2020, the District Court granted a preliminary injunction, finding that H.B. 500 is likely unconstitutional and would irreparably harm

[4] With H.B. 500 enjoined, Lindsay was permitted to try out for BSU's women's cross country and track teams in fall 2020, but did not make the team. Lindsay has subsequently taken a temporary leave of absence from BSU to work full time, establish her Idaho residency, and save money for school. She will remain in Idaho and will return to BSU next school year. She continues to train in order to try out again for the track team, and she remains eligible to compete under NCAA rules.

Lindsay, Jane, and all women and girl athletes in Idaho if it were not enjoined. The Court first determined that H.B. 500 discriminates on the basis of transgender status and sex and so is subject to heightened scrutiny. (1-ER-59-62.) Although H.B. 500 does not "expressly use the term 'transgender,'" the Court recognized based on the law's text, purpose, and effect that it is "directed at excluding women and girls who are transgender[.]" (1-ER-60-61, 77.) And by "creat[ing] a different, more onerous set of rules for women's sports when compared to men's sports," H.B. 500 further discriminates based on sex. (1-ER-80.)

Applying heightened scrutiny, the District Court found that Appellants failed to show that H.B. 500 substantially serves an important state interest. The Court rejected Appellants' reliance on *Clark*—involving a policy preventing cisgender boys from playing volleyball on girls' teams—because *Clark*'s analysis of the justifications for the general rule of sex separation in sport "do not appear to be implicated by allowing transgender women to participate on women's teams." (1-ER-63.) Specifically, in contrast to the policy in *Clark*, H.B. 500's categorical exclusion of girls who are transgender "discriminates against a historically disadvantaged group" and "entirely eliminates their opportunity to participate in school sports" with no evidence

that "allowing transgender women to compete on women's teams would substantially displace female athletes." (1-ER-64-66.)

Nor could Appellants establish any "'exceedingly persuasive' justification" for H.B. 500. (1-ER-68.) The District Court emphasized the "absence of any empirical evidence" that "athletic opportunities are threatened by transgender women athletes in Idaho," citing the "compelling evidence" that "physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression." (1-ER-69.) The Court found a medical consensus that the performance advantage typical of men over women in sport principally results from circulating testosterone—which H.B. 500 "intentionally excludes" from consideration. (1-ER-69-70, 78.) The Court further emphasized that the prior rules governing transgender inclusion had not resulted in any displacement of women athletes in Idaho, other states, or elite athletic organizations like the IOC. (1-ER-67-69, 72-73, 78.) Nor could Appellants justify H.B. 500's sex-verification provision, which inflicts "injury and indignity" on all women and girl athletes and "hinders" the benefits of school sports "by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing

invasive bodily examinations." (1-ER-83.) Because Appellants did not "identif[y] a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics," and enforced through a "humiliating" sex-dispute verification process, the District Court found that H.B. 500 likely violates the Constitution. (1-ER-79-80.)

All other factors likewise supported a preliminary injunction. The District Court found that "Lindsay and Jane both face irreparable harm due to violations of their rights under the Equal Protection Clause." (1-ER-83.) Lindsay further would face a categorical exclusion from being eligible to play school sports and Jane would be "subject to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex." (1-ER-84.) On the other side of the balance, the Court found an injunction "would not harm [Appellants] because it would merely maintain the status quo," with Appellants able to "rely on the NCAA policy for college athletes and IHSAA policy for high school athletes, as they did for nearly a decade prior to the Act." (1-ER-85.) And given the "likelihood that the Act violates the Constitution," the Court concluded that "both the public interest and the balance of the

equities favor a preliminary injunction." (1-ER-86 (internal quotation marks and citation omitted).) That injunction, the Court emphasized, would vindicate "the constitutional rights of every girl and woman athlete in Idaho," including those who are transgender. (1-ER-87.)

SUMMARY OF THE ARGUMENT

The District Court correctly found that H.B. 500 likely violates the Equal Protection Clause, runs counter to the public interest, and would irreparably harm Lindsay, Jane, and all woman and girl athletes in Idaho. The preliminary injunction should be affirmed.

H.B. 500 discriminates on the basis of transgender status and sex, thus triggering heightened equal protection scrutiny. Appellants' suggestion that H.B. 500 does not classify based on transgender status but simply creates a general rule of sex separation in sport cannot be reconciled with the statute's text, purpose, and effect. H.B. 500 departs from the existing system of sex separation in sport in Idaho, which allowed the participation of transgender athletes, to create a sweeping categorical exclusion of girls who are transgender based on an intentionally narrow definition of "biological sex." And H.B. 500 enforces that exclusionary policy with a novel sex-verification regime that subjects all women and girl athletes to differential and worse

treatment compared to men and boy athletes. Appellants' mischaracterization of H.B. 500 cannot obscure the Act's discriminatory classifications or eliminate the State's burden to demonstrate an exceedingly persuasive justification for that discrimination.

The State cannot satisfy that burden: completely banning girls who are transgender from school sports and threatening all girls with invasive and humiliating exams of their reproductive anatomy, chromosomes, and endogenous testosterone does not substantially serve any important governmental interest. Appellants erroneously contend that *Clark* supports H.B. 500's discriminatory classifications, but the sex separation in sport upheld in *Clark* preexisted H.B. 500, remains the status quo under the preliminary injunction, and is not challenged here. *Clark* concerns the exclusion of cisgender men and boys from women's sports and does not govern this wholly different context involving discrimination against a subset of women and girls.

Appellants therefore must—but cannot—justify H.B. 500's specific targeting of girls who are transgender for a categorical rule of exclusion. As the District Court found after reviewing the medical and scientific evidence, no basis exists to conclude that the statute's sweeping ban is necessary to

protect opportunities for women in sports. To the contrary, H.B. 500 intentionally excludes consideration of the one factor with a documented effect on general performance differences between men and women in sports: circulating testosterone. The Act's invasive sex-verification regime likewise serves no purpose other than to implement unwarranted discrimination by subjecting all women and girls to examination in order to identify, isolate, and exclude those who are transgender. Whether reflecting irrational prejudice or fear of those who are different, H.B. 500's discrimination against girls who are transgender—implemented through provisions that harm all girls—cannot be justified under any equal protection standard.

Nor can Appellants establish that the District Court erred in finding irreparable harm and concluding that the balance of the equities and the public interest weigh strongly in favor of the preliminary injunction—as Appellants effectively concede by failing to brief those factors. For all of these reasons, the District Court correctly granted a preliminary injunction enjoining H.B. 500 in full.

STANDARD OF REVIEW

This Court reviews the District Court's grant of a preliminary injunction for an abuse of discretion. This review is "limited and deferential." *Padilla v.*

Immigr. & Customs Enf't, 953 F.3d 1134, 1141 (9th Cir. 2020) (citation omitted). A district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," and "[a]ppellate review of those terms is correspondingly narrow." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (internal quotation marks and citations omitted).

While a district court's legal conclusions are reviewed de novo, factual findings are reviewed for clear error. *Armstrong v. Brown*, 768 F.3d 975, 979 (9th Cir. 2014); *see Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 834 (9th Cir. 2020) ("It is not our role to second-guess the district court's factual findings"). A mere showing of conflicting evidence is insufficient to disturb the district court's findings. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795 (9th Cir. 2005); *see Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (rejecting appellants' request to "re-weigh the evidence and overturn the district court's evidentiary determinations"). Thus, as long as the district court's findings "are plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced it would have reached a different result." *Nat'l Wildlife*, 422 F.3d at 795 (citations omitted).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT H.B. 500 LIKELY VIOLATES EQUAL PROTECTION

As the District Court recognized, Plaintiffs are likely to succeed on their claim that H.B. 500's categorical exclusion of women and girls who are transgender from playing school sports and its sex verification regime designed to implement that discriminatory rule are unconstitutional. The Act discriminates based on both transgender status and sex and therefore must be tested under heighted scrutiny. But Appellants cannot carry their burden to show that H.B. 500 substantially serves the important governmental interest in protecting opportunities for women in sports. As the District Court found, the Act's changes to Idaho's preexisting rules governing sex separation in sport cannot be justified based on the legislative record, scientific evidence about performance differentials in sport, or the experience of athletes in Idaho or anywhere else in the world—including in the most elite competitions. Because Appellants cannot identify an exceedingly persuasive justification for H.B. 500—or *any* justification beyond "ensuring exclusion of transgender women athletes," (1-ER-78)—the law fails under any standard of review.

A. H.B. 500 Must Be Tested Under Heightened Scrutiny Because It Discriminates On The Basis Of Transgender Status And Sex

By barring all women and girls who are transgender from women's sports and subjecting all women and girl athletes—but not men and boy athletes—to a sex-verification procedure, H.B. 500 discriminates based on transgender status and sex. Appellants contend the law merely codifies a general rule of separate boys' and girls' teams based on "biological sex," rather than classifying based on "transgender status," but those arguments ignore H.B. 500's text, context, history, purpose, and effect.

Prior to H.B. 500's enactment, "[e]xisting rules [in Idaho] already prevented boys from playing on girls teams[.]" (1-ER-73.) H.B. 500 changes the law by adopting new "criteria" that are "designed to exclude transgender women and girls" from girls' teams "and to reverse the prior IHSAA and NCAA rules that implemented sex separation in sports while permitting transgender women to compete" following one year of testosterone suppression. (1-ER-77.) Appellants' arguments thus "do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status" and sex, triggering heightened scrutiny. (1-ER-61); *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996) (internal quotation marks omitted)

("*VMI*") ("[A]ll gender-based classifications today warrant heightened scrutiny."); *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (holding that a law classifying based on transgender status is evaluated under "a standard of review that is more than rational basis but less than strict scrutiny").[5]

1. H.B. 500's Categorical Exclusion Of Women And Girls Who Are Transgender Discriminates Based On Transgender Status And Sex

By design, purpose, and effect, H.B. 500 singles out women and girls who are transgender to categorically exclude them from participating in school sports on the basis of both their transgender status and sex.

Discrimination Based on Transgender Status. H.B. 500 defines "biological sex" to deliberately exclude women and girls who are transgender from being eligible to participate in women's sports. The Act requires that women's teams be restricted based on "biological sex" verified by criteria that women who are transgender cannot meet: "reproductive anatomy, genetic

[5] The Intervenors briefly contend that classifications based on transgender status should not trigger intermediate scrutiny and that this Court's decision in *Karnoski* was "wrongly decided." (Intervenors Br. at 27-28 & n.10.) That argument lacks merit, ignores the District Court's analysis of the factors warranting heightened scrutiny, (1-ER-57-58), and disregards the reality that a panel cannot overrule circuit precedent.

makeup, or normal endogenously produced testosterone levels." Idaho Code § 33-6203(3). Those criteria have no documented correlation to athletic performance and in fact "intentionally exclude" consideration of circulating testosterone, which is the "one [sex-related] factor that a consensus of the medical community appears to agree" affects athletic performance. (1-ER-78.) Instead of correlating to characteristics associated with athletic performance, H.B. 500's narrow definition of "biological sex" is perfectly correlated to whether a woman athlete was assigned the sex of male at birth—and women who were assigned male at birth are, by definition, transgender. (5-ER-570.) H.B. 500's restrictive definition of "biological sex," is thus "designed to exclude transgender women and girls" by ensuring they are categorically ineligible to play on women's teams. (1-ER-77.) As such, it constitutes discrimination based on transgender status. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) ("A tax on wearing yarmulkes is a tax on Jews.") (citation omitted); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such

circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

H.B. 500's context and history confirm that the law discriminates based on transgender status. The Legislature's findings expressly refer to "a man [sic] who identifies as a woman and is taking cross-sex hormones." Idaho Code § 33-6202(11). The bill sponsors repeatedly described the goal of the statute as excluding women and girls who are transgender from participating in women's sports, characterizing three transgender women who ran track in Connecticut and Montana as the "threat" that H.B. 500 was designed to address. (1-ER-10; *see* 4-ER-601-12.) The entirety of the legislative debates focused on whether women who are transgender should be barred from women's sports, and not whether cisgender men should be barred (as they already were under the preexisting rules governing sex separation in sport in Idaho, 1-ER-73). And the Legislature enacted H.B. 500 as part of a package of bills targeting transgender individuals in Idaho. (1-ER-78.) As the State's counsel previously acknowledged in advising the Legislature that H.B. 500 is likely unconstitutional, the law is "targeted toward transgender and intersex athletes." (AG Letter at 6.)

Appellants now seek to avoid that conclusion by observing that H.B. 500 does not use the term "transgender" and instead refers only to "biological sex." That argument ignores the definitional exclusion written into the law, which specifically defines "biological sex" to exclude girls who are transgender even though they often possess many biological characteristics typical of cisgender women. *See, e.g.*, *Morris v. Pompeo*, No. 2:19-cv-00569, 2020 WL 6875208, *7 (D. Nev. Nov. 23, 2020) (recognizing that policy that did "not use the term 'transgender'" used criteria that "by definition" would apply only to individuals who are transgender and accordingly "discriminate[d] . . . on the basis of . . . transgender status"). Although Appellants appear to assume that sex assigned at birth (usually based on external genitalia) is the sole determinant of a person's "biological sex," "from a medical perspective, chromosomes, reproductive anatomy and endogenous testosterone alone do not determine a person's sex, nor does a single sex-related characteristic." (4-ER-582.) And as the District Court found, "there is a medical consensus that there is a significant biologic component underlying gender identity." (1-ER-5.) By restricting the definition of "biological sex" to purposefully exclude girls who are transgender, H.B. 500 classifies on that basis.

In this respect, H.B. 500's intentionally restrictive definition of "biological sex" functions as a form of "[p]roxy discrimination," which exists when "a law or policy that treats individuals differently on the basis of seemingly neutral criteria . . . are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). "For example, discriminating against individuals with gray hair is a proxy for age discrimination because "the 'fit' between age and gray hair is sufficiently close." *Id.* (citing *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992)). Likewise here, H.B. 500's definition of "biological sex" is so closely associated with girls who were assigned the sex of male at birth that it amounts to a transgender-status classification.

Indeed, H.B. 500's definition of "biological sex" has no purpose *other* than to exclude women who are transgender from playing on women's teams. Sex-separation in sport is not maintained through "biological sex" definitions because cisgender boys do not assert themselves to be "girls" or "women" (even if they might assert a legal right for boys to play on girls' teams, as occurred in *Clark*). Long before H.B. 500, Idaho had separate teams for boys and girls

with no "biological sex" definition and no record of problems implementing those rules. The sole function of H.B. 500's "biological sex" definition is to force women and girl players to go through a sex-verification process in order to identify and exclude those who were assigned the sex of male at birth—that is, those who are transgender. Appellants err in suggesting that "biological sex" is a well-established legal concept and not one crafted in Idaho for the first time in 2020 to discriminate against transgender people. *Cf. Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 626 (4th Cir. 2020) (Wynn, J., concurring) (observing that the defendant adopted "ends-driven definitions of 'biological gender'" to "guarantee[] a particular outcome: that one student would be unable to use the boys' restroom" based on his transgender status).

This Court notably rejected an argument similar to Appellants' in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), which held that a same-sex marriage ban discriminated on the basis of sexual orientation even though it did not explicitly refer to that classification. *Id.* at 467-68. The defendants contended the laws classified based on "procreative capacity" rather than sexual orientation, with "differential treatment [on the basis of] sexual orientation" constituting only an "incidental effect" of the law. *Id.* But this Court recognized that the bans "discriminate[d] on the basis of sexual orientation"

without express reference to people who are gay and lesbian because the prohibited conduct—entering into a marriage with a person of the same sex—is closely correlated with that status. *Id.* at 468. So too here, H.B. 500's definition of "biological sex" discriminates based on transgender status even without using that specific term.[6] As with the "procreative capacity" arguments raised in *Latta*, the District Court properly held that whatever "physiological differences" the State may use to attempt to justify the "biological sex" definition go only to whether the Act survives heightened scrutiny and "do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status" triggering such scrutiny in the first place. (1-ER-61.)

Appellants further err in contending that objections to H.B. 500's discriminatory classifications amount to a request for a special exception from sex-separation rules for girls who are transgender. That argument ignores

[6] Intervenors miss the point in contending that *Latta* is distinguishable because the same-sex marriage bans did not expressly refer to procreative capacity. Neither did the laws expressly refer to sexual orientation. But because gay and lesbian people form intimate relationships with members of the same sex, this Court recognized that a ban on same-sex marriage in fact classifies based on sexual orientation—just as H.B. 500's test of "biological sex" classifies based on transgender status in purposefully excluding women who are transgender by definition and design.

that H.B. 500 was designed to, and does, exclude only transgender women and girls, who seek only what every cisgender student already has: an opportunity to play school sports. Under Appellants' argument, transgender individuals could never vindicate their rights because it would always be permissible to insist that they act contrary to their gender identity or to claim that laws merely draw permissible lines based on selective definitions of "biological sex." The Supreme Court rejected such arguments in *Bostock*, and this Court likewise should reject them here. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738, 1754 (2020) (holding that firing transgender woman was a form of sex discrimination, notwithstanding her employer's argument that she was instead fired for failing to follow a "biological sex" dress code and could simply have come to work dressed as a man like all "biological males").

Contrary to Appellants' arguments (Intervenors Br. at 24, 26; State Br. at 14-15), the fact that H.B. 500 does not bar transgender boys from playing school sports does not erase or excuse the discrimination against women and girls who are transgender. Where the law draws a line based on a protected status, the fact that not all members of the class are targeted by the discrimination does not insulate the law from heightened scrutiny review; instead, the subset affected by the law may challenge the classification. *See*

Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (per curiam) (discriminating against women with children is sex discrimination even if women without children were not discriminated against); *Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000) ("Simply because a class . . . does not include all members of [a] race does not suffice to make the classification race neutral."); *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977) (singling out some but not all aliens for discrimination constituted a "classification based on alienage" because even though not all aliens were equally affected, "[t]he important points are that [the law] is directed at aliens and that only aliens are harmed by it"); *Mathews v. Lucas*, 427 U.S. 495, 504 n.11 (1976) (fact that statutory classifications "discriminate[d] among illegitimate children does not mean, of course, that they are not also properly described as discriminating between legitimate and illegitimate children").

Appellants' argument further ignores the unique intersectional discrimination girls who are transgender may face, perversely depriving them of protection because they are discriminated against based on the confluence of two different protected traits—their transgender status and their sex. *Cf. B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1101 (9th Cir. 2002) (citation omitted) (describing "the intersectional relationship between discrimination

on the basis of" two characteristics such as "race and gender"); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020) (holding that Black boys could bring Title VI race discrimination claim based on school's hair policy even though Black girls and white boys were not targeted by the policy).

Nor can Appellants avoid H.B. 500's transgender-status classification by relying on *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Intervenors cite *Geduldig* for the proposition that a particular "distinction involving pregnancy did not distinguish based on sex[.]" (Intervenors Br. at 25.) But all *Geduldig* held is that exclusion of pregnancy from a disability benefits program with no showing of "pretext" is *not necessarily* "invidious discrimination against the members of one sex." *Geduldig*, 417 U.S. at 496 n.20.[7] In other words, even under *Geduldig*, "the pregnancy line" *may be* a sex-discrimination line even if not all women are affected so long as "discrimination has occurred." *deLaurier v. San Diego Unified Sch. Dist.*, 588

[7] Notably, *Geduldig* also predates the Supreme Court's modern equal protection jurisprudence and has not been cited by a majority opinion in an equal protection case since the mid-70s. *See* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 Georgetown L.J. 167, 208 n.229 (2020). And since *Geduldig*, the Court has recognized that the differential treatment of pregnancy in insurance and employee-leave policies resting on "the pervasive sex-role stereotype that caring for family members is women's work" is impermissible sex discrimination. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

F.2d 674, 677 (9th Cir. 1978) (holding sex discrimination had occurred when an employer required teachers to take mandatory leave in their ninth month of pregnancy and thus "restrict[ed] . . . pregnant women's employment opportunities"). Here, H.B. 500's intentionally narrow definition of "biological sex," which was specifically designed to categorically exclude girls who are transgender from school sports, is precisely what *Geduldig* prohibits: a pretextual classification designed to effectuate discrimination. The fact that not all transgender people are affected does not erase that discriminatory classification.

Discrimination Based on Sex. Because H.B. 500 discriminates based on transgender status, it also necessarily discriminates based on sex and independently triggers heightened scrutiny on that basis. As the Supreme Court held in *Bostock*, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741.

Appellants embrace the fact that H.B. 500 "discriminates based on sex" in an effort to argue that it does not "discriminate[] more narrowly based on transgender status[.]" (Intervenors Br. at 14 n.6.) But sex and transgender status are not mutually exclusive: that the statute facially discriminates

based on sex does not mean it cannot also facially discriminate based on transgender status. *See Latta*, 771 F.3d at 479 (Berzon, J., concurring) (noting that same-sex marriage bans facially discriminate based on both sexual orientation and sex). The Act triggers heightened scrutiny by classifying on each of those bases.

2. H.B. 500's Sex-Verification Dispute Provision Discriminates Against All Women And Girl Athletes Based On Sex

H.B. 500 treats all women and girl athletes differently and worse than all men and boy athletes by subjecting them to the threat of sex-verification disputes, thereby facially discriminating based on sex for this additional reason. As the District Court recognized, "the Act creates a different, more onerous set of rules for women's sports when compared to men's sports" by "singling out members of girls' and women's teams for sex verification." (1-ER-79-80.) Only players on girls' teams face the threat of having to undergo "humiliating" and "invasive medical tests" to establish their "biological sex" relying on reproductive anatomy, chromosomes, or endogenous testosterone levels. (1-ER-80-81.) Appellants acknowledge the point, accepting that H.B. 500 creates a sex-based line. (*See* State Br. at 34.) H.B. 500's sex-verification provision accordingly independently triggers heightened scrutiny. (1-ER-80

("Where spaces and activities for women are 'different in kind . . . and unequal in tangible and intangible ways from those for men, they are subject to heightened scrutiny.'" (quoting *VMI*, 518 U.S. at 540)).)

B. H.B. 500's Categorical Bar On Transgender Women Participating In Women's Sports Fails Heightened Scrutiny

The District Court properly held that Appellants had not justified H.B. 500 under heightened scrutiny. Appellants defend H.B. 500 by arguing that sex separation in sports is constitutional under *Clark*. But that general rule is not at issue here, and its constitutionality does not resolve the separate question of whether girls who are transgender can be categorically barred from girls' sports. Prior to H.B. 500's enactment, "[e]xisting rules [in Idaho] already prevented boys from playing on girls' teams." (1-ER-73.) The preliminary injunction maintains that status quo. The only relevant way H.B. 500 changes Idaho law is by, for the first time anywhere, singling out and excluding girls who are transgender from playing school sports altogether—a different classification and restriction than this Court considered in *Clark*. (1-ER-66 (recognizing that *Clark* analyzed "sex separation in sport generally" and thus is not "determinative here").)

Appellants accordingly must—but cannot—show that H.B. 500's categorical exclusion of women and girls who are transgender from women's

sport substantially advances an important state interest. As the District Court found after evaluating all evidence, none of the interests offered to defend H.B. 500 are advanced by the law and Plaintiffs are likely to succeed on their equal protection claims.

1. Heightened Scrutiny Is A Demanding Standard And Applies To All Sex-Based Classifications

Heightened scrutiny imposes a "demanding" standard, with the burden "rest[ing] entirely on the State" to demonstrate an "exceedingly persuasive" justification for its differential treatment. *VMI*, 518 U.S. at 533. The government "must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 516 (internal quotation marks and citations omitted). A court must assess the law's "actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." (1-ER-62 (citation omitted).)

The State misstates the constitutional inquiry in arguing that "laws that recognize real differences between the sexes do not violate the Equal Protection Clause simply because they treat the sexes differently." (State Br. at 31.) Laws that differentiate based on asserted "real differences" between

men and women are not presumptively constitutional, as the State claims, but instead must still be tested under heightened scrutiny. *VMI*, 518 U.S. at 533 (recognizing that "'inherent differences' between men and women" cannot be used to "artificially constrain[] . . . an individual's opportunity").

2. H.B. 500's Discrimination Is Not Constitutional Under The Analysis In *Clark*

Appellants err in contending that H.B. 500's categorical exclusion of girls who are transgender from girls' sports is constitutional under *Clark*. (State Br. at 10-12, 18-31; Intervenors Br. at 19-22, 28-39.) *Clark* upheld a policy prohibiting cisgender boys from playing on the girls' volleyball team in a school district that did not sponsor a boys' volleyball team but provided "overall [athletic] opportunit[ies]" to boys that were "not inferior" to those provided to girls. *Clark*, 695 F.2d at 1131, 1132. The parties had stipulated that boys would "on average be potentially better volleyball players than girls" and would "dominate" particular "skills in volleyball," thus creating an "undue advantage" in competition with girls. *Id.* at 1127, 1131. Based on those stipulated facts, this Court found that "due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team." *Id.* at 1131. The Court concluded that the exclusion of boys was substantially related to the

important interests in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes." *Id.*[8]

As the District Court recognized, the general rule of sex separation in sport upheld in *Clark* presents different issues than H.B. 500's categorical exclusion of girls who are transgender from girls' sports. (1-ER-63 (analyzing *Clark* and concluding that "the justifications" for preventing cisgender boys from playing on girls' teams "do not appear to be implicated by allowing transgender women to participate on women's teams").) In advising the Idaho Legislature of H.B. 500's constitutional infirmities, counsel for the State likewise previously acknowledged that "[t]he issue of a transgender female wishing to participate on a team with other women requires considerations beyond those considered in *Clark* and presents issues that courts have not yet resolved." (AG Letter at 4.) Appellants' effort to resist that conclusion now and their assertion that there is no relevant difference between cisgender boys

[8] This Court reiterated this same analysis when the plaintiff's brother challenged a school policy preventing boys from playing on the girls' volleyball team. *Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191, 1192 (9th Cir. 1989) ("*Clark II*"). The Court observed that "Clark d[id] not dispute" the prior conclusion that men would displace women "to a substantial extent" if allowed to compete on women's teams. *Id.* at 1193. The Court adopted the findings in *Clark* and again upheld the policy. *Id.* at 1194.

and girls who are transgender runs counter to common sense, medical consensus, and prevailing law.

At the outset, the State grossly misstates the record and wholly ignores what it means to be transgender in contending that "[t]he only difference between [Plaintiff Lindsay] Hecox and the Clark brothers is gender identity, which does not change the universally recognized sex-based physiological advantages male-sexed athletes have to out-compete and displace female-sexed athletes." (State Br. at 8-9.) As discussed more fully below, that argument entirely ignores the District Court's finding that transgender women who have suppressed their testosterone—as Lindsay has—have no substantial physiological advantages over cisgender women. (1-ER-65-66); *see* pp. 47-48, *infra*. Appellants' insistence, in the face of the District Court's findings, that Lindsay is identical to a cisgender man hinges on their "own misconceptions, which themselves reflect 'stereotypic notions.'" *Grimm*, 972 F.3d 586, 610 (4th Cir. 2020), *as amended* (August 28, 2020) (holding that a boy who is transgender was "similarly situated to other boys" and the defendants' decision to "exclude[] [him] from using the boys restroom facilities" was based on misconceptions and stereotypes).

Courts have likewise recognized the extreme social, psychological, and emotional harms that arise from misgendering individuals who are transgender, excluding them from activities their peers participate in, or forcing them into single-sex spaces inconsistent with their gender identity. *See, e.g.*, *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (describing how exclusion of transgender students from restrooms that matched their gender identity "caus[ed] them genuine distress, anxiety, discomfort and humiliation"); *see* (4-ER-577 (describing how transgender students "suffer and experience worse health outcomes when they are ostracized from their peers through policies that exclude them from spaces and activities that other boys and girls are able to participate in consistent with gender identity").) Here, as the District Court explained, "[n]ot only would being forced onto a men's team be contrary to Lindsay's medical treatment for her gender dysphoria, it would also be painful and humiliating, and potentially subject her to harassment and further discrimination." (1-ER-10.) The State's false claim that transgender girls are identically situated to cisgender boys—*i.e.*, that Lindsay is a man—contravenes science and basic decency, and should be given no weight.

Moreover, as the District Court recognized, all three factors that supported the constitutionality of the policy in *Clark* are absent here. First, while *Clark* recognized that states have an interest in remediating past inequalities in athletic opportunities available to women as compared to men, that interest is not served by further discriminating against a subset of women by categorically excluding those who are transgender from playing school sports. "[L]ike women generally"—and unlike cisgender men—"women who are transgender have historically been discriminated against, not favored." (1-ER-64.) *Clark*'s finding that there "clearly" is a "substantial relationship between the exclusion of all males from the team and the goal of redressing past discrimination" against women has no application to the different lines H.B. 500 draws. 695 F.2d at 1131. Far from serving that interest, the District Court recognized that H.B. 500 "excludes a historically disadvantaged group (transgender women) from participation in sports, and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process." (1-ER-64.)

Second, "under [H.B. 500], women and girls who are transgender will not be able to participate in any school sports, unlike the boys in *Clark*, who generally had equal athletic opportunities" despite being excluded from

volleyball. (1-ER-64.) As *Clark* recognized, "a lack of overall equality of athletic opportunity certainly raises its own problems," 695 F.2d at 1130-31—which *Clark* had no occasion to address but which H.B. 500 squarely presents by "entirely eliminat[ing]" the ability of girls who are transgender to play any school sports. (1-ER-64-65.)

Indeed, the State's counsel previously acknowledged that "[i]n order to defend this legislation, [the State] would need evidence showing that transgender women—who may undergo treatment to reduce testosterone and may consequently experience a change in athletic ability—would have a meaningful opportunity to participate on men's or coed teams." (AG Letter at 4.) But coed teams "are not common at the school level." (*Id.*) And as the District Court observed, playing on men's teams is not a viable option for women who are transgender. (1-ER-64-65.) Indeed, forcing "[p]articipati[on] in sports on teams that contradict one's gender identity 'is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.'" (1-ER-65 (citation omitted).)[9] *Clark*

[9] As Lindsay explained: "I would not compete on a men's team. I am not a man, and it would be embarrassing and painful to be forced onto a team for men—like constantly wearing a big sign that says 'this person is not a "real" woman.'" (4-ER-684.) The District Court properly recognized that the suggestion that "Lindsay and other transgender women are not excluded from

emphasized that "[w]hile equality in specific sports is a worthwhile ideal, it should not be purchased at the expense of ultimate equality of opportunity to participate in sports" overall. 695 F.2d at 1132. H.B. 500's categorical exclusion of girls who are transgender from playing school sports on girls' teams in *any* sport at *any* level denies the very equality of athletic opportunity that *Clark* found critically important.

Third, in contrast to the record in *Clark* establishing that average physiological differences between cisgender boys and girls would result in boys "dominat[ing]" over girls in volleyball, no evidence supports the notion that girls who are transgender would "displace" cisgender girls in athletics "to a substantial extent." *Clark*, 695 F.2d at 1127, 1131. The District Court evaluated the extensive evidence submitted by all parties and found no basis to conclude that "transgender women who suppress their testosterone have significant physiological advantages over cisgender women." (1-ER-66.) That finding accords with practical experience: transgender inclusion is the norm

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school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex. The Ninth Circuit rejected such arguments in *Latta*, 771 F.3d at 467, as did the Supreme Court in *Bostock*, 140 S. Ct. at 1741-42." (1-ER-79.)

for elite athletic organizations such as the IOC and NCAA, with no evidence that cisgender women lack athletic opportunity based on those policies. Nor was there evidence of displacement under the prior Idaho policy permitting girls who are transgender to participate on girls' teams after testosterone suppression. Against all this, the State errs in contending (State Br. at 11) that "[t]he district court disregarded the physiological differences *Clark* found determinative"; rather, the District Court considered Appellants' evidence about purported physiological differences and found it wholly insufficient to justify H.B. 500's discriminatory exclusion of transgender girls from school sports.

Appellants further misread *Clark II* as suggesting that participation by just one cisgender boy on a girls' volleyball team can be barred because it would "set back" the "goal of equal participation by females in interscholastic athletics[.]" 886 F.2d at 1193. (*See* State Br. at 24 n.10; Intervenors Br. at 2, 22.) The Court in *Clark* had already observed that a viable alternative to a categorical ban on allowing boys to play on girls' teams would be to allow "boys' participation . . . but only in limited numbers." 695 F.2d at 1131. The Court in *Clark II* did not disagree; instead, as the District Court observed, the part of *Clark II* on which Appellants rely responded to the boy's "'mystifying'

argument" that the school association "had been 'wholly deficient in its efforts to overcome the effects of past discrimination against women.'" (1-ER-66 n.34 (quoting *Clark II*, 886 F.2d at 1193).) "In light of this inequity, the *Clark II* Court could not see how plaintiff's 'remedy' of allowing him to play on the girl's team would help." (1-ER-66 n.34 (quoting *Clark II*, 886 F.2d at 1193).) But "[t]he *Clark II* Court remained focused on the risk that a ruling in plaintiff's favor would extend to *all* boys and would engender substantial displacement of girls in school sports." (1-ER-66 n.34 (quoting *Clark II*, 886 F.2d at 1193) (emphasis added).)

And that analysis about cisgender boys is simply inapplicable here. As the District Court observed, because "less than one percent of the population is transgender. . . . [i]t is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women." (1-ER-65; *see also* AG Letter at 4 (recognizing that *Clark*'s concern with substantial displacement is not implicated by "transgender students," who "are a very small minority of the population").)

For all of these reasons, the District Court correctly held that *Clark*'s analysis is not "determinative" of H.B. 500's constitutionality. (1-ER-66.)

3. H.B. 500 Does Not Substantially Advance Any Important Governmental Interest

Beyond their misplaced reliance on *Clark,* Appellants cannot justify H.B. 500 under heightened scrutiny: H.B. 500's categorical bar on women and girls who are transgender from women's sports does not serve to protect cisgender women athletes or ensure success or benefits for women in sport generally.

a. H.B. 500 Does Not Protect Cisgender Women

Appellants cannot establish that excluding women and girls who are transgender from women's sports advances a state interest in "protecting" cisgender women athletes. Appellants' argument erroneously presumes that transgender women automatically have a competitive advantage in sport even after a year of testosterone suppression and that—contrary to this Court's precedent—cisgender women are harmed by sharing spaces with transgender women.[10]

[10] This Court has recognized that the desire of some cisgender women to avoid competing against or sharing space with transgender women is not a legally cognizable harm. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020), *cert. denied*, No. 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020) (rejecting

Appellants' arguments—and the legislative findings—ignore that the only physical characteristic with a documented effect on athletic performance is circulating (not endogenous) testosterone. That is why elite athletic organizations such as the IOC, World Athletics, and the NCAA—as well as the IHSAA prior to H.B. 500's enactment—addressed concerns about potential physiological advantages by regulating transgender women's participation through policies based on circulating testosterone. (5-ER-709-10.)[11] Indeed, every study cited by both Plaintiffs' and Appellants' experts concluded that the driving force behind performance differences between men and women after puberty is their level of circulating testosterone. (1-ER-69-70.) But H.B.

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claim by cisgender individuals that they are harmed by policies that include transgender people in single-sex environments consistent with gender identity).

[11] Appellants reference a new World Rugby policy that prevents transgender women from competing in women's rugby if they transition after puberty. (Intervenors Br. at 42; State Br. at 22-23.) USA Rugby and other national associations have declined to follow the policy and will continue to allow women and girls who are transgender to compete in women's rugby events regardless of when they transition. https://www.usa.rugby/2020/10/usa-rugby-response-to-updated-world-rugby-transgender-athlete-policy/. Given that rugby is a high-contact sport that is generally not part of scholastic competition in the United States, the policy governing adult world competition is not a rational guide for a state law governing all school sports. But it is notable that even the World Rugby policy is considerably less restrictive than H.B. 500, as it allows women who are transgender and who transitioned pre-puberty to compete in women's events while H.B. 500 does not.

500 *prohibits* consideration of circulating testosterone levels and instead requires consideration of reproductive anatomy, genetic makeup, and endogenous hormones, even though none of these characteristics has any documented effect on athletic performance independent of circulating testosterone levels. (5-ER-708-09.)

Many women and girls who are transgender do not have circulating testosterone levels typical of cisgender men. Some women and girls who are transgender never go through their endogenous puberty, and therefore their bodies experience none of the impacts of testosterone at puberty and beyond. (4-ER-574; 5-ER-710-11.) Others suppress testosterone through prescribed hormone therapy as part of their treatment for gender dysphoria after puberty, thereby minimizing the impact of testosterone on the body. (5-ER-711-12.) And separate from circulating testosterone, many women and girls who are transgender—like many who are cisgender—are simply not that good at sports but still love to play. H.B. 500 ignores all these realities in creating its rule of categorical exclusion.

As Plaintiffs' expert explained—and as the District Court credited in evaluating the evidence presented by all parties—no scientific or medical evidence supports the Idaho Legislature's finding that girls who are

transgender "have 'an absolute advantage' over non-transgender girls" following gender-affirming hormone therapy. (5-ER-710; *see* 1-ER-70-71.) Indeed, "the study cited in support of this proposition" had been altered following peer review before H.B. 500 was enacted to remove the "conclusions the legislature relied upon"—specifically including the "absolute advantage" language. (1-ER-71.) That study in any event "did not involve transgender athletes at all, but instead considered the differences between transgender men who increased strength and muscle mass with testosterone treatment, and transgender women who lost some strength and muscle mass with testosterone suppression." (1-ER-71.) By contrast, a "study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender female athletes" found that, after treatment had lowered testosterone levels, "the athletes' performance had reduced so that relative to non-transgender women their performance was now proportionally the same as it had been relative to non-transgender men prior to any medical treatment." (5-ER-712.)

The District Court further observed that the State's expert had principally relied on studies that "involve the differences between male and female athletes in general, and contain no reference to, or information about,

the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone." (1-ER-70.) And even the legal scholar cited in H.B. 500's legislative findings "urged Governor Little to veto H.B. 500 because her work was misused" and "endorsed the NCAA's rule of allowing transgender women to participate after one year of hormone and testosterone suppression." (1-ER-72.) All of this evidence amply supported the District Court's finding that "equality in sports is *not* jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women's teams." (1-ER-69.)[12]

Nor could the State demonstrate that there was any actual "problem" that H.B. 500 was needed to solve. No evidence suggested that any issues had arisen under Idaho's prior rules permitting transgender women to compete on women's teams or that any women who are transgender had ever dominated in any sport, at any level, anywhere in the world. "Millions of student-athletes

[12] Intervenors cannot establish that the District Court's finding was clearly erroneous. (Intervenors Br. at 43-44.) They cite a study of non-athlete adults with a median age of 41 who experienced a range in testosterone levels following hormone therapy, but that study made *no* findings that the variance resulted in any physiological advantages in sport following one year of testosterone suppression. That all transgender women may not achieve identical hormone levels after suppression does not establish that H.B. 500's wholesale ban on participation at all levels of sport no matter the circumstances is constitutional.

have competed in the NCAA . . . with no reported examples of any disturbance to women's sports as a result of transgender inclusion." (1-ER-73.) After scouring the entire country, H.B. 500's proponents identified a total of four women athletes who are transgender who had experienced some success in sport—and "at least three of [them] ha[d] notably lost to cisgender women." (1-ER-73.) "[T]he absence of any credible showing that the [challenged law] addressed a particularly acute problem" demonstrates that H.B. 500's discriminatory classifications cannot be justified. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014).

While Appellants argue that the Legislature need not have "empirical" evidence to protect citizens from future harm, none of the cases they cite are relevant here or could justify H.B. 500's sweeping ban on transgender girls participating in school sports. In *King v. Governor of the State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014), the Third Circuit upheld New Jersey's ban on sexual orientation conversion efforts, concluding that the legislature's "empirical judgment" about the nature of the harm to the public was "highly plausible" based on the "the substantial evidence" presented in support of the law. By contrast, H.B. 500 was passed without any evidence to support a categorical ban on all girls who are transgender in all circumstances.

Contrary to the State's assertion (State Br. at 23), the District Court did not "constitutionalize" the NCAA policy permitting women who are transgender to compete following one year of hormone suppression. Because that policy and the comparable IHSAA policy constituted the status quo ante in Idaho, the District Court properly considered H.B. 500 against those background rules and found no justification for the new categorical exclusion of girls who are transgender that was not already served by existing law in Idaho. The District Court did not mandate that Idaho legislate in any particular way; instead, it simply evaluated the constitutionality of the Legislature's chosen path and determined that H.B. 500's categorical exclusion of girls who are transgender cannot survive heightened scrutiny.

b. H.B. 500 Does Not Ensure Success Or Benefits For Women In Sports

Nor does H.B. 500 advance the goal of ensuring success for women in sports. Just the opposite: the law singles out a subset of women—those who are transgender—and bars them from playing school sports at all. In creating that categorical exclusion, H.B. 500 harms *all* women. A principal goal of school athletics (as opposed to elite athletics) is for students to develop skills, make friends, increase physical activity, and learn valuable life lessons—which can contribute to greater success in college and throughout life. (4-ER-

643.) Encouraging student-athletes to focus on improving their own performance and cooperation with teammates maximizes the benefits of athletics for all women. (4-ER-636, 39-40, 43.) Excluding students for no other reason than because they are transgender eliminates the benefits of sports for them and diminishes those benefits for all women and girls. (4-ER-644; *see* Br. *Amicus Curiae* of Athletes in Women's Sports (noting that all women are harmed by excluding women who are transgender from sport).)

Even if "success" in sport were limited to winning championships and coming in first place, there is no evidence that permitting women and girls who are transgender to compete results in "substantial displacement" of cisgender women at any level of competition anywhere in the world. *See* p. 49*, supra*. While the Intervenors have been awarded athletic scholarships like numerous cisgender women in Idaho, there is not a *single* example of a transgender high school student in Idaho—or anywhere else—ever receiving an athletic scholarship, let alone receiving one at the expense of a cisgender athlete. (1-ER-75.)

In the absence of any evidence of lost scholarships, lost championships, or substantial displacement by women and girls who are transgender, the Intervenors contend they have an interest in preventing men who "'identify'

as women" from "becom[ing] popular" because "[w]omen's sport itself will lose its meaning, and its specialness, if males can be redefined as females." (4-ER-536; 4-ER-531.) Though some athletes may prefer not to share women's spaces with women and girls who are transgender, those are precisely the kind of biases that the law cannot validate. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

C. H.B. 500's Sex-Verification Provision Fails Heightened Scrutiny

1. The State Cannot Provide An Exceedingly Persuasive Justification For The Sex-Verification Dispute Process

The State also has no "exceedingly persuasive justification," *VMI*, 518 U.S. at 534, for subjecting only women and girl student athletes to the constant threat of having to undergo humiliating, invasive, and medically unnecessary exams to prove their "biological sex" when challenged. To remain eligible to play, the sex-verification provision forces women and girls to disclose information about their reproductive anatomy, genetics, or endogenous hormones if their sex is "dispute[d]." Idaho Code § 33-6203(3). Anyone—a competitor, an opposing coach, a parent, or even outside organizations and individuals—might dispute an athlete's eligibility under

this provision. *Id.*; (1-ER-2.) As Appellants acknowledge, the provision facially discriminates based on sex: men and boy athletes face no similar risk of a sex dispute and no corresponding requirement to undergo H.B. 500's invasive verification process. (1-ER-3.)

No important government interest justifies H.B. 500's sex-verification regime. The sex-verification process bears no connection to the general rule of sex separation in sport because cisgender men do not assert themselves to be women, making a dispute process unnecessary. That Idaho had no prior sex-verification process for student athletes before H.B. 500, despite its longstanding sex separation in sport, makes that point plain. In fact, *all* states separate athletes by sex, but Idaho can point to no other state with any invasive sex-verification rule like H.B. 500's. Indeed, there is no reason to invasively verify the sex of any student athletes except to exclude transgender women from women's teams. The only purpose served by subjecting all girls to the threat of examination of their reproductive anatomy, endogenous hormones, and genetics is to identify and ban girls who are transgender from playing on women's teams. But a purpose simply to disadvantage one group of people—here, transgender girls—is not a legitimate government interest, much less an important one. *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f

the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (citation omitted). And here, this illegitimate purpose comes at the expense of all women and girls. (*See* Br. *Amicus Curiae* of National Women's Law Center et al. (describing how H.B. 500's sex-verification provision harms all women and girls).)

Appellants fare no better with their argument that the burden imposed by H.B. 500's sex-verification provision is minimal. In apparent recognition that invasive bodily examinations of reproductive anatomy, endogenous testosterone levels, and chromosomes cannot be justified, Appellants assert that a regular sports physical that does not examine any of those factors will suffice—at least for girls who are not transgender. (State Br. at 35-38 (arguing that students who rely on "(1) a health examination and consent form or (2) other statement signed by the student's personal health care provider" are not "subject to the three criteria" listed in H.B. 500); Intervenors Br. at 52 (arguing that girls who obtain a statement from their personal health care provider need not verify sex based on the three enumerated factors).)

But that interpretation of the statute makes no sense. If H.B. 500 does not require girls to verify sex "relying only on" the enumerated factors in the statute, Idaho Code § 33-6302(3), and instead permits verification through a statement signed by a doctor, then girls who are transgender would not be excluded from girls' sports at all. (2-ER-164 at lines 5-11 ("THE COURT: . . . Based on what [State's counsel] just said, is it possible for your clients to get a letter from a health care provider saying they're female? [PLAINTIFFS' COUNSEL]: Absolutely, Your Honor. Lindsay's doctor would certainly certify that she's a woman[.]").) But Appellants argue at length that H.B. 500 can and does exclude transgender women, without even acknowledging—let alone explaining—how their statutory interpretation argument squares with their theory that the Idaho Legislature permissibly barred girls who are transgender from playing school sports. If Appellants are right that Lindsay or any other transgender woman athlete can play if she simply obtains a doctor's note confirming she's a woman, then there was no reason to appeal the preliminary injunction and spend dozens of pages defending the Act's discrimination against women who are transgender.

But Appellants' interpretation is not right. By its plain terms, H.B. 500 permits a health care provider to verify "biological sex" by "relying *only* on one

(1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." Idaho Code § 33-6203(3) (emphasis added). As the District Court found, Appellants' interpretation "is impossible to reconcile with the rest of the Act's provisions" and would "render[] meaningless" the "entire legislative findings and purpose section of the Act." (1-ER-41.)

In the end, Appellants' faulty interpretation of H.B. 500 reveals their discomfort with the statutory requirement that all women and girls in Idaho must face the threat of invasive testing to play sports, but their construction cannot save the statute. The District Court correctly found that instead of "promoting sex equality" or "providing opportunities for female athletes," the sex-verification provision "subject[s] women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations." (1-ER-83.) The provision accordingly cannot survive heightened scrutiny.

2. The District Court Did Not Err In Concluding That Jane Has Standing To Challenge The Discriminatory Provision

Though the State abandons its standing arguments in this Court, the Intervenors argue for the first time on appeal that Jane lacks standing. That

argument lacks merit. This Court and the Supreme Court have held time and again that "equal treatment under law is a judicially cognizable interest" sufficient to establish standing when impinged. *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015) (citing *Heckler v. Mathews*, 465 U.S. 728, 739 (1984)); *Harrison v. Kernan*, 971 F.3d 1069, 1074 (9th Cir. 2020). Even if a lawsuit will not "result[] in any tangible benefit" to the plaintiff, standing exists to "vindicate the 'right to equal treatment.'" *Davis*, 785 F.3d at 1315 (quoting *Heckler*, 465 U.S. at 739). The injury in fact in equal protection cases like this one is the simple existence of unequal treatment that a legal barrier imposes. *Id.* (quoting *Ne. Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). The District Court correctly found that "Jane has suffered an injury because she is subject to disparate rules for participation on girls' teams, while boys can play on boys' teams without such rules." (1-ER-43.)

In addition, H.B. 500 inflicts an injury on Jane by subjecting her to the constant threat of a sex-verification dispute simply because she is a girl. So long as she participates in school sports, her sex could be disputed at any time, by anyone. Because Jane "alleges a credible threat of being forced to undergo a sex verification process" and has identified specific facts that make her

"more likely" to "be subjected to the dispute process," the District Court found she suffers cognizable injury for this additional reason. (1-ER-43-44.)

The Intervenors err in relying on *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002). The students in *Scott* feared that their school district would impose lottery admission based on race and gender in the future, but the district had never subjected the students to a lottery based on those classifications, record evidence suggested that those classifications would *not* be used going forward, and the students had not shown any threat to their school admission. *Id.* at 651, 657, 660-61. Because the government had never actually erected any legal barrier of unequal treatment, the plaintiffs lacked standing. *Id.* at 661. Here, in contrast, the legal barrier that subjects Jane to discriminatory treatment was erected when H.B. 500 became law, empowering anyone to dispute her sex and subject her to invasive testing as long as she plays school sports. Unlike the plaintiffs in *Scott*, Jane is currently affected by H.B. 500, which prevents her from participating in school sports "on an equal basis." *Id.* at 658.

Nor did the District Court err in relying on this Court's decision in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), which held that Starbucks employees whose personal data was contained on a laptop stolen

from the company had standing to sue based on their fear of identity theft. *Id.* at 1143. The Intervenors contend that Jane has established only "that laptop thieves *may exist*," (Intervenors Br. at 50 (emphasis in original))—but here, the laptop has already been stolen by H.B. 500's enactment, which gave the go-ahead to "essentially anyone" to challenge Jane's gender. (1-ER-44.) Jane, like Lindsay, has standing to challenge the discrimination H.B. 500 authorizes.

D. H.B. 500 Fails Any Standard of Review

The enduring purpose of the Equal Protection Clause is to closely scrutinize laws singling out certain classes of people for disfavored treatment. Though H.B. 500's discrimination based on transgender status and sex triggers heightened scrutiny, the law fails under any standard of review. The Act imposes a sweeping, categorical ban on participation in any sport at any grade level for all women and girls who are transgender. It applies to women regardless of the age at which they transition, the level of their circulating testosterone, the level and sport they wish to compete in, and any alleged physical advantages they may possess—with the result that "[t]he breadth of the [law] is so far removed from [the] particular justifications" offered that it is "impossible to credit them." *Romer*, 517 U.S. at 635.

The context surrounding H.B. 500's enactment makes clear that it was passed out of fear of and confusion about transgender people and not for any legitimate purpose. As the District Court noted, "[t]hat the Idaho government stayed in session amidst an unprecedented national shut down [during the COVID pandemic] to pass two laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion." (1-ER-78.)

Indeed, while the Legislature claimed to be seeking to equalize athletic opportunities, the physical characteristics that H.B. 500 focuses on have no correlation to athletic performance and deny athletic opportunities by banning girls who are transgender from participation altogether. As the District Court found, the fact that H.B. 500 "bars consideration of circulating testosterone"—which is "the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance"—"illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes." (1-ER-78.)

The Legislature's decision to "singl[e] out" transgender students for disfavored treatment reveals the "irrational prejudice" on which H.B. 500

actually rests. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). The Act's enactment itself communicates the State's moral disapproval of Lindsay's identity, which the Constitution prohibits. *Lawrence*, 539 U.S. at 582-83. This Court need not find "animus" to determine that the law was impermissibly motivated by "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J. concurring). It was precisely a fear of transgender girls and the sense that they "appear to be different in some respects" that led to Idaho's rushed, sweeping, and unsupportable ban on their participation in sports. *Id.* Under any standard of scrutiny, the Legislature's generalized fear, discomfort, or moral disapproval of a group of people cannot justify H.B. 500. *Cleburne*, 473 U.S. at 448.

II. THE DISTRICT COURT CORRECTLY HELD THAT ALL OTHER PRELIMINARY INJUNCTION FACTORS SUPPORTED ENJOINING H.B. 500

In addition to finding likely success on the merits, the District Court correctly found that Plaintiffs had established irreparable harm and that the balance of the equities and the public interest favored a preliminary

injunction—findings that Appellants do not even attempt to dispute on appeal.

H.B. 500 irreparably harms Lindsay and Jane by violating their constitutional rights, threatening Lindsay with complete exclusion from school sports, and subjecting Jane to the constant risk that someone will dispute her sex and require her to undergo invasive testing to confirm her eligibility. (1-ER-83-84 ("[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." (citation omitted).)

On the other side of the balance, the State faces no harm from a return to the status quo during the pendency of this suit and "it is 'always in the public interest to prevent the violation of a party's constitutional rights.'" (1-ER-86 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).) As the District Court observed, "[i]n stark contrast to the deeply personal and irreparable harms [Lindsay and Jane] face[d], a preliminary injunction would not harm [Appellants] because it would merely maintain the status quo" in Idaho that had been in place for "nearly a decade" and produced no problems or any evidence at all that "transgender women threatened equality in sports." (1-ER-85.) This Court has explained that the preliminary injunction factors are evaluated on a "sliding scale," where a "stronger showing of one element

may offset a weaker showing of another." *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). In this case, all factors strongly support the injunction: as Appellants have effectively conceded, there is no basis to challenge the District Court's conclusion that the risk of irreparable harm, the balance of equities, and the public interest weigh in favor of protecting Lindsay and Jane—and all women and girl athletes in Idaho—from discriminatory treatment, invasive testing, and potential exclusion from women's sports.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE SCOPE OF THE PRELIMINARY INJUNCTION

The Intervenors' attack on the scope of the preliminary injunction fails as well. (Intervenors Br. at 55-60.) "A district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction," and the Intervenors provide no basis to overturn the District Court's exercise of that discretion here. *Lamb-Weston,* 941 F.2d at 974; *see United States v. Supreme Court of New Mexico*, 839 F.3d 888, 928 (10th Cir.

2016) (citation omitted) (reversing only where the injunction embodies an "arbitrary, capricious, whimsical, or manifestly unreasonable judgment").

Contrary to the Intervenors' claims (Intervenors Br. at 55), the preliminary injunction is sufficiently specific under Rule 65(d). "Injunctions are not set aside under Rule 65(d) . . . unless they are so vague that they have no reasonably specific meaning." *Portland Feminist Women's Health Ctr. v. Advocs. for Life, Inc.*, 859 F.2d 681, 685 (9th Cir. 1988) (citation omitted). But here, the scope of the injunction is perfectly clear: the District Court granted Plaintiffs' motion for a preliminary injunction in full, (1-ER-87), thus enjoining Appellants "from enforcing any of the provisions of House Bill 500." (4-ER-564-66).

The District Court further made clear that the injunction would reinstate the preexisting rules in Idaho providing for sex separation in sport but permitting women and girls who are transgender to play on women's teams following one year of testosterone suppression: "[Appellants] can continue to rely on the NCAA policy for college athletics and IHSAA policy for high school athletes, as they did for nearly a decade prior to [H.B. 500]." (1-ER-85.) The Intervenors' suggestion that the injunction erases the general rule that boys cannot play on girls' teams and overturns the rule governing

transgender inclusion following hormone therapy contradicts the District Court's repeated statements that these "[e]xisting rules" had "long been the status quo in Idaho" and would remain in place while H.B. 500 is enjoined. (1-ER-73; *see* 1-ER-55-56 (observing that injunctive relief would "preserve the status quo pending trial on the merits").) This injunction is wholly dissimilar from the injunction in *Schmidt v. Lessard*, 414 U.S. 473 (1974), where the court issued a general command to not "enforce the present Wisconsin scheme," without specifying what rules would be in effect. *Id.* at 476 (internal quotations omitted). Here, the District Court described the statute it was enjoining, the parties affected by the injunction, and the effect of the injunction in specifically restoring the prior rules that constitute the status quo.

The Intervenors further err in contending that the District Court's findings do not support the injunction's scope. The court found that Plaintiffs were likely to succeed on their claims that H.B. 500 discriminates based on transgender status and sex and does not substantially serve the State's asserted interests. Those findings amply supported the District Court's conclusion that H.B. 500—as a whole—is likely "unconstitutional as currently written." (1-ER-87.) Nor did any part of that analysis hinge on characteristics

unique to Lindsay and Jane: to the contrary, the Court found that "the constitutional rights of every girl and woman athlete in Idaho," including "the constitutional rights of transgender girls and women athletes" were "at issue" and harmed by H.B. 500. (1-ER-86-87.) And because the State had "not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an *invalid interest* of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics," (1-ER-79) (emphasis added), the District Court correctly concluded that H.B. 500 must be enjoined in full. (1-ER-87.)

Nor does the scope of the injunction conflict with the District Court's holding that Lindsay and Jane must pursue as-applied claims. In *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), the Supreme Court recognized that a challenge to a *category* of applications of a statute may be characterized as an as-applied challenge. *Id.* at 194. There, the Court observed that a challenge to a statute "as applied to [all] referendum petitions" was "'as applied' in the sense that it did not seek to strike [the statute] in all its applications, but only to the extent it cover[ed] referendum petitions," yet was "'facial' in that it [wa]s not limited to the plaintiffs' particular case, but challenge[d] application of the law more broadly to all referendum petitions." *Id.* at 194. The Court

explained that "[t]he label is not what matters" and that the plaintiffs could obtain an injunction barring the statute's application to all referendum petitions if the plaintiffs could satisfy the "standards for a facial challenge *to the extent of that reach*." *Id.* (emphasis added); *see also, e.g.*, *Supreme Court of New Mexico*, 839 F.3d at 914 (recognizing the "duality" of a claim that a statute cannot lawfully be applied to a category of applications, and observing that under Supreme Court precedent "facial standards are applied *but only to the universe of applications contemplated by plaintiffs' claims, not to all conceivable applications contemplated by the challenged provision*") (emphasis added). Because the District Court recognized a likelihood of success on the claim that H.B. 500 is unconstitutional as applied to *all* women and girl athletes, including those who are transgender, it correctly granted a preliminary injunction covering that category of applications under the standard Intervenors invoke. (Intervenors Br. at 59 (asserting that there must be "*no set of circumstances* . . . under which the Act would be valid") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis in original)).)[13]

[13] Notably, Appellants do not contend that H.B. 500 could constitutionally be applied to some, but not all, women and girl athletes, or to some, but not all, women and girl athletes who are transgender.

The cases cited by Intervenors are inapposite. In *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018), a statute had several non-infringing applications and was deemed unconstitutional *only* when coupled with the plaintiffs' intended commercial speech; indeed, the plaintiffs raised an as-applied challenge to the statute's effect on a specific pricing practice they sought to employ. *Id.* at 1174-75. This Court accordingly found that the injunction should "apply only to plaintiffs, and only with respect to the specific pricing practice that plaintiffs, by express declaration, seek to employ." *Id.* at 1179. Here, in contrast, the District Court's analysis demonstrates the propriety of a challenge to H.B. 500's application to all women and girl athletes, as the law's invalidity as applied to that category of individuals does not turn on circumstances specific to Lindsay and Jane.

Intervenors' remaining cases do not support their argument. Most fail to deal with as-applied challenges at all and instead discuss the propriety of issuing nationwide injunctions. Even if those cases had some bearing on the distinct issue here, they expressly recognize that an injunction is "not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . *if such breadth is necessary to give prevailing parties the relief to which they are entitled*." *Easyriders*

Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (emphasis in original) (applying injunction's effects to all affected motorcyclists rather than just the named plaintiffs). Because H.B. 500 has been found "likely unconstitutional" as applied to Lindsay, Jane, and every other woman and girl athlete in Idaho, the District Court did not err in granting an injunction preventing the Act's enforcement against all who are harmed by the Act's discriminatory provisions. (1-ER-86-87 ("[T]he Constitution must always prevail.").)

CONCLUSION

For the foregoing reasons, the preliminary injunction should be affirmed.

Dated: December 14, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

Under this Court's rule 28-2.6, Plaintiffs are not aware of any related cases.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2020, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Elizabeth Prelogar
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December 14, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2475

JOHN M. KLUGE,

Plaintiff-Appellant,

v.

BROWNSBURG COMMUNITY SCHOOL CORP.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:19-CV-02462 — **Jane Magnus-Stinson**, *Judge*.

ARGUED JANUARY 20, 2022 — DECIDED APRIL 7, 2023

Before ROVNER, BRENNAN, and ST. EVE, *Circuit Judges*.

ROVNER, *Circuit Judge*. John M. Kluge brought a Title VII religious discrimination and retaliation suit against Brownsburg Community School Corporation ("Brownsburg") after he was terminated from his employment as a teacher for refusing to follow the school's guidelines for addressing students. Brownsburg requires its high school teachers to call all students by the names registered in the school's official

student database, and Kluge objected on religious grounds to using the first names of transgender students to the extent that he deemed those names not consistent with their sex recorded at birth. After Brownsburg initially accommodated Kluge's request to call all students by their last names only, the school withdrew the accommodation when it became apparent that the practice was harming students and negatively impacting the learning environment for transgender students, other students both in Kluge's classes and in the school generally, as well as the faculty. The district court granted summary judgment in favor of the school after concluding that the undisputed evidence showed that the school was unable to accommodate Kluge's religious beliefs and practices without imposing an undue hardship on the school's conduct of its business of educating all students that entered its doors. The district court also granted summary judgment in favor of Brownsburg on Kluge's retaliation claim. We agree that the undisputed evidence demonstrates that Kluge's accommodation harmed students and disrupted the learning environment. Because no reasonable jury could conclude that harm to students and disruption to the learning environment are *de minimis* harms to a school's conduct of its business, we affirm. Our dissenting colleague asserts that there are genuine issues of material fact regarding undue hardship but he mischaracterizes the harms claimed by the school and focuses on fact questions that are not legally relevant to the outcome of the discrimination claim, in particular suggesting that a jury should reweigh the harms using information not known to the school at the time of the occurrences in issue, and not relevant to the ultimate question.

I.

On summary judgment, we must construe the facts in favor of the nonmovant, and may not make credibility determinations or weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *McCottrell v. White*, 933 F.3d 651, 655 (7th Cir. 2019); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). We therefore construe the facts in favor of Kluge. Brownsburg is a public school corporation in Brownsburg, Indiana. The Indiana Constitution requires the State's General Assembly "to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." Ind. Const. art. VIII, § 1. School attendance is compulsory in the State by statute. Ind. Code § 20-33-2-4. Brownsburg is governed by an elected Board of Trustees. R. 120-1, at 2. At the relevant time, the corporation and school leadership included the Board President, Phil Utterback; the Superintendent, Dr. Jim Snapp; the Assistant Superintendent, Dr. Kathryn Jessup; the Human Resources Director, Jodi Gordon; and the principal, Dr. Bret Daghe. R. 120-1, at 2–3; R. 120-2, at 3; R. 113-3, at 5; R. 113-4, at 5. Brownsburg High School was the sole public high school in the district. R. 120-2, at 2.

Brownsburg hired Kluge in August 2014 to serve as the sole music and orchestra teacher at the high school. R. 113-2, at 2; R. 120-2, at 3. In that capacity, he taught beginning, intermediate, and advanced orchestra; beginning music theory; and advanced placement music theory. He also assisted the middle school orchestra teacher in teaching classes at the middle school. R. 120-3, at 19–20. Kluge remained employed in

that capacity until the end of the 2017–2018 academic year. R. 120-2, at 3.

Prior to the start of that school year, officials at Brownsburg became aware that several transgender students were enrolled as freshmen. R. 120-1, at 3. This awareness led to discussions among the Brownsburg leadership to address the needs of these students. Gordon and Drs. Snapp, Jessup, and Daghe reached a "firm consensus" that transgender students "face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying." R. 120-1, at 3. According to Dr. Jessup, the Brownsburg leaders concluded that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being." R. 120-1, at 3. The group began to discuss and consider practices and policies that could address these challenges.[1] R. 120-1, at 3–4.

The staff of the school first became aware of these discussions in January 2017, when administrators invited Craig Lee, a Brownsburg teacher and faculty advisor for the high school's Equality Alliance Club, to speak about transgenderism at a faculty meeting.[2] R. 15-3, at 2; R. 58-2, at 1–2. At

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[1] The policies and practices eventually adopted by Brownsburg to address concerns about transgender students were not formally ratified by the Board, but they did operate as directives that teachers were required to follow. We refer to them as policies for convenience.

[2] The Equality Alliance Club is a student club at the school that meets weekly to discuss social and emotional issues affecting all students, including LGBTQ students. R. 58-2, at 2; R. 112-5, at 9. Attendance varied from twelve to forty students at any given meeting, and often included

(continued)

another faculty meeting in February 2017, Lee and guidance counselor Laurie Mehrtens gave a presentation on what it means to be transgender and how teachers can encourage and support transgender students. R. 15-3, at 2.

After these faculty meetings, Kluge and three other teachers approached Dr. Daghe on May 15, 2017, to speak about issues related to transgender students. R. 15-3, at 2; R. 113-5, at 6; R. 120-3, at 11. The four teachers presented Dr. Daghe with a seven-page letter expressing religious objections to transgenderism, taking the position that the school should not treat gender dysphoria as a protected status, and urging the school not to require teachers to refer to transgender students by names or pronouns that the teachers deemed inconsistent with the students' sex recorded at birth. R. 113-1, at 26–32. Kluge identifies as Christian and is a member of Clearnote Church. R. 113-1, at 4. Kluge believes that gender dysphoria "is a type/manifestation of effeminacy, which is sinful." R. 113-1, at 5. Kluge describes "effeminacy" as "for a man to play the part of a woman or a woman to play the part of a man and so that would include acting like/dressing like the opposite sex." R. 120-3, at 6. In addition to believing that gender dysphoria itself is sinful, Kluge believes that it is sinful to "promote gender dysphoria." R. 120-3, at 7. Because the transgender students changed their first names in order to "present[] themselves as the opposite sex," Kluge believes

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transgender students. R. 120-14, at 6. Dr. Daghe described it more broadly as a club trying to make the culture and climate of the school the best it could be. R. 112-5, at 9.

that calling those students by their preferred names would be "encouraging them in sin." R. 120-3, at 10.

The American Psychiatric Association has a very different view of gender dysphoria for adolescents and adults, which it defines as a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months duration," and manifested by at least two of the six listed criteria. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, 2013 ("DSM-5"), at 452. "The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM-5, at 453. *See also Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019) (describing gender dysphoria as "an acute form of mental distress stemming from strong feelings of incongruity between one's anatomy and one's gender identity"). Kluge does not agree with the DSM-5 definition of gender dysphoria. R. 120-3, at 5–6.

At the May 15, 2017 meeting, Dr. Daghe discussed what he considered to be an accommodation to these teachers, namely, a policy that all teachers would use the names and pronouns recorded in the school's official student database, "PowerSchool." R. 112-5, at 5–6. The PowerSchool database contained names, gender markers, preferred pronouns and other data for all students at the school. R. 113-3, at 6; R. 113-5, at 4. According to Kluge, Dr. Daghe indicated that he had resisted the pressure to change the students' names in PowerSchool but would make this change if it would resolve the teachers' concerns regarding how to address transgender students. R. 120-3, at 12.

The three teachers who had signed onto Kluge's letter accepted Dr. Daghe's suggested practice that they would use the PowerSchool names and pronouns, and indicated to Dr. Daghe that they would comply with it going forward. R. 120-3, at 12. Kluge was shocked that the three other teachers "did an about-face" but he said nothing at that time. R. 120-3, at 12. According to Kluge, after the meeting with all four teachers concluded, he went back into Dr. Daghe's office and told him to "keep up the good work" of resisting the pressure of changing the names in PowerSchool. R. 120-3, at 12. Dr. Daghe left these meetings believing that all four teachers had agreed to this practice. R. 112-5, at 5–6. Kluge, however, believed that he and Dr. Daghe were "on the same page," that he could continue to use the students' "legal names," and that "we would not be promoting transgenderism in our school." R. 120-3, at 12.

The Brownsburg leadership settled on the practice of requiring teachers to use the PowerSchool names and pronouns ("Name Policy") as part of the larger plan to address the needs of transgender students. R. 120-1, at 3–4; R. 112-5, at 5. In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, wearing school-related uniforms consistent with that gender. R. 112-5, at 5. Transgender students wishing to change their names, gender markers or pronouns in PowerSchool were permitted to do so only if they first presented two letters, one from a parent and one from a healthcare professional regarding the need for the changes. R. 120-1, at 4. Dr. Jessup explained that the Name Policy furthered two primary goals:

> First, the practice provided the high school faculty a straightforward rule when addressing students; that is, the faculty need and should only call students by the name listed in PowerSchool. Second, it afforded dignity and showed empathy toward transgender students who were considering or in the process of gender transition. Stated differently, the administration considered it important for transgender students to receive, like any other student, respect and affirmation of their preferred identi[t]y, provided they go through the required and reasonable channels of receiving and providing proof of parental permission and a healthcare professional's approval.

R. 120-1, at 4.

A little more than a week before the start of the 2017–2018 school year, Mehrtens (the guidance counselor) sent emails to several teachers, including Kluge, informing them that they would have a transgender student in their classrooms in the upcoming year. R. 120-3, at 13; R. 15-3, at 3. According to one email that Kluge received, the student was transitioning from female to male, and had changed his name and pronouns in the PowerSchool database. Mehrtens said:

> Parents are supportive and aware—Feel free to use "he" and "[student's preferred name]" when communicating.

R. 120-11, at 2 (student's name redacted in the record). Kluge received two such emails, one for each of the transgender

students he would have in his classes that year. R. 120-3, at 13. At first he was shocked that the school was moving in this direction, but because the email contained the language "feel free to use," he read the emails as "permissive, not mandatory," and planned to use the students' "legal names."[3] R. 120-3, at 13–14; R. 15-3, at 3.

On July 27, 2017, the first day of classes at Brownsburg, Kluge met briefly with Dr. Daghe and informed him that he would not call the transgender students by their PowerSchool names and pronouns. He reiterated that he had a religious objection to this practice. Dr. Daghe directed him to stay in his office and consulted the Superintendent, Dr. Jim Snapp. R. 120-3, at 14; R. 15-3, at 3. Later that morning, Drs. Daghe and Snapp met with Kluge to discuss the issue. Dr. Snapp told Kluge that he was required to use the names recorded in the PowerSchool database. Kluge explained again that it was against his sincerely held religious beliefs to use anything other than the names recorded on the students' original birth certificates. Dr. Snapp then presented him with three options:

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[3] As was the case with the district court, we find Kluge's use of the terms "transgender names" and "legal names" imprecise. Many transgender people change their legal names and both of the transgender students in Kluge's classes did so, albeit after the school year in question. There is no evidence in the record regarding what name Kluge planned to use if transgender students changed their legal names, although much of his testimony suggests that his religious objections would remain. Although a person may be transgender, a name may not be, and so we will refer to the students' new names as their "preferred names" or "PowerSchool names." This is not to imply that this was a casual preference of the students alone; as we noted, the students' parents and healthcare providers signed off on any changes to the names in PowerSchool.

comply with the Name Policy; resign; or be suspended pending termination. When Kluge refused to comply or resign, Dr. Snapp suspended him pending termination and told him to go home. R. 120-3, at 14–16; R. 15-3, at 3.

In the course of that July 27 meeting, Kluge told Dr. Snapp the name of his pastor, Dave Abu-Sara. R. 120-3, at 15–16. Kluge did not know who initiated the contact, but soon after the July 27 meeting, Kluge believed that Dr. Snapp and Abu-Sara spoke on the phone. According to Kluge, Abu-Sara told Kluge that he had asked Dr. Snapp to give Kluge the weekend to think about his options, and Dr. Snapp had agreed. R. 120-3, at 15–16. On Monday, July 31, Kluge returned to the school and met with Dr. Snapp and Human Resources Director Jodi Gordon. Dr. Snapp and Gordon reiterated that Kluge had to choose between complying with the Name Policy or termination. R. 120-3, at 17. They presented him with a memo and draft agreement from Dr. Daghe stating:

> You are directed to recognize and treat students in a manner using the identity indicated in PowerSchool. This directive is based on the status of a current court decision applicable to Indiana.
>
> You are also directed to not attempt to counsel or advise students on his/her lifestyle choices.
>
> Please indicate below if you will comply with this directive. This document must be returned to me by noon on Monday, July 31, 2017.
>
> _____ Yes, I will comply with this directive.
>
> _____ No, I will not comply with this directive.

_____ _____

John Kluge, teacher Date

cc: Personnel file

R. 15-1.[4]

Kluge then presented Dr. Snapp and Gordon with two requested accommodations: first, that he be allowed to refer to all students by their last names only, "like a gym coach;" and second, that he not be responsible for handing out gender-specific orchestra uniforms to students. He would treat the class like an "orchestra team," he proposed. He agreed that, if

[4] Kluge has never objected to the directive that he "not attempt to counsel or advise students on his/her lifestyle choices." Neither party addressed this term of the agreement in the briefing, but Dr. Snapp testified that Kluge requested "the ability to talk directly to students about their eternal destination," which Dr. Snapp told him was not allowed. R. 112-6, at 6. This directive is consistent with that conversation. *See also* R. 120-5, at 8 (Dr. Daghe testifying that he included that statement because Kluge's "job was to teach the students, not to make sure he was letting them know his opinion one way or the other," and because he "did not want one of my teachers counseling or advising students on their choices."). The "current court decision applicable to Indiana" was likely our decision in *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), abrogated on other grounds by *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020), which had been issued two months prior to this meeting. We held there that a transgender student had a reasonable likelihood of succeeding on the merits of a Title IX sex discrimination claim based on a theory of sex-stereotyping. 858 F.3d at 1048–50. Although the dissent asserts that nothing in the record indicates that *Whitaker* was the decision to which the school referred, Kluge never contested the point and instead simply argued that any suit brought by a student on these facts under *Whitaker* would be frivolous. Because we decline to address the Title IX issue, we need not address this matter further.

a student asked him why he was using last names only, he would not mention his religious objections to using transgender students' first names and would explain, "I'm using last names only because we're a team, we're an orchestra team, just like a sports coach says, hey, Smith, hey, Jones. We are one orchestra team working towards a common goal." R. 120-3, at 17. Dr. Snapp and Gordon agreed that this was an acceptable arrangement. They also agreed to assign the task of handing out orchestra uniforms to another person so that Kluge would not be required to hand students clothing that he believed was inconsistent with their sex recorded at birth. R. 120-3, at 17. To memorialize this new understanding, Gordon altered the document presented to Kluge: after the first paragraph, she wrote, "We agree that John may use last name only to address students." At the bottom of the page, she wrote, "In addition, Angie Boyer will be responsible for distributing uniforms to students." She initialed both changes. Kluge checked the "I will comply" line, and signed and dated the form. R. 15-1.

Kluge then began to teach his regularly assigned classes which included two transgender students, Aidyn Sucec and Sam Willis.[5] R. 120-3, at 20. Within a month, Dr. Daghe began to hear complaints about Kluge from Lee, the faculty advisor of the Equality Alliance Club. R. 120-2, at 4; R. 58-2, at 2–3; R. 120-14, at 7–8. Lee was also a member of the school's three-

[5] As we note below, Sam Willis did not change his name and gender marker in PowerSchool until the end of September 2017. R. 120-3, at 20.

teacher Faculty Advisory Committee. R. 120-2, at 4. In an August 29, 2017 email to Dr. Daghe, Lee reported:

> I wanted to follow up regarding the powerschool/students changed name discussion at the Faulty Advisory as some issue[s] have arisen in the last few days that need to be addressed. … There is a student who has had their name changed in powerschool. They are a freshman who this teacher knew from 8th grade. The teacher refuses to call the student by their new name. I see this is a serious issue and the student/parents are not exactly happy about it. … As the student said, "what more are we supposed to do?"

R. 120-15, at 2. *See also* R. 120-12 (September 1, 2017 letter to the school from parent of student noting child's transgender status and reporting problems with a teacher who uses incorrect gendered language against the wishes of the parents and medical providers of the child, leading to confusion for other students on how to address the child); R. 120-13 (August 30 through September 21, 2017 email chain between parent and school counselor regarding student's transgender status, updates to PowerSchool database, and repeated problems with Kluge using incorrect gendered language that the parent characterizes as "very disrespectful and hurtful," and which causes the child "a lot of distress."). Lee also described the situation of a student in the process of a PowerSchool name change, whose supportive parent asked the teacher to start using the new name, and the teacher refused, citing the Name

Policy. R. 120-15, at 2. Lee closed his email by turning the problem over to Dr. Daghe:

> I know that this is something that must be hard to deal with from your perspective. You are trying to do the right thing for your employees and students alike. I absolutely do not envy your position and thus far you have been incredibly supportive and it means a lot. However, there is confusion amongst some teachers and students that I think needs clarification and perhaps a teacher or two that needs to know that it is not ok to disobey the powerschool rule.
>
> I hope this makes sense mate. Maybe me, you and Kat need to sit down and talk about this. I am not totally sure and of course I am very biased. However, I have always admired your leadership and now look to you for the next step.

R. 120-15, at 2–3.

Lee also began to report to Dr. Daghe on comments he was hearing from students who attended the Equality Alliance meetings, where Kluge's behavior became a frequent topic of conversation. R. 58-2, at 2–4; R. 120-14, at 7–14; R. 120-2, at 4. According to Lee, both Aidyn and Sam discussed during those meetings how Kluge was referring to them by their last names only, a practice they found insulting and disrespectful. R. 58-2, at 2; R. 120-14, at 7. Lee confirmed that Aidyn and Sam attributed Kluge's last names practice to their presence in the classroom, and this made them feel isolated and targeted.

R. 58-2, at 2–3; R. 120-14, at 7–8. "It was clearly visible the emotional distress and the harm that was being caused towards them. It was very, very clear, and, so, that was clear for everyone to see but that is also what they described as well," Lee testified. R. 120-14, at 7–8. When asked if it was his interpretation that Sam and Aidyn "felt as if they were being discriminated against by Mr. Kluge," Lee replied, "I wouldn't describe it so much as an interpretation. It was just very, very clear at the meetings to see how much emotional harm was being caused towards Sam and Aidyn. It was clear for everyone at the meetings just to see how much of an impact it was having on them. … [I]t was so clearly visible that I don't feel like there was anything necessarily to interpret." R. 120-14, at 8. Lee passed these concerns onto Dr. Jessup as well. R. 120-14, at 8. Although Kluge asserted that he was perfectly compliant in the use of last names only, Lee also reported that students complained that Kluge would occasionally slip up and use first names or gendered honorifics rather than last names only.[6] R. 58-2, at 3; R. 120-14, at 8–9.

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[6] In his deposition, Kluge testified, "From Day 1 I was consistent in using last names only and using it for all students. I didn't target students." R. 120-3, at 36. Because we must construe the record in favor of Kluge on summary judgment, we credit his testimony that he was perfectly compliant with the Name Policy and never slipped up. However, in a letter to the Equal Employment Opportunity Commission, Kluge's lawyer stated, "Kluge made a good faith effort to address all students by last names and to never 'misgender' students. He admits that he may have made occasional mistakes in referring to students he formerly called by their first names." R. 120-19, at 7. In any case, we may also credit Lee's statement that he conveyed to administrators that students complained that Kluge did slip up, not for the truth of the matter but to show the state

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In addition to the complaints of the transgender students, Lee reported that he had been approached by a student who was not in the Equality Alliance but was in Kluge's orchestra class. R. 58-2, at 3; R. 120-14, at 9. That student, who did not identify as LGBTQ, told Lee that Kluge's use of last names made him feel incredibly uncomfortable. The student described Kluge's practice as very awkward because the student was fairly certain that all the students knew why Kluge had switched to using last names, and that it made the transgender students in the orchestra class stand out. The student felt bad for the transgender students, and shared with Lee that other students felt this way as well. R. 58-2, at 3; R. 120-14, at 9. Some students believed that Kluge avoided acknowledging transgender students who raised their hands in class. R. 58-2, at 3; R. 120-14, at 8–9. Kluge denied doing so, but the evidence is undisputed that these sorts of complaints were reported to school administrators.

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of mind of the school administrators receiving these reports. In addition to Lee's testimony, as we discuss below, two transgender students in Kluge's classes averred that Kluge sometimes used gendered honorifics or first names for non-transgender students. Because Kluge denies this, we assume Kluge's perfect compliance for the purpose of the summary judgment motion. Kluge does not, however, contest that the students conveyed such complaints to teachers and administrators, and this is relevant to the administrators' state of mind. *See Khunger v. Access Cmty. Health Network*, 985 F.3d 565, 575 (7th Cir. 2021) (out-of-court complaints about an employee are admissible when offered not for their truth but to show the employer's state of mind when making a termination recommendation). Moreover, Kluge submitted no evidence that the teachers and administrators did not honestly believe the reports that Kluge was not fully compliant.

The record also contains sworn statements from Sam Willis and Aidyn Sucec memorializing their experiences in Kluge's class. R. 58-1 (Willis Affidavit); R. 22-3 (Sucec Affidavit). Sam averred that he knew Kluge from his participation in music programs in middle school. After deciding to publicly transition at the start of his sophomore year (2017–2018), Sam emailed the school counselor that he would be using the name "Samuel" and masculine pronouns going forward. His mother emailed Kluge directly about the change because Kluge had known Sam by a different name in middle school. Kluge did not respond to the email and Sam reported that Kluge referred to him as "Miss Willis" on several occasions.[7] This led to other students questioning Sam's sex, which was upsetting to him. In early fall, Sam's mother requested that he be allowed to wear a tuxedo for a fall concert. At that point, the school informed Sam's mother about the new PowerSchool Name Policy. Sam's parents then submitted the required letters from themselves and Sam's healthcare provider, and his name and gender markers were amended in PowerSchool in time to get the tuxedo. According to Sam, Kluge then stopped calling him "Miss Willis," but sometimes used gendered honorifics such as "Miss" or "Mr." and gen-

[7] Although Sam did not change his name and gender markers in PowerSchool until late September 2017, Kluge's use of the term "Miss Willis" would have violated the Name Policy because of the use of the gendered honorific "Miss." Kluge understood that his accommodation required him to use last names only and refrain from using gendered honorifics in all of his classes, whether or not there were transgender students in the class. R. 120-3, at 18. Nevertheless, Kluge denies ever slipping up, and we credit that testimony as we discuss above.

dered pronouns when referring to students who were not transgender. Sam reported that Kluge's last names practice was awkward because most students knew why Kluge had made the switch, contributing to Sam's sense that he was being targeted because of his transgender identity. Sam explained that he felt hurt by Kluge's treatment, and that his family was hurt and angry that Kluge thought he knew better than they did. He averred that Kluge's actions exposed him to widespread public scrutiny in high school. R. 58-1.

Aidyn Sucec, who began high school the same year that the Name Policy went into effect, averred that, after years of struggling with depression and anxiety, he was diagnosed with gender dysphoria in the spring of 2017. While receiving treatment from medical providers for that condition, Aidyn began to take steps to socially transition, including changing his name and asking others to use male pronouns to refer to him. He explained, "Being addressed and recognized as Aidyn was critical to helping alleviate my gender dysphoria. My emotional and mental health significantly improved once my family and friends began to recognize me as who I am." R. 22-3, at 3. Prior to beginning high school, Aidyn's mother spoke to a guidance counselor to discuss steps the school could take to ensure his safety and well-being as a transgender student. Aidyn's mother and therapist subsequently submitted letters to the school requesting changes to Aidyn's name and gender marker in PowerSchool, and the change was in place at the beginning of the academic year. All of Aidyn's teachers except Kluge complied with the Name Policy. On the first day of class, Aidyn received a folder from the substitute teacher covering for Kluge with his former first

name on it. The substitute also referred to him by his former first name in front of other students, which he experienced as "intensely humiliating and traumatizing." Throughout the fall semester, Kluge refused to call him "Aidyn," instead referring to him as "Sucec" or avoiding using any name and simply nodding or waving in his direction. Aidyn averred that Kluge sometimes used gendered honorifics with other students in the class, and less frequently called those students by their first names. Kluge's behavior left Aidyn feeling "alienated, upset, and dehumanized." He dreaded going to class each day and was uncomfortable each time he had to speak with Kluge one-on-one. Kluge's behavior was noticeable to others in the class, and at one point Aidyn's stand partner asked him why Kluge would not just say his name; Aidyn felt forced to tell him that it was because he was transgender. Aidyn discussed Kluge's behavior with his therapist as part of his ongoing treatment for gender dysphoria. He noted that Kluge's practice was also discussed multiple times at Equality Alliance meetings. By the end of the first semester, Aidyn told his mother that he did not want to continue with orchestra in his sophomore year. He did not in fact continue with orchestra the next year, and due to harassment he faced after Kluge left the school, Aidyn left Brownsburg at the end of his sophomore year.[8] R. 22-3.

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[8] Kluge characterizes the affidavits of Sam and Aidyn as "after-created evidence," which contained information about events that occurred after Kluge's termination. But both affidavits largely describe events that occurred before the school made the decision to terminate Kluge, and both affirm the information that Lee passed on to Dr. Daghe from Equality Alliance Meetings. The only exception is that the school was not aware that,

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Students were not the only source of concern about Kluge's practice. Lee reported that he had been approached by three teachers—Jason Gill, Melinda Lawrie, and Justin Bretz—during that academic year with concerns that Kluge's practice was causing harm to students. R. 120-14, at 16–17 ("they felt very strongly that this was harming students, not just Sam and Aidyn but just students in general who would potentially be in Mr. Kluge's class."). Dr. Daghe was approached by two additional teachers who were also department heads in Fine Arts (the department in which Kluge taught), Tracy Runyon and Melissa Stainbrook. They too conveyed complaints about Kluge's use of last names only. Dr. Daghe explained that teachers within the department who had a complaint about another teacher would convey concerns to the department heads and he was therefore most in contact with those two teachers in Kluge's department. R. 113-5, at 8–9.

After hearing about concerns from counselors that students were uncomfortable in some of their classes with regards to transgender issues, Dr. Jessup attended an Equality Alliance Club meeting to hear from students herself. R. 120-1,

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midway through the school year, Aidyn told his mother that he did not wish to continue with orchestra the next academic year, and in fact ended up leaving Brownsburg at the end of the following year due to harassment he received from other students. Although Brownsburg did not know that Aidyn would withdraw from orchestra or leave the school, at most the affidavit confirms that the school accurately predicted the fallout from Kluge's failure to follow the Name Policy that was designed to avoid this very harm to the school's mission. We do not rely on any information from the affidavits that post-dates Kluge's termination.

at 4; R. 120-6, at 7. Approximately forty students attended the meeting. Four or five students at the meeting complained about a teacher using last names only to address students.[9] The other students in attendance appeared to agree with the complaints. R. 120-1, at 4. Dr. Jessup also heard from students that they felt singled out by the use of their last names and that "not all students were called by their last name by Mr. Kluge." R. 120-6, at 7. *See also* R. 113-4, at 9 (Gordon testifying that she was "made aware that there had been complaints made to Dr. Daghe from students and staff that Mr. Kluge wasn't following those guidelines that he had agreed to at the start of the year.").

Dr. Daghe continued to hear complaints about Kluge's last-names-only practice throughout the fall semester, but hoped that the issue would resolve itself. R. 120-2, at 4. He therefore did not raise the matter with Kluge until he met with Kluge on December 13, 2017, after it became apparent that the accommodation was not working in practice because students were being harmed, and the learning environment was being disrupted. R. 120-2, at 4; R. 112-5, at 7. Dr. Daghe testified that the purpose of the meeting was to tell Kluge that the last-names-only policy was not working in practice:

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[9] The Equality Alliance Club had a policy of not using teachers' names at meetings. R. 120-14, at 11. Nevertheless, because of references to orchestra class and because Kluge was the only teacher at the school who had been permitted the last-names-only accommodation, both Lee and Dr. Jessup understood the students to be referring to Kluge. R. 120-14, at 7; R. 120-1, at 4.

> And the purpose of that meeting was to tell him that that's not going well. I'm getting reports from students, I'm getting reports from parents, I'm getting reports from our teams which are done by grade level, I'm getting reports by teachers in his own department that students are uncomfortable in his class and that they are bringing the conversations that occur in his class to other classrooms and having discussions about the uncomfortableness, whether it was dealing with a transgender student and last names only or whether it was times when last names weren't used or it was times when, you know, kids just want it all to go away and act like everything is normal. So I called John down and told him that's what's been given to me. And so, to me, as the high school principal trying to accommodate people and also trying to make sure that education can move forward, I just told him that.

R. 112-5, at 7.

According to Kluge's own description of the meeting:

> Daghe scheduled a meeting with me to ask me how the year was going and to tell me that my last-name-only Accommodation was creating tension in the students and faculty. He said the transgender students reported feeling "dehumanized" by my calling all students last-name-only. He said that the transgender students'

> friends feel bad for the transgender students when I call transgender students, along with everyone else, by their last-name-only. He said that I am a topic of much discussion in the Equality Alliance Club meetings. He said that a number of faculty avoid me and don't hang out with me as much because of my stance on the issue.
>
> Daghe said that parents complain about me. He stated that a transgender student's mother complained to the principals about my orchestra [hair color] policy, that it was an unfair and unwarranted policy and should be removed. The building principal asked if the other teachers had this same policy. I told him "yes" and sent him their policies and mine. He responded to the parent and the parent backed down. This was a policy by my entire performing arts department that students must have natural-colored hair for performances so they don't distract from the music being played.
>
> Daghe referred to this parent complaint in this meeting as being evidence of me being singled out while other teachers with the same policies did not receive any complaints.
>
> I explained to Daghe that this persecution and unfair treatment I was undergoing was a sign that my faith as witnessed by my using last-names-only to remain neutral was not coming

> back void, but was being effective. He didn't seem to understand why I was encouraged. He told me he didn't like things being tense and didn't think things were working out. He said he thought it might be good for me to resign at the end of the year. I told Daghe I was now encouraged all the more to stay.

R. 15-3, at 4–5. *See also* R. 120-3, at 21–25. Kluge had not "witness[ed]" tension, and also had not "witness[ed]" that anyone was avoiding him. R. 120-3, at 23; R. 112-5, at 7. Although Kluge believed that he was singled out for complaints about the department-wide hair color policy because of his religion, Dr. Daghe concluded that "it was because of the way he was handling this accommodation." R. 112-5, at 7. Because Dr. Daghe would not name the students or faculty who complained, Kluge suspected that Dr. Daghe was lying. R. 120-3, at 23. Kluge left this meeting believing that his use of last names only was working and that there was no evidence of "undue hardship" arising from his practice. R. 120-3, at 23–25.

On January 17, 2018, Dr. Daghe held another meeting with Kluge. According to Kluge's own account of the meeting:

> Daghe scheduled a meeting with me because he said he didn't think he was direct enough in our December 13 meeting. He told me in this meeting plainly that he really wanted to see me resign at the end of the school year. I told him that it was simply because he didn't like the tension and conflict. But I used examples in scripture to point to why this is a sign that I should stay. I

> referenced Acts 19:11-41 with Paul's conflict in Ephesus and 1 Corinthians 16:8-9 when Paul was encouraged by the opportunity, saying, "a wide door for effective service has opened to me, and there are many adversaries."

R. 15-3 at 5. Kluge also reported that Dr. Daghe asked him if he was going to resign and offered to write him letters of recommendation. Kluge deferred the decision, saying he wanted to wait until a January 22, 2018 faculty meeting when new transgender policies would be announced. R. 15-3, at 5.

On January 22, 2018, Dr. Jessup presented the faculty with a document titled "Transgender Questions." R. 15-4. The document provided policies and guidance for faculty in a question/answer format regarding issues relevant to transgender students. Among the questions posed and answers given were the following:

> **Are we allowed to use the student's last name only?** We have agreed to this for the 2017–2018 school year, but moving forward it is our expectation the student will be called by the first name listed in PowerSchool.
>
> **How do teachers break from their personal biases and beliefs so that we can best serve our students?** We know this is a difficult topic for some staff members, however, when you work in a public school, you sign up to follow the law and the policies/practices of that organization and that might mean following practices that are different than your beliefs.

> **What feedback and information has been received from transgender students?** They appreciate teachers who are accepting and supporting of them. They feel dehumanized by teachers they perceive as not being accepting or who continue to use the wrong pronouns or names. Non-transgender students in classrooms with transgender students have stated they feel uncomfortable in classrooms where teachers are not accepting. For example, teachers that call students by their last name, don't use correct pronouns, don't speak to the student or acknowledge them, etc.

R. 15-4, at 9–10.

After this faculty meeting, on February 4, 2018, Kluge sent an email to Drs. Snapp and Daghe quoting the language in the Transgender Questions document regarding the prohibition on the use of last names only. R. 120-16; R. 15-3, at 5. He noted that his agreement with the school was not limited to the 2017–2018 academic year, and asked if he would be allowed to use last names only going forward. R. 120-16. In response, Gordon and Dr. Daghe scheduled a meeting with Kluge for February 6, 2018. R. 15-3, at 6. Kluge secretly recorded the meeting, and the transcript appears in the record. R. 112-4, at 20–55; R. 120-3, at 25. Gordon and Dr. Daghe informed Kluge that, after the 2017–2018 school year, all teachers would be required to address students by the first name recorded in PowerSchool. R. 15-3, at 6; R. 112-4, at 24. Kluge again explained that his objection to using the PowerSchool names for transgender students was religious and that he felt this was a

reasonable accommodation. R. 112-4, at 25–32. Gordon and Dr. Daghe disagreed with him, explaining that he worked in a public school and that the last-names-only practice was not reasonable because it was "detrimental to kids." R. 112-4, at 25–28. Kluge said he felt that using the names in PowerSchool forced him to "encourage" students "in a path that's going to lead to destruction, to hell, I can't as a Christian be encouraging students to hell." R. 112-4, at 28. He cited a study from a doctor at Johns Hopkins that likened transgenderism to anorexia. R. 112-4, at 30. Dr. Daghe and Gordon explained to him that there were doctors on the other side of the issue and that the administrators had conducted their own extensive research in how to address the issue. R. 112-4, at 30. They held firm on the school's Name Policy, and the conversation turned to Kluge's resignation/termination. R. 112-4, at 32. Gordon explained that some teachers were sensitive about letting colleagues and students know that they were leaving, and she therefore honored requests to not communicate or process retirements or resignations until the school year concluded. R. 112-4, at 35–37. She discussed the timing of his departure from the school, explaining that because his position was difficult to fill, the school would need to begin the search as soon as possible. R. 112-4, at 35–37. Kluge interpreted this offer as allowing him to submit a conditional resignation that he could withdraw before some agreed date. R. 15-3, at 6; R. 120-3, at 26. Gordon believed she was offering only to delay notifying anyone of the resignation, not that the resignation could be withdrawn. R. 120-17, at 2; R. 112-4, at 11–12. In fact, Indiana law and the school's bylaws do not permit the withdrawal of a resignation once it has been properly submitted

to the Superintendent, and Gordon was the Superintendent's agent for this purpose. R. 112-4, at 11–12; R. 120-8; R. 120-9.

Gordon met with Kluge again in March 2018 to set a date for his decision. She reiterated that Kluge had three options: comply with the Name Policy; resign; or be terminated. She explained that if he would not comply and did not resign by May 1, 2018, the termination process would begin on that date. R. 15-3, at 6; R. 113-2, at 6.

On April 30, 2018, Kluge submitted his resignation by email. R. 120-17, at 2. In the email, he said he would resign as of early August 2018 when his contract for the academic year finished. He explained that he was resigning because the school required teachers to call transgender students by a name that "encourages the destructive lifestyle and psychological disorder known as gender dysphoria." R. 120-17, at 2. He noted that the school was withdrawing the last-names-only accommodation that allowed him to remain "neutral" on the issue. He was resigning because his Christian conscience "does not allow [him] to call transgender students by their 'preferred' name and pronoun," and the school had directed him to either resign by May 1, or he would be terminated. He concluded:

> Please do not process this letter nor notify anyone, including any administration, about its contents before May 29, 2018. Please email me to acknowledge that you have received this message and that you will grant this request.

R. 120-17, at 2. Gordon replied the same day, telling Kluge, "I will honor your request and not process this letter or share

with BHC administration until May 29." R. 15-2; R. 120-17, at 2.

In May 2018, as part of the curriculum, Kluge participated in an orchestra awards ceremony. R. 120-3, at 32–33. At the ceremony, he addressed the students, including the transgender students, by their first and last names as they appeared in PowerSchool. R. 120-3, at 33; R. 58-1, at 4. Kluge explained that he did this because "it would have been unreasonable and conspicuous to address students in such an informal manner at such a formal event as opposed to the classroom setting where teachers refer to students by last names as a normal form of address." R. 120-3, at 33. In his deposition, Kluge also affirmed the account that his lawyer gave to the EEOC in explaining the exception he made at this event, asserting that he did not wish to "bring into doubt my stated rationale for usage of last names only." R. 120-3, at 32–33; R. 120-19, at 7. Kluge confirmed that his lawyer's statement was an accurate account of what transpired at the orchestra award ceremony, and he adopted some of his lawyer's language as his own statement. R. 120-3, at 32–33. His attorney's statement to the EEOC explained:

> During classes, Kluge addressed students by last names, as a reasonable accommodation for his sincerely held Christian beliefs. But during the orchestra awards ceremony, because of its formal nature, he used the full names for students listed in PowerSchool to address all students as they were receiving their awards—including transgender students—because he was trying to work with the school in only

> requesting what was reasonable. Kluge thought it unreasonable and conspicuous to address students in such an informal manner at such a formal event, as opposed to the classroom setting where teachers refer to students by last names as a normal form of address. Kluge's Christian faith required that he do no harm to his students, and this acquiescence to the administration's position was done solely out of sincerely-held beliefs, and not in agreement with the policy.

R. 120-19, at 7 (Letter of Michael J. Cork, Esq. to David A. Tite, EEOC Investigator). Thus Kluge acknowledged that using last names only in some settings would be unreasonable, conspicuous, and potentially cause harm to his students contrary to the requirements of his Christian faith.[10] He therefore decided to use first and last names, and in keeping with the accommodation, he used the first names from PowerSchool rather than the students' former first names.[11] Kluge conceded that a school has an interest in being concerned with the mental health of its students. R. 120-3, at 35.

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[10] The dissent contends that we are "constru[ing] this statement as a legal concession" that Kluge's practice would potentially harm his students. No construing is necessary; the statement speaks for itself.

[11] Brownsburg contends that Kluge's use of the PowerSchool names at this ceremony calls into question the sincerity of his asserted religious beliefs. Because we resolve the case in favor of Brownsburg, we need not address the sincerity of Kluge's beliefs, and we assume his sincerity for summary judgment purposes.

Kluge scheduled a meeting with Dr. Daghe and Gordon on May 25, 2018, at the Brownsburg Central Office. R. 15-3, at 1. When Kluge arrived for the meeting, Gordon was not present, and Dr. Daghe told Kluge, "We have everything we need. We don't need to meet. Go back to the high school." Dr. Daghe also told Kluge not to meet with Gordon that day. R. 15-3, at 1. Kluge instead delivered a letter to Gordon's office, explaining that he had wanted to meet in order to present a written "Withdrawal of Intention to Resign and Request for Continuation of Accom[m]odation." R. 15-3. A few hours later, Brownsburg locked Kluge out of school buildings and online services, and posted his job as vacant. R. 113-2, at 7; R. 120-3, at 29.

At the June 11, 2018 school board meeting where resignations were considered, Kluge was denied a request to speak during the regular part of the meeting, but gave a brief statement during the public-comment section of the meeting. R. 120-3, at 29; R. 120-18, at 10. He explained what had happened, and asked the board to allow him to withdraw his resignation and to reinstate him. R. 120-3, at 29–30; R. 120-18, at 10. The board instead accepted his resignation without comment. R. 113-2, at 7; R. 120-3, at 30; R. 120-18, at 2.

Kluge sued the school, bringing claims under Title VII for religious discrimination/failure to accommodate; retaliation; and hostile work environment. He also brought claims under the First and Fourteenth Amendments and Indiana law. The district court dismissed the claims under the First and Fourteenth Amendments as well as the state law claims, and the Title VII claim for hostile work environment. Kluge does not appeal those dismissals. Kluge's claim for religious

discrimination/failure to accommodate (for the sake of simplicity, we will call this the discrimination claim) and his retaliation claim proceeded to discovery. Ultimately, Kluge filed a motion for partial summary judgment on his discrimination claim, and the school countered with a cross-motion for summary judgment on both of the remaining claims.

The district court denied Kluge's motion, and granted Brownsburg's cross-motion. On the discrimination claim, the court framed the ultimate issue as "whether, assuming perfect compliance with the last names only accommodation, that accommodation resulted in undue hardship to" Brownsburg. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 839 (S.D. Ind. 2021). For summary judgment purposes, the court treated Kluge's forced resignation as an adverse employment action. The court also accepted that his religious beliefs and objections to using the PowerSchool names and pronouns of transgender students were sincerely held. After finding that there was an objective conflict between Kluge's sincerely held religious beliefs and Brownsburg's policies for transgender students, the court concluded that Kluge's refusal to follow those policies created an undue hardship on Brownsburg's mission of educating all of its students. In particular, the court found that the last-names-only accommodation burdened Brownsburg's ability to provide an education for all students and conflicted with the school's philosophy of creating a safe and supportive environment for all students. In finding that the accommodation created an undue burden, the court relied on the reports of Aidyn and Sam as well as those of other students and teachers. Aidyn and Sam reported feeling targeted and uncomfortable, and Aidyn grew to dread going to

Kluge's orchestra class, ultimately quitting orchestra entirely. Other students and teachers complained that Kluge's practice was offensive or insulting and made his classroom environment unwelcome and uncomfortable. The court found that Brownsburg was not required to allow an accommodation that unduly burdened its business of educating all students in a supportive manner. The court found an additional undue burden in that the accommodation opened the school up to the threat of Title IX discrimination lawsuits that could be brought by transgender students who felt targeted and dehumanized by Kluge's practice. The court concluded that Brownsburg had demonstrated as a matter of law that it could not accommodate Kluge's "religious belief against referring to transgender students using their preferred names and pronouns without incurring undue hardship." *Kluge*, 548 F. Supp. 3d at 846.

As for Kluge's retaliation claim, the court found that Kluge's briefing on the matter had been meager, and that he had simply recited his version of the facts without discussing how those facts meet the requirements of a retaliation claim. The court also noted that Kluge failed to address Brownsburg's argument that there is no evidence in the record from which a reasonable fact finder could infer that its non-discriminatory explanation for its action was a pretext for religious discrimination. Without any explanation of his theory of retaliation and without any evidence demonstrating pretext, the court found that Kluge had waived his claim for retaliation. As an alternate basis for granting judgment in favor of the defendant, the court also noted that Kluge failed to present any evidence from which a reasonable fact finder could

conclude that a causal connection exists between Kluge's protected activity and his resignation, any evidence of pretext, or any evidence that Brownsburg's action was motivated by discriminatory animus. The court therefore granted summary judgment in favor of the school on the retaliation claim as well. Kluge appeals.

II.

On appeal, Kluge asks the court to reverse the grant of summary judgment in favor of Brownsburg on both of his claims. For the discrimination claim, he asks that we remand to the district court in order to enter summary judgment in his favor because Brownsburg withdrew a reasonable accommodation and forced him to resign without demonstrating that the accommodation caused undue hardship.[12] Kluge also

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[12] Kluge appeals both the grant of summary judgment in favor of Brownsburg and the denial of summary judgment in his favor. Specifically, he asks that we reverse and remand for judgment to be entered in his favor as a matter of law. When the district court considers cross-motions for summary judgment, granting one and denying the other, the denial of summary judgment "has merged into the final judgment and is therefore appealable" as part of the appeal from the final judgment granting the opposing party's motion. *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). In order to consider Kluge's request that we reverse the denial of summary judgment in his favor, we would be required to review the facts in the light most favorable to the defendant, Brownsburg, and draw all reasonable inferences in favor of the school. *See Hess v. Reg-Ellen Machine Tool Corp.*, 423 F.3d 653, 658 (7th Cir. 2005) ("With cross-motions, our review of the record requires that we construe all inferences in favor of the party against whom the motion under consideration is made."). As is apparent from our recitation of the undisputed facts, such a review would demonstrate that Kluge is not entitled to judgment as a

(continued)

urges this court to find that he preserved his retaliation claim and presented sufficient evidence in support of that claim to merit summary judgment in his favor; in the alternative, he seeks a trial on the retaliation claim. Brownsburg asks the court to affirm the district court's judgment in all respects. We review the district court's grant of summary judgment *de novo,* and we examine the record in the light most favorable to the party opposing judgment, in this case Kluge, construing all reasonable inferences from the evidence in his favor. *Anderson*, 477 U.S. at 255; *Horne v. Electric Eel Mfg. Co.*, 987 F.3d 704, 713 (7th Cir. 2021). Summary judgment is appropriate when there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson*, 477 U.S. at 247–48; *Horne*, 987 F.3d at 713. "[S]ince the review of summary judgment is plenary, errors of analysis by the district court are immaterial; we ask whether we would have granted summary judgment on this record." *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 386 (7th Cir. 2000). *See also Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir. 1993) ("The question whether a movant is entitled to summary judgment is one of law—one therefore that we review *de novo*, which is to say without deference for the

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matter of law: the school asserts with copious evidence from students, faculty and administrators that Kluge sometimes failed to follow the accommodation (a failure which he conceded through his lawyer during proceedings before the EEOC), treated transgender students differently than non-transgender students, and created what can be described at best as a difficult learning environment for the students in his class. He also alienated his colleagues in the Arts Department and offended parents. Construing the record in favor of Brownsburg, Kluge is not entitled to judgment. In considering Kluge's appeal of the grant of summary judgment in favor of Brownsburg, we must construe the record in Kluge's favor.

view of the district judge and hence almost as if the motion had been made to us directly.").

A.

Title VII provides, in relevant part, that "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). After that provision was enacted, the EEOC issued a guideline that required "that an employer, short of 'undue hardship,' make 'reasonable accommodations' to the religious needs of its employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977); 29 C.F.R. § 1605.1(b) (1968). Congress later codified that "reasonable accommodation" regulation in its definition of the term "religion":

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). The Supreme Court said that "[t]he intent and effect of this definition was to make it an unlawful employment practice under [sec. 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue

hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74.

The statute did not, however, provide guidance for determining the degree of accommodation required of an employer, and legislative history was not illuminating. *Hardison*, 432 U.S. at 74–75. In *Hardison*, the Supreme Court set out to determine the reach of the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, which had not previously been spelled out by Congress or by EEOC guidelines. 432 U.S. at 75. The plaintiff, Hardison, worked at Trans World Airlines ("TWA") in an airplane maintenance department that operated twenty-four hours a day, every day of the year. All employees of the department were subject to the terms of a collective bargaining agreement that had a system of bidding for shift assignments based on seniority. Early in his employment at TWA, Hardison began following a religion that required its members to refrain from work from sunset on Friday until sunset on Saturday. But Hardison lacked the seniority to bid for a schedule that accommodated his religious beliefs and the union was unwilling to allow him to bypass the seniority system. TWA considered other possible solutions, but each had a cost to the employer such as breaching the seniority system, paying premium wages to hire someone to cover the Saturday shift, or leaving the shift uncovered. The company met several times with Hardison in attempts to find a solution, authorized the union steward to search for someone who would voluntarily swap shifts, and attempted without success to find Hardison another job within the company. TWA

eventually discharged Hardison on grounds of insubordination for refusing to work his assigned shift.

In a bench trial, the district court entered judgment in favor of TWA after concluding that the proposed accommodations presented an undue hardship for the company. The court of appeals reversed and found in favor of Hardison, concluding that TWA could have: (1) given Hardison a four-day work-week and used a supervisor or other worker to cover the fifth day; (2) filled Hardison's shift with another employee; or (3) arranged a swap between Hardison and another employee for shifts in the sundown Friday to sundown Saturday period. The Supreme Court rejected all of these options because each would have created "undue hardship" under the statute. In particular, the first option would have caused other shop functions to suffer; the second would have required the company to offer premium overtime pay to the substitute employee; and the third would have violated the seniority system. *Hardison*, 432 U.S. at 77–84.

In considering the "undue hardship" language of the statute, the Court decided that the duty to accommodate did not require a company to take steps inconsistent with a valid collective bargaining agreement or seniority system, noting:

> Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. … Indeed, the foundation of

> Hardison's claim is that TWA and IAM engaged in religious discrimination in violation of [sec. 2000e-2(a)(1)] when they failed to arrange for him to have Saturdays off. It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Hardison, 432 U.S. at 81. The Court relied in part on the statutory preference given to *bona fide* seniority systems, noting that, under section 2000e-2(h), "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." 432 U.S. at 82.

The Court then considered the other options open to TWA to accommodate Hardison's religious practice, such as replacing Hardison on those shifts with supervisory personnel or personnel from other departments, or replacing him with other available workers by paying premium overtime wages. Both alternatives, the Court noted, involved costs to the company, "either in the form of lost efficiency in other jobs or higher wages." 432 U.S. at 84. The Court found that the employer was not required by the statute to incur either cost, instead holding that, "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84.

> Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.
>
> As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Hardison, 432 U.S. at 84–85.

The Supreme Court subsequently spoke on reasonable accommodations for religious practice in the employment

context only two other times. In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986), the Court clarified that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." The Court thus rejected the claim that the accommodation obligation includes a duty to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business. 479 U.S. at 68. Instead, in situations where multiple accommodations are possible, the Court held that an employer has met its statutory obligation "when it demonstrates that it has offered a reasonable accommodation to the employee." 479 U.S. at 69.

In the Court's last and most recent foray into the reasonable accommodation provision of Title VII, the Court considered a case where an employer declined to hire a woman for a sales position in a clothing store because she wore a head scarf, which would violate the store's "Look Policy" that governed employees' dress. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015). At the time the store made the decision, the assistant manager who interviewed the woman found her otherwise qualified to be hired but was concerned that the scarf violated the Look Policy's prohibition on caps. The assistant manager sought guidance from a district manager, informing him that she believed that the prospective employee wore the scarf for religious reasons. The district manager directed the assistant manager not to hire the woman because the scarf would violate the Look Policy as would all other headwear, whether religious or otherwise.

The prospective employee prevailed on a Title VII reasonable accommodation claim in the district court, but the court of appeals reversed, finding that an employer cannot be liable for failing to accommodate a religious practice until the applicant or employee provides the employer with actual knowledge of the need for an accommodation.

The Supreme Court noted that the statute prohibits employers from failing to hire an applicant "because of" her religious practice. The term "because of" imports at a minimum the "but-for" standard of causation. *Abercrombie*, 575 U.S. at 772. Title VII relaxes that standard by providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added); *Abercrombie*, 575 U.S. at 773. The statute also does not impose a knowledge requirement, but instead "prohibits certain *motives*, regardless of the state of the actor's knowledge." *Abercrombie* 575 U.S. at 773. Thus:

> An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed. … An employer may not make an

> applicant's religious practice, confirmed or otherwise, a factor in employment decisions.

Abercrombie, 575 U.S. at 773. Finally, the Court rejected the premise that a neutral employment policy cannot constitute intentional discrimination, finding:

> Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious ... practice," it is no response that the subsequent "fail[ure] ... to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

Abercrombie, 575 U.S. at 775.

The Supreme Court did not address the undue hardship standard in *Philbrook* or *Abercrombie*, leaving in place the standard it set in *Hardison*, namely, that the employer need not "bear more than a *de minimis* cost" in making an accommodation. *See also E.E.O.C. v. Walmart Stores East, L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (describing *Hardison*'s *de minimis* cost as a "slight burden" to avoid the Latin). Our court

established a burden-shifting framework for proof of a Title VII claim for failure to accommodate religion in *E.E.O.C. v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997), which must be modified slightly to account for the Supreme Court's opinion in *Abercrombie*. To make out a *prima facie* case, an employee must demonstrate that: (1) an observance or practice that is religious in nature, and (2) that is based on a sincerely held religious belief, (3) conflicted with an employment requirement, and (4) the religious observance or practice was the basis or a motivating factor for the employee's discharge or other discriminatory treatment. *Abercrombie*, 575 U.S. at 772-73; *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013); *Porter v. City of Chicago*, 700 F.3d 944, 951 (7th Cir. 2012); *Ilona of Hungary*, 108 F.3d at 1575. "If the employee shows these elements, the burden then shifts to the employer to show that it could not accommodate the employee's religious belief or practice without causing the employer undue hardship." *Adeyeye*, 721 F.3d at 449; *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir. 1986).

The district court determined that Kluge established a *prima facie* case of failure to accommodate a religious practice. The court noted that there were issues of fact as to whether Kluge's religious beliefs were sincerely held, but taking the record in the light most favorable to Kluge for the purposes of summary judgment, there was enough evidence that his refusal to use the preferred names and pronouns of the transgender students was a religious practice based on a

sincerely held belief.[13] Kluge also presented adequate evidence that his practice conflicted with an employment requirement, in particular, the PowerSchool Name Policy. Brownsburg does not dispute that forcing Kluge to either comply with the Name Policy, resign, or be terminated was an adverse employment action, and the school generally concedes that, for the purposes of this appeal, Kluge has established a *prima facie* case of failure to accommodate.

B.

The burden then shifts to Brownsburg to demonstrate that it could not reasonably accommodate Kluge "without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). "Reasonableness is assessed in context, of course, and this evaluation will turn in part on whether or not the employer can in fact continue to function absent undue hardship if the employee is permitted" the requested accommodation. *Adeyeye*, 721 F.3d at 455. Accordingly, "[t]he issue of undue hardship will depend on close attention to the specific circumstances of the job[.]" *Id*. As a public school, Brownsburg's "business" is its constitutional and statutory charge to educate all students who enter its doors. We have noted that, "pupils are a captive audience. Education is

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[13] In his response opposing a motion for leave to file an *amicus* brief in the district court, Kluge described his sincerely held religious belief as "what is best for the eternal *spiritual* well-being of [the transgender students] is to avoid affirming them in a moral error." R. 145, at 7. As we mentioned earlier, Kluge also believed that it would be sinful for him to "promote gender dysphoria" by using the transgender student's PowerSchool names and pronouns. R. 120-3, at 6–10.

compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling." *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). Because of the compulsory nature of education, we have noted in the First Amendment context:

> Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues. … The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.

474 F.3d at 479–80.[14]

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[14] The dissent asserts that under the Indiana Constitution, schools need only admit all children, and that the Constitution does not require or prescribe any specific standard of educational quality. The dissent also cites Indiana case law interpreting the State's education statutes as not requiring "that Indiana school corporations affirm transgender identity." (continued)

Brownsburg claims two undue hardships with Kluge's use of students' last names only: first, the school asserts that Kluge's last-names-only practice frustrated its efforts to educate all students because the accommodation negatively impacted students and the learning environment for transgender students and other students as well. Second, Kluge's practice exposed Brownsburg to the risk of Title IX litigation brought by transgender students who claim sex-based discrimination based upon a theory of sex-stereotyping. *See Whitaker*, 858 F.3d at 1047–48.

1.

We begin with Brownsburg's claim that the last-names-only practice frustrated the school's effort to educate all students by harming students and negatively affecting student learning. As we discuss below, the only relevant question at this point is whether the school could accommodate Kluge without working an undue hardship on the conduct of its business. We conclude that the undisputed evidence demonstrates that Brownsburg met its burden of establishing undue

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But Brownsburg never made any claims that the State's Constitution or statutes required it to affirm transgender identity. The school instead consistently relied on its own policy choices about how to run its high school, and how to address the specific challenges faced by a particular group of students. We have cited to the State's Constitution and educational statutes only to provide context and to explain the differences between running schools and managing other kinds of businesses. In addition to the compulsory nature of education, the school stands in for parents and deals with the needs not of adult customers or coworkers (the categories into which the dissent attempts to shoehorn the analysis) but of children.

hardship as a matter of law, and none of the additional evidence cited by the dissent calls that conclusion into question.

It is undisputed that, prior to the start of the 2017–2018 school year, Brownsburg recognized an increase in enrollment of transgender students, and concluded that these students faced "significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying." R. 120-1, at 3. It is also undisputed that Brownsburg administrators determined that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being." R. 120-1, at 3. They therefore began to develop policies and practices for addressing these challenges.

As Dr. Jessup averred, a "very practical but critical question that arose … is what names staff should use to address transgender students in class." R. 120-1, at 3. Obviously, "a high school classroom cannot function without teachers addressing students directly." R. 120-1, at 3. Brownsburg ultimately adopted the PowerSchool Name Policy as part of its larger plan to address the special needs of these students. The goal of the Name Policy was two-fold: to provide the faculty with a straightforward rule when addressing students; and to afford dignity and empathy towards transgender students because the administration considered it important "for transgender students to receive, like any other student, respect and affirmation of their preferred identity[.]" R. 120-1, at 4. The requirement that students could change their names and pronouns in PowerSchool only with the consent of a parent and the approval of a healthcare professional allayed the religious objections and concerns of three of the four teachers

who signed the seven-page letter and accompanied Kluge to the May 15, 2017 meeting with Dr. Daghe. Kluge alone continued to object. In response to Kluge's continued concerns, the school agreed to allow Kluge two accommodations: first, he would address all students by their last names only; and second, another adult would hand out gendered orchestra uniforms, relieving Kluge of that duty.

The school produced copious evidence that, once these accommodations were in place, Dr. Daghe, teacher Craig Lee, and Dr. Jessup soon began to receive reports and complaints about the harms caused by Kluge's last-names-only practice. In particular, Dr. Daghe received reports that transgender students in Kluge's class felt insulted and disrespected by Kluge's use of last names only. They also felt isolated and targeted. A non-transgender student in Kluge's class reported to Lee that the practice was "incredibly awkward." That student reported that the practice made the transgender students stand out, and that he and others in the school felt bad for the transgender students. Dr. Daghe also received reports that transgender students in Kluge's class felt dehumanized by the last-names-only practice, and Dr. Daghe concluded that the practice was "detrimental to kids."

Dr. Jessup personally attended an Equality Alliance meeting and heard complaints about Kluge's practice from four or five students at the meeting, complaints with which the other thirty-five students in attendance appeared to agree. Dr. Jessup heard from students and faculty that students felt singled out by the use of their last names, and that "not all students were called by their last name by Mr. Kluge." R. 120-6, at 7; R. 120-1, at 4.

Dr. Daghe also received reports that Kluge sometimes slipped up and used first names or gendered honorifics for non-transgender students. Although we credit Kluge's denial that he ever made such mistakes, Kluge has no evidence contradicting assertions by Drs. Daghe and Jessup that they received such reports and needed to address them. As Dr. Daghe testified, Kluge's practice also disrupted the learning environment more broadly because students who were uncomfortable in Kluge's classes brought their "discussions about the uncomfortableness, whether it was dealing with a transgender student and last names only or whether it was times when last names weren't used," to other classrooms.

Lee heard complaints about Kluge's practice from students regularly at Equality Alliance meetings, and personally witnessed the emotional pain suffered by the transgender students when they discussed the environment in Kluge's class. Other faculty in Kluge's own department reported tension among students and faculty created by Kluge's last-names-only practice.

All of this was reported to Kluge, mainly by Dr. Daghe, as Kluge himself acknowledged. *See* R. 15-3, at 3–6; R. 112-2, at 4; R. 112-5, at 7. *See also* R. 120-5, at 9 (where Dr. Daghe testified that he talked to Kluge about the transgender students but also about the entire class of students, "about the uncomfortableness of adults in my building around him with similar students in theater, in band, in choir, and orchestra that those teachers share and it was a concern that kids didn't know how to behave, didn't know how to address. And that was the temperament or the way I was addressing the meetings ahead of time and saying can you follow this second accommodation

because we're going to be changing that, as he heard in January, for the following year and I needed this to move forward as a high school principal in a way that he would follow the accommodations and that my conversation with him was not happening the way it was written."). In describing the January 17, 2018 meeting where Dr. Daghe told Kluge that he should resign at the end of the school year, Kluge told Dr. Daghe that "it was simply because he [Dr. Daghe] didn't like the tension and the conflict." R. 15-3, at 5. Kluge interpreted the tension and conflict that he had caused as a scriptural sign that he should stay at the school. R. 15-3, at 5.

Kluge has produced no evidence to the contrary. That is, he has produced no evidence tending to show that the transgender students were not emotionally harmed by his practice or that the learning environment was not disrupted. A practice that indisputably caused emotional harm to students and disruptions to the learning environment is an undue hardship to a school as a matter of law. As Kluge himself conceded, schools have a legitimate interest in the mental health of their students. R. 120-3, at 35. And as Dr. Daghe explained, his job as principal was to "make sure that education can move forward." R. 112-5, at 7. Education is, indeed, the business of every school. Thus, emotional harm to students and disruptions to the learning environment are objectively more than *de minimis* or slight burdens to schools.

Nor did Kluge produce any evidence that Dr. Daghe, Dr. Jessup, and Lee[15] all lied about receiving these reports and

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[15] The dissent points out that Lee described himself as "very biased" on the subject of how the school should handle issues related to (continued)

lied about feeling a need to act on them in order to address the needs of transgender students and the tense educational environment. At most Kluge claims that he did not believe Dr. Daghe on occasion because Dr. Daghe did not give him the names of the students who reported that they were harmed by Kluge's use of last names only. But Kluge's metaphysical doubt about Dr. Daghe's credibility does not create a genuine issue of material fact. "[N]othing requires the district court to disbelieve defendants' proffered evidence simply because [the plaintiff]—without proof—asserts it is false." *Carroll v. Lynch*, 698 F.3d 561, 565 (7th Cir. 2012). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."); *Barnes v. City of Centralia, IL*, 943 F.3d 826, 832 (7th Cir. 2019) (same). Instead, "the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita*, 475 U.S. at 587; Fed. R. Civ. P. 56(e). *See also Carroll*, 698 F.3d at 565 (plaintiff cannot rest on "metaphysical doubt" that defendant lied but must produce evidence so showing).

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transgender students. To his credit, Lee candidly admitted that bias when he made his reports of harm and disruption to school administrators. Dr. Daghe and other administrators were thus aware of that bias when they were assessing the scope and severity of the problem. Although the dissent would have a jury reweigh whether the employer *should have* credited Lee's reports, that is not the relevant question, as we discuss below. *Infra*, at 53-55 (discussing undisputed evidence known to the school at the time of the decision).

Similarly, Kluge testified that he felt no tension from other teachers, was unaware of any problems in his classroom, and felt that his students were not adversely affected by his practice. Kluge believed that his students were performing well and not experiencing any problems. But summary judgment is not defeated by Kluge's perception that all was well. A failure to notice that anything problematic was happening is not evidence that it did not happen; nor is it evidence that Brownsburg did not receive reports from students, teachers, and others that it was happening. Moreover, in employment discrimination cases, the employee's "own opinion about his work performance is irrelevant." *Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 897 (7th Cir. 2015). *See also Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 740 (7th Cir. 2006) (a plaintiff's conclusory statements do not create an issue of fact, and an employee's self-serving statements about his ability are insufficient to contradict an employer's negative assessment of that ability). Indeed, Kluge himself acknowledged that using last names only in some settings would be unreasonable, conspicuous, and potentially cause harm to his students, which is why he used the PowerSchool Names at the orchestra award ceremony. Kluge also acknowledged creating tension and conflict at the school. To the extent that Kluge draws a theological distinction between regular use of the first names in a classroom setting versus using them on a one-time basis at a more formal award ceremony, Brownsburg was within its rights to consider the daily harm of the last names practice in the classroom paramount.

Moreover, the evidence that the dissent cites from three students and a contract teacher is not relevant to the question

presented here. First, that these three children and a contract teacher did not experience or notice harm or disruption does not rebut the truth of the reports of harm and disruption experienced by others. It was not necessary for the school to find that Kluge's practice harmed all of the students before the school was justified in addressing the situation.

Second, none of the information from these four affiants is relevant to the question of whether the decision-makers received reports of emotional harm and disruption to the learning environment from other students, teachers and parents. We cannot emphasize strongly enough that Kluge has produced no evidence suggesting that the reported emotional harms to students and disruptions to the learning environment did not occur or that the reports were not made.

Third, to the extent that the dissent relies on this evidence to demonstrate that Kluge complied perfectly with the accommodation, we have already credited his claim of perfect compliance. The reports of emotional harm and disruption came in nevertheless.

Fourth, none of the information from these three students and the contract teacher was known to school administrators at the time they were making the decision to withdraw the accommodation. The dissent contends that evidence from these students and the contract teacher is relevant "whether or not this information was known by the School District at the time of the adverse employment decision." It is axiomatic that an employer can make decisions based only on the information known to it at the time of the decision. The dissent nevertheless poses the puzzling question, "If, by contextual

evidence obtained after discharge, an employee plaintiff is not able to undermine the alleged presence of undue hardship, when, if ever, can the employee prevail?" The answer is simple: by uncovering evidence that was before the employer at the time of the decision, evidence that would contradict the employer's claims that students were emotionally harmed and the learning environment was disrupted. If no one was harmed and there was no disruption, then the burden of allowing the accommodation would be *de minimis*. But in the absence of any evidence known to the employer contradicting the existence of the harms, there is nothing for a jury to decide. The evidence, of course, may be obtained after the discharge, but it must be evidence that the employer knew at the time of the decision to withdraw the accommodation. To suggest that the employer may be held liable for a decision to withdraw an accommodation based on information that did not exist at the time of the decision holds employers to an impossible "crystal ball" standard. The dissent asserts that applying a test that depends on the employer's knowledge would create a perverse incentive for employers to avoid investigating whether hardship would arise from an accommodation. But there is no claim of a faulty investigation here, and the employer actually granted the accommodation and then saw in real time the harms that resulted. If an employer conducted an inadequate investigation, that could be evidence that the withdrawal of the accommodation was based on some discriminatory reason rather than on the undue hardship, but that is simply not the case here.

The dissent would have a jury second guess whether the reported harms occurred and whether the employer received

those reports even in the absence of evidence to the contrary. In particular, the dissent would have a jury decide the credibility of the students who were emotionally harmed and the teachers who saw and reported disruptions to the learning environment when there is no evidence contradicting the reports of harm and educational disruption. Those assessments were for the school to make based on the information available to it at the time. The dissent would also have a jury second guess whether emotional harm to students (in this case, particularly vulnerable students) and disruptions to the learning environment were sufficient to overcome the *de minimis* undue hardship standard when Kluge himself conceded that the school had a legitimate interest in the mental health of its students, and even though learning is the primary purpose for the existence of the school. These harms were far more than a slight burden as a matter of law.

The dissent also contends that the transgender students were offended not because of any discomfort with the last-names practice itself but because of the students' "assumptions and intuitions about why Kluge was using only last names." The dissent maintains that "[t]he alleged offense arose from students' presumptions and guesses as to Kluge's motives for using last names only." There are two problems with this analysis. First, there is no dispute that the school received reports describing emotional harm to students and disruption to the learning environment, not mere offense. These were the very harms that the school sought to avoid when it developed the Name Policy.

Second, Kluge's motives for his practice are irrelevant to the Title VII analysis. The uncontested evidence demonstrates

that Kluge's *practice* caused the harms whether the students correctly understood his subjective *motives* or not. As we have discussed, the school was aware of the issues faced by this group of students and had identified the use of their PowerSchool names and pronouns as an important means of providing dignity, empathy, respect and affirmation for this group of children who faced significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying. Although some of the students appear to have inferred that Kluge's practice was due to the presence of transgender students at the school, the students had no information regarding why Kluge would not use the students' PowerSchool names and pronouns. Whether his motive was religious, ideological, grammatical or otherwise was irrelevant because it was the *practice*, not the unknown *motive* that caused the reported harms. The school stretched to accommodate Kluge with a facially neutral accommodation of using last names only; nonetheless, the undisputed evidence showed that the practice resulted in genuine harm to students and real disruption to the learning environment.

Moreover, Kluge's practice was contrary to the preference of not only the school and the students, but also the students' parents and healthcare providers, who had decided that it was in the best interest of these children to be addressed in a particular manner, with their PowerSchool names and pronouns. Brownsburg's "business" for the purpose of analyzing undue hardship was to provide public education. Unlike a for-profit corporation, Brownsburg's mission of education for all students was mandated by the State's constitution and

legislature. In Indiana, public schools play a custodial and protective role in the compulsory education system, and public schools stand in the relation of parents and guardians to the students regarding all matters of discipline and conduct of students. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 979 (Ind. 2002). After conducting its own research, the school reasonably deferred to the judgment of parents and healthcare providers regarding how to meet the specific needs of transgender students.

Although with corporate defendants, our cases analyze undue hardship by considering financial costs and business interests, the school's "business" here is more analogous to that of the Veterans Administration ("V.A.") in *Baz*. In that case, the V.A. hired a chaplain in a hospital where approximately two thirds of the patients were psychiatric patients. The V.A. saw the position of chaplain as a secular one where proselytizing was prohibited and chaplains were expected to serve as a "quiescent, passive listener and cautious counselor," as part of the hospital's philosophy of total patient care. Baz instead "saw himself as an active, evangelistic, charismatic preacher," and acted accordingly. 782 F.2d at 703–04. When he refused to change his approach, the hospital terminated his employment. After a bench trial, the district court ruled in favor of the hospital.

On appeal, Baz argued that the hospital had failed to prove that the health and welfare of the patients were harmed by his evangelism. We noted that he was confusing "the business necessity defense to a disparate impact cause of action with the 'undue hardship' standard used to measure an employer's duty to accommodate to an employee's religious

observances in a disparate treatment claim of religious discrimination." 782 F.2d at 706. The latter type of case, the same one that Kluge brings here, requires the defendant to provide "evidence to show that accommodation would create a hardship on his business. This hardship has been construed as anything more than a *de minimis* cost to the employer." *Id*. (citing *Hardison*, 432 U.S. at 84).

> The defendants are not required to show that their philosophy of total patient care is objectively better than that espoused by Reverend Baz; they need only show that it would be a hardship to accommodate his theology in view of their established theory and practice.
>
> The defendants here have met this burden. They have produced evidence tending to show that Reverend Baz's philosophy of the care of psychiatric patients is antithetical to that of the V.A. To accommodate Reverend Baz's religious practices, they would have to either adopt his philosophy of patient care, expend resources on continually checking up on what Reverend Baz was doing or stand by while he practices his (in their view, damaging) ministry in their facility. None of these is an accommodation required by Title VII.

Baz, 782 F.2d at 706–07.

Kluge makes a similar mistake of law here. Brownsburg need not show that its philosophy of treating transgender students "like any other student, [with] respect and affirmation

of their preferred identity" was better than that espoused by Kluge. They needed only to show "that it would be a hardship to accommodate his theology in view of their established theory and practice." *Baz*, 782 F.2d at 706. Brownsburg met this burden by producing evidence tending to show that Kluge's last-names-only practice was "antithetical to that of the" school. 782 F.2d at 706–07. It is no answer that Kluge called all students by their last names and was trying to be neutral on the issue of transgenderism. The last-names-only practice conflicted with the school's philosophy of affirming and respecting all students because the undisputed evidence showed that the accommodation resulted in students feeling disrespected, targeted, and dehumanized, and in disruptions to the learning environment. Title VII does not require the school to adopt an accommodation that, although facially neutral, does not work that way in practice. Brownsburg allowed Kluge to employ the practice for an entire school year, counseling him along the way about the problems he was creating and encouraging him to either follow the practice that every other teacher in the school followed or leave his job because he was harming students and the educational environment by failing to follow the school's philosophy of respect and affirmation for all students. Title VII does not require an employer to retain an employee who harms the employer's mission. *Baz*, 782 F.2d at 706–07.

Nor was any other reasonable accommodation available. Kluge was the school's only music teacher, and so students could not, for example, be transferred to another classroom (if we assume that transfer to another classroom would not be equally stigmatizing). There was no other teacher to take

Kluge's place in the orchestra class. Kluge himself has never suggested any other viable accommodation. *See Ryan v. U.S. Dep't of Justice*, 950 F.2d 458, 461 (7th Cir. 1991) (employers are not required to negotiate with employees about a religious accommodation but only to act on any accommodation that does not work an undue hardship; an employee who neglects multiple opportunities during a lengthy disciplinary process to propose a concrete accommodation makes his own choice). Because no reasonable jury could conclude that a practice that emotionally harms students and disrupts the learning environment is only a slight burden to a school, and because no other accommodations were available, under *Baz*, Brownsburg has proved undue hardship as a matter of law.[16] *See also Walmart Stores East, L.P.*, 992 F.3d at 658–60 (affirming summary judgment where the accommodation of the plaintiff's religious practice created more than a slight burden on the employer because it would have increased the burden on other workers, or resulted in a staffing shortage, or forced the employer to change its preferred rotation system designed to train all assistant managers in all departments); *Adams v.*

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[16] Kluge asserts that *Baz* is inapplicable because his religious beliefs did not preclude him from doing his job, as he claims was the case in *Baz*. But the issue in *Baz* was analogous: Baz was performing his job in a manner that conflicted with the hospital's requirement that the chaplain serve as a "quiescent, passive listener and cautious counselor," as part of the hospital's philosophy of total patient care. Kluge was performing his job in a manner that conflicted with the school's mission of educating all students, and its philosophy of treating all students with respect and affirmation for their identity in the service of that goal. Kluge's attempt to characterize the school's goal as somehow "illegitimate" lacks support in Title VII case law.

Retail Ventures, Inc., 325 Fed. App'x 440, 443 (7th Cir. 2009) (affirming summary judgment in favor of employer on religious accommodation claim where accommodation would have increased cost, decreased efficiency, or created a scheduling strain); *Noesen v. Medical Staffing Network, Inc.*, 232 Fed. App'x 581, 584–85 (7th Cir. 2007) (affirming summary judgment in favor of employer when Catholic pharmacist's requested religious accommodation of relief from telephone and counter duties in order to avoid customers requesting birth control would have required other employees to assume a disproportionate share of work, or would have left data input work undone).

Kluge's attempt to characterize the emotional harm expressed by the transgender students as "third party grumblings" or a "heckler's veto" has no basis in the record and no support in Title VII law.[17] The dissent echoes this

[17] The dissent also suggests that the question of whether the accommodation constituted an undue hardship "by way of the School District's clients—the students—should be an open question for the factfinder" because an adverse employment action based on the discriminatory preferences of others, including coworkers and customers, is unlawful. But there is no fact question for a jury here because Kluge presented no evidence that the students, teachers or parents harbored a discriminatory bias against Kluge or that Brownsburg terminated Kluge based on the discriminatory preferences of others. In fact, one of the parents reporting harm to her child from Kluge's practice told the school, "I really don't care what he thinks about transgender issues on a personal level. My child deserves to be treated with respect. His refusal to use [the child's] preferred name and pronouns is very disrespectful and hurtful." R. 120-13, at 2. Acting on such a report cannot reasonably be construed as giving effect to a discriminatory preference.

mischaracterization, reducing the harms claimed to "taking offense," "disgruntlement," "grumblings," and "mere offense," rather than the harms that the school actually claimed to students, the learning environment, and to the school's mission to treat all students respectfully. Kluge's complaint of a "heckler's veto" sounds in the First Amendment. But the district court dismissed Kluge's First Amendment claims, and he has not appealed that dismissal. R. 70. The district court correctly held that when Kluge was addressing students in the classroom, his speech was not protected by the First Amendment. R. 70, at 13 (noting that Kluge conceded that his address of students in his classroom was part of his official duties as a teacher); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *Mayer*, 474 F.3d at 479 (citing our well-settled precedent that "public-school teachers must hew to the approach prescribed by principals (and others higher up in the chain of authority)"). Title VII provides more protection for an employee's religious speech than the First Amendment but its protection is limited to accommodations that do not work an undue hardship on the employer. *Ryan*, 950 F.2d at 461. *Cf. Mayer*, 474 F.3d at 480 (noting that "the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system"). As we have just held, Kluge's practice resulted in an undue hardship on his employer as a matter of law.

As for "third party grumblings," the case law does not support Kluge in what is essentially a repackaged First Amendment claim of a heckler's veto. For example, in *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001), we considered a claim by Elizabeth Anderson, an employee of a shipping company, U.S.F. Logistics, who wished to use the phrase, "Have a Blessed Day," in correspondence with her co-workers and the company's customers. Although her co-workers did not object, an employee of Microsoft, U.S.F. Logistics' largest customer, received this religious greeting and complained that it was unacceptable and must stop. Her employer directed her to stop using the phrase with customers, and in particular with Microsoft. After her employer declined to identify the particular Microsoft contact who had complained, she continued to use the phrase with Microsoft employees and moved for a preliminary and permanent injunction allowing her to use the phrase in her work. 274 F.3d at 473–74.

The district court denied her motion for a preliminary injunction, finding that she did not have a likelihood of success on the merits because her employer reasonably accommodated her by allowing her to use the phrase with persons who were not offended by it. We affirmed, noting first that Title VII requires only reasonable accommodation, not the satisfaction of an employee's every desire. *Anderson*, 274 F.3d at 475. U.S.F. Logistics was legitimately concerned about its relationship with its customers. The company required only that she cease using the phrase with the objecting customer, and we concluded that her employer reasonably accommodated her. 274 F.3d at 476. Because a Microsoft representative had

complained that the use of the phrase was inappropriate, permitting Anderson to continue to use the phrase would impose her religious views on that customer. We concluded that the evidence therefore suggested that Anderson's religious practice could damage her employer's relationship with Microsoft. 274 F.3d at 477. But even if her practice had not imposed her religious beliefs upon others, the employer was still entitled to restrict it if it impaired the employer's legitimate interests, so long as her belief was reasonably accommodated. 274 F.3d at 477.

The same applies here, albeit in the non-profit business setting of a public school engaged in providing compulsory education to high school students. Brownsburg was entitled to require Kluge to use a form of address that did not offend or injure its students or harm the classroom environment. The school had a legitimate interest in its relationship with its students, who together with their parents, are effectively the school's customers. *See Smiley v. Columbia College Chicago*, 714 F.3d 998, 1002 (7th Cir. 2013) ("It is not unreasonable for [a college] to expect that its instructors will teach classes in a professional manner that does not distress students."). Because Kluge's practice harmed that relationship, and because there was no other way to accommodate Kluge's beliefs without harming the school's mission and philosophy for educating all students, his "third party grumblings" claim fails.[18]

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[18] In making his "third-party grumblings" argument, Kluge relied on cases that have either been reversed or are factually distinguishable. *See Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), vacated by *Parker Seal Co. v. Cummins*, 433 U.S. 903 (1977). The district court's judgment (continued)

in favor of the employer was eventually summarily affirmed by the Sixth Circuit on remand from the Supreme Court. *Cummins v. Parker Seal Co.*, 561 F.2d 658 (6th Cir. 1977). Kluge's lawyers failed to acknowledge that they were relying on a case that had been overturned, and even failed to acknowledge the error in his reply brief after opposing counsel pointed it out in the response brief. Appellee's Response Brief, at 36 n.4. "Lawyers are not entitled to ignore controlling, adverse precedent. We expect (and are entitled to) better performance by members of the bar." *Jackson v. City of Peoria, Illinois*, 825 F.3d 328, 331 (7th Cir. 2016). *See also* Practitioner's Handbook for Appeals, at 159 (available at www.ca7.uscourts.gov). Nor are the Ninth Circuit cases that Kluge cited applicable here. *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978), merely found that the defendant's asserted basis for undue hardship had no factual basis in the record. The court also noted that, "Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship." But this is not a case of grumbling by co-workers; Brownsburg's undue burden is to its mission of educating all students and its philosophy of treating all students with respect and affirmation. The Ninth Circuit repeated this formulation the same day in another case, *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978), stating that, "undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. … An employer or union would have to show, as in *Hardison*, actual imposition on co-workers or disruption of the work routine." In the context of a school, where the requested accommodation primarily affects students, disruption to the learning environment meets the *Hardison* standard. The teachers here were not "grumbling" but, as Dr. Daghe testified, were reporting disruptions to the learning environment because "students are uncomfortable in [Kluge's] class and that they are bringing the conversations that occur in his class to other classrooms and having discussions about the uncomfortableness, whether it was dealing with a transgender student and last names only or whether it was times when last names weren't used or it was times when, you know, kids just want it all to go away and act like everything is normal." R. 112-5, at 7. The teachers similarly reported that children did not know how to address each

(continued)

In sum, the school produced uncontradicted evidence that Kluge's last-names-only practice stigmatized the transgender students and caused them demonstrable emotional harm as reported to the administration by Lee, who personally witnessed it. Kluge was told that students reported feeling disrespected, targeted, isolated, and dehumanized. As Kluge conceded, the school has a legitimate interest in the mental health of its students, and an accommodation is not reasonable, as Dr. Daghe told Kluge, "when it's detrimental to kids." R. 113-4, at 28. Kluge's practice also adversely affected the classroom environment which both transgender and non-transgender students considered tense, awkward and uncomfortable. Dr. Daghe told Kluge, based on reports from students and faculty, that his practice resulted in students being uncertain about how to behave and how to address their transgender classmates. Kluge's practice also disrupted other classrooms when students brought their concerns and discussions about the practice to other teachers in other classrooms. It conflicted with the school's carefully constructed Name Policy that sought to address the special challenges that transgender students face in school, and balanced those concerns with the preferences of the students' parents and healthcare providers. Allowing Kluge to continue in the practice thus placed an undue hardship on Brownsburg's mission to educate all of its students, and its desire to treat all students

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other or how to behave around transgender students and similar students because of Kluge's practice. R. 120-5, at 9. The teachers reports of harm to students as well as classroom and school disruption are a far cry from "third-party grumblings."

with respect and affirmation for their identity in the service of that mission.

2.

Brownsburg claimed a second undue hardship, namely, that Kluge's practice unreasonably exposed the school to liability under Title IX. Close in time to Brownsburg's adoption of the Name Policy, our court issued its decision in *Whitaker*. In *Whitaker*, we recognized that transgender students may bring a sex discrimination claim under Title IX based on a theory of sex-stereotyping. 858 F.3d at 1047–50. We have already concluded that the district court correctly ordered summary judgment in favor of Brownsburg because the uncontested evidence demonstrated that Kluge's last-names-only practice harmed students and disrupted the educational environment, which constituted an undue hardship on Brownsburg's conduct of its business. Thus, we decline to reach the issue of whether Kluge's accommodation created an additional undue hardship by exposing the school to liability under Title IX. Our decision to decline to address liability under Title IX should not be interpreted as agreement with the dissent's analysis of this issue. It is simply unnecessary to reach this issue in this case.

C.

Kluge also brought a claim for retaliation against Brownsburg, alleging that Brownsburg "retaliated against Mr. Kluge for engaging in protected conduct, when it agreed in writing to the accommodation Mr. Kluge requested for his religious beliefs, then removed the accommodation—without any showing of undue hardship—and told Mr. Kluge he could

use transgender names and pronouns, resign, or be terminated." R. 15, at 17–18. Kluge sought to prove his retaliation claim using the burden-shifting method outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In order make out a *prima face* case for retaliation under the burden-shifting method, Kluge must demonstrate that: (1) he engaged in statutorily protected activity; (2) he suffered a materially adverse action; and (3) there is a but-for causal connection between the two events. *Robertson v. Dep't of Health Servs.*, 949 F.3d 371, 378 (7th Cir. 2020); *Contreras v. Suncast Corp.*, 237 F.3d 756, 765 (7th Cir. 2001). The causation standard in retaliation claims is more stringent than the standard in discrimination claims. *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 828 n.1 (7th Cir. 2014). Following *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362 (2013), "the protected activity of an employee making a retaliation claim must have been 'a but-for cause of the alleged adverse action by the employer.'" In contrast, a "lessened causation standard" applies in Title VII discrimination cases. *Nassar*, 570 U.S. at 348. "The requirement of but-for causation in retaliation claims does not mean that the protected activity must have been the only cause of the adverse action. Rather, it means that the adverse action would not have happened without the activity." *Nassar*, 570 U.S. at 346–47. *See also Robertson*, 949 F.3d at 378 (describing the causation requirement as producing adequate evidence to establish that "there existed a but-for causal connection" between the protected activity and the adverse action). Once the *prima facie* case of retaliation is established:

> an employer may produce evidence which, if taken as true, would permit the conclusion that

> it had a legitimate non-discriminatory reason for taking the adverse employment action. … If the employer meets this burden, the plaintiff, to avoid summary judgment, then must produce evidence that would permit a trier of fact to establish, by a preponderance of the evidence, that the legitimate reasons offered by the employer were not its true reasons but were a pretext for discrimination.

Robertson 949 F.3d at 378. *See also Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 564 (7th Cir. 2016) (where the employer demonstrates that the employee would have been fired absent his protected activity, then the alleged retaliatory motive, even if unchallenged, was not a but-for cause of the employee's harm).

In the district court, Brownsburg sought summary judgment on this claim, contending that: (1) Kluge could not make out a *prima facie* case of retaliation because no reasonable jury could conclude on this record that there was a causal connection between the protected activity of seeking a religious accommodation at the start of the school year, and the adverse employment action which occurred at the end of the school year after it became apparent that the accommodation was not working; and (2) even if Kluge was able to establish a *prima facie* case, Brownsburg had articulated legitimate, non-discriminatory reasons for its actions, and Kluge presented no evidence from which a reasonable jury could infer pretext.

Kluge responded to Brownsburg's motion by asserting that he had engaged in statutorily protected activity by

identifying a sincerely held religious belief that he should identify students by their "birth names, instead of their 'new' transgender names," by asking for an accommodation in July 2017, and by asking in February 2018 for the school to confirm that his accommodation was still valid. R. 153, at 27. For an adverse employment action, he asserted that the school withdrew the accommodation, demanded his compliance with the Name Policy or his resignation, and then coerced him into submitting a conditional resignation.[19] In his district court briefing, Kluge then flatly stated, "there is a causal connection between the protected conduct and the adverse employment action." R. 153, at 27. The remainder of his argument on retaliation was simply a recitation of the same facts that he alleged in support of his discrimination claim. Namely, he asserted that the accommodation was implemented in July 2017, the school indicated its intent to withdraw it in the January 2018 "Transgender Questions" document, he then asked in February for the school to confirm that his accommodation agreement had no end date, and the school indicated that it did intend to require compliance with the Name Policy from all faculty beginning in the next academic year as explained in the "Transgender Questions" document. Kluge then asserted that Gordon told him that he could submit a conditional resignation, that he did so in reliance of her promise that it would be conditional, that he attempted to rescind the resignation on May 28, 2018, but the school would not allow him to rescind

[19] In the district court, Brownsburg did not contest for summary judgment purposes that Kluge could produce evidence in support of protected activity and an adverse action, focusing instead on the causation element of the *prima facie* case, and the lack of any evidence of pretext.

and instead terminated his employment.[20] Kluge did not address Brownsburg's stated nondiscriminatory reason for his termination, that his refusal to comply with the Name Policy was detrimental to students and to the learning environment. He made no attempt to show that this reason was a pretext to cover religious discrimination.

As we noted above, the district court found that Kluge waived his retaliation argument at summary judgment with meager briefing, simply reciting his version of the facts without discussing how those facts meet the legal requirements of a retaliation claim. The court also noted that Kluge failed to address Brownsburg's argument that there is no evidence in the record from which a reasonable fact finder could infer that its nondiscriminatory explanation for its action was a pretext. The court thus found that Kluge had waived his retaliation

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[20] The district court found that the record contained no factual basis for Kluge's claim that Gordon led him to believe that he could submit a conditional resignation that could later be withdrawn. Nor was there any factual basis supporting his contention that he did in fact submit a conditional resignation, according to the district court. On appeal, Kluge cites no evidence contradicting those findings. As the district court pointed out, Gordon told Kluge only that she would respect an employee's wish not to disclose his resignation to colleagues until the end of the school year. She never told him that he could withdraw a properly submitted resignation, and in fact it was not possible to withdraw a resignation made to the Superintendent or his agent (Gordon, in this instance). R. 112-4, at 11–12; R. 120-8; R. 120-9. Kluge himself recorded the meeting where he asserts that Gordon made the offer of a conditional resignation, and the transcript of that meeting does not support his claim. R. 112-4, at 20–55. Nor is there any language in his actual resignation suggesting that it was conditional. The issue of the purported breach of a promise to allow a conditional resignation has no merit and we will not give it further consideration.

claim. As an alternate basis for granting judgment in favor of the defendant, the court also addressed the merits, noting that Kluge failed to present any evidence from which a reasonable fact finder could conclude that a causal connection exists between Kluge's protected activity and his resignation, any evidence of pretext, or any evidence that Brownsburg's action was motivated by discriminatory animus. The court therefore granted summary judgment in favor of the school on the retaliation claim as well.

Although Kluge's briefing on retaliation in the district court was thin, we find that the argument was not waived and proceed to the merits. Kluge's claim fails on the causation element. That is, he failed to produce evidence that established a but-for causal link between protected activity and the adverse action, and so failed to make out a *prima facie* case of retaliation.[21] Indeed, on appeal, Kluge relies on outdated precedent to assert that, to establish a causal link, he must show

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[21] In his reply brief on appeal, Kluge suggests for the first time that he meets the causation element with evidence that, in the July 27, 2017 meeting, Dr. Snapp became "very angry" with him the first time that Kluge mentioned his religious objection to using the transgender students' PowerSchool first names. Appellant's Reply Brief, at 20; R. 120-3, at 19. He also asserts that Dr. Snapp engaged in a theological debate with him, and told him that his beliefs were wrong. *Id*. Kluge waived this argument by not raising it in the district court, and by not raising it on appeal until his reply brief. *Accident Fund Ins. Co. of America v. Custom Mech. Constr., Inc.*, 49 F.4th 1100, 1108 (7th Cir. 2022) (arguments raised for the first time in a reply brief are waived); *White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021) (same); *DM Trans, LLC v. Scott*, 38 F.4th 608, 619 (7th Cir. 2022) (issues and arguments raised for the first time on appeal are forfeited, as are arguments that are not sufficiently developed).

only "that the protected activity and the adverse action were not wholly unrelated." *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1014 (7th Cir. 1997). But as we explained above, after the Supreme Court's decision in *Nassar*, he must demonstrate that the protected activity of an employee making a retaliation claim was a but-for cause of the alleged adverse action by the employer. Kluge's evidence falls short of meeting this standard. He says only that he engaged in protected activity and that when he refused to either comply with the policy or resign, "his supervisors subjected him to a [sic] 'a pattern of criticism and animosity' and finally constructively discharged him." Appellant's Opening Brief, at 42 (quoting *Hunt-Golliday*, 104 F.3d at 1014). He cited no record evidence in the district court in support of this conclusory claim that anyone subjected him to a "pattern of criticism and animosity," failed to cite any such evidence on appeal until his reply brief, and makes no attempt to connect his protected activity to his resignation. Although he cites evidence of protected activity and an adverse action (both of which Brownsburg conceded for the purposes of summary judgment), he cites nothing supporting but-for causation.

Instead, the undisputed evidence demonstrates that Brownsburg worked with Kluge to create a workable accommodation during the 2017-2018 school year. Only after the last-names-only practice proved harmful to students and the learning environment did the school withdraw it, and even then Brownsburg allowed Kluge to continue the practice through the end of the school year. Further, Brownsburg did not disturb the additional accommodation relieving Kluge of

the task of handing out gender-specific uniforms. The length of time between the protected activity (of Kluge requesting a religious accommodation) and the adverse employment action, together with the school's attempt to find a workable solution defeat any inference that Brownsburg asked Kluge to resign in retaliation for his protected activity.

Even if we assume that Kluge cleared the hurdle of the *prima facie* case, he makes no effort to demonstrate any material issue of fact on the question of pretext:

> "Pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is [a] 'lie, specifically a phony reason for some action.'" *Argyropoulos*, 539 F.3d at 736 (quoting *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 737 (7th Cir. 2006)). We have repeatedly emphasized that when "assessing a plaintiff's claim that an employer's explanation is pretextual, we do not ... second-guess[ ] an employer's facially legitimate business decisions." *Id*. (internal quotation marks omitted). An employer's reasons for firing an employee can be "foolish or trivial or even baseless,'' as long as they are "honestly believed." *Culver*, 416 F.3d at 547 (quoting *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997)).

Lord, 839 F.3d at 564. Instead of producing evidence of pretext, Kluge simply ties the legitimacy of his retaliation claim to the validity of his discrimination claim. That is, he asserts that he need not present evidence of pretext because Brownsburg

never presented a legitimate, nondiscriminatory basis for terminating his employment, and that his "whole argument was that the district had *no legitimate basis* for revoking his accommodation and forcing him to resign." Appellant's Opening Brief, at 40. In so arguing, Kluge is essentially conceding that he has never provided evidence of pretext, apparently resting entirely on his claim that Brownsburg never produced a legitimate, nondiscriminatory reason for his termination. That was a risky strategy.

As we have just concluded, Brownsburg did in fact demonstrate legitimate reasons for withdrawing the accommodation. Brownsburg was within its rights as an employer facing an undue hardship to withdraw the requested accommodation when it became apparent that it was not working in practice and was causing harm to students and to the educational environment. That was a legitimate, nondiscriminatory reason for the termination. In the absence of any evidence that it was a pretext for religious discrimination—i.e., that it was a lie or a phony reason—we will not second-guess Brownsburg's business decision. *Lord*, 839 F.3d at 564. *See also Boss v. Castro*, 816 F.3d 910, 917 (7th Cir. 2016) ("[W]hen an employer articulates a plausible, legal reason for its action, it is not our province to decide whether that reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for its action;" the "federal courts are not a super-personnel department that second-guesses facially legitimate employer policies."). "We have said time and again (in more than one hundred reported opinions, by our count) that we are not a super-personnel department that will substitute our criteria for an employer's for hiring, promoting, or disciplining employees."

Joll v. Valparaiso Cmty. Sch., 953 F.3d 923, 933 (7th Cir. 2020). *See also Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("To successfully challenge the honesty of the company's reasons [the plaintiff] must specifically rebut those reasons. But an opportunity for rebuttal is not an invitation to criticize the employer's evaluation process or simply to question its conclusion about the quality of an employee's performance. Rather, rebuttal must include facts tending to show that the employer's reasons for some negative job action are false, thereby implying (if not actually showing) that the real reason is illegal discrimination. In other words, arguing about the accuracy of the employer's assessment is a distraction … because the question is not whether the employer's reasons for a decision are '*right* but whether the employer's description of its reasons is *honest*.'"). Here, the employer conclusively demonstrated that it withdrew the accommodation solely because it worked an undue hardship on the school's business of educating all students. There is no hint in this record that this explanation was false and that the real reason for the termination was discrimination.

Interestingly, the dissent acknowledges that Kluge's failure to demonstrate that Brownsburg's legitimate, nondiscriminatory reason for his termination was a pretext dooms his retaliation claim. Yet even though Kluge himself tied the success of his two claims together, the dissent does not acknowledge that Kluge's failure to rebut the school's uncontested, nondiscriminatory explanation for withdrawing the accommodation is also fatal to his discrimination claim.

Brownsburg began developing the Name Policy before it ever knew that Kluge would have a religious objection to the

directive. In the face of his objection, the school made several efforts to accommodate his beliefs, meeting with him multiple times, agreeing to allow his use of last names only, and offering to have another person hand out gender-specific orchestra uniforms (an accommodation that Brownsburg never withdrew). The school's decision to allow students to change their names and gender markers in the PowerSchool database only with the approval of a parent and a healthcare provider assuaged the religious concerns of three of the four teachers lodging a religious objection. That the school decided to withdraw the last-names-only accommodation only when it was apparent that it was harming students and disrupting the learning environment was to the school's credit. *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989) ("The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) (same). For all of these reasons, we affirm the grant of summary judgment in favor of Brownsburg on the retaliation claim.

III.

In sum, we affirm summary judgment against Kluge on his discrimination claim. Brownsburg has demonstrated as a matter of law that the requested accommodation worked an undue burden on the school's educational mission by harming transgender students and negatively impacting the learning environment for transgender students, for other students in Kluge's classes and in the school generally, and for faculty. Title VII does not require that employers accommodate religious practices that work an undue hardship on the conduct

of the employer's business; that sometimes means that a religious employee's practice cannot be accommodated. Moreover, Kluge's retaliation claim fails as a matter of law because he failed to produce any evidence supporting the causation element of the *prima facie* case, or any evidence that the school's explanation for its actions was a pretext for religious discrimination.

AFFIRMED.

BRENNAN, *Circuit Judge*, concurring in part and dissenting in part.

Brownsburg Community School Corporation required music teacher John Kluge to use the chosen first names and pronouns of transgender students. Kluge objected on religious grounds, and a gender-neutral accommodation was arrived at: He would address his students by their last names only. The School District received some complaints about this practice, so it revoked the accommodation and told Kluge he could comply, resign, or be terminated. He tendered his resignation.

Kluge sued the School District under Title VII for failure to reasonably accommodate his religious beliefs and for retaliation against his accommodation request. The majority opinion affirms summary judgment for the School District on both claims. On Kluge's retaliation claim, I disagree with my colleagues' conclusion as to causation but concur in the judgment for the School District. I respectfully dissent on the religious accommodation claim.

This case tests the limits of the Supreme Court's atextual but controlling interpretation of "undue hardship" in Title VII's religious accommodation provision as "more than a *de minimis* cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); 42 U.S.C. § 2000e(j). Do complaints of offense constitute more than a *de minimis* cost? Specifically, is being offended by an employee's religious practice enough to discharge the employer's duty to reasonably accommodate the employee's religious practice? The majority opinion answers in the affirmative. Under its reasoning, Title VII provides no protections for religious conscientious objectors who in good faith try to accommodate their employers' dictates. This court

has not ruled on whether taking offense can constitute more than a *de minimis* cost, so we should tread carefully.

I would reverse the district court in part and grant partial summary judgment for Kluge that his religious beliefs are sincerely held and that he has established a prima facie case for religious discrimination. Then Kluge's religious accommodation claim comes down to a fact-intensive inquiry: Did the School District demonstrate that Kluge's gender-neutral accommodation of calling all students by only their last names causes undue hardship—that is, more than a *de minimis* cost? The majority opinion says "yes," but it sidesteps Kluge's countervailing evidence, fails to construe the record in his favor, and overlooks credibility issues on both sides, which are reserved for resolution by the factfinder.

Courts uniformly review context-specific evidence to evaluate whether a religious accommodation in fact imposes an undue hardship. But without supporting authority, my colleagues hold that the undue hardship inquiry looks only to evidence within the employer's knowledge at the time of the adverse employment decision. The majority opinion thus resolves this case based on the School District's receipt of some allegations that the accommodation did not work and caused tension and discomfort. It deems irrelevant the testimony of Kluge, three students, and another teacher. Considering the entire record, there is a genuine issue of material fact on undue hardship, which we should remand for trial.

I. Factual Background

The majority opinion downplays certain record evidence that in my view creates a genuine issue of material fact on undue hardship. This includes evidence about the School

District's Name Policy and Kluge's last-names-only accommodation; complaints about that accommodation; countervailing evidence about Kluge's accommodation as practiced in his classroom; the School District's revocation of the accommodation; and Kluge tendering his resignation.

A. Name Policy & Accommodation

John Kluge is a Christian and a leader in his church. From 2014 to 2018, he taught orchestra at Brownsburg High School, part of the Brownsburg Community School Corporation (School District), west of Indianapolis. But he was not just any orchestra teacher; many students and former students said he was a great one. R. 52-5, at 2; R. 52-4, at 2; R. 120-18, at 11, 13.

In May 2017, discussions surrounding the needs of transgender students led the School District to adopt the Name Policy. R. 120-1, at 3–4. Kluge believes that based upon his religion, he cannot affirm the transgender identity of his students by calling them by their chosen names. R. 113-1, at 6–9. On July 27, 2017, Kluge objected to the Name Policy based on his religious convictions, and Principal Daghe and Superintendent Snapp gave Kluge three choices: comply, resign, or be suspended pending termination. R. 15-3, at 3; R. 120-3, at 14. At this meeting, Kluge says Snapp got "very angry," explained why Kluge's beliefs were "wrong," and argued that his "beliefs aren't what's in the Bible." R. 120-3, at 19. Kluge responded with scripture that supported his beliefs. To the contrary, Snapp recalled that he had a "cordial conversation" on their respective religious beliefs. R. 113-6, at 6. In

the end, Kluge refused to comply, and Superintendent Snapp gave him the weekend to consider his options. R. 120-3, at 15.

On Monday July 31, 2017, Kluge met with Snapp and Human Resources Director Gordon. *Id.* at 17. Gordon presented Kluge with a form to indicate whether he would comply with the Name Policy. R. 15-1, at 1. Kluge proposed a compromise that he be allowed to refer to students by their last names only, "like a sports coach," and the school administrators agreed. R. 120-3, at 17.

B. Complaints

During the 2017–2018 school year—the relevant time frame for evaluating undue hardship—Principal Daghe "first learned of concerns with Mr. Kluge and how he was addressing students in class via an email from Craig Lee … on August 29, 2017." R. 120-2, at 4. Lee served as the faculty advisor and host for the Equality Alliance, a student club that met weekly "to discuss issues that impact the LGBTQ community." R. 120-14, at 6.

Staff. In his email, Lee referenced a teacher who refused to call a transgender student by their new name, but he did not mention Kluge. R. 120-15. Still, Principal Daghe attested he believed and confirmed that the email referred to Kluge. R. 120-2, at 4. Among other things, Lee stated, "[T]here is confusion amongst some teachers and students that I think needs clarification and perhaps a teacher or two that needs to know that it is not ok to disobey the powerschool [sic] rule." R. 120-15. Lee said he was "not totally sure" of the best next step and that he was "very biased" on the topic. *Id*. Lee testified separately that several students in Equality Alliance meetings

found Kluge's last-names-only practice insulting and disrespectful. R. 58-2, at 2.

Assistant Superintendent Jessup also recounted visiting an Equality Alliance meeting where she heard four or five students complain about a teacher using last names only. R. 120-1, at 4. In her view, the other 35 or so students in attendance appeared to agree with the complaints.[1] *Id.* Again, while the students did not identify Kluge by name, "it was certainly implied that he was the teacher in question." *Id.* She had no doubt the teacher was Kluge because he was the only staff member who had been permitted the last-names-only accommodation. *Id.* Deposition testimony also revealed that some teachers had complained about Kluge's accommodation. R. 120-14, at 16–17; R. 113-5, at 8–9; *see also* R. 113-4, at 9.

Students. Two transgender students in Kluge's orchestra class during the 2017–2018 school year, Aidyn Sucec and Sam Willis, submitted declarations. The majority opinion addresses them at length, so I highlight only a few points. Aidyn said "Kluge's behavior was noticeable to other students in the class." R. 22-3, at 4. Aidyn recalled, "At one point, my stand partner asked me why Mr. Kluge wouldn't just say my name.

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[1] The record does not reflect the total number of transgender students at Brownsburg High School in school year 2017–2018. The evidence shows three transgender students in Kluge's classes: Aidyn Sucec, Sam Willis, and an unnamed third student. R. 22-3; R. 58-1; R. 52-3 at 3. A student in Kluge's orchestra class, Lauren Bohrer, said the class averaged about 40 students. R. 52-3 at 2. According to the Indiana Department of Education Data Reports Archive, Attendance & Enrollment, in the 2017–2018 school year, Brownsburg High School had 2,646 students. IND. DEP'T OF EDUC., *School Enrollment by Grade Level*, https://www.in.gov/doe/it/data-center-and-reports/data-reports-archive/.

I felt forced to tell him that it was because I'm transgender." *Id.* Similarly, Sam opined that "Kluge's use of last names in class made the classroom environment very awkward." R. 58-1, at 3. Sam said "[m]ost of the students knew why Mr. Kluge had switched to using last names, which contributed to the awkwardness and [his] sense that [he] was being targeted because of [his] transgender identity." *Id.* at 3–4.

Parents. In fall 2017, the high school received two complaints about Kluge. The first was in a letter from the parents of a transgender student, and the second in an email exchange between a Brownsburg school counselor and a transgender student's parent. R. 120-12; R. 120-13. In the email exchange, the counselor advised that the administration "require[d] that students role play" at home "to practice situations in which" they are called by a name other than the one they prefer. R. 120-13, at 6. The counselor continued, "As a school, we will certainly do our best to get the name/pronouns right, but we are all human and there may [be] instances where we don't get it quite right. In those moments, we do not want [the student] to be offended, feel disrespected, or feel discouraged." *Id.* at 6–7.

C. Countervailing Evidence

These complaints are just one side of the story, however. Three of Kluge's students and a fellow teacher, all of whom observed his classes in the 2017–2018 school year, attested that the last-names-only practice did not adversely affect the classroom environment. This evidence, along with Kluge's

testimony, create a genuine issue of material fact on undue hardship.

Lauren Bohrer Declaration. Lauren Bohrer and Aidyn were students in Kluge's orchestra class. R. 52-3, at 2. Bohrer attested that she "did not hear Mr. Kluge ever call students by gendered prefixes." *Id.* She explained that orchestra is a larger class, so individual interactions were few. "It was rare that Mr. Kluge had occasion to call on any individual student directly unless they raised their hand to ask a question." *Id.* Bohrer remembered that after the first few weeks of class, Kluge stopped calling out last names to take attendance and instead took attendance by noting students that were absent.

According to Bohrer, "Mr. Kluge never once brought up the use of only last names or made known to our class his reason for using only last names. I did not find it odd and Mr. Kluge did not seem uncomfortable addressing us in this fashion. I never suspected that it was anything other than the easiest way for him to address us as our last names are listed first in PowerSchool." *Id.* at 3. Bohrer also said she had a transgender stand partner—not Aidyn—and that she "never saw Mr. Kluge treat [her] stand-mate any differently than cisgender students." *Id.* "[She] never saw or heard about any animosity between them." *Id.* "[Her] stand mate never told [her] that they disliked Mr. Kluge's behavior or that Mr. Kluge had been unfair to them." *Id.*

Bohrer did not know Aidyn personally, but she was hesitant to engage or interact with him "due to [his] reputation for confrontational and aggressive behavior toward people who did not strictly conform to [his] mindset." *Id.* In fall semester 2018—after Kluge's termination—Bohrer alleges that she was called to the principal's office based on Aidyn's false

accusations of her calling him a "f----t." *Id.* at 4. Per Bohrer, the principal conceded that it was unlikely that Aidyn's accusations were true. *Id.* at 5.

Kennedy Roberts Declaration. Kennedy Roberts, another orchestra student, said Kluge was a "favorite teacher[]." R. 52-4, at 1. Roberts recalled that "the energy [Kluge] put into conducting [their] orchestra and creating a fun classroom environment is incomparable to any teacher [he'd] had." *Id.* at 1. Roberts said, "During the school year, [Kluge] always called everyone by their last names, which I never knew the reason as to why, but I never really thought anything of it. It's just what he did." *Id.* at 2. Roberts corroborated Bohrer's testimony that Kluge called student last names for attendance "at first, maybe 5-8 times over the year." *Id.* From what Roberts could tell, Kluge "treated everyone this way, no one was singled out in front of the class or intentionally treated disrespectfully." *Id.*

Mary Jacobson Declaration. A third student, Mary Jacobson, was in both Kluge's Music Theory and Advanced Orchestra classes. R. 52-5, at 2. Jacobson attested that, between these two classes, "[she] never heard Mr. Kluge refer to students by their first name, or by any gendered prefix or pronouns." *Id.* at 2. She "never heard Mr. Kluge discuss his use of last names with any student or give any explanation for it. His use of last names was not unnatural sounding. I never heard any students question him about it, and I never brought up the topic to him myself." *Id.* at 2. And she "did not see or hear Mr. Kluge in conflict with any students nor did [she] witness any students receiving different treatment than the rest of the class received." *Id.* She also added that Kluge was a

"wonderful teacher" whose "kindness and fairness" made for an "open and honest classroom demeanor." *Id.* at 2–3.

Natalie Gain Declaration. In addition to these student declarations, Natalie Gain, a teacher who led private music lessons at the school during the day, submitted a declaration stating that she "never heard [Kluge] use gendered language in the classroom." R. 52-2, at 3. "[She] only heard him use last names with the students" and "never heard any of the students discussing the [sic] Mr. Kluge's use of last names, or any references to his agreement with the administration." *Id.* "[A]s far as [she] could tell, Mr. Kluge's accommodation was not common knowledge … ." *Id.* She also said Kluge "had mostly used last names … the previous school year anyway, with 'Mr./Ms.' for students to encourage a respectful teaching environment, like college classes." *Id.* at 2.

Kluge's Testimony. Kluge also attested there were no issues with the last-names-only accommodation. He said that in the 2017 fall semester leading up to a meeting with Principal Daghe on December 13, 2017, "there were no student protests, there were no written complaints about [his] use of last names for all students, there were no classroom disturbances, and there were no cancelled classes." R. 113-2, at 4. Kluge said he did not witness tension in the students and faculty. R. 120-3, at 23. He did not see animosity from the students toward him. *Id.* Instead, Kluge averred that "the accommodation worked as intended and [his] students excelled," some winning awards for their performances during the 2017–2018 school year. R. 113-2, at 4. He recounted, "We performed better than ever in our orchestra competitions. Students' grades on their AP [Music Theory] exam were great. There was a lot of participation in the extracurricular programs, a lot of students

performing in the voluntary extra stuff that you can do in orchestra." R. 120-3, at 23–24.

D. Revocation of Kluge's Accommodation

On January 22, 2018, Assistant Superintendent Jessup presented faculty with a document entitled "Transgender Questions" accompanied by a presentation titled "Transgender Considerations." Both stated that the last-names-only accommodation would not be permitted the following school year. R. 15-4; R. 120-20. The majority opinion refers to excerpts from only the Transgender Questions document. Other portions of that document include:

> **Where is the line drawn on "pleasing" students and their beliefs?** It is our job to make all students feel welcome and accepted in the public school environment.
>
> …
>
> **How do we deal with a student exploding in anger with being called the wrong name or gender?** If it's the fifth time this week the staff member has messed up the pronoun, then the staff member needs to get on board. However, if the student explodes on one small mistake, we

> would address the student behavior as we normally would.

R. 15-4, at 9–10.

The Transgender Considerations presentation stated in relevant part:

> ***Considerations***
>
> …
>
> - Replace gender specific language with inclusive alternatives—instead of "ladies and gentleman" [sic] or "boys and girls" try using "everyone," "people" or "folks"
> - If you are creating a form for students, consider whether you really need to have a question about sex or gender; if so, provide gender options
> - Try not to make assumptions about the genders of students … .
>
> …
>
> - Avoid using boy/girl methods to divide students—seating charts, lining up, groups, etc.
> - If possible, provide gender neutral uniforms
>
> …
>
> ***Other Guidance***
>
> - Creating a safe and supportive environment for all students is important
>   - Be respectful and nonjudgmental; do not show skepticism and/or disapproval

R. 120-20, at 5–7.

On February 6, 2018, Kluge, Principal Daghe, and Human Resources Director Gordon met, and the school administrators confirmed that Kluge would not be allowed his

accommodation in the next school year. R. 113-2, at 6. In this meeting, the three discussed how Kluge might announce his departure if he resigned. Gordon said other staff had left and not told anybody—without "any fanfare." R. 113-4, at 39. She suggested that Kluge did not have to talk about his retirement with staff or students. But Gordon qualified, "that's kind of up to you." *Id.*

E. Kluge Tenders Resignation

Kluge submitted his resignation letter on April 30, 2018, and continued to teach for the rest of the school year. In May, he presided over the school's orchestra awards ceremony, where he referred to all students by their PowerSchool first and last name. R. 120-3, at 32. On May 25, 2018, the School District locked Kluge out of its buildings, effectuating his resignation. R. 15-3, at 1; R. 113-2, at 7. Two weeks later at a School District Board meeting, Kluge asked the Board of Trustees not to accept his resignation and requested that he be reinstated. R. 113-2, at 7; R. 120-3, at 29–30; R. 120-18, at 10. The Board heard comments from Kluge and the community—some in support of termination and others against—and ultimately accepted Kluge's resignation, ending his employment. R. 113-2, at 7; R. 120-18, at 9–13. Both Aidyn and Sam offered comments at the Board meeting. R. 120-18, at 11.

After the meeting, Jeff Gracey, a parent of a School District student, recalled that Kluge addressed the Board with passion and wept when he found out that he would not retain his position. R. 52-6, at 3. Gracey opined that Aidyn's comments were "confrontational," and that he "seemed well coached" and "enthused about the prospect of Mr. Kluge losing his job." *Id.* Gracey said that Aidyn's comments before the Board

"seemed like a personal vendetta or a means to force others to use their voices to reinforce their ideology." *Id.* at 4.

II. Legal Framework

Kluge's religious accommodation and retaliation claims and the record evidence are considered under the familiar law of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. Still, close review of the law on failure-to-accommodate claims is critical in this case because some of it is in flux and the law that is unclear bears directly upon the claims we decide.

A. Title VII

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … religion." 42 U.S.C. § 2000e-2(a)(1). The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

To make a prima facie case based on an employer's failure to provide a religious accommodation, a plaintiff must show: (1) an observance or practice that is religious in nature; (2) that conflicts with an employment requirement; and (3) that the need for a religious accommodation was a motivating factor in the adverse employment decision or other discriminatory treatment. *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997) (citations omitted); *EEOC v.*

Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772–73 (2015) (modifying the former third factor—the employer's actual notice of the employee's need for a religious accommodation). In addition, the employee must show his religious belief is sincerely held. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978)).

Whether an accommodation is reasonable is necessarily linked to the question of undue hardship: "Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to make a reasonable accommodation of the religious practice or to show that any reasonable accommodation would result in undue hardship." *Porter v. City of Chicago*, 700 F.3d 944, 951 (7th Cir. 2012) (citing *Ilona*, 108 F.3d at 1575–76). "Reasonableness is assessed in context, of course, and this evaluation will turn in part on whether or not the employer can *in fact* continue to function absent undue hardship" with the accommodation in place. *Adeyeye*, 721 F.3d at 455 (emphasis added). Undue hardship is an objective inquiry that "will depend on close attention to the specific circumstances of the job" and the nature of the accommodation. *Id.*

B. *Hardison*'s *De Minimis* Cost Test

The Supreme Court interpreted "undue hardship" to mean "more than a *de minimis* cost" in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). *Hardison* involved a Sabbatarian employee who refused to work on Saturdays on religious grounds. *Id.* at 66. In holding that accommodating Hardison's schedule would impose more than a *de minimis* cost, the Court observed that replacing him with other employees "would involve costs to TWA, either in the form of

lost efficiency in other jobs or higher wages," and require TWA to "carve out a special exception to its seniority system" of giving senior employees priority in choosing their schedule. *Id.* at 83–84. Accordingly, this court has observed that *Hardison* is most instructive when there is an existing system that attempts to accommodate the religious and non-religious preferences of employes—such as by a seniority system or collective bargaining agreement. *Adeyeye*, 721 F.3d at 456; *see also EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 315 (4th Cir. 2008) (discussing pre-existing company policies to accommodate employees' work scheduling preferences). *Hardison*'s core is that "Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers." *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021).

Since *Hardison*, the Supreme Court has reaffirmed the *de minimis* cost test in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986). In that case, the Court also clarified that the employer's duty to accommodate under § 2000e(j) ends "where the employer has already reasonably accommodated the employee's religious needs." *Id.* at 68. The Court, in its only other Title VII religious accommodation case post-*Hardison*, did not mention the *de minimis* cost test because the Court remanded for further proceedings under its holding that the need for a religious accommodation need only be a motivating factor for the employer's adverse employment decision. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772–73, 775 (2015). The case apparently settled on remand.

So the *de minimis* cost test remains controlling law absent a contrary indication from the Supreme Court. *See Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016). But remember, *Hardison*'s test is

"*more* than a *de minimis* cost," and the Court has not defined how much more. 432 U.S. at 84 (emphasis added). The Court reaffirmed in *Abercrombie* that "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices." 575 U.S at 775. "Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual ... because of such individual's' 'religious observance and practice.'" *Id.* (citing §§ 2000e-2(a)(1), 2000e(j)). "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.* So the Court apparently reads the *de minimis* cost test to have some substance.

Since *Hardison*, the *de minimis* cost test has come under criticism.[2] Most importantly, the Supreme Court has recently

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[2] *E.g.*, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, Thomas, and Gorsuch, Js., concurring) ("*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'"); *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1229 (2021) (Gorsuch and Alito, JJ., dissenting) (referring to *Hardison* as a "mistake … of the Court's own making" and observing "it is past time for the Court to correct it"); *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 826–29 (6th Cir. 2020) (Thapar, J., concurring) (discussing how the *Hardison* test is contrary to ordinary, contemporary meaning and incongruent with the treatment of "undue hardship" in other federal statutory contexts); Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107, 122 (2015) ("In relying on the de minimis standard, the Court essentially held that little more than virtual identical treatment of religious employees was required."); Matthew P. Mooney, *Between a Stone and a Hard Place: How the Hajj Can Restore the Spirit of Reasonable Accommodation to Title VII*, Note, 62 Duke L.J. 1029, 1040 (2013) ("Thus, the Court was left to fill in the gaps, which it did by severely limiting employers' duty to accommodate their employees.").

granted certiorari in *Groff v. DeJoy*, 143 S. Ct. 646 (2023) (mem.). That case presents a classic Sabbatarian scenario, as in *Hardison*. The Third Circuit held that the employee's requested accommodation to be exempted from work on Sunday caused more than a *de minimis* cost to the employer. *See Groff v. DeJoy*, 35 F.4th 162, 175 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 646 (2023). The questions presented in *Groff* on which the Court has granted certiorari are squarely relevant here: "1. Whether this Court should disapprove the more-than-de-minimis-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)[;] 2. Whether an employer may demonstrate 'undue hardship on the conduct of the employer's business' under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself." Petition for Writ of Certiorari, *Groff*, No. 22-174, at i; Questions Presented Report, *Groff*, No. 22-174.

C. "Undue Hardship" & Offense

1. Statutory Text

The statutory text of 42 U.S.C. § 2000e(j) provides little help in answering whether offense constitutes undue hardship. At enactment, "hardship" generally meant "'adversity,' 'suffering' or 'a thing hard to bear.'" *Small*, 952 F.3d at 826–827 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 601 (1969); BLACK'S LAW DICTIONARY 646 (5th ed. 1979); WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 826 (2d ed. 1975)). The ordinary meaning of "hardship" does not exclude non-economic

difficulties such as hurt feelings, albeit connoting a degree of severity given the adjective "undue."

Hardison's controlling test uses the word "cost," 432 U.S. at 84, which implies an economic or at least quantifiable loss to the employer. As mentioned above, *Hardison* was focused on "costs to [the employer]" by scheduling around the Sabbatarian employee's schedule—"either in the form of lost efficiency in other jobs or higher wages." *Id.* at 84. So, from the outset, the Supreme Court appears to have set an operational or economic gloss on "hardship."

2. EEOC Regulation

While neither the statute's text nor *Hardison* provide answers to whether offense is enough, the Equal Employment Opportunity Commission has issued informative regulations and guidance. For Title VII, the EEOC may issue procedural but not substantive regulations to carry out the statutory provisions. 42 U.S.C. § 2000e-12(a); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002) (citations omitted). Nonetheless, the regulations are persuasive (albeit nonbinding) guidance, meriting lesser deference under *Skidmore* in light of the "specialized experience and broader investigations and information" available to the agency. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360–61 (2013); *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (explaining that the EEOC's interpretive statements are entitled to a "measure of respect" (quoting *Alaska Dept. of Env't Conservation v. EPA*, 540 U.S. 461, 487–88 (2004))).

In 29 C.F.R. § 1605.2(e), the EEOC states that it will determine "undue hardship" as "more than a *de minimis* cost" in

accordance with *Hardison*. In making the "undue hardship" determination, the EEOC gives "due regard [] to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." *Id.* "In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship." *Id.* But administrative costs for providing a religious accommodation, such as "costs involved in rearranging schedules and recording substitutions for payroll purposes" "will not constitute more than a *de minimis* cost." *Id.* Coworker or customer feelings, preferences, and complaints are not mentioned in § 1605.2.

3. EEOC Guidance

An EEOC Guidance addresses coworker complaints and customer preferences. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, Section 12: Religious Discrimination (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_255006745363916107498 6%207844 (*EEOC Guidance*).

As to coworker complaints, the Guidance states, "Although infringing on coworkers' abilities to perform their duties or subjecting coworkers to a hostile work environment will generally constitute undue hardship, the general disgruntlement, resentment, or jealousy of coworkers will not." *Id.* (footnotes omitted). "Undue hardship requires more than proof that some coworkers complained or are offended by an unpopular religious belief or by alleged 'special treatment' afforded to the employee requesting religious accommodation; a showing of undue hardship based on coworker interests

generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work." *Id.* (footnote omitted). "Applying this standard, it would be an undue hardship for an employer to accommodate religious expression that is unwelcome potential harassment based on race, color, sex, national origin, religion, age, disability, or genetic information, or based on its own internal anti-harassment policy." *Id.* So in general, the EEOC requires more than coworker complaints or offense by an employee's religious observance or practice to constitute an undue hardship. The religious accommodation must cause some operational disruption, or rise to such a level that it can be considered harassment or to cause a hostile work environment. *Id.*

As to customer preference, the Guidance states, "An employer's action based on the discriminatory preferences of others, including coworkers or customers, is unlawful." *Id.* It provides an illustrative example:

> **Employment Decision Based on Customer Preference**
>
> Harinder, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after Harinder begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When he inquires, the crew complains that Harinder, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the September 11th attacks. The manager tells Harinder that he has to let him go because the

> customers' discomfort is understandable. The manager has subjected Harinder to unlawful religious discrimination by taking an adverse action based on customers' preference not to have a cashier of Harinder's perceived religion. Harinder's termination based on customer preference would violate Title VII regardless of whether he was – or was misperceived to be -- Muslim, Sikh, or any other religion.

Id.

This example shows that the EEOC does not tolerate religious discrimination based on the preferences, opinions, and feelings of customers about an employee's religious observance or practice.

It can be debated whether a public-school student is more like a coworker or a customer. A customer gives voluntary patronage to a business, while a public school requires student attendance (unless alternative schooling is available). So a public-school student may be more akin to a coworker than a customer. If a student is seen as a coworker, the Guidance suggests that the student's disgruntlement at employee conduct is not enough for undue hardship. But if the employee conduct constitutes harassment of the student or causes a hostile educational environment, then it would be enough. If a public-school student is closer to a customer of a school, the Guidance suggests that the student's disgruntlement is not enough for undue hardship. The majority opinion situates the student offense as closer to customer preference, which

categorically would not provide a basis for undue hardship under the EEOC Guidance.

4. Caselaw

The post-*Hardison* caselaw is sparse on whether coworker or customer offense is enough for more than a *de minimis* cost to the employer. This court has not addressed the question, but other circuits have and generally find that the grumblings or offense of others are not enough to constitute undue hardship.

Customer Sentiments. The majority opinion cites *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001), for the proposition that customer complaints—and thus student complaints—may suffice to constitute an undue hardship upon the employer. *Anderson* involved a Christian employee who sought to use the phrase "Have a Blessed Day" in signing off on written correspondence or ending telephone conversations. *Id.* at 473. The employer became concerned when one of its clients complained that the employee's use of the phrase was "unacceptable" and "must stop." *Id.* The employee filed suit for a preliminary injunction that allowed her to use the phrase in communications with the employer's customers, which the district court denied. *Id.* at 474.

In affirming the district court, this court observed that "Anderson's religious practice did not require her to use the 'Blessed Day' phrase with everyone" and that the employer was "concerned about its relationship with its customers." *Id.* at 476. We also recognized that the employer had a "legitimate interest[]" in protecting its relationship with clients. *Id.* at 477. Ultimately, we concluded that the employer had reasonably accommodated its employee by allowing Anderson to use the

phrase with co-workers but not clients. *Id.* at 474–76. Recall that the employer's Title VII duty to accommodate "is at an end" when "where the employer has already reasonably accommodated the employee's religious needs." *Ansonia*, 479 U.S. at 68. Therefore, in *Anderson* this court did not consider whether customer objections to an employee's religious belief or practice were enough to constitute more than a *de minimis* cost to the employer.

More importantly, *Anderson* is distinguishable from the facts in this case. Anderson sought to use a religious phrase, which the district court had found to impose her religious beliefs on the employer's clients or vendors. *Anderson*, 274 F.3d at 477–78. As the majority opinion recognizes, *Anderson* held that the employer could restrict the employee's religious speech with clients in providing the reasonable accommodation. *Id.* But here, an employer seeks to force an employee to engage in transgender-affirming speech contrary to his religious beliefs. Whether Kluge's gender-neutral accommodation constitutes an undue hardship by way of the School District's clients—the students—should be an open question for the factfinder. Recall that the EEOC opines that employers' adverse employment "action based on the discriminatory preferences of others, including coworkers or customers, is unlawful." *EEOC Guidance*.

Coworker Sentiments. Other courts have addressed whether coworker offense is enough to constitute undue hardship. In *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), the Ninth Circuit held that coworkers' "general sentiment against" a "free rider[]" employee who refused to join an employer-mandated union on religious grounds was not an undue hardship. *Id.* at 402. The court stated,

"Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship." *Id.* And in a factually similar case, the Ninth Circuit reiterated that "undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief." *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (citing *General Dynamics*, 589 F.2d at 402). Though *General Dynamics* did not discuss *Hardison*'s *de minimis* cost test, the Ninth Circuit cited the case and operated under its regime. *Id.* at 400–01 (citing *Hardison*, 432 U.S. 63). *Burns* affirmed *General Dynamics*'s core principle that grumblings are not sufficient in an explicit analysis under *Hardison*. *Burns*, 589 F.2d at 406–07. Whether students are closer to coworkers or customers, *General Dynamics*, *Burns*, and the EEOC Guidance provide that grumblings are not enough for undue hardship.

In *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607–08 (9th Cir. 2004), the Ninth Circuit explained that an employer "need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce." The relevant employee had publicly posted in the workplace Bible scriptures condemning sodomy in response to his employer's poster promoting inclusion of gay workers. *Id.* at 601–02. So the Ninth Circuit's law generally accords with the EEOC Guidance's

suggestion that, while coworker grumblings are not sufficient to establish undue hardship, coworker harassment is.[3]

How much more than de minimis*?* In *Burns* and *General Dynamics*, the courts entered a judgment in favor of the employee, reversing bench trial decisions and concluding that the employer had failed to demonstrate that no reasonable accommodation could be provided without undue hardship. *Burns*, 589 F.2d at 407–08; *General Dynamics*, 589 F.2d at 402–03. That these cases and numerous other court decisions on the *de minimis* cost issue have been resolved by trial—some in favor of the employer, others for the employee—shows that the test, even if more than a *de minimis* cost, has some teeth.[4]

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[3] Kluge also cited a decision that was later vacated, *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd*, *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976), *vacated on reh'g*, 433 U.S. 903 (1977). Another Sixth Circuit decision, *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520–21 (6th Cir. 1975), stands for the principle for which Kluge cited it: that coworker grumblings are not enough for undue hardship. Whether *Draper*'s holding on coworker grumblings remains good law in the Sixth Circuit after *Hardison* is an open question.

[4] *See, e.g.*, *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995) (judgment for employer); *Mann v. Frank*, 7 F.3d 1365 (8th Cir. 1993) (same); *Cook v. Chrysler Corp.*, 981 F.2d 336 (8th Cir. 1992); *Ryan v. U.S. Dep't of Just.*, 950 F.2d 458 (7th Cir. 1991) (same); *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990) (same); *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (same); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022 (5th Cir. 1984) (same); *Wren v. T.I.M.E.-D.C., Inc.*, 595 F.2d 441 (8th Cir. 1979). *But see, e.g.*, *Opuku-Boateng v. California.*, 95 F.3d 1461, 1469 (9th Cir. 1996) (Sabbatarian case in which the Ninth Circuit concluded that the district court clearly erred in finding undue hardship and granted judgment for employee); *Brown v. Polk County*, 61 F.3d 650, 656–57 (8th Cir. 1995) (partial reversal and remand for judgment and relief for employee because employer had not demonstrated that "occasional spontaneous prayers and

At least one circuit court has remanded for a new jury trial on the *de minimis* cost issue. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439–41 (9th Cir. 1993). So, it follows that this fact-laden issue is often decided by trial.

Even when the *de minimis* cost issue is decided at summary judgment, our fellow circuits vary greatly in construing the test.[5] But religious accommodation caselaw confirms that the

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isolated references to Christian belief" caused undue hardship); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134–35 (3d Cir. 1986) (upholding on clear error review the district court's finding of no undue hardship based on the lower court's familiarity with the evidence and witness credibility findings); *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 452 (7th Cir. 1981) (affirming judgment for plaintiff because the employer failed to present evidence of undue hardship).

[5] *See, e.g.*, *Groff v. DeJoy*, 35 F.4th 162, 175 (3d Cir. 2022) (judgment for employer), *cert. granted*, 143 S. Ct. 646 (2023); *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656 (7th Cir. 2021) (judgment for employer); *EEOC v. GEO Grp., Inc.*, 616 F.3d 265 (3d Cir. 2010) (same); *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009) (same); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (judgment for employer where there was harassment of coworkers); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508 (6th Cir. 2002) (judgment for employer); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001) (same); *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001) (same); *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000) (same); *Weber v. Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000) (same); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019 (10th Cir. 1994) (same); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994) (same); *Eversley v. MBank Dallas*, 843 F.2d 172 (5th Cir. 1988) (same). *But see, e.g.*, *Tabura v. Kellogg USA*, 880 F.3d 544, 557–58 (10th Cir. 2018) (remanded for trial because defendant did not move for summary judgment on undue hardship issue); *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014) (genuine issue of material fact on undue hardship issue); *Antoine v. First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013) (same); *Adeyeye v. Heartland Sweeteners*, LLC, 721 F.3d 444, 455–56 (7th Cir. 2013) (same); *Balint v. Carson City*, 180 F.3d 1047 (9th Cir.

de minimis cost test has some weight. Application of that test to an accommodation is necessarily fact-intensive, and many cases are resolved by the factfinder. The majority opinion's reading of the *de minimis* cost test effectively eliminates the duty of the employer to provide reasonable religious accommodations where there are complaints of offense.

III. Religious Accommodation Claim

At the heart of this appeal is the district court's grant of summary judgment to the School District on Kluge's religious accommodation claim. We review that decision de novo. *Markel Ins. Co. v. Rau*, 954 F.3d 1012, 1016 (7th Cir. 2020). When reviewing cross-motions for summary judgment, as here, we view the facts "in favor of the party against whom the motion under consideration is made," drawing all reasonable inferences in its favor. *Id.* (citation omitted); *Hess v. Bd. of Trs. of S. Ill. Univ.*, 839 F.3d 668, 673 (7th Cir. 2016) (citation omitted).

I conclude first that Kluge has demonstrated his religious beliefs are sincerely held and he has established a prima facie case for religious discrimination. In reaching this partial summary judgment for Kluge, I construe all facts in favor of the School District. Then the burden shifts to the School District to show that any reasonable accommodation would in fact result in undue hardship. *Porter*, 700 F.3d at 951; *Adeyeye*, 721 F.3d at 455. We do not have to postulate a reasonable accommodation as one is provided: Kluge's last-names-only accommodation as used in the 2017–2018 school year. The question then is whether, construing the evidence and reasonable inferences in favor of Kluge, the School District has carried its

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1999) (same); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1577, 1583 (7th Cir. 1997) (affirming summary judgment for employee).

burden to prove that the accommodation caused more than a *de minimis* cost to it. In performing this analysis, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are reserved for the factfinder. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *McCottrell v. White*, 933 F.3d 651, 655 (7th Cir. 2019). To me, the School District has not satisfied its burden and a genuine issue of material fact remains for trial.

A. Sincerity

The School District concedes for purposes of appeal that Kluge made his prima facie case, but it challenges the sincerity of Kluge's religious beliefs in the alternative.

To show sincerity, Kluge "must present evidence that would allow a reasonable jury to find that (1) 'the belief for which protection is sought [is] religious in [the] person's own scheme of things' and (2) that it is 'sincerely held.'" *Adeyeye*, 721 F.3d at 451 (quoting *Redmond*, 574 F.2d at 901 n.12). When reviewing a plaintiff's sincerity, courts do not review an individual's "motives or reasons for holding the belief." *Id.* at 452. Nor do courts "dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 452–53 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715 (1981)). "In such an intensely personal area, … the claim of the [practitioner] that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger*, 380 U.S. 163, 184 (1965). Title VII does not "require perfect consistency in observance, practice and interpretation when determining if a belief system qualifies as a religion or whether a person's belief is sincere." *Adeyeye*, 721 F.3d at 453.

"[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance." *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("[F]or where would religion be without its backsliders, penitents, and prodigal sons?") (citing *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988)). It is not within the court's "province to evaluate whether particular religious practices or observances are necessarily orthodox or even mandated by an organized religious hierarchy." *Adeyeye*, 721 F.3d at 452.

Kluge has proved the sincerity of his beliefs. He is an active leader at his local church and believes in the absolute truth of the Bible, a fact he repeatedly told the School District when voicing concerns over its new policies. R. 120-3, at 4–5, 7, 19; R. 113-1, at 6–9; R. 113-2, at 2. He believes that, per his religion, he cannot affirm transgender identity by calling his transgender students by their modified PowerSchool names. R. 120-3, at 14; R. 120-19, at 6. All of this is uncontested, and "[t]he validity of what he believes cannot be questioned." *Seeger*, 380 U.S. at 184; *see also Adeyeye*, 721 F.3d at 452.

Kluge and Superintendent Snapp recount discussing their contrasting Christian beliefs on July 27, 2017, and I credit Snapp's testimony that it was a "cordial" chat. R. 113-6, at 6–7; R. 120-3, at 19. During that conversation, Kluge said he explained his beliefs with scripture. R. 120-3, at 19. Nothing in Snapp's recollection of the discussion suggests this is untrue. R. 113-6, at 6–7. In that meeting, Kluge ultimately refused to comply with the School District's Name Policy because his religious beliefs would not permit it. R. 120-3, at 14; R. 120-19,

at 6. So when opposed, Kluge defended his religious beliefs and practices.

The School District's sole rejoinder to these undisputed facts is Kluge's deviation from the last-names-only accommodation during the May 2018 orchestra awards ceremony. Kluge testified he complied with the Name Policy on that occasion because he believed "it would have been unreasonable and conspicuous" to refer to his students by only their last names at the ceremony.[6] R. 120-3, at 33. Kluge said he was "making a good effort to work within the bounds of [his] accommodation," and believed an exception for this "special" and "formal" event complied with his religious beliefs because it was not "ordinary" or regular behavior. *Id.* at 33–34. On this point, his attorney's EEOC submission states, "Kluge's Christian faith required that he do no harm to his students, and this acquiescence to the administration's position was done solely out of sincerely-held beliefs." R. 120-19, at 7.

No evidence is presented to the contrary. The School District notes that Kluge testified there are instances where it is appropriate and consistent with his religious beliefs to address a transgender student by the student's first name, even if the first name differs from the student's biological sex. R. 120-3, at 8–9. This is consistent with Kluge balancing his Christian beliefs of not affirming transgender identity with doing no harm. The School District also cites evidence that Kluge's religious denomination does not take a hardline

[6] The majority opinion construes this statement as a legal concession that using last names only would potentially cause harm to his students, but Kluge did not concede this point in his briefs or at oral argument.

stance in requiring a transgender child to use the bathroom of her birth sex. R. 120-4, at 12. But even construing the record in the light most favorable to the School District, I do not see how this evidence impugns Kluge's otherwise regular religious belief and practice of not using the PowerSchool names.

The evidence shows Kluge balancing his Christian values of not "regularly calling students by transgender names" with his duty to "do no harm." R. 120-3, at 33; R. 120-19, at 7. In evaluating sincerity, we are not to criticize Kluge's balancing or take issue with a one-time exception. *Adeyeye*, 721 F.3d at 453–54 (rejecting employer's contention that the court should probe and disapprove of employee's religious beliefs); *Grayson*, 666 F.3d at 454 (overlooking that Nazirite believer followed certain biblical proscriptions but not others). At the ceremony, Kluge chose a path in accord with his balancing of his Christian values. This does not detract from his sincerity or create a genuine issue of material fact on the issue. Construing all facts in the School District's favor, I conclude that Kluge has established the sincerity of his religious beliefs and practices.

B. Prima Facie Case

The majority opinion proceeds under the School District's concession on appeal that Kluge established a prima facie case for the religious accommodation claim. I conclude that Kluge is entitled to partial summary judgment on the prima facie case for his religious accommodation claim.

Recall that to make a prima facie case based on an employer's failure to provide a religious accommodation, a plaintiff must show: (1) an observance or practice that is religious in nature; (2) that conflicts with an employment

requirement; and (3) that the need for a religious accommodation was a motivating factor in the adverse employment decision or other discriminatory treatment. *Ilona*, 108 F.3d at 1575; *Abercrombie*, 575 U.S. at 772–73. There is no question that Kluge's refusal to adhere to the Name Policy is a religiously motivated practice. This refusal conflicts with the School District's Name Policy. Further, the School District does not dispute that requiring Kluge to choose between Name Policy compliance, resignation, or termination was an adverse employment action. So, the prima facie case turns on whether Kluge's need for a religious accommodation was a motivating factor for his forced resignation.

There is no doubt that it was, viewing the record in the School District's favor. Its asserted reason for forcing Kluge to resign was the "[c]omplaints from the high school community" regarding the very last-names-only accommodation that Kluge had requested in July 2017. R. 121, at 45. The School District said it had "received complaints that the accommodation was not conducive to a well-run classroom and negatively impacted students." *Id.* Thus, the reason for the adverse employment action is the accommodation that Kluge requested and received for the 2017–2018 school year. Kluge had three choices at the end of that school year: comply with the Name Policy, resign, or be terminated. R. 113-2, at 6; R. 15-3, at 6.

If Kluge did not need a religious accommodation for the Name Policy and complied with its terms, he could stay. So, there is no genuine issue of material fact that Kluge's need for a religious accommodation was a motivating factor behind the School District's adverse employment decision. The Supreme Court clarified in *Abercrombie* that Title VII supplies a

"motivating factor" standard even lower than "the traditional standard of but-for causation." 575 U.S. at 773 (citing 42 U.S.C. § 2000e-2(m)). Under this lenient standard Kluge proved the motivating factor element and thus a prima facie case for his religious accommodation claim.

Having established the prima facie case, the burden shifts to the School District to show that any reasonable accommodation would result in undue hardship—that is, more than a *de minimis* cost. *Porter*, 700 F.3d at 951; *Hardison*, 432 U.S. at 84. Viewing the evidence and reasonable inferences in Kluge's favor, there is a genuine issue of material fact on the question of undue hardship. The School District points to two sources of hardship: fear of Title IX liability and interference with its ability to educate students. I consider these two grounds in the next two sections.

C. Fear of Title IX Liability

The evidence is lacking that the School District considered and was concerned about Title IX liability. Under current caselaw, the alleged fear amounted to speculation.

Only a single piece of evidence might indicate that the School District contemplated Title IX liability: one sentence in the form presented to Kluge on July 31, 2017, which stated, "This directive is based on the status of a current court decision applicable to Indiana." R. 15-1, at 1. Nothing suggests what the School District meant by this sentence. Yet the majority opinion states, without record support, that "[t]he 'current court decision applicable to Indiana' was likely our decision in *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), abrogated on other grounds by *Illinois Republican Party v. Pritzker*, 973 F.3d

760 (7th Cir. 2020), which had been issued two months prior to" the July 31 compromise meeting. Presumably the majority opinion juxtaposes the timing of the School District's form and *Whitaker* to conclude that the District was likely referring to that case. But without record evidence, that inference stretches too far. In addition, this speculation runs counter to the requirement at this stage that facts and inferences be construed in favor of Kluge. Properly viewed, the sentence on the School District's form is an unclear statement of concern about the implications of an unidentified court decision.

Even if we were to accept that the School District considered *Whitaker*, at best that case creates only a speculative risk of Title IX liability based on Kluge's actions. First, *Whitaker* concerned a district court's grant of preliminary injunction based on a Title IX theory of transgender sex-stereotyping by a school district. 858 F.3d at 1038–39. In that case this court concluded only that the transgender students in question were sufficiently likely to succeed on the merits of their Title IX sex discrimination claim against the school district to warrant a preliminary injunction. *Id.* at 1046–50. That said, the Supreme Court has held that, under Title VII, an employer who discriminates against an employee for being transgender discriminates on the basis of sex. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743 (2020). But the Court has not held that the same construction of sex discrimination applies to Title IX.

Second, *Whitaker* concerned a transgender student who requested preliminary injunctive relief to allow him to use the boys' bathroom in violation of the school district's bathroom policy. *Whitaker*, 858 F.3d at 1038–39. So, assuming that "on the basis of sex" is interpreted in accordance with *Bostock*, the school district's policy of excluding transgender students

from non-birth-sex restrooms only arguably violated Title IX's provision that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31(a). Such legal assumptions, without the benefit of Supreme Court or Seventh Circuit authorities establishing Title IX liability for transgender discrimination, present merely speculative risk of Title IX liability for the School District.

Even more, it is unlikely that Kluge conforming with the Name Policy constitutes a benefit of a federally funded educational program. Further, Kluge's last-names-only practice is gender-neutral and generally applicable, so it is doubtful that the practice constitutes discrimination on the basis of sex. Even if we assume that the School District considered the implications of *Whitaker* and Title IX liability, any risk it faced was speculative. Construing the record in Kluge's favor, I conclude that the School District may not rely on fear of Title IX liability in the undue hardship equation.

D. Interference with Educational Mission

This leaves the School District with its other alleged basis for undue hardship—interference with its educational mission. The majority opinion agrees with the district court's conclusion that "Kluge's use of the last names only accommodation burdened [the School District's] ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students." I evaluate this ground by examining: (1) the School District's educational mission; (2) the complaints of offense taken to Kluge's last-names-only accommodation and whether they

constitute more than a *de minimis* cost; and (3) other considerations, including caselaw and the practical impact of the majority opinion.

1. The School District's Educational Mission

Before assessing the evidence, it is important to understand what the School District's educational mission is for its students and its grounds for claiming this mission.

Indiana Constitution. The School District relies first on the Education Clause (Article 8, Section 1) of the Indiana Constitution to define its educational mission. That provision states in relevant part that it "shall be the duty of the General Assembly … to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." IND. CONST. art. VIII, § 1. The district court suggests that this charge to provide public education "equally open to all" meant the School District has a constitutional mission to affirm transgender identities in public schools.

But the text and history of the Education Clause confirm that the phrase "equally open to all" refers only to the equal admission of students. The text of the Indiana Constitution expresses "a duty to *provide* for a general and uniform system of open common schools without tuition." *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009). The Education Clause "does not require the attainment of any standard of resulting educational quality." *Id.* at 521. "The phrases 'general and uniform,' 'tuition … without charge,' and 'equally open to all' do not require or prescribe any standard of educational achievement that must be attained by the system of common schools." *Id.* Contemporary dictionaries confirm this

reading. For example, "open" was defined as "[a]dmitting all persons without restraint; free to all comers." *Open*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 571 (1841). On its face, the text of the Education Clause "says nothing whatsoever about educational quality." *Bonner*, 907 N.E.2d at 521.

The historical context of the Education Clause supports this plain meaning interpretation. In the years preceding the Education Clause's ratification, the Indiana General Assembly had engaged in a series of constitutional and legislative efforts to provide for a "common school" education. *Nagy ex rel. Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484–89 (Ind. 2006); 2 DONALD F. CARMONY, THE HISTORY OF INDIANA 381 (1998); DONALD F. CARMONY, THE INDIANA CONSTITUTIONAL CONVENTION OF 1850–1851 103–04 (1931). The phrase "common school" referenced schools that were "open to the children of all the inhabitants of a town or district." *Nagy ex rel. Nagy*, 844 N.E.2d at 489 (quoting AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 988 (1856))

By the 1850–1851 Indiana Constitutional Convention—in which the Education Clause was drafted—the common school movement had garnered "considerable attention" and support for the idea that the state should be responsible for providing every child the opportunity for elementary education. *Embry v. O'Bannon*, 798 N.E.2d 157, 162–63 (Ind. 2003). The convention debates centered on the need to provide for the "education of every child in the State." 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1858–61 (1851). The Convention also adopted a resolution to describe the relevant changes in the Indiana Constitution it had drafted, which stated: "It is also provided, that the Legislature

shall establish a uniform system of common schools, wherein tuition shall be free." INDIANA HISTORICAL COMMISSION, CONSTITUTION MAKING IN INDIANA 410 (1916) (quoting *An Address to the Electors of the State* (Feb. 8, 1851)). The Education Clause was thereafter ratified as part of the Constitution of 1851. IND. CONST. art. VIII, § 1; WILLIAM P. MCLAUCHLAN, THE INDIANA STATE CONSTITUTION 16 (2011). Following ratification, in December 1851, Governor Joseph A. Wright addressed the General Assembly, stating that it was their "duty to husband this fund … to provide for the education of the youth of every county, township, and district." *Horner v. Curry*, 125 N.E.3d 584, 599 (Ind. 2019) (quoting *Indiana House Journal* at 20 (Dec. 2, 1852)).

This historical tour confirms that the text of the Indiana Constitution's Education Clause only charges the School District with admitting all children into its schools. It does not require or prescribe any specific standard of educational quality.

Statutory Directive. In identifying the School District's educational mission, the district court also relied on the fact that "[t]he Indiana Supreme Court has recognized that public schools play a 'custodial and protective role,' which has been codified by the legislature in passing compulsory education laws that mandate the availability of public education. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 979 (Ind. 2002)." The majority opinion also relies on *Linke*. But the Indiana Supreme Court in *Linke* merely confirmed that the Indiana legislature had codified compulsory school attendance and Indiana school corporations' supervision over all pupils in accordance with the Education Clause. *Linke*, 763 N.E.2d at 979, 983 (citing IND. CONST. art. VIII, § 1 and the then-effective IND. CODE

§ 20–8.1–5.1–3). That court did not read into the Education Clause a requirement that Indiana school corporations affirm transgender identity.

The School District's Policy. Without a purported constitutional or statutory obligation to affirm transgender identity, the School District is left with its own recent policy to inform its educational mission. The principles and mission underlying the Name Policy were outlined in the January 22, 2018 Transgender Questions document and accompanying Transgender Considerations presentation in the middle of the 2017–2018 school year. R. 15-4; R. 120-20. While styled as "Questions" and "Considerations" and couched in precatory language on gender-neutral practices, as applied to Kluge and in practice, they were more than suggestions.

For example, the Questions document said that staff should "make all students feel welcome and accepted in the public school environment." R. 15-4, at 9. And the Considerations presentation said, "Creating a safe and supportive environment for all students is important." R. 120-20, at 7. The Considerations presentation also had several gender-neutral best practices such as providing "gender neutral uniforms"; avoiding using "boy/girl methods to divide students"; and using gender-neutral indefinite pronouns/nouns such as "everyone" or "people" instead of "ladies and gentlemen." *Id*. at 5. It suffices to say that the School District adopted an educational mission to create a safe and supportive learning environment for all students and, more specifically, transgender students.

2. Complaints of Offense

The question then becomes whether the complaints of offense taken by school staff and students to Kluge's use of last names are enough to constitute more than a *de minimis* cost to the School District's mission of creating a transgender-supportive learning environment. Considering Kluge's gender-neutral accommodation, teacher and student complaints about that accommodation, evidence in Kluge's favor, and various credibility questions, I conclude that there is a genuine issue of material fact on this evidentiary record.

i. Gender-neutral Accommodation

The last-names-only accommodation was, obviously, gender-neutral. Kluge called students by their last names in the 2017–2018 school year. The evidence conflicts as to whether he was perfectly consistent in this practice. *See* R. 58-2, at 3; R. 120-19, at 7; R. 120-3, at 36; R. 52-3, at 2; R. 52-4, at 2; R. 52-5, at 2. But Kluge, another teacher, and three of his students during the 2017–2018 school year attested that he was consistent. R. 120-3, at 36; R. 52-2, at 3; R. 52-3, at 2; R. 52-4, at 2; R. 52-5, at 2. Construing the record in Kluge's favor and crediting his testimony leads to the conclusion that he adhered to the accommodation.

Even if Kluge's testimony is not credited, the school administration acknowledged that mistakes could happen. A Brownsburg High School counselor acknowledged that there may be instances where school staff "don't get" a transgender student's name or pronoun "quite right." R. 120-13, at 5. And the Considerations presentation stated, "*Try* not to make assumptions about the genders of students." R. 120-20, at 5 (emphasis added). The Questions document even addressed how

to handle a "student exploding in anger with being called the wrong name or gender." R. 15-4, at 10. For the most part, Kluge consistently referred to all students in a gender-neutral manner by their last names only, so undue hardship either did not arise or the record presents a factual dispute.

ii. Teacher Complaints

Craig Lee and several teachers, including two fine arts department heads, complained about how Kluge was addressing students to the school administration. R. 120-2; R. 120-14, at 16–17; R. 113-5, at 8–9. Lee averred the complaints of three teachers arose out of concerns that Kluge's practice "was harming students." R. 120-14, at 17. Lee did not mention any harm or harassment of the teachers themselves. But he added that none of the three teachers told him that they had visited Kluge's class or witnessed the harm firsthand. *Id.* And Principal Daghe attested the complaints from the department heads mostly arose from "continued issues" relayed from students "that were in [Kluge's] classes." R. 113-5, at 8. Unlike in *Peterson*, where the employee posted scriptures demeaning or degrading gay coworkers, 358 F.3d at 601–02, 607, nothing in the record shows Kluge harassing his coworkers by adhering to the last-names-only accommodation.

Undue hardship requires more than coworker offense by a religious belief or practice. It requires actual infringement on the rights of coworkers—such as by harassment—or the disruption of work. *See EEOC Guidance*; *General Dynamics*, 589 F.2d at 402; *Burns*, 589 F.2d at 407. Viewing the record in favor of Kluge, the evidence does not show that his coworkers' complaints were more than mere complaints of offense. In fact, the teacher complaints relay student complaints, which

form the real core of the School District's case for undue hardship.

iii. Student Complaints

Two transgender students and an unidentified number of other students complained that Kluge's use of last names only offended them. Teacher Craig Lee relayed that at Equality Alliance meetings, Aidyn and Sam said they found the practice "insulting and disrespectful." R. 120-14, at 7. He could not "recall any other students … who are transgendered [sic]" talking about the subject. *Id.* at 6–7. Lee's declaration said students in Kluge's class felt likewise. R. 58-2, at 2. Assistant Superintendent Jessup's recollection of an Equality Alliance meeting accords with this report. R. 120-1, at 4.

Aidyn and Sam also spoke on their own behalf. Aidyn said Kluge's practice "made [Aidyn] feel alienated, upset, and dehumanized." R. 22-3, at 4. Sam attested "Mr. Kluge's use of last names in class made the classroom environment very awkward" and that, even now, Kluge's actions hurt him and cause him anxiety. R. 58-1, at 3–4. Their complaints were consistent with one letter and one email chain from parents of transgender students, which were transmitted to the school administration in fall 2017. R. 120-12; R. 120-13. The parents of one transgender student, in reference to a teacher that "routinely refers to [our child] by his last name only," said the practice was "ok, but we do wonder if the teacher does this with other students or if it is only [our child]." R. 120-12. So at least one transgender student's parents thought Kluge's practice was fine if consistently applied.

The majority opinion repeatedly states that Kluge's last-names-only practice caused classroom "disruption," citing

portions of Principal Daghe's affidavit and deposition. R. 120-2, at 4; R. 112-5, at 7. Daghe does not mention disruption. Instead, he notes "tension," "uncomfortableness," and that the accommodation was "not going well." R. 120-2, at 4; R. 112-5, at 7–8. He asserts such "tension … was affecting the overall functioning of the performing arts department." R. 120-2, at 4. But neither Daghe nor the record reveals how Kluge's last-names-only practice hampered the department's operations, and there is much countervailing evidence. Besides, we are to draw all reasonable inferences in Kluge's favor.

My colleagues also infer that Kluge acknowledged creating tension and conflict at the school when he said Principal Daghe wanted him to resign "simply because [Daghe] didn't like the tension and conflict." R. 15-3, at 5. But the context of this quote demonstrates that Kluge was referring to *Daghe's* perception of tension and conflict—not his own. In the paragraph directly before this quote, Kluge recounted that Daghe said "he didn't like things being tense and didn't think things were working out." The majority opinion again fails to view the record in Kluge's favor.

There is a crucial distinction here: No evidence shows that Kluge revealed to students his motivations for calling them by their last names in the 2017–2018 school year. Lee's retelling of a student's complaint said that the student "was fairly certain that all the students knew why Mr. Kluge had switched to using last names." R. 58-2, at 3. Aidyn alleged that "Kluge's behavior was noticeable to other students in the class." R. 22-3, at 4. But Aidyn also recalled, "At one point, my stand partner asked me why Mr. Kluge wouldn't just say my name. I felt forced to tell him that it was because I'm transgender." *Id.* The record says nothing about Aidyn telling

the stand-mate about his intuitions of Kluge's motive. And importantly, Aidyn's recollection of his stand partner asking him about Kluge's last-names-only practice corroborates other testimony that students did not know Kluge's motives. Similarly, Sam said "[m]ost of the students knew why Mr. Kluge had switched to using last names." R. 58-1, at 3–4. But Sam did not explain how the students knew Kluge's motives for using last names only.

In contrast, the record is replete with evidence that Kluge never revealed his religious motives and that students did not know the reason why Kluge used last names only. Three students—Lauren Bohrer, Kennedy Roberts, and Mary Jacobson—attested that Kluge consistently called his students by their last names and did not explain his motives for doing so. R. 52-3, at 3; R. 52-4, at 2; R. 52-5, at 2. Roberts "never really thought anything of it. It's just what he did." R. 52-4, at 2. And fellow music teacher Natalie Gain averred that she "never heard [Kluge] use gendered language in the classroom"; "only heard him use last names with the students"; and "never heard any of the students discussing the [sic] Mr. Kluge's use of last names, or any references to his agreement with the administration." R. 52-2, at 3. "[A]s far as [she] could tell, Mr. Kluge's accommodation was not common knowledge … ." *Id.*

The evidence shows that student complaints of offense at Kluge's last-names-only practice came not from any discomfort with the practice itself but from students' assumptions and intuitions about why Kluge was using only last names. Neither this nor any other court has held that mere offense at an employee's religious observance or practice is enough for undue hardship. And the facts here are a step removed: The

alleged offense arose from students' presumptions and guesses as to Kluge's motives for using last names only. The majority opinion breaks new ground here. This distinction, as well as the evidence in Kluge's favor, presents a genuine issue of material fact on undue hardship.

iv. Evidence for Kluge

The record also contains the testimony of Kluge, three students, and a teacher, who contradict the complaints about Kluge's last-names-only accommodation. The district court failed to give due weight to this evidence. But the majority opinion goes further, stating that Kluge's evidence is not relevant to undue hardship. To my colleagues, the undue hardship inquiry ended once the School District received some reports that the accommodation did not work and caused tension and discomfort.

Every court to consider undue hardship has framed the inquiry as an objective one, dependent on the factual context of the case. *See, e.g.*, *Groff*, 35 F.4th at 174 ("The undue hardship analysis is case-specific, requiring a court to look to 'both the fact as well as the magnitude of the alleged undue hardship' … ." (quoting *GEO Group*, 616 F.3d at 273)); *Tabura*, 880 F.3d at 558 (cleaned up and citations omitted) ("Whether an employer will incur an undue hardship is a fact question that turns on the particular factual context of each case."); *Adeyeye*, 721 F.3d at 455. In a similar vein, cases evaluating undue hardship—including *Hardison*—address factors such as the need to rearrange schedules or the additional work burden on coworkers. *See, e.g.*, *Hardison*, 432 U.S. at 83–84; *Adeyeye*, 721 F.3d at 455; *Ilona*, 108 F.3d at 1576–77. Because undue hardship depends on the factual context, the reports of three students and a teacher that contradict the alleged harms caused

by Kluge's last-names-only practice are relevant, whether or not this information was known by the School District at the time of the adverse employment decision.

The majority opinion holds that the undue hardship inquiry considers only evidence within the employer's knowledge when the adverse employment decision is made. But no authority is cited for this proposition. Under this reasoning, an employer's sole focus on allegations of difficulties arising from a religious accommodation would defeat any employee's failure-to-accommodate claim. Such an outcome creates a perverse incentive for employers to avoid investigating undue hardship. If, by contextual evidence obtained after discharge, an employee plaintiff is not able to undermine the alleged presence of undue hardship, when, if ever, can the employee prevail? Before his termination, the employee would have to bring to the employer's attention evidence contrary to the reports of undue hardship.

Consider the evidence for Kluge. Three students and a teacher submitted declarations that Kluge's practice did not diminish the classroom environment. Bohrer attested that because the orchestra class was large, Kluge rarely had occasion to call on any individual student directly. R. 52-3, at 2. Roberts corroborated that Kluge called last names for attendance "at first, maybe 5-8 times over the year." R. 52-4, at 2. This evidence tends to show that Kluge's last-names-only practice did not have more than a *de minimis* impact on classroom operations.

A number of students said Kluge's practice did not cause significant interruption with the classroom environment. Bohrer, Roberts, and Jacobson all testified similarly that Kluge's use of only last names was not unnatural, odd, or

uncomfortable. R. 52-3, at 3; R. 52-4, at 2; R. 52-5, at 2. Bohrer said she never saw Kluge treat her transgender stand partner differently and that the stand-mate "never told [her] that they disliked Mr. Kluge's behavior or that Mr. Kluge had been unfair to them." R. 52-3, at 3. Fellow teacher Natalie Gain added that Kluge "had mostly used last names … the previous school year anyway, with 'Mr./Ms.' for students to encourage a respectful teaching environment, like college classes." R. 52-2, at 2. As such, she "saw no reason as to why there would be issues with Mr. Kluge's compromise." *Id.*

Kluge also alleged that there were no issues with his use of last names—no protests, classroom disturbances, cancelled classes, student animosity, or tensions. R. 113-2, at 4; R. 120-3, at 23. Instead, Kluge says the accommodation worked without undue hardship. His students excelled, winning awards, scoring high on their AP Music Theory exams, and participating in extracurricular music activities. R. 113-2, at 4; R. 120-3, at 23–24. The School District contests none of these objective measures of pedagogical success.

v. Credibility Issues

The record also revealed potential biases and credibility issues with many of the witnesses. A few notable examples underscore the fact-intensive nature of the undue hardship decision. Weighing the evidence on undue hardship and making credibility determinations are reserved for the factfinder. *Liberty Lobby*, 477 U.S. at 255; *McCottrell*, 933 F.3d at 655. Only the factfinder "can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*,

470 U.S. 564, 575 (1985); *see also Kadia v. Gonzales*, 501 F.3d 817, 819–20 (7th Cir. 2007).

Kluge is biased to give testimony in his favor. His student Bohrer is a professed Christian, so her testimony may have been offered to favor Kluge. R. 52-3, at 3. Aidyn also has credibility issues. Bohrer alleged that Aidyn falsely accused her of calling him a "f----t." *Id.* at 4. A parent, Jeff Gracey, also opined that Aidyn seemed motivated to put Kluge out of a job. R. 52-6, at 3–4. And Craig Lee, the teacher who relayed student complaints about Kluge to the school administration, admitted he was "very biased." R. 120-15.

* * *

The evidence on undue hardship cuts for and against Kluge. Three students, a teacher, and Kluge all attest that the last-names-only accommodation worked without issue. But Aidyn and Sam, some students in secondhand accounts, and some teachers complained the accommodation did not work. Both sides have credibility issues. The witnesses conflict as to whether and to what degree Kluge's accommodation was offensive. Even more, the evidence shows that any alleged offense came from students' assumptions about Kluge's motives for the last-names-only practice—not from the practice itself. The record also shows that Kluge's practice was infrequent and not critical to how his music classes operated. Of course, at this posture, we must draw inferences from the facts in favor of Kluge, and reserve credibility issues and weighing of the evidence for the factfinder. This record demonstrates a genuine issue of material fact as to whether

the accommodation caused more than a *de minimis* cost to the School District's educational mission.

3. Caselaw and Practical Impact

In examining the School District's alleged basis for undue hardship—interference with its educational mission—there are also other considerations, including consistency with caselaw and the practical impact of the majority opinion's analysis.

Caselaw. Concluding that a fact issue exists on this record accords with this court's caselaw on the employer's duty to provide reasonable religious accommodations under Title VII. In *Walmart*, this court stated *Hardison*'s core is "that Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers." *Walmart*, 992 F.3d at 659 (citing *Hardison*, 432 U.S. at 78–79). As mentioned earlier, there was no evidence that Kluge's accommodation burdened other school staff.

The majority opinion cites *Smiley v. Columbia College Chicago*, 714 F.3d 998, 1002 (7th Cir. 2013), for the proposition that a school has a legitimate interest in ensuring that its "instructors will teach classes in a professional manner that does not distress students." While correct, *Smiley* involved a teacher who singled out and harassed a student for being Jewish. *Id.* at 1000. The teacher was terminated for unprofessional conduct that "distress[ed] students." *Id.* at 1002. Kluge's last-names-only practice is different in kind, not just degree.

The majority opinion also analogizes the facts here to those in *Baz*, in which a V.A. hospital chaplain actively proselytized and held "Christian evangelical service[s]" in contravention of the hospital's purpose for his role that he serve as

a "quiescent, passive listener and cautious counselor." 782 F.2d at 703–04, 709. The V.A. had "instituted … an ecumenical approach to its chaplaincy with special attention to the sensitive needs of its patient population." *Id.* at 709. Reverend Baz's self-ascribed "active, evangelistic, charismatic" preaching and proselytization went against the hospital's mission and purpose for his role. *Id.* at 709. This court held that the V.A. had met its burden of producing evidence "tending to show that Reverend Baz's philosophy of the care of psychiatric patients is antithetical to that of the V.A." *Id.* at 706–07. "To accommodate Reverend Baz's religious practices, they would have to either adopt his philosophy of patient care, expend resources on continually checking up on what Reverend Baz was doing or stand by while he practices his (in their view, damaging) ministry in their facility." *Id.*

Here, of course, Kluge did not proselytize. He did not reveal to his students why he used only last names, and he never shared his religious beliefs with them. He used last names only with all his students, and Bohrer and Roberts suggested that even this last name usage was relatively infrequent. R. 53-3, at 2; R. 52-4, at 2. The question is whether this infrequent use of last names only when referring to students caused more than a *de minimis* cost as to render the practice unreasonable.

This court stated in *Adeyeye* that "[r]easonableness is assessed in context … and this evaluation will turn in part on whether or not the employer can in fact continue to function absent undue hardship" under the accommodation. 721 F.3d at 455. *Adeyeye* involved an employee who sought several weeks of unpaid leave to lead his father's religious burial rites. *Id.* at 447. This court held that the employer was not

entitled to summary judgment "that any reasonable jury would have to find that permitting Adeyeye to take three weeks of unpaid leave in conjunction with his week of vacation would have created an undue hardship." *Id.* at 455. Similarly in *Ilona*, this court upheld the district court's factual finding that the employer had not demonstrated that allowing two employees to take off a day for Yom Kippur resulted in more than a *de minimis* cost to the employer. 108 F.3d at 1572, 1576–77. If taking time off from work does not establish more than a *de minimis* cost, perhaps neither does allowing a teacher to use last names only.

In the district court, the School District argued that using a student's chosen first name is a "purely administrative" task or duty. R. 145, at 9-10; R. 121, at 24, 28. So it should come as no surprise that Kluge's accommodation required no adjustment to the School District's operation, scheduling, or curriculum. Our and other circuits' caselaw shows that the *de minimis* cost test has substance.

Practical Impact. Under the reasoning of the majority opinion, once an employer receives complaints of offense about an employee's religious observance or practice, undue hardship has been established as long as avoiding offense is its policy. But reviewing those complaints and the credibility of those complainants—including assessing any biases and motivations—are context-specific questions for the factfinder, which our caselaw requires. *See Adeyeye*, 721 F.3d at 455; *Kadia*, 501 F.3d at 819–20.

Consider a variation of the facts here. What if a teacher does not take issue with a transgender student's chosen first names, but that teacher does take issue—on religious grounds—with the use of chosen pronouns (they / them /

their). So, the teacher insists on calling students by their chosen first name. Say a transgender student feels uncomfortable with the teacher's efforts to refer to all students by their first name where a pronoun would suffice. Would the students' discomfort and complaints be sufficient to force the teacher to use the chosen pronouns where appropriate or be terminated? Under the majority opinion's reasoning, the answer is "yes." The facts here are close to this hypothetical.

Recall the EEOC Guidance's example of the Sikh coffee shop employee, Harinder, who sought to wear his religiously mandated turban at work. Is Harinder out of luck if the café decides that religious neutrality or avoiding customer offense by religious apparel is its official policy? The EEOC is concerned that the already lenient *de minimis* cost test may be read out of existence by customer preferences or opinions. The majority opinion realizes these fears.

Properly interpreted and applied, Title VII should provide protection for conscientious religious objectors who in good faith try to accommodate their employers' dictates. The undue hardship provision should not become "an exemption from the accommodation requirement altogether," whenever an employer receives some complaints of emotional hurt arising from protected religious activity. *Ilona*, 108 F.3d at 1577. More broadly, the purpose of Title VII is to protect minorities against those who disagree with their beliefs. *See* 42 U.S.C § 2000e–2. Under the majority opinion, if some people—on this record, at most a few transgender students in Kluge's classes—say they are offended, the protected religious adherent has no right to a reasonable accommodation.

On Kluge's religious accommodation claim, I conclude that a genuine issue of material fact exists about whether the

last-names-only accommodation would result in more than a *de minimis* cost. So I would reverse the district court's grant of summary judgment to the School District on this claim and remand the undue hardship issue for trial.

IV. Retaliation Claim

Although at least a genuine issue of material fact exists as to whether Kluge's protected activity was a but-for cause of his forced resignation by the School District, I concur with my colleagues to affirm the judgment for the School District on his retaliation claim. The record does not contain sufficient evidence from which a reasonable jury could infer that the School District's nondiscriminatory explanation for its adverse employment action was pretext for religious discrimination.[7]

Kluge's claimed protected activity was his July 2017 request for the last-names-only religious accommodation. R. 15,

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[7] Kluge's failure to show that the School District's nondiscriminatory explanation was pretext does not also doom his religious accommodation claim. A different version of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework applies to failure-to-accommodate cases, as opposed to retaliation or disparate treatment cases. *See Tabura*, 880 F.3d at 549–50; *Porter*, 700 F.3d at 951; *Firestone Fibers & Textiles Co.*, 515 F.3d at 312. Neither discriminatory intent nor pretext are elements of a failure-to-accommodate claim. *See Walmart Stores East*, 992 F.3d 656; *Adeyeye*, 721 F.3d at 449; *Porter*, 700 F.3d at 951; *Anderson*, 274 F.3d at 475; *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998); *Ilona*, 108 F.3d at 1574–75; *Ryan*, 950 F.2d 458; *Redmond*, 574 F.2d at 901. After Kluge established a prima facie case, the burden was on the School District "to show that any reasonable accommodation would result in undue hardship." *Porter*, 700 F.3d at 951 (citing *Ilona*, 108 F.3d at 1575–76). Because a genuine issue of material fact exists on undue hardship, that issue should

at 17–18; R. 121, at 44–45. The School District does not contest that forcing Kluge to comply with the Name Policy, resign, or be terminated is an adverse employment action. The nondiscriminatory reason for forcing Kluge to comply or resign was the "[c]omplaints from the high school community" about the accommodation that Kluge had requested in July 2017. R. 121, at 45.

Recognizing the obvious tie between the School District's claimed reason for terminating Kluge and the religious accommodation requested, in my view Kluge has established but-for causation. (The prima facie causation standard for Title VII retaliation claims is but-for—not proximate—causation. *Robertson v. Dep't of Health Servs.*, 949 F.3d 371, 378 (7th Cir. 2020).) At a minimum, construing all the facts in his favor, there is a genuine issue of material fact on this question. This is not a case where the employer has a separate nondiscriminatory reason—such as poor work performance—unrelated to the protected accommodation activity. *See, e.g.*, *Logan v. City of Chicago*, 4 F.4th 529, 537 (7th Cir. 2021); *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948, 954 (7th Cir. 2021). The employer's asserted nondiscriminatory reason is the alleged harm caused by the protected accommodation requested and granted. So this case presents enough facts to establish but-for cause. Ultimately though, I agree with my colleagues that

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proceed to trial. A retaliation claim, however, is governed by the standard *McDonnell Douglas* framework. *See Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 926 (7th Cir. 2019); *Miller v. Am. Fam. Mut. Ins. Co.*, 203 F.3d 997, 1007 (7th Cir. 2000). So once the School District supplied a nondiscriminatory reason for forcing Kluge to resign, he had to come up with enough evidence of pretext to raise a genuine issue of material fact, which he did not.

Kluge has failed as a matter of proof to show pretext, so I concur that the judgment for the School District on Kluge's retaliation claim should be affirmed.

V. Conclusion

Title VII's religious accommodation provisions do not apply only in a community accepting of the tenets of an employee's religion. "If relief under Title VII can be denied merely because the majority group … will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976) (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)).

For the reasons explained above, I respectfully DISSENT on the religious accommodation claim, and I conclude that a genuine issue of material fact exists on undue hardship and would remand that issue for trial. I respectfully CONCUR in the judgment for the School District on Kluge's retaliation claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

PARENTS DEFENDING EDUCATION,

Plaintiff,

vs.

LINN-MAR COMMUNITY SCHOOL DISTRICT, et al.,

Defendants.

No. 22-CV-78 CJW-MAR

MEMORANDUM OPINION AND ORDER

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This matter is before the Court on plaintiff's Motion for Preliminary Injunction. (Doc. 3). Defendants timely resisted (Doc. 17), and plaintiffs timely replied. (Doc. 21). On September 6, 2022, Professors of Psychology and Human Development filed an amicus brief (Doc. 23) in favor of denying the injunction, and amici One Iowa and Iowa Safe Schools filed an additional amicus brief (Doc. 25) in favor of defendants. The Court held oral argument on September 6, 2022. (Doc. 26).

On September 12, 2022, the Court **denied** plaintiff's motion. (Doc. 28). The Court writes now to provide more detailed reasoning of its decision.

I. BACKGROUND

The Court's factual findings are based on plaintiff's complaint and the parties' sworn declarations and exhibits submitted in support of their positions. The Court's factual findings here are provisional and not binding in future proceedings. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits[.]") (citations omitted); *SEC v. Zahareas*, 272 F.3d 1102, 1105 (8th Cir. 2001) (same). Affidavits submitted at the preliminary injunction phase need not meet the requirements of affidavits under Rule 56(c)(4), but courts may consider the "competence, personal knowledge and credibility of the affiant" in determining the weight to give the evidence. *Bracco v. Lackner*, 462 F. Supp. 436, 442 n.3 (N.D. Cal. 1978) (citing 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2949)). The Court will discuss additional facts as they become relevant to its analysis.

On April 25, 2022, defendants Linn-Mar Community School District, Shannon Bisgard, Brittania Morey, Clark Weaver, Barry Buchholz, Sondra Nelson, Matt Rollinger, Melissa Walker, and Rachel Wall (collectively, the "School District") enacted an administrative regulation, Board Policy 504.13-R ("the Policy"). (Doc. 17, at 2).

The Policy was enacted to "implement and clarify the School District's obligations under Board Policy no. 504.13," which was adopted the same day. (Docs. 3, at 1; 17, at 2-3).

The Policy covers several topics and areas of school behavior related to treatment of transgender and gender-nonconforming students. (Doc. 1-1). Several provisions of the Policy are relevant here, including those entitled Establishment of Gender Supports, Records, Confidentiality, and Name and Pronouns. (*See generally* Docs. 1; 3; 17). The first of these provides for plans related to students' gender identities ("Gender Support Plans"):

> **Establishment of Gender Supports**
>
> Communication with the student and/or parent/guardian is key. Schools should make a case-by-case determination about appropriate arrangements for transgender students regarding names/pronouns, restroom and locker facilities, overnight accommodations on school trips, and participation in activities. These arrangements should be based on the student's or family's wishes, be minimally burdensome, and be appropriate under the circumstances.
>
> Any student in seventh grade or older will have priority of their support plan over their parent/guardian. All supports can be documented in a Gender Support Plan.
>
> Any student, regardless of how they identify, may request to meet with a school administrator and/or school counselor to receive support from the school and implement a Gender Support Plan. When a student and/or parent/guardian contacts school staff about support at school, the school will hold a meeting with the student within 10 school days of being notified about the request for support. The student should agree with who is a part of the meeting, including whether their parent/guardian will participate.
>
> The Gender Support Plan will be maintained in the student's temporary records, not the student's permanent records. The Linn-Mar Community School District is committed to supporting all transgender students, gender nonconforming students, and students who are questioning their gender. A Gender Support Plan is not required for a student to receive supports at school. In instances where there is not a Gender Support Plan, school administrators and/or school counselors shall work with the student to identify and coordinate support. Support available through a Gender

> Support Plan, or otherwise, can include steps appropriate to also support siblings and family members of transgender students, gender nonconforming students, and students who are questioning their gender. Supports being provided for transgender, gender nonconforming students, and students who are questioning their gender will be reviewed on an annual basis or sooner, as necessary.

(Doc. 1-1, at 2-3). The Policy provides for record-keeping as it relates to students' preferred or adopted names and pronouns:

> **Records**
>
> The district and/or building shall maintain a mandatory, permanent student record that includes a student's legal name and legal gender. However, to the extent that the district and/or building is not legally required to use a student's legal name and gender on other school records or documents, the district and/or building shall use the name and gender preferred by the student. The district and/or building will change a student's official record to reflect a change in legal name or gender upon receipt of documentation that such change has been made pursuant to a court order or through amendment of state or federally-issued identification (School IDs, for example, are not legal documents and should use the student's preferred name). In situations where school staff or administration are required by law to use or report a transgender student's legal name or gender, such as for purposes of standardized testing, building secretaries will keep a record of the student's legal names and this document will be kept in a locked file for their access only. When a student transitions from one school to another, the recording form will be shared from building secretary-to-building secretary. A student's Gender Support Plan will be shared either administrator-to-administrator or school counselor-to-school counselor; depending on the student's preference.
>
> All written records related to student meetings concerning their gender identity and/or gender transition with any staff member will be kept in a temporary file that shall be maintained by the school counselor. The file will only be accessible to staff members that the student has authorized in advance to do so.

(*Id.*, at 5-8).

The provision related to confidentiality states:

> **Confidentiality**
>
> All persons, including students, have a right to privacy which includes the right to keep one's transgender status private at school. Information about a student's transgender status, legal name, or gender assigned at birth may also constitute personally identifiable information contained in a student's education records under the Family Educational Rights and Privacy Act. Disclosing this information other than as allowed by law is not permitted. Conversations between students and school counselors are protected, confidential conversations under applicable counselor/student laws. The district shall ensure that all information relating to student gender identity contained in student education records will be kept confidential in accordance with applicable state, local, and federal privacy laws. The district shall not disclose information that may reveal a student's transgender status to others including but not limited to other students, parents, and school staff unless legally required to do so (such as national standardized testing, drivers permits, transcripts, etc.), or unless the student has authorized such disclosure.
>
> Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. The fact that a student chooses to disclose their transgender status to school staff or other students does not authorize them to share other medical information about the student. School staff should always check with the student first before contacting their parent/guardian. School staff should ask the student what name and pronouns they would like school officials to use in communications with their family. All students under 18 years of age, or those over 18 years of age who are claimed as dependents by their parents/guardians for tax purposes, should be aware that a parent/guardian has the right to review their student's education records under FERPA.

(*Id.*, at 3-4). The "Name and Pronoun" provision provides:

> **Names and Pronouns**
>
> Every student has the right to be addressed by a name and pronoun that corresponds to their gender identity. A court-ordered name or gender change is not required, and the student need not change official school records.

> At the beginning of each semester, teachers may ask all students how they want to be addressed in class and in communications with their parent/guardian. Within 10 school days of receiving a request from a student, regardless of age, or a parent/guardian (with the student's consent), the district shall change a student's name and/or gender marker in student technology logins, email systems, student identification cards, non-legal documents such as diplomas and awards, yearbooks, and at events such as graduation. A student may make this request via their Gender Support Plan, if the student has requested one.
>
> In situations wherein the district is required by law to use or to report a student's legal name and/or gender marker, such as for purposes of standardized testing, the building secretaries will keep a record of the student's legal names and this document will be kept in a locked file for their access only. When a student transitions from one school to another, the recording form will be shared from building secretary-to-building secretary. A student's Gender Support Plan will be shared either administrator-to-administrator or school counselor-to-school counselor; depending on the student's preference.
>
> An intentional and/or persistent refusal by staff or students to respect a student's gender identity is a violation of school board policies 103.1 Anti-Bullying and Anti-Harassment, 104.1 Equal Educational Opportunity, and 104.3 Prohibition of Discrimination and/or Harassment based on Sex Per Title IX.

(*Id.*, at 4; 17, at 21).

On August 2, 2022, plaintiff, a parents organization, filed a complaint on behalf of seven anonymous parents who are purportedly members of the plaintiff organization. (Doc. 1). The complaint alleged the following violations: Count I—Violation of the Fourteenth Amendment (Parental Exclusion), Count II—Violation of the First Amendment (Compelled Speech), Count III—Violation of the First Amendment (Content and Viewpoint-Based Discrimination), Count IV—Violation of the First Amendment (Overbreadth), and Count V—Violation of the First and Fourteenth Amendments (Void for Vagueness). (*Id.*, at 20-28).

On August 5, 2022, plaintiff filed a Motion for Preliminary Injunction. (Doc. 3). Plaintiff requested an injunction barring enforcement of not only the provisions it challenges in the complaint but of the entire Policy. (*Id.*).

Plaintiff asserts arguments on behalf of seven parents identified only as "Parents A-G" who are opposed to enforcement of the Policy for several reasons. Parents A and B's children have neurodevelopmental disorders, such as autism spectrum disorder, that create confusion when distinguishing between sexes and gender. (Docs. 3-2, at 1-2; 3-3, at 1-2). Parents A and B allege harm because their children could potentially misstate their sex, gender, or pronouns, indicating to the average listener that they are a gender different from that assigned at birth and identify as nonbinary or transgender. (Docs. 3-2, at 2-4; 3-3, at 2-3). They fear, in that scenario, that staff would create a Gender Support Plan without parental consent. (Docs. 3-2, at 2-3; 3-3, at 2-4). Parent C has similar fears that her daughter will be given a Gender Support Plan without her knowledge because of conversations with her daughter, her daughter's friend-group, and her daughter's life experiences. (Doc. 3-4, at 2-3). Parents A-C also assert harm to their fundamental right to make decisions about the care, custody, and control of their children. (Docs. 3-2, at 3; 3-3, at 2-3; 3-4, at 3).

Parents D-G state that they and their children believe in only two genders, do not believe in gender dysphoria, and do not believe people assigned one sex at birth can genuinely identify later as another gender. (Docs 3-5, at 2; 3-6, at 2; 3-7, at 2; 3-8, at 2). Parents D-G allege harm through the chilling of speech because their children will be punished under the Policy if they do not "respect" another child's name or pronouns on a repeat, intentional basis, and they feel uncomfortable voicing their opinions on gender identity at school. (Docs 3-5, at 2; 3-6, at 2; 3-7, at 2; 3-8, at 2-3).

II. PRELIMINARY INJUNCTION STANDARD

Plaintiff seeks a preliminary injunction to prevent the enforcement of the Linn-Mar Community School District's Board Policy 504.13-R during the pendency of litigation. (Doc. 3). To prevail on a motion for a preliminary injunction, a party must establish: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other party litigants; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981); *Winter v. Nat. Res. Def. Couns., Inc.*, 555 U.S. 7, 20 (2008). The movant bears the burden of establishing the propriety of a preliminary injunction. *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir. 1995). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis original) (quoting 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995)). "[T]he burden on the movant is heavy, in particular where . . . 'granting the preliminary injunction will give [the movant] substantially the relief it would obtain after a trial on the merits.'" *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (second alteration in original) (quoting *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993)).

III. ANALYSIS

Because the absence of irreparable harm is fatal to a motion for preliminary injunction, the Court will first address the threat of irreparable harm. The Court will then discuss the remaining *Dataphase* factors. *See Dataphase*, 640 F.2d at 113, n.9.

A. Irreparable Harm

The Court finds that plaintiff will not suffer irreparable harm absent a preliminary injunction.

1. Arguments

Plaintiff argues that it has suffered irreparable harm for two reasons. First, it argues that without an injunction, its members will be denied their constitutional rights to child-rearing—i.e., the fundamental right to make decisions concerning the care, custody, and control of their children. (Doc. 3-1, at 24–25). Second, plaintiff argues its members' children will be irreparably harmed by the denial of their First Amendment rights to free speech if an injunction is not granted. (*Id.*, at 25).

Defendants, however, argue plaintiff's members and their children face no threat of irreparable harm. Defendants assert plaintiff has not shown a risk of "immediate irreparable injury" because plaintiff (1) has not identified any injury that has occurred to date to members or their children and (2) has not identified any imminent risk of irreparable harm to its members of their children. (Doc. 17, at 29).

2. Applicable Law

"[T]o warrant a preliminary injunction, the moving party must demonstrate a sufficient threat of irreparable harm." *Wachovia Secs., L.L.C. v. Stanton*, 571 F. Supp. 2d 1014, 1044 (N.D. Iowa 2008) (citation omitted). The movant must show more than the mere possibility that irreparable harm will occur. *TrueNorth Co., L.C. v. TruNorth Warranty Plans of N. Am., LLC*, 353 F. Supp. 3d 788, 801 (N.D. Iowa 2018). Rather, the movant must show it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Counc., Inc.*, 555 U.S. 7, 20 (2008). Thus, "[s]peculative harm does not support a preliminary injunction." *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012); *see also Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) ("[T]o demonstrate

irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." (quoting *Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir. 1996))). "The failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction[.]" *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987); *see also Dataphase*, 640 F.2d at 113, n.9 ("[T]he absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction.").

3. Analysis

Here, plaintiff has not shown irreparable harm will occur absent a preliminary injunction. Plaintiff has only provided evidence that harm is possible. Plaintiff has not, however, shown that there has been or will be impending, certain harm under the Policy.

There have been no showings of discipline under the Policy, that Gender Support Plans were given to children of Parents A-C, or that any parents have been denied information. Though the parents allege their children will likely be disciplined, will likely be given Gender Support Plans, and they will likely be denied any information or involvement if their children are given those plans, they have not shown that this future harm will occur with such imminence or such greatness that they will face or have faced irreparable harm. *See Turkish Coalition of Am., Inc. v. Bruininks*, 678 F.3d 617, 622 (8th Cir. 2012) (discussing, for purposes of certain imminence under standing doctrine, discipline under a school policy that is conceivable but is without sufficient factual recitation that such disciplinary practices exist). Currently, all plaintiff and its members face is speculative, notional harm that may never occur. Plaintiff must show "more than a mere possibility that irreparable harm will occur[,]" but plaintiff, at this stage, has failed to do so. *TrueNorth*, 353 F. Supp. 3d at 801.

Further, there has not been a showing with sufficient specificity of chilled speech or the avoidance of a certain course of conduct caused by the Policy's limitations.

Plaintiff has not shown that it is certain or imminent that Parents A-G's children will violate the Policy and receive discipline nor has plaintiff sufficiently recited what their children wish to say that will conflict with the Policy. The Court cannot infer that the students are avoiding a certain course of conduct because the Court cannot be sure what that course of conduct is. Further, there has been no recitation that if discipline occurs, it will be irreparable harm requiring an injunction. Indeed, to the extent that defendants disciplined children for violation of the Policy, that discipline would be subject to review and could be reversed, and thus, not irreparable. In short, the parents only assert that they fear their rights will be harmed if some uncertain future events occur. They have not shown any of these harms to be certain or imminent.

Thus, the Court finds irreparable harm does not weigh in favor of an injunction. Again, though this finding is sufficient to defeat this motion for preliminary injunction, the Court will still analyze the rest of the merits.

B. Balance of Harms

The Court finds the balance of harms weighs against granting a preliminary injunction.

1. Arguments

Plaintiff argues a preliminary injunction is required because of the threat to plaintiff's members' constitutional rights absent an injunction. (Doc. 3-1, at 25). Plaintiff also asserts this factor and the public interest merge when the defendant is a government actor, but the Court will assess them separately under *Dataphase*, as that is the standard for a preliminary injunction.[1] (*Id.*).

[1] Plaintiff states in its brief, "[t]he balance of the equities and the public interest factors 'merge when the Government is the party opposing the preliminary injunction.' *Nken v. Holder*, 556 U.S. 418, 435 (2009)." The Supreme Court did not say this. In the *Nken* decision, the Court discusses the functional overlap between the stay factors used in immigration cases and the factors applied to preliminary injunctions. *Nken v. Holder*, 556 U.S. 418, 428, 434 (2009)

Defendants assert the Policy is enforced to create a safe and supportive environment for all students, and an injunction would deprive all students of the security of knowing the school will recognize their autonomy and privacy to the extent various laws allow and require. (Doc. 17, at 30). Defendants also state harm to plaintiff is only hypothetical, so the balance of harms weighs in favor of defendants. (*Id.*).

2. Applicable Law

"[T]he balance of harms analysis examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public." *Wachovia Secs., L.L.C.*, 571 F. Supp.2d at 1047. It is not the same analysis as the irreparable harm analysis. *Id.* The balance of harms analysis considers several factors including the threat of each parties' rights that would result from granting or denying the injunction, the potential economic harm to the parties, and whether the defendant has taken voluntary remedial action. *Id.* "[A]n illusory harm to the movant will not outweigh any actual harm to the non-movant." *Frank N. Magid Assocs., Inc. v. Marrs*, No. 16-CV-198-LRR, 2017 WL 3091457, at *5 (N.D. Iowa Jan. 9, 2017) (quoting *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 976–77 (N.D. Iowa 2006)).

("There is substantial overlap between these and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.") (internal citations omitted). The Court later discusses the stay factors of harm to the opposing party and the public interest, stating those factors "merge when the Government is the opposing party[,]" *Id.*, at 435, as opposed to the "balance of equities" and "public interest" factors. The language plaintiff quotes came from a district court opinion and is not binding on this Court. *See Dorce v. Wolf*, 506 F. Supp. 3d 142, 145 n.4 (D. Mass. 2020). After researching the provenance of the purported Supreme Court quote from plaintiff's brief, the misquotation does not appear to be intentional or meant to misguide the Court. It is an example, however, of sloppy, poor writing for which there is little excuse.

3. Analysis

The Court finds the balance of harms disfavors injunction. The balance of harms only considers those harms that would result were the Court to issue an injunction. If an injunction were granted here, it would not only prevent enforcement of the provisions at issue; it would prevent enforcement of the entire Policy because plaintiff has challenged the entire administrative Policy.[2] (Doc. 3, at 1). An injunction would block students from any protection from harassment and bullying on the basis of gender identity and would prevent the school from disciplining such harassment and bullying under various Title IX and Iowa civil rights-related provisions that defendants are obligated by law to enforce. If a child were being bullied or harassed under any provision of the entire Policy, the school would not be allowed to step in and stop the bullying and would leave a vulnerable child with no remedy within the district. This child could include a child belonging to Parents B-G.[3]

Further, by prohibiting the school from enforcing a policy in furtherance of various Iowa laws, including Section 216.9, an injunction would put defendants between a rock and a hard place. Defendants would be compelled to not interfere with bullying and harassment as relates to the Code provisions it is legally bound to enforce if those provisions are furthered through the Policy. Defendants could face penalties for not effectuating the laws. So, not only would the district's children be harmed by unstoppable bullying, but the district could face risks and penalties, such as reduced funding that

[2] It appeared at the hearing, however, that plaintiff was attempting to narrow its ask to an injunction only to the challenged provisions. The Court will not assume that to be the case, however, since that was not clear and the party's filings ask for injunction to the entire Policy.

[3] As the Court stated in its prior order, it does not mention Parent A in its analysis here, given their child is no longer enrolled in the district and will not be subjected to the Policy's provisions.

impacts the overall quality and span of the education the district can provide students. This is just one of many possible penalties the legislature may prescribe.

In contrast, no harm would immediately befall plaintiff if an injunction were not issued. Plaintiff has not shown any harms currently befall the parents or children for which it speaks as the Policy remains in force. However, even if the Court assumes harm to the plaintiff will occur, that harm would be insufficient to warrant an injunction. If the Court assumes Parents B-G will be deprived of information as to their children, that their children will be given or discuss a Gender Support Plan, or that their children will be punished for violating the provisions at issue, the Court finds that harm is not so great as to outweigh the harm to defendants and students within the district. Further, any such harm alleged to befall plaintiff as a result of the Policy, which would continue absent injunction, is not certainly impending and thus cannot be said to threaten plaintiff's rights so substantially as to favor injunction. Six parents assert their children face potential harm without an injunction. All families and their children in the district face potential harm with an injunction, given the Policy reaches to protect all students for various reasons and not only for name and pronoun misuse.

Thus, the balance of harms weighs against granting a preliminary injunction.

C. Likelihood of Success on the Merits

The Court finds the likelihood of success on the merits weighs against an injunction.

1. Arguments

Plaintiff asserts various arguments as to why it will succeed on the merits. First, plaintiff argues it has standing to bring this suit on behalf of its member-parents who have standing to sue. (Doc. 21, at 6-7). Next, plaintiff asserts a violation of the Fourteenth Amendment right of child rearing because parents will be deprived of information related to their children's gender identities and will have no input or control over their children's

decisions related to gender identity under the Policy. (Doc 3-1, at 17-18). Plaintiff also alleges it is likely to succeed on the merits because the Policy violates the First Amendment through its speech restrictions and compulsion of speech. (*Id.*, at 20). Plaintiff asserts the Policy also regulates speech in the following ways: first, it is a content and viewpoint-based regulation; second, is overbroad; and finally, it is void for vagueness under the First and Fourteenth Amendments. (*Id.*, at 20).

Defendants assert plaintiff cannot be successful on the merits because it lacks standing. (Doc. 17, at 5-13). Defendants also argue plaintiff is unlikely to succeed on the merits on the basis of its fundamental rights claim because there is no deprivation of any liberty interest through the Policy. (*Id.*, at 13-14). Next, defendants assert plaintiff cannot prevail on the merits of any of its First Amendment claims. (*Id.*, at 20). Defendants argue plaintiff cannot prevail because the Policy does not compel speech, and it is not content or viewpoint-based because it does not regulate based on the content of the speaker's message or its ideology or views. (*Id.*, at 23). Also, defendants argue the Policy is not overbroad because it does not overstep its scope of regulation, nor is it void for vagueness because students are on notice of what the Policy prohibits and that it will not be applied arbitrarily. (*Id.*, at 24, 26).

2. Applicable Law

The Eighth Circuit has rejected the notion that the phrase "probability of success on the merits" should be read to mean that a movant can "prove a greater than fifty [percent] likelihood that he will prevail on the merits." *Dataphase Sys., Inc.*, 640 F.2d at 113. More recently, the Eighth Circuit has explained that in cases not seeking to enjoin "government action based on presumptively reasoned democratic processes," courts should "apply the familiar 'fair chance of prevailing' test" to assess whether a movant has a likelihood of success on the merits. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732–33 (8th Cir. 2008). The "fair chance of prevailing" test

"asks only whether a movant has demonstrated a 'fair chance of prevailing' in the ultimate litigation and . . . does not require a strict probabilistic determination of the chances of a movant's success when other factors, for example irreparable harm, carry substantial weight." *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1053–54 (8th Cir. 2014) (citations omitted).

A plaintiff must have standing to show a likelihood of success on the merits. Standing requires 1) an injury in fact that is concrete and particularized, actual or imminent; 2) that the injury in fact was likely caused by the defendant; and 3) that the injury would likely be redressed by judicial relief. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The burden to show all three elements of standing lies with the plaintiff. *Id.*, at 2208.

When a plaintiff alleges injury prior to enforcement, plaintiff must show either (1) an intention to engage in particular conduct impacted by the policy and that plaintiff individually faces a credible threat of enforcement if he acts or (2) that he self-censors as the result of an objectively reasonable chilling effect. *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Larid v. Tatum*, 408 U.S. 1, 13-14 (1972). Further, causation requires the injury plaintiff has experienced to be fairly traceable to the alleged conduct. *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2606 (2022). Finally, redress asks whether a favorable ruling would redress—remedy or compensate—the relevant injury caused by defendant. *Id.*

Additionally, when a plaintiff asserts third party standing to assert the rights of another, courts require that the plaintiff make two additional showings: (1) that the party asserting the right has a "close" relationship with the person who possesses the right;

(2) whether there is a "hindrance" to the possessor's ability to protect his own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

3. Analysis

Here, the Court finds plaintiff is unlikely to succeed on the merits. The Court first notes the parties do not dispute plaintiff's ability to bring this suit on behalf of its parent-members and their minor children. The Court will first address plaintiff's standing before moving into its fundamental rights and First Amendment discussions.

a. Standing

First, plaintiff faces some substantial obstacles of succeeding on the merits because plaintiff appears, on the facts alleged at this stage, to lack standing. Plaintiff has not provided facts to sufficiently allege an injury in fact, that Policy enforcement caused the injury, or that an injunction would redress the alleged injury.

i. Injury in Fact

First, there has not been a sufficient factual recitation for the Court to conclude, at this stage, that Parents A-G or their children have suffered an injury in fact. An injury in fact cannot simply be a possible future injury but instead must be certainly impending. *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 409 (2013).

In the absence of enforcement on a facial challenge, courts evaluate whether injury was caused through a chilling effect or through a credible threat of enforcement. Plaintiff, however, has only stated boilerplate, notional, subjective fears of chilled speech. None of the parents assert their child has been disciplined under the Policy. Plaintiff has not alleged any child has been disciplined for the misuse or failure to respect another child's preferred name or pronouns. The parents claim injury because their children may decide to express certain views or address another child using pronouns or names which that child does not identify and that if their children do so, they may receive discipline under the Policy. In other words, their children have "chilled" their own

speech based on their perception that they will be disciplined for speaking under the Policy. None of these parents, however, allege their child's speech has resulted in discipline under the Policy, that they have been threatened with discipline directly if they do express their views on gender identity, or that the Policy's requirement of respecting another's gender identity relates to anything other than students' names or pronouns. (Doc 1-1, at 4); *see Turkish Coal. of Am., Inc. v. Bruininks*, 678 F.3d 617, 622 (8th Cir. 2012) (stating injury cannot be found when there is a lack of factual allegations that certain retaliatory or disciplinary actions may result under the school policy). They also do not with sufficient specificity allege what their children might say that will cause an injury through discipline under the Policy; instead they assert that the mere existence of the Policy is chilling speech. *See Turkish Coal.*, 678 F.3d at 621-22; *Morrison v. Bd. of Educ. Of Boyd County*, 521 F.3d 602, 608-10 (6th Cir. 2008). Fear of hypothetical future harm to plaintiff's members and their children is not enough to sufficiently allege an injury in fact on these facts. *Clapper*, 568 U.S. at 416.

Additionally, plaintiff asserts a conjectural possibility of injury via a Gender Support Plan being created for the children without parental knowledge or consent. They predict the school and/or their children will not involve the parents in the creation of or discussions about a Gender Support Plan and that the school will not be forthcoming about Gender Support Plans when parents ask in violation of their fundamental rights of child-rearing. Based on the record currently before the Court, no one has been denied information related to their child's gender identity or Gender Support Plan. Though the Court does not doubt their genuine fears, the facts currently alleged before the Court do not sufficiently show the parents or their children have been injured or that they face certainly impending injury through enforcement of the Policy. The theory that (1) their child will express a desire for or indicate by mistake a desire for a plan, (2) the child will be given a plan, (3) without parental consent or knowledge, (4) and the information will

be hidden or denied when parents ask requires too many speculative assumptions without sufficient factual allegations to support a finding of injury. *See Turkish Coal.*, 678 F.3d at 622.

Parent A, additionally, has freely withdrawn their child from the school district. The Policy no longer applies to their child, and the harm of being "forced" out of the school district is self-inflicted. *See Clapper*, 568 U.S. at 416 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). Even assuming the Policy "forced" the child to leave the district, the Policy itself still has no effect on the child and cannot cause a cognizable injury in fact.

ii. Causation

There have not been sufficient factual allegations to find causation. Because the Court finds there is no injury in fact, potential enforcement of the Policy does not qualify as causation sufficient to confer standing. The Policy cannot cause an injury when there is no injury to cause. Here, the facts plaintiff alleges at this stage are not sufficient to show any injury was caused by the Policy. Thus, plaintiff has not shown a fair probability that there is causation.

iii. Redressability

Even if there were causation, plaintiff has not sufficiently shown an injunction would redress any injury. Iowa has several statutes prohibiting similar conduct as the Policy prohibits. *See, e.g.*, IOWA CODE § 280.28 (2022); Iowa Code § 216.9 (2022). Even if the Policy did not exist or an injunction were granted, the law still expressly prohibits discrimination in Iowa public schools based on gender identity. *See* § 216.9. Thus, plaintiff has failed to establish a fair probability an injunction would redress its alleged injury.

For these reasons, based on the record before the Court at this early stage of litigation, plaintiff will have a difficult time establishing that Parents A-G have standing. If the parents lack standing, so too does plaintiff.

b. Child Rearing

The Court finds plaintiff has not shown a likelihood of success on the merits based on an alleged violation of the fundamental right of child rearing. Plaintiff is certainly correct no one can decide without proper process that a parent is unfit or should not be allowed to make decisions directed toward the care, custody, and control of their children. *See Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). Plaintiff has not shown sufficiently, however, that there is any certain, impending action taken under the Policy that will interfere with that right. Plaintiff does not allege on behalf of any of the parents that their children have been given a plan or allege with sufficient specificity that they will be given a plan. Nor does plaintiff allege these parents have been left out of any plan creation or sufficiently allege that they will with certainty soon be left out.

Finally, plaintiff and parents do not allege they have been denied access to information about their minor children nor have they shown any certain impending denial of access. To be sure, that is not to say that the language of the Policy does not raise legitimate concerns about whether defendants could, or would fail to disclose to, or conceal information from, parents about their children's gender identity. The Policy itself is not explicit as to what standards schools will apply in supplying to parents information about their minor child's gender identity. Nevertheless, based on the record currently before the Court, plaintiff will have difficulty showing that the Policy violates their constitutional rights.

Thus, the Court finds plaintiff has not shown a fair probability of success on the merits as to its child rearing claim.

c. First Amendment

Likewise, plaintiff has not shown a fair chance of prevailing on its First Amendment claims. Plaintiff has not sufficiently alleged a fair probability of success on the merits as to compelled speech, content and viewpoint-based speech regulation, that the Policy is overbroad, nor that the Policy is vague.

Schools have more leeway in what protected speech and expression they may legally restrict. For example, they may regulate speech in school that causes substantial disruption or material interference with school activities, regulate indecent and vulgar speech or that promoting illegal drug use, or exercise editorial control over expression in school-sponsored activities if the editing reasonably relates to legitimate pedagogical concerns. *Morse v. Frederick*, 551 U.S. 393, 409 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). Recently, the Supreme Court has announced there are possible scenarios under which expression off-campus may be limited, though it has not explicitly identified those scenarios. *See Mahanoy Area Sch. Dist. V. B.L. by and through Levy*, 141 S.Ct. 2038, 2046-49 (2021).

i. Compelled Speech

Plaintiff has not sufficiently shown any speech is compelled by the Policy. There is no allegation the Policy requires students to speak to other specific students or do so using their names or pronouns. If they do speak to other students, they do not have to refer to other students by names or pronouns. It is also possible to use the universal word "they," which is often used to refer to a person or people regardless of whether that person uses "they" as a pronoun. Adolescents often go about their school day not interacting with other students, both intentionally and unintentionally. It is not farfetched to think students will not interact, again, intentionally and unintentionally, with students

with whom they fundamentally disagree or whose lifestyles they do not agree with. There is no way to gauge whether these students will be placed in groups together for projects or assignments. But there have been no factual allegations that the Policy requires students to call each other by anything at all, including their names or pronouns, as opposed to "you" or "they," which people naturally do in reference to each other already. The only allegation that has been made is that, if a student does use names or pronouns, they must be preferred names or pronouns.

Again, to be clear, the Policy arguably places students in the position that they cannot fully express themselves and their beliefs, but schools may legitimately restrict First Amendment rights in certain limited circumstances. *Tinker*, 393 U.S. at 514.

Thus, plaintiff has not shown a fair probability of prevailing on this ground.

ii. Content and Viewpoint Based

Plaintiff has not alleged sufficiently that the Policy is content or viewpoint based. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Gilbert, Ariz.*, 576 U.S. 155, 164 (2015). Further, the classification of content-based or content-neutral laws requires courts to determine whether a speech regulation facially draws a distinction based on what message the speaker conveys. *Id.* In contrast, viewpoint discrimination regulates speech on the basis of the speaker's ideology, perspective, or opinion within the speech. *Rosenberger v. Rector and Visitors of Univ. Va.*, 55 U.S. 819, 829 (1995).

At this stage, the Policy appears content and viewpoint neutral. Though the Policy is geared toward protecting transgender and nonbinary students, the Names and Pronouns provision, from a plain reading, applies to misuse of any student's name or pronouns, including those who identify as cisgender. The provision appears to apply with equal force to someone named Nathaniel who prefers the nickname Nate as it does to a transgender individual who wishes to go by a name different from their legal or birth

name. The Names and Pronouns provision provides that whatever name Nate provides to staff as part of his gender identity, it should be used, and any "intentional and/or persistent refusal by staff or students to respect a student's gender identity is a violation of school board policies[.]" More concretely, if Nate is a cisgendered male, the Policy bars anyone from calling Nate "her." Thus, the Policy appears, at this stage, to be content neutral.

Plaintiff has not shown facts indicating expression of views of any kind will be disciplined or that their expression will be limited under the Policy. The Policy itself has not been shown to penalize students for expressing views that there are only two genders or that gender dysphoria does not exist, nor that it penalizes opposite expression. It only has been shown to penalize students for conduct directed at a specific individual in relation to their name and pronouns, as part of their gender identity. Thus, it appears, based on the facts currently before the Court, to be viewpoint neutral.

Again, even if the Policy restricts free speech rights of students to some degree, schools have more leeway to do so in a school setting. Thus, plaintiff has not shown a fair probability that the Policy is not content and viewpoint neutral.

iii. Overbroad

Plaintiff next alleges the Policy is overbroad. A policy or law is facially overbroad under the First Amendment when no application of the policy would be constitutional or where a substantial number of the policy's potential applications would be unconstitutional in relation to the policy's legitimate sweep. *Ams. For Prosperity Found. V. Bonta*, 141 S. Ct. 2373, 2387 (2021).

Plaintiff has not shown evidence that the Policy is overbroad. The Policy provision "Names and Pronouns" provides "intentional and/or persistent refusal . . . to respect a student's gender identity" is a violation. (*See* Doc 1-1, at 4). Plaintiff has not shown the Policy is intended to discipline accidental misuse, jokes, or opinions related to gender

identity in general. On its face, the Policy provides that a student will be punished for intentional and repeated misuse of a name or pronoun and behavior targeting specific people, including, presumably, jokes or making fun of someone on the basis of their gender or name. The district argues the purpose of the Policy is to protect students who are transgender or nonbinary from harassment and bullying, based on their names and pronouns, which often change when people's gender identity changes. There is nothing in the record currently to indicate the Policy is being applied beyond its legitimate sweep. The factual recitation does not indicate at this stage that "refusal . . . to respect" means anything other than refusal to honor a specific person's gender identity. Thus, plaintiff has not shown a fair probability of success in proving the Policy is facially overbroad.

iv. Vagueness

Finally, plaintiff has not shown a fair probability that the Policy is vague. A policy or statute is void for vagueness when the offense the policy regulates or penalizes is not (1) "with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Plaintiff has not shown a likelihood of success on the merits as to the vague for voidness challenge. Though the word "respect" could mean a variety of things, the context it is used in and its position in the sentence indicates "respect" means "will acknowledge or honor through use of." (Doc. 1-1, at 4). Given its position under a section about names and pronouns, it appears "respect" means students and staff members must use a student's preferred name and pronouns when speaking to or about them at school. Plaintiff has not shown evidence supporting the idea that the provision, on its face, applies to any other scenario. Plaintiff has not shown a fair probability that students

or staff are not on notice of what behavior violates the Policy given a plain reading of the Policy provision.

Further, there is no evidence before the Court at this stage that indicates a fair probability that the Policy provision encourages arbitrary or discriminatory enforcement. The Policy provides that a repeated, intentional misuse of a student's name or pronouns violates school policies. (Doc. 1-1, at 4). This indicates, facially, that the school will not discipline less-favored students for accidental misuse or one-time occurrences. This does not mean the Policy does not raise concerns about the threshold for enforcement of the provision, however. The Policy, on its face, applies to all students who choose intentionally and repeatedly to misuse students' names or pronouns, and no facts to the contrary are before the Court. There is nothing in the record to indicate the Policy as a whole or the Name and Pronoun provision leads to arbitrary or discriminatory enforcement or is facially unconstitutional under void for vagueness doctrine. Plaintiff has not met their burden.

Thus, the Court finds the likelihood of success on the merits weighs against an injunction.

D. Public Interest

The Court finds that the public interest tips in favor of denying the preliminary injunction.

1. Arguments

Plaintiff asserts that the public interest weighs in favor of granting a preliminary injunction because it is tautologically in the public interest to prevent constitutional rights violations. (Doc. 3-1, at 25). Also, plaintiff argues that it cannot be a legitimate public interest to enforce what is, in its view, an unconstitutional ordinance. (Doc. 21, at 15).

Defendants argue the public interest weighs in favor of fighting discrimination. (Doc. 17, at 30-31). The public has a heavy, broad interest, defendants argue, in

eradicating harassment, bullying, and discrimination on the basis of gender identity. (*Id.*). Defendants assert this interest is far broader than the interests of parents who wish to access their children's school information, which the Policy allows. (*Id.*, at 31).

2. Applicable Law

This Court has noted as follows:

> The "public interest" factor frequently invites the court to indulge in broad observations about conduct that is generally recognizable as costly or injurious. However, there are more concrete considerations, such as reference to the purposes and interests any underlying legislation was intended to serve [and] a preference for enjoining inequitable conduct[.]

Prudential Ins., 728 F. Supp. 2d at 1032 (internal citations omitted).

3. Analysis

The Court finds the public interest weighs against a preliminary injunction. It is in the public interest to ensure schools comply with state laws that prohibit discrimination based on gender identity. *See* Iowa Code § 216.9 (2022). Likewise, it is in the public interest that public schools are productive, safe places to educate children. Creating a safe environment for children necessarily includes ensuring no child is subject to harassment, bullying, or made to feel lesser for any reason by students, staff, or others while at school. It is, however, also in the public interest to prevent the chilling of protected speech and interference with the right of child-rearing. At this stage, however, those alleged harms to protected speech and child-rearing here are not imminent harms and cannot be said to tip the scales in favor of an injunction.

Thus, the public interest tips in favor of denying the injunction.

IV. CONCLUSION

For these reasons stated above, the Court finds against plaintiff's motion for a preliminary injunction.

IT IS SO ORDERED this 20th day of September, 2022.

C.J. Williams
United States District Judge
Northern District of Iowa

21-1365-cv
Selina Soule et al. v. Connecticut Association of Schools et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022

(Argued: September 29, 2022 Decided: December 16, 2022)

Docket No. 21-1365-cv

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother; ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,

Plaintiffs-Appellants,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. D/B/A CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants-Appellees,

and

ANDRAYA YEARWOOD; THANIA EDWARDS, on behalf of her daughter, T.M.; COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,

Intervenor-Defendants-Appellees.[*]

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[*] The Clerk of the Court is directed to amend the caption to conform to the above.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Before: CHIN, CARNEY, and ROBINSON, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the District of Connecticut (Chatigny, *J.*) dismissing claims against defendants-appellees Connecticut Interscholastic Athletic Conference and its member high schools under Title IX of the Education Amendments of 1972 challenging its policy allowing transgender students to participate in gender specific sports consistent with their gender identity. Plaintiffs-appellants are four cisgender female students who allege that the policy disproportionally disadvantages cisgender girls as compared to boys. The district court granted defendants-appellees' motion to dismiss the challenge to the policy as not justiciable and the claims for monetary relief as barred.

AFFIRMED.

ROGER G. BROOKS (John J. Bursch, Christiana M. Holcomb, *and* Cody S. Barnett, *on the brief*), Alliance Defending Freedom, Scottsdale, AZ, Washington, DC, *and* Ashburn, VA, *for Plaintiffs-Appellants*.

PETER J. MURPHY (Linda L. Yoder, *on the brief*), Shipman & Goodwin LLP, Hartford, CT, *and* Johanna G. Zelman, FordHarrison, LLP, Hartford, CT, *and* David S. Monastersky, Howd & Ludorf, LLC, Hartford, CT, *and* Michael E. Roberts, Commission on Human Rights and Opportunities, Hartford, CT, *for Defendants-Appellees*.

JOSHUA BLOCK (Lindsey Kaley, Galen Sherwin, Elana Bildner, *and* Dan Barrett, *on the brief*), ACLU Foundation, New York, NY, *and* ACLU Foundation of Connecticut, Hartford, CT, *for Intervenor-Defendants-Appellees*.

CHIN, *Circuit Judge*:

Since 2013, defendants-appellees, Connecticut Interscholastic Athletic Conference (the "CIAC") and its member high schools (together, "Defendants"), have followed the "Transgender Participation" Policy (the "Policy"), which permits high school students to compete on gender specific athletic teams consistent with their gender identity if that is different from "the gender listed on their official birth certificates." CIAC By-Laws Article IX,

Section B.[1] Plaintiffs-appellants are four female athletes who are cisgender ("Plaintiffs"), and who attended CIAC member high schools and competed in CIAC-sponsored girls' track events against female athletes who are transgender. Plaintiffs allege that the Policy violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), because the participation of transgender females in girls' high school athletic events results in "students who are born female" having materially fewer opportunities for victory, public recognition, athletic scholarships, and future employment "than students who are born male." J. App'x at 131 ¶ 4.

To remedy the alleged Title IX violations, Plaintiffs requested damages and two injunctions -- one to enjoin future enforcement of the Policy and one to alter the records of certain prior CIAC-sponsored girls' track events to remove the records achieved by two transgender girls, who intervened in this action. The district court dismissed the claims on grounds that (1) Plaintiffs' request to enjoin future enforcement of the Policy was moot; (2) Plaintiffs lacked standing to assert their claim for an injunction to change the record books; and

[1] The CIAC's Handbook, which includes the Policy at Article IX, Section B of the By-Laws, can be found on the CIAC's website at http://www.casciac.org/ciachandbook. The Policy is available at page 54 of the Handbook.

(3) Plaintiffs' claims for monetary damages were barred under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).[2]

Like the district court, we are unpersuaded, with respect to the claim for an injunction to alter the records, that Plaintiffs have established the injury in fact and redressability requirements for standing; both fail for reasons of speculation. And because we conclude that the CIAC and its member schools did not have adequate notice that the Policy violates Title IX -- indeed, they had notice to the contrary -- Plaintiffs' claims for damages must be dismissed.

Accordingly, we AFFIRM the district court's dismissal of Plaintiffs' claims against the CIAC and its member high schools.

STATEMENT OF THE CASE

The material facts alleged in Plaintiffs' second amended complaint (the "Complaint") are assumed to be true, and all reasonable inferences are drawn in their favor. *See Donoghue v. Bulldog Invs. Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012) (Rule 12(b)(1) motion to dismiss); *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) (Rule 12(b)(6) motion to dismiss).

[2] At oral argument, Plaintiffs conceded that their claim for prospective injunctive relief is moot because all Plaintiffs have graduated from high school and are no longer subject to the Policy. Thus, the dismissal of this claim as moot is affirmed.

I. The Facts

Plaintiffs Chelsea Mitchell, Ashley Nicoletti, Alanna Smith, and Selina Soule were -- at the time the Complaint was filed -- Connecticut high school students who each ran track for their high school teams. Each was competitive at the statewide level and trained hard to "shave mere fractions of seconds off [their] race times." J. App'x at 130 ¶ 1. Plaintiffs allege that the Policy forced them to compete against female athletes who are transgender, which deprived them of a fair shot at statewide titles.

The CIAC has applied the Policy since the 2013-2014 school year, permitting high school students to participate on gender specific sports teams consistent with their gender identity. The Policy expresses a commitment "to providing transgender student-athletes with equal opportunities to participate in CIAC athletic programs consistent with their gender identity," and "conclude[s] that it would be fundamentally unjust and contrary to applicable state and federal law to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes." CIAC By-Laws Article IX, Section B. Thus, a student's eligibility to participate on a CIAC gender specific sports team is based on "the gender

identification of that student in current school records and daily life activities in the school and community," and the school district's "determin[ation] that the expression of the student's gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics." *Id.*

Pursuant to the Policy, intervenor-defendant-appellee Andraya Yearwood participated on the girls' track team at Cromwell High School for the 2017, 2018, and 2019 indoor and outdoor seasons, and the 2020 indoor season. Also pursuant to the Policy, intervenor-defendant-appellee Terry Miller participated on the girls' track team at Bloomfield High School for the 2018 outdoor season, the 2019 indoor and outdoor seasons, and the 2020 indoor season. During these track seasons, Yearwood and Miller, both girls who are transgender, competed in CIAC-sponsored track events against girls who are cisgender, including Plaintiffs -- Mitchell, Nicoletti, Smith, and Soule.

In certain races, Yearwood and Miller finished ahead of Plaintiffs. For example:

Mitchell: In the 2019 Class S State Championship Women's Indoor 55-meter; the 2019 State Open Championship Women's Indoor 55-meter; the 2019 Class S State Championship Women's Outdoor 100-meter; and the

2019 Class S State Championship Women's Outdoor 200-meter, Mitchell either placed second after Miller, or third after both Miller and Yearwood.

Nicoletti: In the 2019 Class S State Championship Women's Outdoor 100-meter preliminary race, Miller took second place, Yearwood took third, and Nicoletti took ninth.

Smith: In the 2019 State Open Championship Women's Outdoor 200-meter final, Miller placed first and Smith placed third.

Soule: In the 2019 State Open Championship Women's Indoor 55-meter preliminary race, Miller, Yearwood, and Soule finished first, second, and eighth, respectively.

In other races, Plaintiffs finished ahead of Yearwood and Miller. For example, in the 2019 Class S State Championship Women's Outdoor 100-meter preliminary race, Mitchell, Miller, and Yearwood finished first, second, and third, respectively.

II. The Proceedings Below

In February 2020, Plaintiffs brought this action against the CIAC and its member high schools, alleging that the Policy "is now regularly resulting in boys displacing girls in competitive track events in Connecticut"; "students who

are born female now have materially *fewer* opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records, than students who are born male"; and "[t]his reality is discrimination against girls that directly violates the requirements of Title IX." J. App'x at 131 ¶¶ 3-5.

Plaintiffs also alleged that the Policy has impacted their individual achievements by depriving them -- as cisgender female athletes -- of certain state championship titles and opportunities to advance to higher levels of statewide competition. Specifically, Plaintiffs alleged that but for the Policy, Mitchell would be the record holder of four additional state champion titles; Nicoletti would have placed seventh in the 2019 Class S State Championship Women's Outdoor 100-meter preliminary race, and advanced to the 100-meter final; Smith would have placed second in the 2019 State Open Championship Women's Outdoor 200-meter final; and Soule would have placed sixth in the 2019 State Open Championship Women's Indoor 55-meter preliminary race, and advanced to the 55-meter final.

Plaintiffs sought a declaration that the Policy violates Title IX by "failing to provide competitive opportunities that effectively accommodate the abilities of girls" and "equal treatment, benefits, and opportunities for girls in athletic competition"; monetary relief for the alleged Title IX violations; an injunction against future enforcement of the Policy; and an injunction requiring the CIAC and its member schools "to remove male athletes from any record . . . designated for girls or women" and "to remove times achieved by athletes born male . . . from any records purporting to record times achieved by girls or women." J. App'x at 175-76 (prayer for relief). Plaintiffs also moved for a preliminary injunction to prevent transgender girls from competing in the then-upcoming outdoor track season.

Before Plaintiffs' motion for a preliminary injunction could be heard, the COVID-19 pandemic closed schools and nonessential businesses throughout Connecticut, and all interscholastic athletic competition was suspended indefinitely. The district court denied Plaintiffs' motion for expedited treatment on April 8, 2020, concluding that Plaintiffs had no need for a preliminary injunction when all spring track events had been cancelled due to the ongoing pandemic.

On August 21, 2020, the CIAC and its member schools jointly moved to dismiss the Complaint, asserting, *inter alia*, that Plaintiffs lacked standing to seek injunctions enjoining future enforcement of the Policy and requiring revisions to race records; Plaintiffs' requested relief would violate the rights of Yearwood, Miller, and other transgender students protected by Title IX and the Equal Protection Clause of the Fourteenth Amendment; Plaintiffs had not plausibly alleged that competing against girls who are transgender violates Title IX; and Plaintiffs' claims for monetary relief under Title IX were barred.

On April 25, 2021, the district court granted Defendants' motion to dismiss on grounds that (1) Plaintiffs' request for injunctive relief against the Policy became moot after Yearwood and Miller graduated in June 2020; (2) Plaintiffs lacked standing to seek an injunction requiring corrections to past athletic records because their theory of redressability was too speculative; and (3) Plaintiffs' request for damages was barred because the CIAC did not receive adequate notice that its Policy violated Title IX. *See generally Soule v. Conn. Ass'n of Schs., Inc.*, No. 20-CV-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021). The court thereafter entered judgment, dismissing the action.

This appeal followed.

DISCUSSION

We conclude that, first, Plaintiffs lack standing to seek an injunction rewriting the records and, second, Plaintiffs' claims for monetary relief are barred under *Pennhurst*. Accordingly, we affirm the district court's dismissal of the Complaint.

I. Claims for Injunctive Relief

We review *de novo* the district court's dismissal of the claims for injunctive relief pursuant to Rule 12(b)(1). *See Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 172 (2d Cir. 2021). "[A] plaintiff asserting standing must 'allege facts that affirmatively and plausibly suggest that [she] has standing to sue' and courts 'need not credit a complaint's conclusory statements without reference to its factual context.'" *Id.* (citation omitted).

To satisfy the constitutional requirement of standing, plaintiffs in federal court bear the burden of establishing that (1) they have suffered an "injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed

by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). "A plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d Cir. 2004) (citation omitted). The claimed future injury must be "*certainly impending* to constitute injury in fact," and "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation and internal quotation marks omitted).

Here, Plaintiffs present two theories of standing. First, Plaintiffs argue that the Policy deprived them of a "chance to be champions," and that CIAC's current records perpetuate this past injury because "[w]hen records fail to appropriately credit female achievements, athletes like Plaintiffs feel 'erased.'" Appellants' Br. at 18-19. Second, Plaintiffs argue that the current records affect Plaintiffs' future employment opportunities, and that correcting the records

would redress this harm.[3] We conclude that both theories of standing fail to establish injury in fact and redressability.

A. A Chance to be Champions

Plaintiffs' theory of injury in fact -- that the Policy deprived them of a "chance to be champions" -- fails because they have not alleged a cognizable deprivation here. All four Plaintiffs regularly competed at state track championships as high school athletes, where Plaintiffs had the opportunity to compete for state titles in different events. And, on numerous occasions, Plaintiffs were indeed "champions," finishing first in various events, even sometimes when competing against Yearwood and Miller. *See, e.g.*, J. App'x at 157 ¶ 100 (Mitchell defeated Yearwood and Miller in 2019 Class S Women's Outdoor 100-meter); Suppl. App'x at 54-55 (Soule placed first in long jump and 4x200 relay at 2019 state championships). Plaintiffs simply have not been deprived of a "chance to be champions."

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[3] Plaintiffs also alleged in their Complaint that maintaining the current records affects their college recruitment and scholarship opportunities. This claim, however, is now moot because all Plaintiffs have graduated from high school, have matriculated at undergraduate institutions, and are competing on collegiate track-and-field teams; it would be impossible, at this point, for an injunction correcting the records to grant Plaintiffs improved college recruitment opportunities. *See Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (citation and internal quotation marks omitted)).

We do not hold that the deprivation of a "chance to be champions" can never be "an invasion of a legally protected interest," sufficient for injury in fact. *Lujan*, 504 U.S. at 560. Indeed, in *McCormick*, a case which Plaintiffs rely on, we found that female athletes suffered this deprivation, in violation of Title IX, when the school district scheduled girls' soccer in the Spring and boys' soccer in the Fall, because participation in state championships for soccer was available only to teams scheduled in the Fall. *See McCormick*, 370 F.3d at 295-96.

But the injury suffered by the female athletes in *McCormick* is easily distinguishable from Plaintiffs' circumstances here. In *McCormick*, the school district's scheduling decision afforded male athletes, and simultaneously deprived female athletes of, the opportunity to *compete* at state championships -- the "chance to be champions." *Id.* at 295 ("The scheduling of soccer in the spring, therefore, places a ceiling on the possible achievement of the female soccer players that they cannot break through no matter how hard they strive. The boys are subject to no such ceiling."). Here, the Policy did not deprive Plaintiffs of the opportunity to compete at state championships.

Even assuming Plaintiffs could show injury in fact, the independent constitutional requirement of redressability remains unsatisfied. It is not

apparent that an injunction to rewrite the records would redress Plaintiffs' alleged deprivation -- revising the records would not give Plaintiffs "a *chance* to be champions." Plaintiffs' injury of being deprived of a "chance to be champions" could be remedied only with damages for past deprivation, or with an injunction requiring do-overs of the races. But the former, as explained below, are unavailable to Plaintiffs, and Plaintiffs do not seek the latter. Indeed, the races were run in conformity with the rules in effect at the time; times were recorded; medals for gold, silver and bronze were in fact awarded to athletes who finished first, second, and third; and the records accurately reflect those results. Plaintiffs have not shown that there is a proper legal framework for invalidating or altering records achieved by student-athletes who competed in conformity with the applicable rules. This mismatch between Plaintiffs' alleged injury and requested relief is fatal to establishing redressability. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Plaintiffs argue that an injunction changing the records would remedy the fact that Plaintiffs feel "erased" by the current records, because the

injunction would give Plaintiffs additional public recognition for their athletic achievements and hard work. Appellants' Br. at 19-20. But absent a proper means to alter the records, a ruling from this Court would give Plaintiffs nothing more than "psychic satisfaction," which, on its own, "is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel*, 523 U.S. at 107; *accord Kapur v. Fed. Commc'ns Comm'n*, 991 F.3d 193, 196 (D.C. Cir. 2021) ("The 'psychic satisfaction' of winning doesn't cut it."); *I.L. v. Alabama*, 739 F.3d 1273, 1281 (11th Cir. 2014) ("[G]ranting the plaintiffs the relief they request would result in nothing more than a mere 'moral' victory, something the federal courts may not properly provide."); *Doyle v. Town of Litchfield*, 372 F. Supp. 2d 288, 303 (D. Conn. 2005) ("[S]ome emotional or mental satisfaction . . . is inadequate to confer standing, no matter how worthy the cause.").

Thus, Plaintiffs' first theory of standing -- that the Policy deprived them of a "chance to be champions" -- fails to establish both injury in fact and redressability.

B. Prospects at Future Employment

Next, Plaintiffs argue that the records "*could* . . . affect all four Plaintiffs' prospects at future employment." Appellants' Br. at 20 (emphasis

added). "[A]llegations of *possible* future injury," however, are insufficient to satisfy injury in fact. *Clapper*, 568 U.S. at 409. To support the argument that Plaintiffs' future employment opportunities are harmed by maintaining the records as is, Plaintiffs assert that "[o]ur society places a high value on athletic achievements," 94% of female business executives "participated and recorded achievements in interscholastic sports," and most employers will likely "consider Plaintiffs more favorably in light of their achievements." Appellants' Br. at 21-22.

It is true that employers often find candidates with athletic experience more appealing. Indeed, some employers (including federal judges perhaps) may favor candidates for employment who competed on collegiate athletic teams for the very reason that athletic experience speaks loudly about the candidate's discipline, time-management skills, patience, and ability to collaborate. But the records that Plaintiffs want re-written already show their participation and impressive achievements in high school athletics; the mere fact that athletic experience may be a significant factor for prospective employers in their hiring decisions does not show that Plaintiffs' future employment opportunities are harmed by the current records.

Moreover, because "[a]n employer is entitled to arrive at a subjective evaluation of a candidate's suitability for a position," *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001), *superseded in part on other grounds by* Fed. R. Civ. P. 37(e), Plaintiffs can only speculate as to how prospective employers will exercise their discretion when hiring and whether the requested revisions to the records would have any noticeable impact. This speculation is insufficient to show injury in fact. *See Clapper*, 568 U.S. at 410-14 (concluding that plaintiffs' claim of future injury was not "certainly impending" where harm to plaintiffs depended on the discretion of government officials and plaintiffs could only speculate as to how they would exercise their discretion). Thus, Plaintiffs have failed to show injury in fact because they have not established that maintaining the records as they are now will cause future injury to Plaintiffs' employment opportunities that is "certainly impending."

Nor have Plaintiffs established redressability. Plaintiffs argue that athletic achievements highlight valuable skill sets to employers and can distinguish Plaintiffs from other applicants. But even conceding that some athletic achievements can impact one's opportunities for employment, Plaintiffs have only speculated that changing the records -- so that (1) Mitchell finishes first

instead of second in four championship races, (2) Smith finishes second instead of third in one championship race, and (3) Soule and Nicoletti both advance to the next level of competition in their respective events -- would change a prospective employer's decision to hire any one of them. The reality is that an injunction requiring changes to the records would not bind any prospective employers who consider hiring Plaintiffs because they are not before the court, and thus a favorable decision for Plaintiffs is not likely to change their future employment prospects or outcomes. *See Lujan*, 504 U.S. at 562 (holding no injury and redressability where their "existence . . . depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict" (citation omitted)). And, as the district court noted, even if the records were amended, Plaintiffs have not shown that their employment prospects are likely to be any different, given that a simple internet search would reveal to the prospective employer this controversy about the records. *See Soule*, 2021 WL 1617206, at *7. Thus, because Plaintiffs have failed to plausibly allege that an injunction requiring changes to the records is likely to change their employment opportunities, Plaintiffs have failed to meet their burden on redressability.

To be clear, we do not decide now whether a court can ever award an injunction to rewrite records. As the parties to this appeal emphasized at argument, the accuracy of records are significant, "inaccurate" records can cause real injury to athletes, and the question of accuracy can go beyond identifying who had the fastest time, who jumped the farthest, or who hit the most home runs.[4] Even so, not every harm is an injury that can be redressed in an Article III court -- the requirements of standing must be satisfied, and Plaintiffs have failed to do so here.

[4] Controversies over athletic records are not uncommon. Around the time of argument in this case, the controversy over who holds the single-season home run record in Major League Baseball ("MLB") was reignited when New York Yankee Aaron Judge beat Roger Maris's record by hitting his sixty-second home run that season. *See* Jack Vita, *WATCH: Aaron Judge Hits 62nd Home Run Passing Roger Maris' AL HR Record*, Sports Illustrated (Oct. 4, 2022), https://www.si.com/fannation/mlb/fastball/news/watch-aaron-judge-hits-62nd-home-run-passing-roger-maris-al-hr-record. Before Judge, Barry Bonds, Mark McGwire, and Sammy Sosa each had surpassed Maris's sixty-one home runs. But their season records, set in MLB's infamous "steroid era," carry the stain of performance-enhancing drugs. *See* Mike Gavin, *Aaron Judge Hits 61st Home Run to Tie Roger Maris' Record*, NBC Sports (Sept. 28, 2022), https://www.nbcsports.com/philadelphia/phillies/aaron-judge-hits-61st-home-run-tie-roger-maris-record. Some, including Judge, say Bonds's seventy-three home run record is the one to beat, because seventy-three is the most home runs hit in a single MLB season. *See* Joseph Salvador, *Aaron Judge Recently Said Barry Bonds's 73 Home Runs Is True Record*, Sports Illustrated (Sept. 29, 2022), https://www.si.com/mlb/2022/09/29/aaron-judge-barry-bonds-73-home-runs-true-record. Others maintain that Babe Ruth still holds the record, because Ruth's sixty home runs in a 154-game season is more impressive than the records set in 162-game seasons by Maris, Bonds, McGwire, Sosa and Judge. *See* Gavin, *supra*. All this is to say the debate over who holds the record, whether aided by more games or abetted by banned substances, persists to this day, among MLB fans and athletes, on the internet, and in the ballparks -- but it, like this controversy, is not a debate for the courtroom.

II. Claims for Damages

We review *de novo* a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *See Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 95 (2d Cir. 2010).

A. Applicable Law

Title IX broadly prohibits education programs that receive federal funding from discriminating "on the basis of sex." 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."). The Supreme Court has recognized an implied private right of action under Title IX, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979), and has held that monetary relief is available in such suits, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

Because Congress enacted Title IX pursuant to its authority under the Spending Clause, however, private damages actions under Title IX "are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Davis Next Friend LaShonda D. v. Monroe*

Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999) ("When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'" (citation omitted)); *see also Pennhurst*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions [imposed by Congress's Spending Clause legislation] or is unable to ascertain what is expected of it."). To determine whether a funding recipient is on notice that its conduct "falls within the scope of Title IX's proscriptions," *Davis*, 526 U.S. at 647, we look to guidance promulgated by the agency responsible for Title IX's enforcement, the Department of Education's Office of Civil Rights ("OCR"), *see Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 93 (2d Cir. 2012), and to relevant decisions from the Courts of Appeals, *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183-84 (2005).

There is one recognized exception to *Pennhurst*'s notice requirement: "*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis*, 526 U.S. at 642.

B. Application

There is no dispute here that the CIAC and its member schools are recipients of federal education funding for Title IX purposes. Thus, unless the exception set forth in *Davis* were to apply, Plaintiffs' suit for private damages may proceed only if *Pennhurst*'s notice requirement is satisfied -- *i.e.*, if it is shown that the CIAC and its member schools had adequate notice that they could be liable under Title IX as a result of the Policy. We conclude that only the opposite has been shown here.

Looking first to guidance promulgated since the Policy's adoption in 2013, OCR's position on transgender students' participation in athletics has fluctuated with the changes in presidential administrations in 2016 and 2020.[5] But even when promulgating and rescinding its guidance, OCR never clearly provided that allowing transgender students to participate on athletic teams

[5] In 2017, OCR rescinded its guidance from 2016 -- which stated that transgender students must be allowed to participate in activities consistent with their gender identity, *see* Letter from Catherine E. Lhamon, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., and Vanita Gupta, Principal Dep. Ass't Att'y Gen. for Civil Rights, U.S. Dep't of Justice (May 13, 2016), -- on grounds that the legal issues implicated in the 2016 guidance needed to be considered "more completely," Letter from Sandra Battle, Acting Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., and T.E. Wheeler, II, Acting Ass't Att'y Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017). Similarly, in August 2020, OCR sent the CIAC a Revised Letter of Impending Enforcement Action, stating that OCR interpreted Title IX to require that gender specific sports teams be separated based on biological sex, but OCR withdrew this letter in February 2021, stating that it should "not be relied upon in this or any other matter." *See* ECF Nos. 172-1, 154-2.

consistent with their gender identity violates Title IX. *Cf. Jackson*, 544 U.S. at 183 (finding adequate notice where "regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years").

Next, the Supreme Court's recent decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and the decisions of our sister circuits interpreting Title IX strongly support the conclusion that the CIAC and its member schools lacked notice that a policy such as that at issue here violates Title IX.

In *Bostock*, the Supreme Court interpreted Title VII's prohibition of discrimination "on the basis of sex" as proscribing discrimination based on one's transgender status, 140 S. Ct. at 1737, and the Court has "looked to its Title VII interpretations of discrimination in illuminating Title IX," *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting). Title IX includes language identical to that in Title VII, broadly prohibiting discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Thus, it cannot be said that the Policy -- which prohibits discrimination based on a student's transgender status by allowing all

students to participate on gender specific teams consistent with their gender identity -- "falls within the scope of Title IX's proscriptions."

Moreover, the Courts of Appeals considering whether Title IX prohibits schools from treating transgender students consistent with their gender identity have held that the statute does not. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020) (concluding that school district's plan allowing transgender students to use bathrooms consistent with their gender identity does not discriminate on the basis of sex in violation of Title IX because the plan treats all students equally, regardless of their sex); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 535 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) ("The School District's policy allows all students to use bathrooms and locker rooms that align with their gender identity. It does not discriminate based on sex, and therefore does not offend Title IX.").

Some Courts of Appeals have taken it further and held that treating transgender students consistent with their sex assigned at birth -- as the CIAC and its member schools would be doing if the Policy were terminated -- violates Title IX. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (holding that school

board's policy requiring students to use bathrooms based on biological sex unlawfully discriminated against transgender student in violation of Title IX); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017)("A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."); *see also Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016). Although these cases from our sister circuits do not address the exact issue of participation of transgender athletes on gender specific sports teams, such authority nonetheless establishes that discrimination based on transgender status is generally prohibited under federal law, and further supports the conclusion that the CIAC and its member schools lacked clear notice that the Policy violates Title IX.

Invoking *Davis*, Plaintiffs argue that their suit for private damages may proceed even if there was no clear notice that the Policy violates Title IX because the CIAC and its member schools, through the Policy, intentionally discriminated against cisgender female athletes. We are not persuaded.

This "intentional conduct" exception to *Pennhurst*'s notice requirement has been applied only in cases where the funding recipient is

deliberately indifferent to known acts of retaliation or sexual harassment in violation of Title IX. *See, e.g.*, *Jackson*, 544 U.S. at 173 ("Retaliation against a person because [they] complained of sex discrimination is [a] form of intentional sex discrimination encompassed by Title IX's private cause of action."); *Davis*, 526 U.S. at 646-47 (concluding that federal funding recipients may be liable for private damages under Title IX "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment"); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (concluding the same where deliberate indifference is to known teacher-on-student sexual harassment); *Franklin*, 503 U.S. at 74-75 (same). Plaintiffs have presented no persuasive arguments as to why the exception should also apply in this case, where the alleged Title IX violation is a facially neutral policy, and not a failure to respond to known instances of discriminatory conduct that clearly violates Title IX. *See Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685, 693 (6th Cir. 2000) (explaining that *Franklin*, *Gebser*, and *Davis* "all address deliberate indifference to sexual harassment, and are not readily analogous" to cases alleging sex discrimination with respect to facially neutral athletic opportunities). And even if this exception to the notice requirement is extended to cases involving claims of discrimination

in athletics, the Policy could not be considered "intentional conduct that violates the clear terms of [Title IX]," *Davis*, 526 U.S. at 642, given *Bostock* and the decisions from other Courts of Appeals. Thus, the "intentional conduct" exception is inapplicable here.

Accordingly, we conclude that Plaintiffs' claims for money damages are barred.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's judgment dismissing the Complaint.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother; ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,	:	
Plaintiffs,	:	
v.	:	Case No. 3:20-cv-00201 (RNC)
CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,	:	
Defendants,	:	
and	:	
ANDRAYA YEARWOOD; THANIA EDWARDS on behalf of her daughter, T.M.; CONNECTICUT COMMISSION ON HUMAN RIGHTS,	:	
Intervenors.	:	

RULING AND ORDER

This case involves a challenge to the transgender participation policy of the Connecticut Interscholastic Athletic

Conference ("CIAC"), the governing body for interscholastic athletics in Connecticut, which permits high school students to participate in sex-segregated sports consistent with their gender identity.[1] Plaintiffs claim that the CIAC policy puts non-transgender girls at a competitive disadvantage in girls' track and, as a result, denies them rights guaranteed by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and implementing regulations, which require that if a school provides athletic programs or opportunities segregated by sex, it must do so in a manner that "[p]rovides equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(c). Defendants have jointly moved to dismiss the action on numerous grounds. For reasons discussed below, I conclude that the plaintiffs' challenge to the CIAC policy is not justiciable at this time and their claims for monetary relief are barred and dismiss the action on this basis without addressing the other grounds raised in the joint motion.

I.

In February 2020, plaintiffs Selina Soule and Chelsea Mitchell, then high school seniors, and Alanna Smith, then a high school sophomore, brought this action seeking a preliminary

[1] The CIAC policy requires member schools to determine eligibility to participate in sex-segregated athletics based on "the gender identification of [the] student in current school records and daily life activities in the school . . . ." ECF No. 141 ¶ 74.

injunction to prevent transgender girls from competing in events scheduled to take place during the 2020 Spring Outdoor Track season. Plaintiffs alleged that without a preliminary injunction, they would continue to face unfair competition by two transgender students, Andraya Yearwood and Terry Miller, then high school seniors. Plaintiffs claimed that by permitting "male-bodied athletes" –- defined as "individuals with an XY genotype" -- to compete in girls' track, the defendants were denying them an opportunity to compete for places on the victory podium in violation of Title IX and 34 C.F.R. § 106.41(c). The issue raised by the plaintiffs is one of first impression.[2]

Prior to bringing this action, the plaintiffs had filed a complaint with the U.S. Department of Education's Office of Civil Rights ("OCR"). OCR initiated an investigation in response to the complaint but took no action to prevent Yearwood and Miller from competing in the 2020 Spring Track Season, so the plaintiffs filed this suit. Explaining the need for immediate relief, the motion stated:

> Plaintiffs Soule and Mitchell are seniors in high school, and the brief remainder of this academic year contains the final track and field competitions of their high school athletic careers. The Spring track season begins in March, with the first interscholastic meet subject to the CIAC

[2] The issue implicates opposing interests that are not easily reconciled. See Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule, 27 Duke J. Gender L. & Pol'y 69, 99 (2020).

> Policy scheduled to occur as soon as April 4, 2020. Absent immediate injunctive relief from this Court, the irreparable harm they will suffer under the continuing operation of the Defendants' policy and its enforcement will leave their concluding interscholastic athletics season marred and their personal experience substantially injured. Though Plaintiff Alanna Smith is a sophomore, her interests are no less immediately impacted or properly honored with immediate equitable relief, as the profound interests in and experience of high school athletics are concurrently fleeting and formative, and each season of eminent value and importance.

In addition to CIAC, the complaint named as defendants the school boards for the three high schools attended by the plaintiffs (Glastonbury, Canton, and Danbury) and the two high schools attended by the transgender students (Bloomfield and Cromwell). All five schools are members of CIAC and, as such, must abide by its transgender participation policy.

Soon after the complaint was filed, Yearwood, Miller, and the Connecticut Commission on Human Rights and Opportunities ("CHRO") filed motions to intervene, which the plaintiffs opposed. Before the plaintiffs' motion for a preliminary injunction could be heard, Connecticut declared a public health emergency in response to the Covid-19 pandemic. Schools and nonessential businesses were closed across the state, and interscholastic athletic competition was suspended indefinitely. Plaintiffs subsequently filed an amended complaint adding Ashley Nicoletti, then a sophomore, as a plaintiff. They also renewed their motion for an expedited hearing, which was opposed by the

defendants and proposed intervenors on the ground that the 2020 Spring Track season was likely to be cancelled in its entirety.

Following oral argument, the motions to intervene were granted, either as a matter of right or permissively, thereby enabling Yearwood, Miller, and the CHRO to participate in this litigation as additional defendants along with the CIAC and the five school boards. The plaintiffs' motion for expedited treatment was denied because of Covid-19, which would prevent resumption of interscholastic athletic competition for the rest of the academic year. Further proceedings in this case were then stayed by agreement while the plaintiffs sought appellate review of a ruling denying a recusal motion.[3] After the stay was lifted, defendants filed the pending motion to dismiss, which has been fully briefed and argued.

II.

Plaintiffs' second amended complaint alleges that CIAC's transgender participation policy

> is now regularly resulting in boys displacing girls in competitive track events in Connecticut -- excluding specific and identifiable girls including Plaintiffs from honors, opportunities to compete at higher levels, and public recognition critical to college recruiting and

[3] Plaintiffs moved for my recusal on the ground that I had demonstrated bias by calling on plaintiffs' counsel to refrain from continuing to refer to Yearwood and Miller as "males," which I regarded as needlessly provocative. Plaintiffs' counsel argued that this usage was necessary because the present action concerns the effects of biological differences between persons born male and persons born female.

> scholarship opportunities that should go to these outstanding female athletes.
>
> As a result, in scholastic track competition in Connecticut, more boys than girls are experiencing victory and gaining the advantages that follow, even though postseason competition is nominally designed to ensure that equal numbers of boys and girls advance to higher levels of competition. In the state of Connecticut, students who are born female now have materially *fewer* opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records, than students who are born make.

Plaintiffs claim that

> This reality is discrimination against girls that directly violates the requirements of Title IX: "Treating girls differently regarding a matter so fundamental to the experience of sports – the chance to be champions – is inconsistent with Title IX's mandate of equal opportunity for both sexes." McCormick ex rel. McCormick v. Sch. Dist. Of Mamaroneck, 370 F.3d 275, 295 (2d Cir. 2004).

Plaintiffs request:

> A declaration that Defendants have violated Title IX by failing to provide competitive opportunities that effectively accommodate the abilities of girls;
>
> A declaration that Defendants have violated Title IX by failing to provide equal treatment, benefits, and opportunities for girls in athletic competition;
>
> An injunction prohibiting all Defendants, in interscholastic competitions sponsored, organized, or participated in by the Defendants or any of them, from permitting males –- individuals with an XY genotype -- from participating in events that are designated for girls, women, or females;
>
> An injunction requiring all Defendants to correct any and all records, public and non-public, to remove male athletes from any record or recognition purporting to record times, victories, or qualifications for elite competitions

> designated for girls or women, and conversely to correctly give credit and/or titles to female athletes who would have received such credit and/or titles but for the participation of males in such competition;
>
> An injunction requiring all Defendants to correct any and all records, public or non-public, to remove times achieved by male athletes from any records purporting to record times achieved by girls or women;
>
> An award of nominal and compensatory damages and other monetary relief as permitted by law; [and]
>
> An award of Plaintiffs' reasonable attorneys' fees and expenses, as authorized by 42 U.S.C. § 1988.

III.

A.

In the joint motion to dismiss, the defendants first contend that the plaintiffs lack standing to seek an injunction enjoining enforcement of the CIAC policy. Standing refers to the personal stake a plaintiff must have in a disputed issue in order to be able to obtain a judicial determination of the issue in federal court. See Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of a particular issue."). Under Article III of the United States Constitution, the judicial power of the federal courts is limited to adjudicating "cases" and "controversies." The law of standing implements this limitation by requiring a plaintiff to demonstrate that she requires judicial relief in order to redress a legally cognizable injury to her. See Allen v.

Wright, 468 U.S. 737, 751 (1984) (noting that, to have standing under Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (discussing three elements of standing: injury in fact, causal connection to defendant's conduct, and redressability).[4] Unless a plaintiff's personal stake in a disputed issue satisfies the standing requirement, the court lacks jurisdiction to adjudicate the issue at the plaintiff's request. See Warth, 422 U.S. at 498 (explaining that standing doctrine is "founded in concern about the proper –- and properly limited -- role of the courts in a democratic society").[5]

The defendants contend that the plaintiffs lack standing with regard to the principal form of relief at issue -- an injunction preventing enforcement of the CIAC policy. Soule and Mitchell have graduated and thus are no longer eligible to compete in CIAC-sponsored events. But Smith and Nicoletti, now

[4] "Injury" in this context signifies harm to the plaintiff, either actual or imminent, due to unlawful conduct attributable to the defendant. To provide standing to sue, the injury to the plaintiff must be "distinct" and "palpable," and not "abstract," "hypothetical," or "conjectural." See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

[5] The standing requirement must be satisfied with regard to each claim and form of relief. Town of Chester, N.Y. v. Laroe Ests., Inc., 137 S. Ct. 1645, 1650 (2017). Therefore, in applying the requirement, each claim and form of relief must be analyzed separately.

juniors, have another year of eligibility. Whether their interest in obtaining the requested injunction is still sufficient to support adjudication of their claim on the merits is the main issue presented by the joint motion to dismiss.

Defendants argue that Smith and Nicoletti lack standing because they have not identified a transgender student who is likely to compete against them next season. Defendants further argue that, "[e]ven if Smith and Nicoletti could allege with any certainty that girls who are transgender will imminently compete in track and field, and that they will personally compete against those transgender girls, Smith and Nicoletti cannot credibly allege that they will finish in particular spots in particular races next year if girls who are transgender are barred from competing." ECF No. 145-1 at 16.

Plaintiffs correctly argue that the issue is one of mootness rather than standing. ECF No. 154 at 45. The standing inquiry concerns a plaintiff's personal stake in the outcome of an action at the time the action is filed; mootness, on the other hand, ensures that a plaintiff maintains a sufficient personal stake in the outcome of an action for the duration of the litigation. See Klein on behalf of Qlik Techs., Inc. v. Qlik Techs., Inc., 906 F.3d 215, 220–21 (2d Cir. 2018) ("The consequences of losing a stake in ongoing litigation are determined not by asking whether the party losing its stake in

the litigation has lost its standing but by asking whether the action has become moot." (emphasis in original)). However, standing and mootness are closely related doctrines of justiciability rooted in Article III. The Supreme Court has described mootness as "the doctrine of standing set in a time frame." Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (referring to "this Court's repeated statements that the doctrine of mootness can be described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)'" (quoting Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 68 n.22 (1997))). And the underlying concern of the two doctrines is the same –- a plaintiff seeking relief in federal court must maintain a "legally cognizable interest" in the outcome of the action. Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013). In other words, a plaintiff must retain a "personal stake" that "subsists through all stages of federal judicial proceedings." Spencer v. Kemna, 523 U.S. 1, 7 (1998). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Id.; see also Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) ("At all stages of litigation,

a plaintiff must maintain a personal interest in the dispute. The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings.").

Defendants have the burden of establishing mootness, as plaintiffs point out. Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 603 (2d Cir. 2016). But the burden is not the one plaintiffs describe in their brief. Elaborating on the defendants' burden, plaintiffs argue that "[i]f standing exists at the time injunctive relief is requested, then that request will not be deemed moot unless defendants meet 'the heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again.'" ECF No. 154 at 45 (quoting Laidlaw, 528 U.S. at 189). To satisfy this standard of mootness, plaintiffs continue, "[s]ubsequent events must make it 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Id. (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).

The burden plaintiffs describe does not apply here. Plaintiffs are relying on an "extremely strict standard" of mootness applied by courts when a defendant argues that its voluntary cessation of the challenged conduct has served to moot the case. See Wright & Miller, 33 Fed. Prac. & Proc. Judicial

Review § 8347 (2d ed.); see also Concentrated Phosphate, 393 U.S. at 203 (distinguishing the voluntary cessation exception from the general mootness standard and explaining that the voluntary cessation standard erects a higher bar to mootness because if a defendant could moot a case by voluntarily ceasing the challenged conduct, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways'" (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953))). This stringent standard does not apply when mootness is based on a change in circumstances other than voluntary cessation of the challenged conduct. See Laidlaw, 528 U.S. at 214 (Scalia, J., dissenting) ("The required showing that it is 'absolutely clear' that the conduct 'could not reasonably be expected to recur' is not the threshold showing required for mootness, but the heightened showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of 'standing set in a time frame.'" (emphasis in original)). Thus, the correct inquiry for our purposes is the typical mootness question: whether "the issues presented are no longer 'live' or the parties lack a legally

cognizable interest in the outcome." DiMartile v. Cuomo, 834 F. App'x 677, 678 (2d Cir. 2021) (quoting Already, 568 U.S. at 91).

Applying this standard, I conclude that the request to enjoin enforcement of the CIAC policy has become moot due to the graduation of Yearwood and Miller, whose participation in girls' track provided the impetus for this action. There is no indication that Smith and Nicoletti will encounter competition by a transgender student in a CIAC-sponsored event next season. Defendants' counsel have represented that they know of no transgender student who will be participating in girls' track at that time.[6] It is still theoretically possible that a transgender student could attempt to do so. Even then, however, a legally cognizable injury to these plaintiffs would depend on a transgender student running in the same events and achieving substantially similar times. Such "speculative contingencies" are insufficient to satisfy the case or controversy requirement of Article III. Hall v. Beals, 396 U.S. 45, 49 (1969); see also Knaust v. City of Kingston, 157 F.3d 86, 88 (2d Cir. 1998) (noting that it will not "suffice to hypothesize the possibility that at some future time, under circumstances that could only be guessed at now, the parties could theoretically become embroiled in a like controversy once again"). As a result, Smith and

[6] This representation was made during a colloquy with counsel regarding the present motion. See ECF No. 174 at 24-25.

Nicoletti currently lack a legally cognizable interest in seeking to enjoin enforcement of the CIAC policy. See Already, 568 U.S. at 100 (finding moot plaintiff's request for injunctive relief because plaintiff's "only legally cognizable injury . . . is now gone and . . . cannot reasonably be expected to recur"); Cheeseman v. Carey, 623 F.2d 1387, 1392 (2d Cir. 1980) (holding that request for injunction was moot after plaintiffs "received all the relief due them" and that the "issue thus now lacks one of the requisites of a live controversy, namely, a 'real and immediate' threat of injury").

Smith and Nicoletti contend that their challenge to the CIAC policy falls within the exception to the mootness doctrine for a controversy that is capable of repetition while evading judicial review. See United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540 (2018). "A dispute qualifies for [this] exception only 'if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" Id. (quoting Turner v. Rogers, 564 U.S. 431, 439-440 (2011)). To qualify for this "severely circumscribed" exception, Knaust, 157 F.3d at 88, which is available only in "exceptional situations," Spencer, 523 U.S. at 17, a plaintiff must do more than make a "speculative and theoretical assertion" that an injury might

recur. Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ., 397 F.3d 77, 86 (2d Cir. 2005). Rather, a plaintiff must allege that it is "'reasonable to expect' and 'probable' -- not simply possible -- that the complaining party would again be subjected to the 'action for which he initially sought relief.'" Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 82 (2d Cir. 1991) (quoting Honig v. Doe, 484 U.S. 305, 318-22 (1988)); see New Jersey Carpenters Health Fund v. Novastar Mortg., Inc., 753 F. App'x 16, 20 (2d Cir. 2018) (explaining that, to fit within this exception to mootness, plaintiffs "must show that these same parties are reasonably likely to find themselves in dispute of the issues raised" (quoting Video Tutorial Servs., Inc. v. MCI Telecomms. Corp., 79 F.3d 3, 6 (2d Cir. 1996) (per curiam))).

Plaintiffs argue that this exception to mootness applies because "[f]irst one, then another, male-bodied athlete has participated in girls' track competitions under CIAC auspices for each of the last three years," and "CIAC and the Defendant Schools insist on continuing the Policy that enables this." ECF No. 154 at 46. As just discussed, however, there is no indication that Smith and Nicoletti will face competition by a transgender student next season. The Second Circuit has repeatedly declined to apply the "capable of repetition" exception when an injury's recurrence "is not reasonably likely

but, at best, only a theoretical and speculative possibility." Lillbask, 397 F.3d at 86 (emphasis in original); see Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 121 (2d Cir. 2001) (declining to apply the capable of repetition exception because, although plaintiff's age and status as a student "mean[t] recurrence [wa]s theoretically possible, that is insufficient to support the requisite 'reasonable expectation' of recurrence"); Knaust, 157 F.3d at 88 (holding that exception did not apply because "nothing ha[d] been shown to suggest any 'reasonable expectation' that [plaintiff] [would] confront any like situation in the future"); Courshon v. Berkett, 16 F. App'x 57, 63 (2d Cir. 2001) (rejecting exception for claims based on "mere speculation" of recurrence); Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 82–83 (2d Cir. 1991) (holding that, though injury could happen "in the next few years," it was "not imminent" and "not sufficiently likely to recur"); Armstrong v. Ward, 529 F.2d 1132, 1136 (2d Cir. 1976) (rejecting application of the exception because, although there was "a possibility" the dispute would recur, "such speculative contingencies afford no basis for our passing on the substantive issues [appellees] would have us decide" (quoting Hall, 396 U.S. at 49)).[7]

[7] Plaintiffs submit that they "have no ability to know what male-bodied athletes may register to compete in girls' track events in the next season."

Plaintiffs also fail to show that the injury they complain about, if it did recur, would "evade review." If it turns out that a transgender student does register to compete in girls' track next season, Smith and Nicoletti will be able to file a new action under Title IX along with a motion for a preliminary injunction. Plaintiffs have expressed doubt that such a motion could be heard and decided in a timely manner. However, it is reasonable to expect that if Smith and Nicoletti were to allege facts satisfying the traditional requirements for a preliminary injunction, a request for an expedited hearing would be granted.[8] Plaintiffs' request for an expedited hearing in this case was denied only because of Covid-19 and the ensuing suspension and cancellation of CIAC-sponsored events. Accordingly, I conclude that the request for an injunction enjoining enforcement of the CIAC policy is now moot.[9]

ECF No. 154 at 38. That may be true. Even so, no case has been cited or found in which mootness was avoided under the "capable of repetition" exception on the seemingly paradoxical ground that the plaintiff had no way of knowing whether the injury would recur.

[8] At the hearing, the plaintiffs would have to show that without a preliminary injunction, they would sustain immediate, irreparable harm -- the showing traditionally required to obtain injunctive relief. See Levin v. Harleston, 966 F.2d 85, 90 (2d Cir. 1992).

[9] Plaintiffs' request for a declaratory judgment is moot for the same reasons. Declaratory relief is a form of prospective relief that requires a plaintiff to show "a sufficient likelihood that he will again be wronged in a similar way." Marcavage v. City of New York, 689 F.3d 98, 103 (2d Cir. 2012) (quoting Lyons, 461 U.S. at 111). Because plaintiffs have failed to make such a showing, their claims for declaratory relief must be dismissed. See Preiser v. Newkirk, 422 U.S. 395, 402 (1975) (explaining that, to determine whether a request for declaratory relief has become moot, the question is "whether the facts alleged, under all the circumstances, show that there is a

B.

Defendants next argue that plaintiffs lack standing to seek an injunction requiring changes in the defendants' records. Plaintiffs seek an order requiring the defendants to revise records of races in which Yearwood or Miller competed by eliminating them from the order of finish and moving everyone else up one position. Defendants contend that with regard to this requested relief, plaintiffs fail to satisfy the redressability element of standing, which requires a plaintiff to show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560.[10] Plaintiffs respond that the requested revisions are relevant to their ability to get scholarships and jobs –- scholarships in the case of Smith and Nicoletti, jobs in the case of all the plaintiffs.

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substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (emphasis in original) (quoting Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941))); Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) ("A plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future."); Golden v. Zwickler, 394 U.S. 103, 110 (1969) (holding that plaintiff was not entitled to declaratory relief because it was "most unlikely" that his alleged injury would recur and there was thus not a "specific live grievance" or "sufficient immediacy and reality" to warrant the requested relief).

[10] Defendants also dispute the underlying assumption that the races would have resulted in the same order of finish if Yearwood and Miller did not compete. However, as plaintiffs correctly point out, the order of finish is regularly adjusted in this manner when a runner has been disqualified after the completion of a race.

After careful consideration, I conclude that the plaintiffs' theory of redressability is not sufficiently supported to provide any of the plaintiffs with standing. Based on the plaintiffs' detailed submissions, which are accepted as true and construed most favorably to them, it appears that but for the CIAC policy: (1) Chelsea Mitchell would have finished first in four elite events in 2019,[11] and qualified for the 2017 New England Regional Championship in the Women's 100m; (2) Selina Soule would have advanced to the next level of competition in the 2019 CIAC State Open Championship in the Women's Indoor 55m; (3) Ashley Nicoletti would have qualified to run in the 2019 CIAC Class S Women's Outdoor 100m; and (4) Alanna Smith would have finished second in the Women's 200m at the 2019 State Outdoor Open.

Plaintiff's theory of redressability has some cogency in the case of Chelsea Mitchell. Changing the defendants' records could provide her with a basis to list four additional wins on her resume, and those wins might well be of interest to a prospective employer. But it seems inevitable that before making an offer to Mitchell, a prospective employer impressed by her record would learn that she did not actually finish first in

[11] Specifically, Mitchell would have won the CIAC Outdoor Track, Class S, Women's 100m and 200m; the CIAC Indoor Track, Class S, Women's 55m; and the CIAC Indoor Track, Open, Women's 55m.

the four races. In other words, even with the requested changes, Mitchell's position with regard to her employment prospects would remain essentially the same.[12]

The two cases plaintiffs cite in support of their theory of redressability are readily distinguishable because both involve expungement of erroneous disciplinary action from a student's school record. See Flint v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007); Hatter v. Los Angeles City High Sch. Dist., 452 F.2d 673, 674 (9th Cir. 1971). A student's disciplinary record is always relevant to college recruiters and prospective employers. Here, in contrast, the requested revisions might well have no bearing on Mitchell's employment prospects. At a minimum, gauging the effect of the requested revisions on prospective employers requires guesswork. The Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013); see also ASARCO Inc. v. Kadish, 490 U.S. 605, 614–15 (1989); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 42-43 (1976).

[12] Plaintiffs' submissions provide no basis to conclude that changing the defendants' records would be relevant to the educational or employment prospects of the other plaintiffs.

C.

The remaining issue is whether plaintiffs' claims for money damages are barred. The Supreme Court has held that monetary relief is available in private suits under Title IX only if the defendant received adequate notice that it could be liable for the conduct at issue. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999). Defendants submit that they did not receive the requisite notice. I agree.[13]

The notice requirement derives from Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), where the Court considered whether a state entity, in accepting federal funds under the Developmentally Disabled Assistance and Bill of Rights Act, agreed to assume the costs of providing disabled persons with appropriate treatment in the least restrictive environment. The "crucial inquiry," the Court stated, was whether Congress had provided "clear notice to the States that they, by accepting funds under the Act, would indeed be obligated" to underwrite the high costs of such treatment. Pennhurst, 451 U.S. at 25.

[13] Plaintiffs argue that the question of notice should be deferred until a later stage of the case. However, if the plaintiffs' claims for money damages are barred due to lack of adequate notice, the action is subject to dismissal in its entirety because the only remaining form of relief sought in this case -- attorney's fees and expenses -- is "insufficient, standing alone, to sustain jurisdiction." Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993); see also Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990); Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) ("A request for attorney's fees or costs cannot establish standing because those awards are merely a 'byproduct' of a suit that already succeeded . . . .").

Because Congress had failed to provide clear notice, the relief requested by the plaintiff class was unavailable. "Though Congress' power to legislate under the spending power is broad," the Court explained, "it does not include surprising participating States with post-acceptance or 'retroactive' conditions." Id.

There can be no doubt that the clear notice required by Pennhurst is lacking here. Title IX broadly prohibits discrimination in educational programs and activities on the basis of sex. See 20 U.S.C. § 1681(a); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) (noting that Title IX is a "broadly written general prohibition on discrimination"). Congress left it to the Department of Education ("ED") to promulgate specific rules. See 20 U.S.C. § 1682; see also Biediger v. Quinnipiac Univ., 691 F.3d 85, 96 (2d Cir. 2012) ("Congress explicitly delegated to the administering agency 'the task of prescribing standards for athletic programs under Title IX.'" (quoting McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004))); Catherine Jean Archibald, Transgender Bathroom Rights, 24 Duke J. Gender L. & Pol'y 1, 27–28 (2016) ("States that accept federal funding for education programs [under Title IX] have agreed to prohibit sex discrimination and to allow the Federal Government to make interpretations about what prohibiting sex discrimination

requires."). Whether the defendants received the requisite notice thus depends primarily on the guidance provided to them by ED. See Davis, 526 U.S. at 647 (guidance issued by ED providing that certain discrimination violates Title IX would have "contribute[d] to [the School] Board's notice of proscribed misconduct" had it been issued earlier).

Beginning in 2014, ED's Office of Civil Rights ("OCR") notified schools that "[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX." Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014). In 2015, OCR gave notice that "[t]he Department's Title IX regulations permit schools to provide sex-segregated . . . athletic teams . . . [and] [w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity." Letter from James A. Ferg-Cadima, Acting Deputy Assistant for Policy, U.S. Dep't of Educ. Office for Civil Rights, to Emily Prince (Jan. 7, 2015). In 2016, OCR went further, stating unequivocally that "transgender students must be allowed to participate in such activities . . . consistent with their gender identity." Letter from Catherine E. Lhamon, Ass't Sec.

for Civil Rights, U.S. Dep't of Educ. and Vanita Gupta, Principal Dep. Ass't Attorney for Civil Rights, U.S. Dep't of Justice (May 13, 2016) [hereinafter "2016 Guidance"].[14]

Plaintiffs argue that OCR reversed course when it issued a Dear Colleague letter in 2017. See Letter from Sandra Battle, Acting Ass't Sec. for Civil Rights, U.S. Dep't of Educ. and T.E. Wheeler, II, Acting Ass't Attorney General for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017). The 2017 letter did not provide any new or different guidance, however. Instead, it stated that OCR was rescinding the 2016 Guidance "in order to further and more completely consider the legal issues involved." The letter expressed OCR's belief that it was required to give "due regard for the primary role of the States and local school districts in establishing educational policy." Id. This assurance could reasonably be interpreted by the defendants to mean that OCR would be inclined to defer to local authorities. At a minimum, the letter did not provide clear notice that allowing transgender students to compete in girls' track would violate Title IX.

[14] These guidance documents are subject to judicial notice because they are public records whose accuracy cannot be questioned. See Porazzo v. Bumble Bee Foods, LLC, 822 F. Supp. 2d 406, 411–12 (S.D.N.Y. 2011) (taking notice of agency guidance documents and other documents); Controlled Air, Inc. v. Barr, No. 3:19-CV-1420 (JBA), 2020 WL 979874, at *3 n.2 (D. Conn. Feb. 28, 2020), aff'd, 826 F. App'x 121 (2d Cir. 2020) (same).

No further guidance was provided to the defendants until May 2020, several months after this action was brought, when OCR sent them a Letter of Impending Enforcement Action based on a complaint it had received about Yearwood and Miller competing in girls' track. See ECF No. 117-1. In August 2020, a Revised Letter of Impending Enforcement Action was issued to the defendants, informing them for the first time that OCR interpreted Title IX and its implementing regulations to require that sex-specific sports teams be separated based on biological sex. ECF No. 154-2. This letter and the previous letter were withdrawn in February 2021. ECF No. 172-1. In withdrawing the Revised Enforcement Letter, OCR stated that the letter had been "issued without the review required for agency guidance documents" and should therefore "not be relied upon in this or any other matter." Id. at 2.

In light of this history, it is apparent that OCR did not provide the defendants with clear notice that they would be liable for money damages if they permitted Yearwood and Miller to compete in girls' track. See Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 607 (S.D. Ohio 2016) (no liability could be imposed under Title IX in part because "federal regulations and Title IX guidance indicate[d] that [school] was required" to take the actions at issue and "actions taken by [school] to comply with guidance to implement Title IX cannot have been in

violation of Title IX"); Doe v. Columbia Coll. Chicago, 299 F. Supp. 3d 939, 956–57 (N.D. Ill. 2017), aff'd, 933 F.3d 849 (7th Cir. 2019) (same because a 2011 Dear Colleague letter required school's actions); Doe v. Coll. of Wooster, 243 F. Supp. 3d 875, 887 (N.D. Ohio 2017) ("[I]t stands to reason that evidence that a university has endeavored to comply with federal guidance on Title IX cannot support a violation of Title IX."); Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ., 584 F.3d 253, 277 (6th Cir. 2009) (Pennhurst's clear-statement rule was not satisfied in part because "the former Secretary of Education found that [the provision] means the opposite of what the current Secretary claims"); New York v. United States Dep't of Health & Human Servs., 414 F. Supp. 3d 475, 565–71 (S.D.N.Y. 2019) (holding that states were "denied notice" under Pennhurst because they would not have "clearly underst[oo]d" that the term "discrimination" as used in the statute "would be given the meaning" later ascribed to it); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 658 (5th Cir. 1997) (refusing, pursuant to Pennhurst, to "retroactively" bind defendants to ED's later interpretation of Title IX because the government "cannot modify past agreements with recipients by unilaterally issuing guidelines through the Department of Education").[15]

[15] Plaintiffs cite no case under Title IX, or any other Spending Clause statute, permitting liability to be imposed for conduct that was approved by

In support of their position that the defendants did receive the requisite notice, plaintiffs state that "repeated Supreme Court decisions have put educational institutions 'on notice that they could be subjected to private suits for intentional sex discrimination,' and that this liability 'encompass[es] diverse forms of intentional sex discrimination.'" ECF No. 154 at 45 (quoting Jackson, 544 U.S. at 182–83). Plaintiffs rely on cases involving claims of sexual harassment in violation of Title IX, which are readily distinguishable from the plaintiffs' claims of denial of equal treatment and effective accommodation. See, e.g., Davis, 526 U.S. at 650 (sexual harassment in violation of Title IX requires discrimination "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"); Gebser, 524 U.S. at 290 (under Title IX, a school is liable for sexual harassment only if it had actual knowledge of harassment

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the agency responsible for providing guidance to funding recipients. Such a holding would be at odds with Pennhurst itself. In that case, the Court pointedly observed that the very "governmental agency responsible for the administration of the Act and the agency with which the participating States have the most contact, has never understood [the provision] to impose conditions on participating States." Pennhurst, 451 U.S. at 25. To hold that the states received adequate notice, the Court stated, would therefore "strai[n] credulity." Id. The same is true here. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (noting that the "central concern" for Pennhurst purposes is whether defendants had fair notice); see also Peter J. Smith, Pennhurst, Chevron and the Spending Power, 110 Yale L.J. 1187, 1191 (2001) (noting the "potential unfairness to state recipients" of binding them to an agency's interpretation of terms in a statute "in cases in which the agency reverses its prior view").

and failed adequately to respond); see also Horner v. Kentucky High Sch. Athletic Ass'n, 206 F.3d 685, 693 (6th Cir. 2000) (noting that Franklin, Gebser, and Davis "all address deliberate indifference to sexual harassment and are not readily analogous" to cases alleging discrimination in athletics).

More pertinent to the notice issue presented here is what courts have said about the obligations of states and local school districts to transgender students under Title IX. See, e.g., Jackson, 544 U.S. at 183–84 (holding that defendants were on notice in part because, "importantly, the Courts of Appeals that had considered the question at the time of the conduct at issue in this case all had already interpreted Title IX to cover retaliation"). In its 2016 Guidance, OCR stated that requiring schools to permit transgender students to participate in sex-segregated activities consistent with their gender identity comported with judicial decisions under Title IX. That statement remains accurate. Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. See A.H. v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 552 (M.D. Pa. 2019) (collecting and discussing cases). Every Court of Appeals to consider the issue has so held. See Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020), cert. denied, No. 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020); Doe by & through

Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018); Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); Dodds v. United States Dep't of Educ., 845 F.3d 217 (6th Cir. 2016); G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017). This unbroken line of authority reinforces the conclusion that the plaintiffs' claims for money damages are barred.[16]

IV.

Accordingly, the motion to dismiss is hereby granted. The Clerk may enter judgment in favor of the defendants dismissing the action.

So ordered this 25th day of April 2021.

/s/ Robert N. Chatigny
Robert N. Chatigny
United States District Judge

[16] In a recent case under Title VII, the Supreme Court observed that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1741 (2020). The parties dispute the significance of Bostock for cases arising under Title IX's prohibition of sex discrimination. But there is no need to get into that dispute now.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 14-3290 and 14-3506

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNIE WHITAKER,

Defendant-Appellant.

Appeals from the United States District Court for the
Western District of Wisconsin.
Nos. 14-cr-00017, 07-cr-00123 — **Barbara B. Crabb**, *Judge.*

ARGUED APRIL 20, 2015 — DECIDED APRIL 12, 2016

Before WOOD, *Chief Judge,* HAMILTON, *Circuit Judge*, and DARRAH, *District Judge*.*

DARRAH, *District Judge*. Acting on information that drugs were being sold from a certain apartment in Madison, Wisconsin, law enforcement obtained the permission of the apartment property manager and brought a narcotics-

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*Hon. John W. Darrah of the Northern District of Illinois, sitting by designation.

detecting dog to the locked, shared hallway of the apartment building. The dog alerted to the presence of drugs at a nearby apartment door and then went to the targeted apartment where Whitaker was residing. After the officers obtained a search warrant, Whitaker was arrested and charged with drug and firearm crimes based on evidence found in the apartment. At the time of his arrest, Whitaker was serving a term of supervised release in Case No. 07-cr-123, a conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). After the district court denied his pretrial motions challenging the search and the dog's reliability, Whitaker entered a conditional guilty plea that preserved his right to appeal the district court's ruling.

On appeal, Whitaker raises four issues. First, he argues the use of the dog was a search under the Fourth Amendment and *Florida v. Jardines*, 133 S. Ct. 1409 (2013). Second, he contends that the district court should have granted him a *Franks* hearing because there was a material omission in the affidavit used to obtain the search warrant. Third, Whitaker claims that the dog's training records should have been turned over to him, pursuant to *Florida v. Harris*, 133 S. Ct. 1050 (2013). Finally, he argues his term of supervised release had expired and he should not have been sentenced after revocation. For the reasons discussed below, we reverse the district court's holding regarding the search. The remaining issues are therefore moot.

I. BACKGROUND

In October 2013, Dane County Sheriff's Deputy Joel Wagner met with a confidential informant about drug dealing at 6902 Stockbridge Drive, Apartment 204, in Madison, Wisconsin. The informant told Wagner that "Javari" lived in

Apartment 204, drove a black Cadillac Escalade and carried a handgun in his waistband. The informant reported seeing Javari and another individual selling drugs in the apartment.

On October 14, 2013, Wagner met with the property manager for 6902 Stockbridge Drive and learned that Apartment 204 was leased to Ruthie Whitaker. The property manager took Wagner to the underground parking garage, where Wagner observed a black Cadillac Escalade in the parking stall for Apartment 204. The license plate showed that the Escalade was registered to Ruthie Whitaker.

Over a month later, on November 25, 2013, the same informant sent Wagner a text message. The text message indicated that one of the individuals dealing drugs contacted the informant and told the informant that the individual was back in town and was at the apartment with a lot of "h." The informant knew "h" to mean heroin. On December 4, 2013, the property manager signed a consent form, authorizing a K9 search of 6902 Stockbridge Drive. On December 17, 2013, Wagner received an anonymous complaint concerning drug activity at 6902 Stockbridge Drive. The anonymous informant did not specifically mention Apartment 204 but indicated that the person who was selling out of 6902 Stockbridge Drive drove a black Cadillac Escalade.

On January 7, 2014, Wagner and Deputy Jay O'Neil, with his drug-sniffing K9 partner, "Hunter," went to 6902 Stockbridge Drive. Hunter first alerted on the Escalade parked in the space for Apartment 204. Upon a later search of the Escalade, no drugs were found.

The officers took Hunter to the second floor of the apartment building and into its locked hallway, where there

were at least six to eight apartments. According to his police report (produced during discovery), O'Neil took Hunter on a quick walk through the hallway in order to get used to any people or animal smells. During the first pass, Hunter showed extreme interest in Apartment 204 but did not alert. Hunter then alerted to the presence of drugs at the door of nearby Apartment 208. Wagner told O'Neil that it was not the targeted apartment. On a secondary sniff, Hunter alerted on Apartment 204.

After obtaining the search warrant, the officers recovered cocaine, heroin, and marijuana in Apartment 204. Whitaker was the sole occupant at the time the warrant was executed, and, in a post-arrest interview, he admitted he lived there. He also told officers about a handgun in his apartment and consented to the officers' re-entry to retrieve it.

On April 11, 2014, Whitaker filed a motion to suppress the evidence seized during the search. He also requested a *Franks* hearing and the production of Hunter's training records. On May 19, 2014, the magistrate judge issued a Report and Recommendation, recommending that Whitaker's motions be denied. On June 16, 2014, the district court adopted the Report and Recommendation. On October 9, 2014, Whitaker was sentenced to consecutive terms of 12 months' imprisonment on Count 1, possession with intent to distribute heroin and cocaine, and 60 months' imprisonment on Count 3, use of a firearm in furtherance of a drug trafficking crime. On November 14, 2014, the district court revoked Whitaker's supervised release in Case No. 07-cr-123 and sentenced him to a term of 18 months' imprisonment to run consecutively with the sentence given for Count 3 and concurrently with the sentence given for Count 1.

II. ANALYSIS

A. The Fourth Amendment and Jardines

When reviewing appeals from denials of motions to suppress, we review legal questions *de novo* and factual findings for clear error. *United States v. Breland*, 356 F.3d 787, 791 (7th Cir. 2004). Whitaker contends that the district court erred in holding that he had no expectation of privacy in the apartment building's common hallway and denying his motion to suppress the evidence gathered from his apartment.

In *Florida v. Jardines*, 133 S. Ct. 1409, 1417-18 (2013), the Supreme Court held that the government's use of a trained police dog to investigate a home and its immediate surroundings was a search under the Fourth Amendment. The Court explained that the defendant had an expectation of privacy in his porch, which is part of the home's curtilage and "enjoys protection as part of the home itself." *Id.* at 1414. This is because the curtilage "is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" *Id.* at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213). The Court was clear that its holding was based on the trespass to the defendant's curtilage, not a violation of the defendant's privacy interests. *Id.* at 1417-20. Therefore, when the police physically intruded onto the defendant's property to gather evidence without a warrant or consent, they had conducted a search without a license to do so, in violation of the Fourth Amendment. *Id.* at 1417.

Whitaker argues that *Jardines* should be extended to the hallway outside his apartment door because the law enforcement took the dog to his door for the purpose of gather-

ing incriminating forensic evidence. He cites to *United States v. Herman*, 588 F. App'x 493, 494 (7th Cir. 2014), in which we specifically left open the question of whether "*Jardines* applies to apartment hallways (which are open to many persons other than a given tenant's family and invitees), whether consent of another tenant or the landlord would permit a dog to enter, and whether, if the use of the dog is a search, what is required for that search to be reasonable (reasonable suspicion? probable cause? probable cause plus a warrant?)." Although Whitaker recognizes that *Jardines* was premised on trespass to property, he also argues that this use of a drug-detection dog violated his privacy interests under *Kyllo v. United States*, 533 U.S. 27 (2001), and *Katz v. United States*, 389 U.S. 347 (1967).

The use of a drug-sniffing dog here clearly invaded reasonable privacy expectations, as explained in Justice Kagan's concurring opinion in *Jardines*. The police in *Jardines* could reasonably and lawfully walk up to the front door of the house in that case to knock on the door and ask to speak to the residents. The police were not entitled, however, to bring a "super-sensitive instrument" to detect objects and activities that they could not perceive without its help. 133 S. Ct. at 1418. The police could not stand on the front porch and look inside with binoculars or put a stethoscope to the door to listen. Similarly, they could not bring the super-sensitive dog to detect objects or activities inside the home. As Justice Kagan explained, viewed through a privacy lens, *Jardines* was controlled by *Kyllo*, which held that police officers conducted a search by using a thermal-imaging device to detect heat emanating from within the home, even without trespassing on the property. 133 S. Ct. at 1419.

Kyllo held that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at 40. That rule reflects a concern with leaving "the homeowner at the mercy of ... technology that could discern all human activity in the home." *Id.* at 35-36. A dog search conducted from an apartment hallway comes within this rule's ambit. A trained drug-sniffing dog is a sophisticated sensing device not available to the general public. The dog here detected something (the presence of drugs) that otherwise would have been unknowable without entering the apartment.[1]

Indeed, the fact that this was a search of a home distinguishes this case from dog sniffs in public places in *United States v. Place*, 462 U.S. 696, 698 (1983) (luggage at airport), and *Illinois v. Caballes*, 543 U.S. 405, 406 (2005) (traffic stop). Neither case implicated the Fourth Amendment's core concern of protecting the privacy of the home. It is true that Whitaker did not have a reasonable expectation of complete

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[1] There is little doubt that a highly trained drug-detecting dog is a "super-sensitive instrument" under *Kyllo*. See *Jardines*, 133 S. Ct. at 1418-19 (Kagan, J., concurring). *Kyllo* described a category of "sense-enhancing technology" that is "not available to public use." 533 U.S. at 34. A trained dog's nose is a detection device capable of alerting the handler to the presence of odors at almost non-existent levels. Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 Hous. L. Rev. 103, 116-31 (2009). Like any technology, it is a tool that must be deployed in a particular way by a trained handler to be effective. *Id.* And like other sophisticated detection tools, the results and accuracy of dog searches are subject to detailed research and analysis. *Id.*

privacy in his apartment hallway. See *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991). Whitaker's lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public.

Whitaker's lack of a right to exclude did not mean he had no right to expect certain norms of behavior in his apartment hallway. Yes, other residents and their guests (and even their dogs) can pass through the hallway. They are not entitled, though, to set up chairs and have a party in the hallway right outside the door. Similarly, the fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean he could put a stethoscope to the door to listen to all that is happening inside. Applied to this case, this means that because other residents might bring their dogs through the hallway does not mean the police can park a sophisticated drug-sniffing dog outside an apartment door, at least without a warrant. See *Jardines*, 133 S. Ct. at 1416.

The practical effects of *Jardines* also weigh in favor of applying its holding to dog sniffs at doors in closed apartment hallways. Distinguishing *Jardines* based on the differences between the front porch of a stand-alone house and the closed hallways of an apartment building draws arbitrary lines.

First, there is the middle ground between traditional apartment buildings and single-family houses. How would courts treat a split-level duplex? Perhaps even one that had been converted from a house into apartments? Does the

number of units in the building matter, or do all multi-unit buildings lack the protection *Jardines* gives to single-family buildings? And what about garden apartments whose doors, like houses, open directly to the outdoors?

Second, a strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity. For example, according to the Census's American Housing Survey for 2013, 67.8% of households composed solely of whites live in one-unit detached houses. For households solely composed of blacks, that number dropped to 47.2%. And for Hispanic households, that number was 52.1%. The percentage of households that live in single-unit, detached houses consistently rises with income. At the low end, 40.9% of households that earned less than $10,000 lived in single-unit, detached houses, and, at the high end, 84% of households that earned more than $120,000 did so. See United States Census Bureau, American Housing Survey, *Table Creator*, http://sasweb.ssd.census.gov/ahs/ahstablecreator.html (allowing the breakdown of housing type by race and income).

The police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of the apartment and search for the scent of illegal drugs.

B. The Good-Faith Exception and Davis

Davis v. United States, 131 S. Ct. 2419 (2011), held that evidence obtained in violation of the Fourth Amendment should not be suppressed, "when the police conduct a search in objectively reasonable reliance on binding appellate prec-

edent." 131 S. Ct. at 2434. This holding was based on the reasoning that officers should be permitted to rely on police practices specifically authorized by binding appellate precedent. *Id.* at 2439.

At the time of this search, there was no recognized expectation of privacy in the common areas of a multi-unit apartment building. See *United States v. Espinoza*, 256 F.3d 718, 723 (holding "tenants lack a legitimate expectation of privacy in the common areas of multi-family buildings"); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (holding "tenant has no reasonable expectation of privacy in the common areas of an apartment building"); *Henry v. City of Chicago*, 702 F.3d 916 (7th Cir. 2012) ("Absent certain particular facts not alleged here, there is no reasonable expectation of privacy in common areas of multiple dwelling buildings."). However, no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant. Therefore, the officer could not reasonably rely on binding appellate precedent, and the good-faith exception does not apply.

Moreover, *Kyllo* was decided before the search of Whitaker's apartment. The logic of *Kyllo* should have reasonably indicated by the time of this search that a warrantless dog sniff at an apartment door would ordinarily amount to an unreasonable search in violation of the Fourth Amendment.

III. CONCLUSION

Accordingly, we REVERSE the denial of Whitaker's motion to suppress and REMAND for proceedings consistent with this opinion.