Gender Justice GU4506
Spring 2020
Professor Katherine Franke
Jerome Greene Hall, Room 546

Course Reader – Volume 2

March 2nd: The Pregnant Body

- *Trubeck v. Ullman*, 147 Conn. 633 (1960)
- Brief of ACLU in *Griswold v. Connecticut*
- Litigation: Connecticut, in Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling (2d edition, 2012) pp. 163-184

March 9th: Criminalizing Pregnancy

- When Prosecutors Jail a Mother for a Miscarriage," *New York Times*, December 28, 2018
- "Federal Court of Appeals Decision Prevents Pregnant Woman's Challenge to Wisconsin's 'Unborn Child Protection Act'." *National Advocates for Pregnant Women.* June 18, 2018
- "Arkansas Court of Appeals Overturns Criminal Conviction for Concealing a Birth (Links to an external site.)." *National Advocates for Pregnant Women.* March 14, 2018
- *Anne O'Hara Bynum v. State of Arkansas*. Arkansas Court of Appeals. Opinion Delivered, March 14, 2018
- Concurrence in *Anne O'Hara Bynum v. State of Arkansas*. Arkansas Court of Appeals. Opinion Delivered, March 14, 2018

March 16th: Spring Recess (no class)

Gender, Sex, and Sexual Orientation

March 23rd: Is Sexual Orientation Discrimination a Form of Sex Discrimination?

- Brian D. Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009)
- Hively v Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017)

March 30th: Is Transgender Discrimination a Form of Sex Discrimination?

- Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)
- Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012)
- G.G. v. Gloucester County School Board, brief of the ACLU.

MARCH 2ND: THE PREGNANT BODY

[12, 13] Under Practice Book § 155, argument of the applicable law in support of a claim for the admission or exclusion of evidence is permitted only if the court requests it. Especially when difficult or unusual evidential problems involving material rulings are encountered, a court is well advised to avail itself of all proper assistance which competent counsel can give. Here, while the court allowed counsel to state, as required by Practice Book § 155, the ground on which he claimed the question concerning the payment of the fine was admissible, the court refused to permit argument of the claim of admissibility. The court was technically within its rights in refusing to permit any argument at all. Since, as already pointed out, the answer clearly would have been inadmissible, no argument, even had argument ben permitted, could have been of assistance to the court.

There is no error.

In this opinion the other Judges concurred.

147 Conn. 633

David M. TRUBEK et al.

v.

Abraham S. ULLMAN, State's Attorney.

Supreme Court of Errors of Connecticut.

Nov. 1, 1960.

Action for declaratory judgment determining the constitutionality of legislation forbidding the use and prescription of contraceptive devices, brought to the Superior Court in New Haven County, where a demurrer to the complaint was sustained, Elmer W. Ryan, J., and the plaintiffs failing to plead further, judgment was rendered in favor of the defendant, from which the plaintiffs appealed. The Supreme Court of Errors, Mellitz, J., held that statutes are valid as a proper exercise of the police power and do not invade rights granted by Fourteenth Amendment to Federal Constitution, as applied to a husband and wife who wish to obtain from a reputable physician information on proper methods of preventing conception and thereby avoiding the possibility that children will be conceived before the plaintiffs are prepared psychologically or economically for the duties and obligations of parenthood.

No error.

1. Abortion ⇦1

Constitutional Law ⇦274

Statutes prohibiting use of contraceptives, or the counseling or abetting of such use, are valid as a proper exercise of police power and do not invade rights guaranteed by Fourteenth Amendment to Federal Constitution, as applied to a husband and wife who wished to obtain from a reputable physician information on proper methods of preventing conception and thereby avoiding the possibility that children will be conceived before husband and wife are prepared psychologically or economically for the duties and obligations of parenthood. C.G.S.A. §§ 53–32, 54–196.

Catherine G. Roraback, Canaan, for appellants (plaintiffs).

Raymond J. Cannon, Asst. Atty. Gen., with whom, on the brief, was Albert L. Coles, Atty. Gen., for appellee (defendant).

Before BALDWIN, C. J., and KING, MURPHY, MELLITZ and SHEA, JJ.

MELLITZ, Associate Justice.

[1] The plaintiffs brought this action for a declaratory judgment to determine the constitutionality of §§ 53–32 and 54–196 of the General Statutes [1] as applied to the facts set forth in the complaint. A demurrer to the complaint was sustained on a number of grounds, among them, that the rights and jural relations of parties in the situation of the plaintiffs have been conclusively determined in previous decisions, and that the complaint does not set forth any substantial question or issue which has not been previously determined and requires settlement. The plaintiffs not having pleaded over, judgment was rendered in favor of the defendant. The plaintiffs have appealed.

[2, 3] The statutes were recently involved in litigation before us in which their constitutionality was sustained. Buxton v. Ullman, and three companion cases, 147 Conn. 48, 156 A.2d 508.

The allegations of the complaint are as follows: The plaintiffs are husband and wife and have lived together in New Haven since their marriage in June, 1958. Both are law students, Mrs. Trubek being twenty-one years old and her husband twenty-three years old. In March, 1959, they consulted a physician to obtain information and medical service as to the best and safest methods for the prevention of conception. They have a desire to raise a family but first wish an opportunity to adjust, mentally, spiritually and physically, to each other so as to establish a secure and permanent marriage before they become parents. A pregnancy at this time would mean a disruption of Mrs. Trubek's professional education. When they are economically and otherwise prepared to have children, the plaintiffs desire to have as

1. "Sec. 53–32. Use of Drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

"Sec. 54–196. Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

many "as may be consistent with their resources, so as to insure adequate provision for each and all of them." The plaintiffs believe that they have a moral responsibility to have only as many children as they feel they can provide with the optimum individual care, attention and devotion. The physician consulted by them has refused to give them information and advice on the manner and means of preventing conception on the ground that such action on his part may be claimed by the defendant, the state's attorney, to constitute a violation of §§ 53–32 and 54–196 of the General Statutes.

The claim of the plaintiffs is that they are deprived by those statutes of rights guaranteed by the fourteenth amendment to the federal constitution. The same claim was advanced and considered in Buxton v. Ullman, supra. Likewise, the validity of § 53–32 as a proper exercise of the police power was determined in State v. Nelson, 126 Conn. 412, 11 A.2d 856. The essential difference between the facts here and those in the earlier cases is that no claim is made here that information relating to the employment of contraceptive measures is essential for the purpose of safeguarding the health of the plaintiff wife. The central point of the factual situations of the other cases was that, in the absence of such information, normal marital relations between the husband and the wife were fraught with danger either because a pregnancy would jeopardize the life or health of the wife or because of the likelihood that any children born would be defective. The essential feature of the factual situation here is a concept of the marriage relationship as one in which the plaintiffs are entitled, under the fourteenth amendment to the federal constitution, to be protected from the operation of statutes which prevent them from obtaining from a reputable physician information on proper methods of preventing conception and thereby avoiding the possibility that children will be conceived before the plaintiffs are prepared psychologically or economically for the duties and obligations of parenthood. We find nothing in the concept advanced by the plaintiffs, or in the facts recited in the complaint in connection therewith, which would warrant a conclusion that the rights and jural relations of parties in the situation of the plaintiffs have not been concluded by previous decisions.

There is no error.

In this opinion the other Judges concurred.

1965 WL 115616 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Estelle T. GRISWOLD and C. Lee Buxton, Appellants,
v.
CONNECTICUT.

No. 496.
October Term, 1964.
February 25, 1965.

Appeal from the Supreme Court of Errors of Connecticut

Motion for Leave to File Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae and Brief Amici Curiae

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION AS *AMICI CURIAE*

Statutes Involved

General Statutes of Connecticut, Revision of 1958:

Section 53-32. Any person who uses any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned.

Statement of the Case

Appellant C. Lee Buxton is a physician, licensed to practice in the State of Connecticut and Chairman of the Department of Obstetrics and Gynecology at the Yale Medical School (R. 17). He is an author in the field of his specialty and a leader in professional organizations concerned with that field (R. 17).

Appellant Estelle T. Griswold is Executive Director of the Planned Parenthood League of Connecticut (R. 17).

On November 1, 1961, following the decision of this Court in *Poe v. Ullman,* 367 U. S. 497 (1961), the Planned Parenthood Center of New Haven was opened (R. 16-7). The purpose of the Center was to provide information, instruction and medical advice to married persons as to the means of preventing conception, and to educate married persons generally as to such means (R. 17).

The Center occupied eight rooms of the building in which it was situated (R. 17). Dr. Buxton was Medical Director of the Center (R. 17). Mrs. Griswold was Acting Director of the Center in charge of its administration and its educational program (R. 17).

During the period of its operation, from November 1 to November 10, the Center made information, instruction, education and medical advice on birth control available to married persons who sought it (R. 17).

With respect to a woman who came to the Center seeking contraceptive advice the general procedure was to take her case history and explain to her various methods of contraception. She was then examined by a staff doctor, who prescribed the method of contraception selected by her unless it was contraindicated. The patient was furnished with the contraceptive device or material prescribed by the doctor, and a doctor or nurse advised her how to use it. Fees were charged on a sliding scale, depending on family income, and ranged from nothing to $15 (R. 18-9).

Dr. Buxton, as Medical Director, made all medical decisions with respect to the facilities of the Center, the procedure to be followed, the types of contraceptive advice and methods available, and the selection of doctors to staff the Center (R. 18). In addition, on several occasions, as a physician he examined and gave contraceptive advice to patients at the Center (R. 18). Mrs. Griswold on several occasions interviewed persons coming to the Center, took case histories, conducted group orientation sessions describing the methods of contraception and, on one occasion, gave a patient a drug or medical article to prevent conception (R. 20).

Among those who went to the Center seeking contraceptive advice were three married women. They followed the procedure described above, were given contraceptive material prescribed by the doctor, and subsequently used the material for the purpose of preventing conception (R. 20-2).

On November 10, 1961, after Dr. Buxton and Mrs. Griswold were arrested, the Center closed (R. 18).

Both appellants were subsequently tried and convicted for aiding and abetting the violation of Section 53-32.

ARGUMENT

I.

Section 53-32 on its face violates the right to privacy guaranteed by the due process clause of the Fourteenth Amendment.

The right to privacy is protected against invasion by the States through the Fourteenth Amendment. *Wolf v. Colorado;* 338 U. S. 25 (1949); *Mapp v. Ohio,* 367 U. S. 643 (1961). In *Wolf* the Court held that "The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S. at 27.

It was Mr. Justice Brandeis' view that privacy was the keystone of the Constitution. Dissenting in *Olmstead v. United States,* 277 U. S. 438, 478 (1928), he said:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment."

Although the Court has often considered cases arising out of the application of the search and seizure provision of the Constitution to both the federal and state governments, it has not had occasion to consider a case raising the question of the extent of the right to privacy in circumstances, which touch the marrow of human behavior as presented in this case.

It can be safely observed that marriage and the family are the foundations of our culture, and the focal points about which individual lives revolve.[1] That certain aspects of marriage and family life are subject to the reasonable exercise of the police power is not in dispute, but that power is generally restricted to assuring minimum standards of care and education.[2] The incidents of marriage and family life that are the private concern of the family itself, and consequently beyond the reach of the government, are numerically overwhelming.

Among those inviolable incidents of marriage, and the human love on which it is based, is the right to express that love through sexual union, and the right to bear and raise a family. No other rights are entitled to greater privacy than that normally bestowed upon the acts of intercourse and procreation. Nonetheless, Connecticut presumes to assert the power to regulate the conduct of its citizens by notifying them that although the State will tolerate sexual intercourse between spouses, it will declare such intercourse to be criminal unless they abstain from the use of devices for effectively regulating the frequency of pregnancy. They must, says Connecticut, forbear from planning the size of their family regardless of their physical condition, their desires or their means.

It is unnecessary to expatiate upon the nature of the liberty which Connecticut has arbitrarily denied to husband and wife. It is a private expression of love which should properly be beyond invasion or abridgment by the government. "This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' *Allgeyer v. Louisiana,* 165 U. S. 578; *Adair v. United States,* 208 U. S. 161, 173." *Berea College v. Kentucky,* 211 U. S. 45, 67-69 (1908) (Harlan *J.,* dissenting).

This case is not unlike *Rochin v. California,* 342 U. S. 165 (1952). There, police officers, having some information that Rochin was selling narcotics, broke into his house, entered the bedroom, where he was sitting partially dressed on the side of his bed and upon which his wife was lying, and attempted unsuccessfully to extract some capsules he had put in his mouth when the police entered the room. They then took Rochin to a hospital, had his stomach pumped and retrieved the capsules which proved to contain morphine. The capsules were admitted at trial over petitioner's objections.

This Court reversed the conviction, finding that the conduct of the police "shock[ed] the conscience," offended "a sense of justice" and violated "decencies of civilized conduct,"[3] and therefore violated the due process clause of the Fourteenth Amendment. The power asserted by Connecticut to withdraw from its citizens the right freely to use effective means of contraception and thereby limit the size of their family in accordance with their personal choice, evokes the same quality of outrage to civilized sensibilities as did the power asserted in *Rochin.* The shocking nature of the assertion of state power is, perhaps, greater here than in *Rochin.*

The women to whom appellants provided services in the clinic want only to enjoy their matrimonial love and affection without any interference by the State. Their right to do so intrudes not at all upon any valid interest or conflicting right of their fellow citizens. It is a right which "may not be submitted to vote * * * [and] depend[s] on the outcome of no elections."[4] In short, they want legislators as well as policemen to stay out of their bedrooms.

II.

Section 53-32 on its face violates the due process clause of the Fourteenth Amendment because it bears no reasonable relation to a proper legislative purpose.

1. Section 53-32 violates the liberty protected by the Fourteenth Amendment.

Prior decisions of this Court have held family matters peculiarly within the ambit of the personal liberty guaranteed by the Fourteenth Amendment.

In *Meyer v. Nebraska,* 262 U. S. 390 (1923), a statute forbidding foreign languages to be taught in primary schools within the state was held arbitrary and in violation of the Fourteenth Amendment. In the course of its opinion the court described the "liberty" guaranteed by the Fourteenth Amendment as follows:

"Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage

in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U. S. at 399.

In *Pierce v. Society of the Sisters of the Holy Names,* 268 U. S. 510 (1925), this Court struck down as contrary to the due process clause of the Fourteenth Amendment, a state statute which required children between the ages of eight and sixteen to attend public schools. The Court said:
"We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the up-bringing and education of children under their control. * * * The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S. at 534-35.

In *Skinner v. Oklahoma,* 316 U. S. 535, 541 (1942), this Court, in striking down a sterilization statute, said:

> "We are dealing here with legislation that involves one of the basic civil rights of man."

Meyers, Pierce and *Skinner* sustain the conclusion that the law, to a large extent, regards marriage and the family as the ultimate repository of personal freedom, and that the power vested in husband and wife to conduct the affairs of their family free of state interference is virtually plenary. The relatively narrow area of control left to the government[5] may not be exercised arbitrarily. As stated in *Pierce,* when that power is exercised it must have a "reasonable relation to some purpose within the competency of the state."[6]

2. Section 53-32 bears no reasonable relation to its legislative purpose.

a. The statute's purpose is to regulate morality.

The Connecticut statute was one of many statutes enacted as part of the religious-moral zealotry generated by Anthony Comstock. *Poe v. Buxton,* 367 U. S. 497, 520 n. 10 (Douglas, *J.* dissenting). Other than the general history of the Comstockian rampage, there seems to be no specific legislative history in connection with Connecticut's enactment, but there is no doubt as to its general purpose, for the State of Connecticut has admitted that its purpose is "to protect the moral welfare of its citizenry."[7] The same general purpose has been enunciated by a series of Connecticut court decisions upholding the law as valid. For example, in *State v. Nelson,* 126 Conn. 412, 425, 11 A. 2d 856 (1940), the court below adopted the purpose of a similar Massachusetts statute as enunciated by the Massachusetts Supreme Judicial Court:

" '[The statute's] plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender ... a virile and virtuous race of men and women' ".[8]

b. The statute bears no relation to its avowed purpose.

Not only does the State admit that the purpose of Section 53-32 is to promote public morality, but there is no hiding the fact that it was inspired by a zealot who believed that "anything remotely touching on sex" was obscene.[9] However, this Court, reflecting the overwhelming national sentiment, has explicitly rejected that theme:

"... [S]ex and obscenity are not synonymous....

Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and concern." *Roth v. U. S.,* 354 U. S. 476, 487 (1957).

It is perfectly obvious that a statute whose terms forbid even married couples to use contraceptive devices, has no bearing whatsoever on morality. We suggest that the Court may judicially notice this fact.

On the other hand, it has been established that the interdiction of contraceptive devices affirmatively endangers health and stable family relations. See Brief of Planned Parenthood Federation, *amicus curiae,* Appendix B. Indeed, there are numerous medical disorders in which life itself can be jeopardized by a prohibition against effective contraceptive devices.
"These case histories spell out two of the medical conditions, lung disease and heart trouble, which dictate the use of contraception, or in some instances sterilization, depending on whether the prevention of pregnancy is to be temporary or permanent.

Some of the other common medical conditions making birth control advisable, either temporarily or permanently, include kidney disease resulting in decreased function of that organ; advanced diabetes of such chronicity and severity that the patient shows evidence of blood vessel damage; cancer of the breast, thyroid or other organ which has been removed surgically less than three years before, so that there is insufficient time to determine whether it is likely the malignancy was entirely eliminated; and a host of nervous afflictions such as multiple sclerosis and Parkinson's dissease."[10]

The court below, in *Tileston v. Ullman,* 129 Conn. 84, 26 A. 2d 582 (1942), in upholding Section 53-32, concluded that the statute made no exception on grounds of health. It declared that "absolute abstention" was a "reasonable, efficacious and practicable" alternative. That alternative, though it may do honor to Comstock, cannot survive better authority.

> "In the close relationship of married life the effect of prolonged abstinence is usually harmful to mental health and balance and to the marriage relationship and a risk to fidelity. As a birth control measure for recommendation by the physician abstinence is negligible."[11]

There is no doubt that the statute, as interpreted by the State's highest court to explicitly preclude contraceptive devices from being used in circumstances where life is actually endangered, runs afoul of the Fourteenth Amendment. To forbid the use of effective contraceptive devices under such conditions requires married couples either to abstain from sexual intercourse or to play Russian roulette with less effective contraceptive methods. But this is choice which the state may not impose on its citizens. *Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra; Skinner v. Oklahoma, supra.*

III.

Section 53-32 violates the equal protection clause of the Fourteenth Amendment.

In *Skinner v. Oklahoma, supra,* this Court held that a law requiring the sterilization of some criminals, but not others who had committed essentially the same offense, failed to meet the requirements of the equal protection clause of the Fourteenth Amendment. Mr. Justice Douglas, writing for the Court, stated:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins, 118 U. S. 356; Gaines v. Gaines, 305 U. S. 337."

In *Yick Wo v. Hopkins,* 118 U. S. 356, 375 (1885), this Court held:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Both the *Skinner* doctrine and the *Yick Wo* doctrine apply here. In view of the basic liberty involved, the State's classification, subjected to the same "strict scrutiny" as in *Skinner,* fails for three reasons.

First, a classification which makes the use of a contraceptive device illegal, but excludes contraceptive methods which do not employ devices, is unreasonable. The statute does not make illegal the use of contraception, but merely that kind of contraception which is achieved by means of a "device". The law imposes no sanction on other methods of contraception--for example, the rhythm method and withdrawal. This distinction is arbitrary, for the successful use of any of the contraceptive methods will have the identical result. If the purported legislative purpose is to be realized, the State must prohibit withdrawal and the rhythm method as well as "devices".

Second, the "right of the individual to engage in any of the common occupations ...," as the Court in *Meyer v. Nebraska, supra,* put it, applies to women as well as to men.

In contemporary times, the liberty of "establishing a home" encompasses not only the right of parents to raise children, but includes the wife's right to order her childbearing according to her financial and emotional needs, her abilities, and her achievements. No citation of authority is required to support the fact that in addition to its economic consequences, the ability to regulate child-bearing has been a significant factor in the emancipation of married women. In this respect, effective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions. Cf. *Trubeck v. Ullman,* 147 Conn. 633, 65 A. 2d 158 (1960). Thus, the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively.

Lastly, even if we were to concede some reasonable relation between contraception and the legislative purpose, which we do not, the legislature, by enacting a prohibition against users of devices, without barring their manufacture and sale within the State, are discriminating against certain individuals, "without rhyme or reason". *Goesaert v. Cleary,* 335 U. S. 464 (1948). The law lays an "unequal hand" on those who have committed "intrinsically the same quality of offense". In this respect, the case at bar comes within the holding of *Skinner,* where the Court held that the State of Oklahoma could not select for sterilization those who had thrice committed grand larceny, and give immunity to embezzlers. In this case, the State of Connecticut has sought to promote morality via the regulation of contraceptive devices. The selection of the *users* of the devices, as the sole target of this criminal statute, with immunity to the manufacturers and sellers, is that sort of "invidious discrimination" prohibited in *Skinner*.

The equal protection clause "requires that the classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis,* 347 U. S. 231 (1954).[12]

CONCLUSION

For the reasons stated above, the judgment of the Court below should be reversed.

Footnotes

[*] Adopted from appellants' brief.

[1] The late Mr. Justice Frankfurter, commemorating Judge Learned Hand's fifty years of federal judicial service, said of Judge Hand that "he has achieved the one thing in life that makes all the rest bearable--a happy marriage." 264 F. 2d 21 (foreword).

[2] See, e.g., Connecticut General Statutes, Revision of '1958: §17-32 et seq. (Dependent and Neglected Children); §53-304 (Non-support); §53-309 (Abandonment) ; §10-184 (School Attendance, Duties of Parents).

[3] 42 U. S. at 172, 173.

[4] *West Virginia v. Barnette,* 319 U. S. 624, 638 (1943).

[5] See, e.g., note 2, *supra.*

[6] 268 U. S. at 535.

[7] *Poe v. Ullman,* 367 U. S. at 545 (Harlan, *J.* dissenting). Likewise, the court below described Section 53-32 as relating to "the public safety and welfare, including health and morals ..." (R. 63). The Appellate Division in this case had suggested that another purpose of the statute was "for the perpetuation of the race and to avert ... perils of extinction" (R. 49). This justification was properly ignored by the Supreme Court of Errors.

[8] *Commonwealth v. Gardner,* 300 Mass. 372, 375-376 (1938).

[9] *Poe v. Ullman,* 367 U. S. at 520 n. 10.

[10] Guttmacher, Alan, M.D., *Babies by Choice or by Chance* (Avon Books, 1961), pp. 18-19.

[11] Dickinson, *Techniques of Conception Control* (3d ed. 1950), p. 40.

[12] It may also be noted that prohibition against the use of contraceptive devices, and allowance of contraception without any device, is a distinction created and maintained by religious dogma, notably Orthodox Jewry and Roman Catholicism. Guttmacher, Alan, M.D., *Babies by Choice or by Chance* (Avon Books, 1961), pp. 79-86. A statute enacted pursuant to a Puritan theology, which believed that idiocy, epilepsy and damnation were the fruits of sexual activity, and which is supported in this century largely by other religious dogmas, breeches the wall of separation between church and state, and violates the First Amendment. See, for example, *Engel v. Vilale,* 370 U. S. 421 (1962); *Abington School Dist. v. Schempp,* 374 U. S. 203 (1963). Undoubtedly the state can legislate in the field of morals, but it cannot seek to impose on all its diverse citizenry a morality which is preached and pursued only in the dogmas of some religions.

LITIGATION: CONNECTICUT

Women vs. Connecticut, "Some Thoughts on Strategy" (Circa February 1970)

Whereas the abortion debate in New York was largely—though, as we have seen, by no means exclusively—focused on the legislature, in Connecticut the legislature resisted efforts to reform the state's abortion law, a factor that led advocates for change to focus on the courts instead.

Under Connecticut's 19th-century statute, a woman could be imprisoned for seeking or receiving an abortion, as could anyone who performed an abortion or helped a woman procure one, unless it was necessary for the life of the woman or her fetus. Neither a 1967 bill to add rape as an exception to the abortion law, nor a 1969 bill that would permit therapeutic abortion, ever made it out of committee. There was, however, a deep normative divide between the legislature and many doctors and clergy in the state. As the materials in Part I show, many in the state believed in repeal and counseled women on obtaining legal abortions, in and out of state.

When a group of women's liberation activists organized to challenge Connecticut's statute in the early 1970s, they looked for new pathways of change. The group considered organizing a referral service (with or without the assistance of clergy seeking repeal) in order to increase access to abortion, educate women, and mobilize support for change, and, eventually, to force the question of the law's constitutionality. In ultimately deciding to file a lawsuit arguing that Connecticut's abortion law was unconstitutional, their goal was not only—or perhaps even primarily—to repeal the law. On their list of objectives, "get[ting] rid of Connecticut's law" was third, behind "educat[ing] the world and bring[ing] the subject into the open more..." and "involv[ing] women (lots of them) in a winning fight about an issue that is peculiarly theirs."

I. Objectives

A. To educate the world and bring the subject into the open more (along with questions about women's health care generally);

B. To involve women (lots of them) in a winning fight about an issue that is peculiarly theirs;

C. To get rid of Connecticut's law;

D. To enable as many women as possible to get abortions when they want them.

II. Referral

A. To meet various objectives, this service would have to

1. be efficient and capable of dealing with perhaps hundreds of women a month;

2. be clandestine (to avoid arrests, which would frustrate objective D at least) and therefore involve considerable security consciousness (which would limit our ability to attain objectives A and possible B and D); OR

3. be provocatively public (which would meet objectives A and B and D until the bust and possibly A, B and C after the bust);

4. involve sensitive and sophisticated counseling and other related support services.

B. Arguments for a clandestine service

1. It is needed. We already get calls. The only other organized service is run mostly by men (CCS).

2. We could involve a more or less limited number of women in doing something that's needed for themselves and for their sisters.

3. It would be educational (but in a limited way).

C. Arguments against clandestine service

1. We could only serve a limited number of women and involve a limited number of women in working.

2. If we were seriously worried about getting busted, we would have to be very security conscious. That would be nerve-wracking and possibly destructive to the proper spirit of women's organizing.

3. Our educational and propaganda impact would be minimal.
4. We would be fitting our institutions to meet a stupid law and have less chance of dumping the law altogether.

D. Arguments for a public referral service

1. It could put as much emphasis on education and propaganda as on its basic service. Education is more effective in the context where the subject counts.
2. It could involve lots of women in a public fight for a while.
3. We would be challenging Connecticut to enforce or dump its law. If we were busted we would have a more urgent and perhaps better case (First Amendment rights, too) then in a civil suit.
4. We could see that more women got helped because they would know about us.

E. Arguments against a public referral service

1. We might not be in business long enough to accomplish anything.
2. We might not be able to control who got busted. We would be risking things for women coming to us for help and for doctors. Getting busted is a drag; someone could even end up serving time.
3. Doctors and women might not come or cooperate for fear of the stuff mentioned in number (2) above.
4. We would be prosecuted in Connecticut rather than federal courts; in other words, in courts less likely to react positively to our arguments.
5. The demand might be greater than we (or the "profession") could handle. We might find we do more servicing than educating or organizing.

III. Law suit

A. We have a couple ways of doing it:

1. We can join up with the clergy and Doug Schrader, their lawyer, in one federal suit (not a class suit) involving clergy, women, and possibly doctors all together; OR
2. We can try to do our "own" strictly women's suit in the style of the now-moot New York suit.

B. To meet various objectives we would have to
   1. Involve as many plaintiffs and witnesses as possible and/or get women working on publicity, demonstrations and other aspects of the suit;
   2. Make a lot of noise about it all;
   3. Be willing to press on up to the Supreme Court, which means time, among other things;
   4. Press the basic issues of women's rights rather than vagueness arguments which are more likely to win.

C. Arguments for a suit in general
   1. Without risking our necks we might succeed in getting rid of Connecticut's law.
   2. We cannot really wait for the NY suit because it is nullified by the new NY law.
   3. It is a convenient vehicle for publicity (otherwise known as education or propaganda).
   4. It could be done in various ways—with greater or smaller numbers of people involved and more or less devotion of our resources. In other words, it could be grand scale or just one of several more modest projects.

D. Arguments against a suit in general
   1. The Law is pretty remote from most people and difficult to get people meaningfully involved in.
   2. For all our energy and time, it might not work. We might not win.

E. Arguments about going in with the clergy rather than doing our own
   1. They would supply money, lawyers, respectability.
   2. There would be more kinds of plaintiffs and thus more issues to be raised.
   3. We could supply as many women plaintiffs and women's issues as we could come up with.
   4. They will probably go ahead without us and before we get going on our own suit if we do not join. They would get ACLU support. That would all be wasted resources.

5. BUT A lot of things would be at their initiative ("they" being mostly men).
6. We might not have time to muster maximum publicity and support for the women's part.

IV. General agitation

(We have never discussed this possibility but probably should. Some women in Washington State had demonstrations of 2000 + people in the state capital. Washington is now one state with a bill for abortion on demand before its legislature.)

V. Doing nothing

(The tide of history seems to be running in our direction. Is this the time for us to get involved or the time to become the vanguard in some less popular cause?)

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Women vs. Connecticut Organizing Pamphlet (Circa November 1970)

Women versus Connecticut, as the group came to be called, presented a new model of abortion activism. Abortion reform during the 1960s initially sought to protect women; Women versus Connecticut sought to empower them. Once the group decided to mount a challenge to Connecticut's law, only women, and as many as possible, were to be the plaintiffs, lawyers, organizers, and experts.

What follows is an organizing pamphlet used by Women versus Connecticut to recruit plaintiffs for the lawsuit. The signatories to the document included members of the New Haven women's liberation group, which drew on the students of Yale Law School and the surrounding community. The organizing pamphlet sets forth the group's arguments, explains the process of bringing a lawsuit, and then sets out the grounds of the group's constitutional arguments. Once the group had decided to sue, it was determined to make clear that Women versus Connecticut's effort to legalize abortion was part of a larger struggle for equal voice and equal citizenship. As in New York, the movement recruited hundreds of women as plaintiffs in the case. When filed, there were 858 women named in the complaint; as the suit progressed, that number reached 1,700. Lawyers for the group included Nancy Stearns of the Center for Constitutional Rights,

who played a key role in the Abramowicz *case in New York, and Catherine Roraback (1920–2007), a graduate of Yale Law School who had worked with Professor Thomas Emerson in challenging Connecticut's ban on birth control, which the Supreme Court ruled unconstitutional in the* Griswold *case.*

FOREWORD

About fifteen women came together in February, 1970 because we wanted to do something about abortion. Most of us were also in Women's Liberation; about half had had abortions; most of us had been contacted by women desperate to obtain abortions. As we talked, we began to discover that "the abortion issue" is inseparable from many other dimensions of our lives as women—we just think of it as separate because society has isolated it by making it a crime. In our meetings we began to understand that it was important for us to figure out how abortion connected to the rest of our lives and couch our action in those terms.

At the end of eight months of discussion of our experiences, and research we did on abortion and health care, we decided to try to reach all the women in Connecticut who wanted to work with us to abolish Connecticut's law against abortion. We decided that bringing a lawsuit against Connecticut's anti-abortion law was an important first step toward a decent health care system and women's control over their bodies.

We wrote the statement which follows to summarize for ourselves and new people our thoughts about the relationships we came to see after long discussion and struggle. Newer members need not agree with all of what we now believe, and we expect that the newly expanded group which has decided to call itself Women versus Connecticut will probably evolve its own position. We present it as an introduction because it is the basic stance from which the suit was initiated.

As women in this society, we lack control over our own bodies.

For years women have been under constant pressure to have children. Our culture teaches us that we are not complete women unless we have children. Our husbands and boyfriends encourage us to bear children as proof of their masculinity. Contraception is almost always our responsibility. Contraceptives that are known to be safe are not always effective; contraceptives that are known to be effective are not always safe. Abortion is illegal, and women who get abortions often risk their lives.

Other pressures compel some of us not to have children. If we are unmarried,

we become social outcasts by bearing children. Those of us who are poor and live on welfare know that opponents of welfare want to limit the size of our families. We are pressured to use contraceptives or be sterilized; each time we have another child the meager allowance per child gets even smaller. Population control advocates tell us that overpopulation is the reason our environment is polluted. They imply that unless women everywhere stop having babies, thousands of children in underdeveloped countries will starve, and all people will be deprived of clean air, pure water, and space in which to live.

We want control over our own bodies. We are tired of being pressured to have children or not to have children. It's our decision.

But control over our bodies is meaningless without control over our lives. Women must not be forced into personal and economic dependence on men or on degrading jobs in order to assure adequate care for the children they bear. Our decisions to bear children cannot be freely made if we know that aid in child care is not forthcoming and that we will be solely responsible for the daily care of our children.

We are a group of women associated with Women's Liberation who want to bring suit to challenge Connecticut's abortion law. For the past several months we have been meeting regularly to talk about abortion, population control, health care, and our lives as women. We have decided to act to change some of the oppressive realities of our lives.

We believe that women must unite to free themselves from a culture that defines them only as daughters, wives, and mothers. We must be free to be human whether or not we choose to marry or bear children.

We believe it is wrong for this society to put the economic needs of corporations first and human needs second. These corporations rob Third World countries of resources with which their populations could be fed. At home, they make their profits by exploiting workers and polluting the environment. We think the issue is not control of the world's population but control of the world's resources. The question is not how many children but what proportion of the world's resources each child receives.

We believe all people have a right to meaningful work, an adequate income, access to good health care, and parent-controlled child care. We believe children have a right to be born into a world where many adults will be able to love and care for them according to their needs.

We don't expect these things to be given to us; we will have to fight for them. The abortion suit is just a beginning. If we succeed in changing the law, we will

still have to fight to make abortions cheap enough so all women can afford them. We will have to struggle to prevent abortion from being used as a weapon against women who want to have children. We will have to fight to create a health care system controlled by those who use and work in it. And we know there are many other struggles ahead.

We are women committed to working together for these changes. Join us!

Betsy Gilbertson Wilhelm, Gretchen Goodenow,
Michele Fletcher, Ann Freedman, Sasha Harmon,
Marione Cobb, Jill Hultin, Harriet Katz, Ann Hill,
Gail Falk, Joan Gombos, Nancy Greep

WOMEN VERSUS CONNECTICUT

We are initiating a suit to try to get Connecticut's abortion law declared unconstitutional.

Under present Connecticut law, abortions are only legal if they are necessary to preserve the life of the mother. Women who have abortions as well as anyone who either performs them or helps women arrange to get them can be imprisoned and/or fined. The abortionist can be fined $1000 and imprisoned up to five years; the woman who had the abortion can be fined $500 and imprisoned up to two years; anyone who helped her arrange the abortion can be fined $500 and imprisoned for up to one year.

The law is used. Dr. Morris Sullman, a doctor in New London, was recently convicted of performing an abortion. There have been a number of arrests of those suspected of performing and arranging illegal abortions in the New Haven area in the past few months. (The woman who had the abortion rarely gets arrested. The usual pattern is for police or medical personnel to threaten women who are desperately ill following botched abortions with prosecution unless they agree to reveal the name of their abortionist.)

Women vs. Connecticut has not chosen to try and change the law because we believe in the power of the law to bring about the liberation of women, or even because we are convinced that once the law is declared unconstitutional all women who need them will be able to get abortions in Connecticut.

We see changing the law only as a necessary first step toward making those things possible.

As long as the law is on the books, doctors and hospitals can always hide behind it. Hospitals which choose not to do abortions have an iron-clad defense;

hospitals like Yale-New Haven which do some abortions are protected from community pressure to do more by the argument that if their current practices are publicized they will be forced to stop doing any.

And as long as the law makes obtaining an abortion a criminal act, we will continue to be forced to behave like—and thus to feel like—criminals.

We doubt that our troubles will be over once the law is changed. We suspect that hospitals will be reluctant to reallocate their priorities to make giving abortions to thousands of women possible; that doctors will not want to spend much of their valuable time doing this brief, uninteresting (and possibly unlucrative) procedure. But we will never get to this stage without first getting rid of the law.

Connecticut's abortion law was enacted in 1821 and amended in 1860. Many states have laws similar to Connecticut's, although in the past few years nine states have enacted "reform" laws which make abortion legal under several categories of circumstances: if the mother's mental health is threatened, if there is evidence indicating the child will be born with a deformity, if the child is the product of rape or incest, etc. However, a recent study indicates that only 15% of all women who have abortions do so for reasons covered by "reform" laws—and expense prevents many eligible women from getting them.

During the past year there have been some important legal changes. A Federal court in Washington, D.C. has declared the abortion law there unconstitutional because it is too vague (it specifies that abortions are legal to preserve the life and health of the mother). The Wisconsin abortion law, which is similar to Connecticut's, has been found unconstitutional by a Federal three-judge panel which found that the police power of the state did not entitle it to deny to women the right to decide for themselves whether or not to bear a child. Hawaii (which has a 90-day residency requirement) and New York (no residency requirement) have passed new laws which make abortion legal when performed in a hospital by a doctor. The New York legislature appears to have been favorably influenced by four suits—one brought by several hundred women, the others by a minister, a group of doctors, and several women for whom childbearing presented special burdens—which were pending before a Federal three-judge panel in New York at the time of passage of the new law.

These changes in other states create a favorable climate for change in Connecticut. There are a couple of ways the Connecticut law could be changed: by getting a new law—like New York's for example—passed by the legislature, or by bringing a suit which asks the courts to find Connecticut's abortion law unconstitutional.

Getting a new law that we would approve of through Connecticut's heavily Catholic legislature seems unlikely. Previous efforts to introduce even moderate reform measures have been unsuccessful. Asking the courts to find Connecticut's abortion law unconstitutional seems more apt to succeed.

What it means to "ask the courts to find Connecticut's abortion law unconstitutional:"

1. In every state there are two sets of courts—state courts and Federal courts. State courts make decisions about cases that result from violation of state law. Federal courts make decisions about cases that arise from violations of Federal law and about conflicts between state law and the Federal Constitution.

2. There are two ways we could go about asking the courts to make a decision on the constitutionality of the Connecticut abortion law.

   A. We could get arrested under the law—one way to do this might be to set up a flagrantly public referral service—and if we were convicted we could appeal through the state courts, hoping eventually to win in the U.S. Supreme Court. The problems with this approach are these: we would be unlikely to get the law declared unconstitutional by Connecticut courts since they are subject to the same political pressures as the legislature; it takes a long time and a lot of money to go from the lowest state court to the U.S. Supreme Court; some of us would have to get arrested and might go to jail.

   B. We could go into Federal court and ask for a declaratory judgment. This means that we would ask the U.S. District Court of Connecticut to analyze the Connecticut abortion law in terms of the U.S. Constitution and find the law unconstitutional. This amounts to asking the Federal court to use its power as interpreter of the Constitution to make a ruling on a state law which is ordinarily the territory of the state courts. To do this, no one has to get arrested. Those of us who want the law declared unconstitutional become plaintiffs in a civil action. The attorney general of Connecticut, who represents the state judicial system, is the defendant.

Advantages of this approach are that it takes less time and costs less than bringing a test case by getting arrested; no one has to risk jail; the suit is a positive statement of our position, instead of a defense to criminal charges.

Any group or combination of groups that feel themselves "irreparably harmed" by the law can be plaintiffs in this type of suit. All women fit in this category. We

have planned in terms of a women's suit, in which the plaintiffs would be as many women as possible single, married, professional, laywomen—all those who feel the law denies them their constitutional rights. Twelve hundred New Jersey women are bringing such a suit there. In New York, where a group of women brought a similar suit, the plaintiffs included professionals—like doctors and ministers who are frequently asked to give abortions or information about abortion. Any woman who feels she might be in the position to advise another woman about abortion is welcome to join our suit.

Since the constitutionality of abortion laws is being challenged in a number of states, many of the legal arguments we are apt to use have already been set forth in briefs written for other states. The legal arguments we plan to use are outlined in the next section of this pamphlet.

Because the legal system is so chauvinist—only 4% of lawyers are women, less than 1% of judges, and the law has been slow to recognize the rights of women—the idea of bringing a women's suit which demands that the legal system recognize women's rights is particularly appealing.

LEGAL ARGUMENTS

The legal arguments we are making to show that Connecticut's abortion law violates women's rights under the United States Constitution are summarized as follows:

1. Right to Privacy

The Connecticut abortion law violates a woman's right to privacy, because it denies her the right to control over her own body and the right to make her own decisions in intimate personal matters related to marriage, family, and sex. It is every woman's decision, not the State's decision, as to whether she wants to bear a child. It is a personal decision, made in privacy and not to be interfered with by the State.

2. Right to Life, Liberty, and Property

A woman's right to life is jeopardized by the abortion law in that childbirth carries with it a risk to the life and health of the woman. This risk is higher than the risk involved in getting an abortion in the early stages of pregnancy.

In Connecticut, the actuality of an unwanted pregnancy, or the possibility of such a pregnancy, severely limits a woman's liberty and freedom to engage in the political process, to choose her own profession, and to fulfill herself in any way which does not relate to the bearing and raising of children. Unmarried women

who become pregnant and are forced to bear children against their will suffer an extreme deprivation of liberty and human dignity by the social stigma placed on them as unwed mothers.

Women also suffer loss of property in that they are denied jobs solely on the basis of possible pregnancy, or motherhood. Pregnant women are forced to leave their jobs without compensation and without any guarantee of returning to work after they give birth.

Women who are forced to bear children they cannot support suffer extreme economic hardship. Because there are few facilities for child care outside the home, these women are effectively excluded from seeking employment and are forced to rely on welfare or charities to help in raising their children, at a loss to their liberty and independence in economic matters.

3. Right to Equal Protection (Right of Rich and Poor Alike to Get Abortions)

Rich women in Connecticut can afford to travel to London or Puerto Rico for abortions. They also have greater opportunity to learn of private New York hospitals that perform abortions for out-of-state women at fees of $500–600. Thus, Connecticut's abortion law places a much heavier burden on poor women, who cannot afford the prices charged by hospitals in New York for therapeutic abortions, nor can they afford a trip out of the country.

4. The Abortion Law Imposes a Cruel and Unusual Punishment on Women by Forcing Them to Bear Children

Forcing a person to give up his citizenship and to leave the country has been called a cruel and unusual punishment by the U.S. Supreme Court. We are arguing that forcing a woman, who does not want a child, to carry a pregnancy to term imposes on her the highest form of mental cruelty, as well as the physical hardship of pregnancy and childbirth and the economic burden of supporting a child for 21 years. Obviously, women who want children do not see pregnancy and childbirth as punishment. But for women who are forced to have children against their will, the abortion law creates a devastating torture of body and mind and often turns a woman's life into hell.

5. Connecticut's Abortion Law Is Unconstitutionally Vague

A criminal law, like the abortion law, must be worded so that the people affected by it know what is being forbidden. The words, "necessary to preserve the life of

the mother," which are used in the state abortion law do not meet the standard, because the terms "necessary," "preserve" and "life" are ambiguous. They could mean that an abortion is not permitted unless the woman will die in pregnancy or childbirth or if she attempts suicide during her pregnancy; it could also mean that a woman's health will be injured in childbirth so that her life span will be shortened; it could also mean that a woman's quality of life will be changed for the worse, if she has a child. If no one is clear about the meaning of the law, how can it be enforced?

6. Right to Freedom of Religion

The Connecticut abortion law is kept on the books by people who hold the religious belief that human life begins at the moment of conception and that abortion means killing a person. They are imposing their religious views on all the other people who do not think abortion is murder, and who have the constitutional right to hold their beliefs without interference by state laws, such as the abortion law.

7. Right to Free Speech

People who want to help women get abortions can be prosecuted under the Connecticut abortion law. This violates their right to freedom of expression, to give out information on how to do abortions, who will do abortions and where they can be obtained.

8. The State Has No Justification for Its Abortion Law

When the abortion law was passed in the nineteenth century, the State was worried about the health hazards of performing abortions. At that time, even the most minor operation was dangerous. The State also showed an interest in protecting the morals of women, and keeping them out of the hands of scurrilous men, who would force them to risk their lives getting abortions. Times have changed—medically, abortion under proper conditions is now a safe minor operation, and the law intended to protect women now forces them to depend on racketeers and profiteers for dangerous illegal abortions.

9. Women's Rights

Two other arguments we have yet to develop are:

a) The abortion law violates the Nineteenth Amendment, which women fought for to give them equal footing with men in the public sphere. As

long as women are forced to have and raise children, they are denied that equal footing guaranteed by the Nineteenth Amendment.

b) The Thirteenth Amendment forbids involuntary servitude. We think forced pregnancies are definitely a form of slavery against a woman's will.

Legal information for plaintiffs—

WHO CAN BE PLAINTIFFS:

1. Any woman who is living in Connecticut and is of childbearing age and who does not wish to bear a child at this time.
2. Women medical workers, such as doctors or nurses, who have been or may be asked to perform or help perform an abortion.
3. Women, especially in a professional position of counselor, clergywoman, social worker, or doctor, who have been asked or may be asked to advise or refer persons about abortions.

Named plaintiffs will be representing all other persons in Connecticut in similar situations. The decision that the Court makes about the validity of the abortion statute will affect everyone in the state. The list of hundreds of named plaintiffs, plus their personal participation in various public activities and the hearings could have an important influence on the outcome.

RESPONSIBILITIES AND OPPORTUNITIES OF PLAINTIFFS

In this type of lawsuit you will not face any kind of fines or sentence, or be restricted from leaving the state.

Plaintiffs may have to answer written or oral questions about the subject matter or the suit. This is a formal procedure available to the defendants (who will be the state's attorneys representing Connecticut). To present such questions would be costly and time-consuming for them and it seems unlikely that they will do so. Attendance in court at the preliminary hearings and eventually at the trial will not be compelled, but is strongly urged. A packed courtroom will be important and it is your right to know what is happening.

A brief questionnaire will be given each plaintiff. Your answers will help establish particular reasons needed to claim the right to be in court at all. This material will only be for the use of your lawyers and their assistants and it will not be turned into the court.

You will need to sign a statement authorizing your attorney to represent you.

Women under 21 may be plaintiffs if one of their parents is willing to sign as guardian. If not, we are hoping to make arrangements for one of the over 21 plaintiffs to act as "guardian ad litem" (guardian for the purpose of this suit).

Memorandum of Decision, *Abele v. Markle* I (April 18, 1972)

On March 2, 1971, Women versus Connecticut filed a complaint in federal court on behalf of 858 women. The lawsuit, captioned Abele v. Markle*, alleged that "[t]he Connecticut abortion laws compel women of childbearing age, doctors, and other medical personnel and those who counsel or assist women to procure an abortion, to forego their constitutional rights to life, liberty and property, to freedom of speech and expression, to privacy, against cruel and unusual punishments, against involuntary servitude and to due process of law and equal protection of the laws." The case challenged socioeconomic inequality in access to abortion and emphasized the need for abortion in cases where pregnancy endangers a woman's health. But the value animating many of its claims on the Constitution was women's right to equal freedom with men. The lawsuit argued that the state, through its abortion laws, "classif[ies]...women not as full and equal citizens but as limited and inferior persons—persons denied the right to choose a life style or an occupation other than one consistent with bearing all the children they conceive" and that the abortion ban unconstitutionally "discriminate[s] against women by forcing a woman to bear each child she conceives without imposing like burdens on the man for the child whom he has helped create." The lawsuit also claimed that Connecticut's abortion laws impermissibly infringed upon the rights of doctors and counselors, but these claims were secondary to those concerning the indignity and injuries the abortion ban inflicted on women.*

On April 18, 1972, a federal court held Connecticut's abortion laws unconstitutional, with two judges supporting the decision and one dissenting. Each of the three judges who heard the case wrote a separate opinion.

Judge Joseph Edward Lumbard (1901–1999), named to the federal appeals court in New York by President Dwight D. Eisenhower in 1955, based his decision clearly and unequivocally on the constitutional arguments advanced by the women's movement. In Abele*, Judge Lumbard responded to women's testimony about the injuries and indignities that laws criminalizing abortion imposed on them and recognized that laws criminalizing abortion inflicted constitutionally cognizable harms on women,*

and not doctors only, as earlier judgments had found. He reasoned that constitutional protection for women's decision whether to abort a pregnancy was warranted because of changing social views about women's "status" and "roles." He cited the Nineteenth Amendment's conferring on women the right to vote; Reed v. Reed*, the first equal protection sex-discrimination decision; federal employment-discrimination law; and the Equal Rights Amendment, which had just been sent to the states. In striking down Connecticut's 19th-century statute, he recognized that the nation's understanding of women had changed since the law was first enacted, emphasizing that "society now considers women the equal of men." Women, therefore, "are the appropriate decisionmakers about matters affecting their fundamental concerns." The state's interest in protecting the fetus, he continued, is insufficient to abridge a woman's constitutional right "to determine within an appropriate period after conception whether or not she wishes to bear a child."*

Judge Jon O. Newman, a Yale Law School graduate named to the federal district court in Connecticut months earlier by President Richard M. Nixon, concurred but based his decision on narrower grounds, emphasizing the uncertain legislative history of the state's abortion law. Judge Newman reasoned that in the 19th century, the legislature criminalized abortion either to protect pregnant women from dangerous surgery—an interest made obsolete by improvements in medical technology—or to preserve a woman's morals; that is, to deter her from engaging in nonmarital, nonprocreative sex. Neither rationale offered sufficient reason to restrict women's decisionmaking in the 20th century. Judge Newman left open the question of whether the state could criminalize abortion in order to protect the unborn, explaining that he saw no evidence that this was the state's purpose in passing its 1860 abortion law.

Judge T. Emmet Clarie (1913–1997), a former chairman of the Connecticut State Liquor Commission named to the district court by President John F. Kennedy, was the dissenter. He would have held that Connecticut's abortion laws were not, in fact, unconstitutional. Rather, any intrusion upon a woman's privacy that they cause is justified by the state's compelling interest in protecting the unborn. His opinion gives voice to movement concerns about protecting human life and traditional family roles.

Although the Abele *case has, until now, been largely forgotten, it was one of many cases to address the abortion conflict in the years preceding* Roe. Abele *presented several of the most prominent legal arguments being made at the time that* Roe *was decided—arguments emphasizing far-reaching changes in women's legal status, in sexual mores, and in medical science as reasons to reconsider the constitutionality of criminal laws adopted a century earlier.*

LUMBARD, CIRCUIT JUDGE.

In Connecticut, statutes prohibit all abortions, all attempts at abortion, and all aid, advice and encouragement to bring about abortion, unless necessary to preserve the life of the mother or the fetus....We think that by these statutes Connecticut trespasses unjustifiably on the personal privacy and liberty of its female citizenry. Accordingly we hold the statutes unconstitutional in violation of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.

The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman.

The Connecticut anti-abortion laws take from women the power to determine whether or not to have a child once conception has occurred. In 1860, when these statutes were enacted in their present form, women had few rights. Since then, however, their status in our society has changed dramatically. From being wholly excluded from political matters, they have secured full access to the political arena. From the home, they have moved into industry; now some 30 million women comprise forty percent of the work force. And as women's roles have changed, so have societal attitudes. The recently passed equal rights statute and the pending equal rights amendment demonstrate that society now considers women the equal of men.

The changed role of women in society and the changed attitudes toward them reflect the societal judgment that women can competently order their own lives and that they are the appropriate decisionmakers about matters affecting their

fundamental concerns. Thus, surveying the public on the issue of abortion, the Rockefeller Commission on Population and the American Future found that fully 94% of the American public favored abortion under some circumstances and the Commission itself recommended that the "matter of abortion should be left to the conscience of the individual concerned." Similarly, the Supreme Court has said, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird (1972); Griswold v. Connecticut (1965).

The state has argued that the statutes may be justified as attempts to balance the rights of the fetus against the rights of the woman. While the Connecticut courts have not so construed the statutes,[1] we accept this characterization as one fairly drawn from the face of the statutes. Nevertheless we hold that the state's interest in striking this balance as it has is insufficient to warrant removing from the woman all decisionmaking power over whether to terminate a pregnancy.

The state interest in taking the determination not to have children from the woman is, because of changing societal conditions, far less substantial than it was at the time of the passage of the statutes. The Malthusian specter, only a dim shadow in the past, has caused grave concern in recent years as the world's population has increased beyond all previous estimates. Unimpeachable studies have indicated the importance of slowing or halting population growth. And with the decline in mortality rates, high fertility is no longer necessary to societal survival. Legislative and judicial responses to these considerations are evidenced by the fact that within the last three years 16 legislatures have passed liberalized abortion laws and 13 courts have struck down restrictive anti-abortion statutes similar to those of Connecticut. In short, population growth must be restricted, not enhanced, and thus the state interest in pronatalist statutes such as these is limited.

Moreover, these statutes restrict a woman's choice in instances in which the state interest is virtually nil. The statutes force a woman to carry to natural term a pregnancy that is the result of rape or incest. Yet these acts are prohibited by the

[1] The statutes, infrequently considered by the Connecticut courts, have been construed as advancing two distinct legislative goals: inhibition of promiscuous sexual relationships by prohibiting escape from unintentional pregnancy, and the protection of pregnant women from the dangers of nineteenth century surgery. However laudable a purpose the goal of reducing the frequency of promiscuous sexual relationships may have been considered one hundred years ago, it does not amount to a compelling interest today in the face of changed moral standards. Moreover, advances in medical science since 1860 have made abortion in the early stages of pregnancy no more dangerous than childbirth. Only a narrowly drawn statute prohibiting abortions endangering the life of the pregnant woman would be justified in light of a legislative intent to protect the woman's health.

state at least in part to avoid the offspring of such unions. Forcing a woman to carry and bear a child resulting from such criminal violations of privacy cruelly stigmatizes her in the eyes of society. Similarly, the statutes require a woman to carry to natural term a fetus likely to be born a mental or physical cripple. But the state has less interest in the birth of such a child than a woman has in terminating such a pregnancy. For the state to deny therapeutic abortion in these cases is an overreaching of the police power.

Balancing the interests, we find that the fundamental nature of the decision to have an abortion and its importance to the woman involved are unquestioned, that in a changing society women have been recognized as the appropriate decisionmakers over matters regarding their fundamental concerns, that because of the population crisis the state interest in these statutes is less than when they were passed and that, because of their great breadth, the statutes intrude into areas in which the state has little interest. We conclude that the state's interests are insufficient to take from the woman the decision after conception whether she will bear a child and that she, as the appropriate decisionmaker, must be free to choose. What was considered to be due process with respect to permissible abortion in 1860 is not due process in 1972.

The essential requirement of due process is that the woman be given the power to determine within an appropriate period after conception whether or not she wishes to bear a child. Of course, nothing prohibits the state from promulgating reasonable health and safety regulations surrounding abortion procedures.

In holding the statutes unconstitutional, we grant only declaratory relief to this effect as there is no reason to believe that the state will not obey our mandate.

NEWMAN, DISTRICT JUDGE (CONCURRING IN THE RESULT)

I fully agree with Judge Lumbard's conclusion that the plaintiffs are entitled to a judgment declaring the Connecticut abortion statutes unconstitutional, but my reasons for reaching that conclusion cover somewhat less ground. Moreover, having found the statutes unconstitutional, I would grant plaintiff Doe injunctive relief.

...[T]he question to be faced is whether the state interests being advanced in 1860 are today sufficient to justify the invasion of the mother's liberty. I agree with Judge Lumbard that protecting the mother's health, which plainly was a state interest in 1860 and may well have provided a valid state interest for these stat-

utes when enacted, will not furnish a subordinating state interest today, when the mother's life is exposed to less risk by abortion than by childbirth.

The second justification advanced by the state, protecting the mother's morals, may well have been an objective in 1860. This justification apparently proceeds from the premise that if abortion is prohibited, the threat of having to bear a child will deter a woman from sexual intercourse. Protecting the morals of the mother thus turns out to mean deterring her from having sexual relations. But the Supreme Court has decided that such a purpose cannot validate invasion of a woman's right to privacy in matters of family and sex. Griswold v. Connecticut (1965); Eisenstadt v. Baird (1971).

That leaves the state's third justification, protecting the life of the unborn child. Judge Lumbard is willing to assume this was a purpose of the 1860 legislature and finds it constitutionally insufficient. Judge Clarie concludes it was in fact a purpose of the 1860 legislature and finds it constitutionally sufficient. With deference, I am persuaded that protecting the life of the unborn child was most likely not a purpose of the 1860 legislature. At a minimum it has not been shown with sufficient certainty that this was the legislature's purpose as to warrant a weighing of this purpose against the mother's constitutionally protected rights. Whether a fetus is to be considered the sort of "life" entitled to the legal safeguards normally available to a person after birth is undeniably a matter of deep religious and philosophical dispute. If the Connecticut legislature had made a judgment on this issue and had enacted laws to accord such protection to the unborn child, the constitutionality of such laws would pose a legal question of extreme difficulty, since the legislative judgment on this subject would be entitled to careful consideration. Compare with Byrn v. New York City Health & Hospitals Corporation (N.Y. 1972).... Since that legislative determination has not been shown to have been made, I think it is inappropriate to decide the constitutional issue that would be posed if such a legislative justification was before us.

Because I believe the only interests which the 1860 legislature was seeking to advance are not today sufficient to justify invasion of the plaintiff's constitutionally protected rights, I join with Judge Lumbard in holding these statutes unconstitutional.

....

CLARIE, DISTRICT JUDGE (DISSENTING):

I respectfully disagree and accordingly dissent from the majority opinion. This Court's bold assumption of judicial-legislative power to strike down a time-tested

Connecticut Statute constitutes an unwarranted federal judicial intrusion into the legislative sphere. The state legislature long ago made a basic choice between two conflicting human values. It chose to uphold the right of the human fetus to life over a woman's right to privacy and self-determination in sexual and family matters. The legislature has repeatedly refused to alter this decision to the present date.

The majority has reached out and grasped at the nebulous supposition that the protection of fetal life is not the purpose of the Connecticut anti-abortion laws. This assumption is unwarranted. The history of these statutes indicates that they were designed to protect fetal life.

....

PRIOR TO 1860, the Connecticut statutes concerned only abortions performed upon a woman "quick with child." This indicates a legislative determination that human "life" began at that point. The statute of 1860 amended that law to forbid abortion at any stage of fetal development. This amendment reflected a legislative judgment that fetal life at any stage merited the protection of the law. If the primary purpose of the anti-abortion laws was to protect the woman from the dangers of 19th century surgical techniques, as the majority suggests, it is impossible to understand why the original law prohibited abortions only after quickening. Certainly, the risk of infection caused by unsterilized instruments was as great before the fetus had quickened.

....

THE CASE OF *GRISWOLD*, which is relied upon by the majority, decided that the state could not, consistent with the zone of privacy emanating from the Bill of Rights, completely prohibit the use of contraceptives. The Court ruled that prohibiting contraceptives served no compelling state purpose. However, this decision is not applicable to the facts of the present case. It is one thing to prevent the impregnation of the ovum by the spermatozoa, and quite another to deliberately destroy newly formed human life. Different values are invoked. While the marital privacy referred to in *Griswold* limits itself to the personal conjugal relationship of only two people, abortion projects itself far beyond the bounds of personal intimacy. It is directed against an innocent victim, a third human being endowed with unique genetic characteristics....

The majority cite as an extreme illustration that the Connecticut law proscribes abortions, even in situations where the pregnancy is the result of incest or rape, or where there is a likelihood that the child will be born with a serious mental or physical defect. While it is conceded that such pregnancies and births are often fraught with personal hardship, the proper forum in which to present

and test such concerns is the legislature....

The people, acting through their legislature, have in effect decreed that this new life is an innocent victim, not an unjust aggressor.

....

CERTAINLY, THE REPEATED failure of the successive attempts to repeal or liberalize the anti-abortion laws can be attributed realistically, only to a legislative determination to protect fetal life. As recently as December 10, 1968, the Legislative Council recommended to the legislature that no legislative action should be taken on the proposal to liberalize our present laws on abortion. At page 10 in this report, it stated:

> The Council feels that should an unborn child become a thing rather than a person in the minds of people, in any stage of its development, the dignity of human life is in jeopardy. The family, too, which is the very basis of our society, would be minimized or perhaps destroyed.

The aforesaid conclusion by the legislative leaders leaves no room to question, but that their real concern was the protection of fetal life.

....

IT SHOULD BE NOTED that the majority decision leaves the State of Connecticut with no law or control in this area of human relationships. It invites unlimited foeticide (the murder of unborn human beings), as a way of life, in a state long known as the land of steady habits. The Connecticut legislature has historically, consistently, and affirmatively expressed its determination to safeguard and respect human life. The action of the majority constitutes an unwarranted federal judicial intrusion into the legislative sphere of state government. The judiciary was never intended nor designed to perform such a function. I would uphold the constitutionality of the challenged state statutes and deny relief.

Excerpted from *Abele v. Markle,* 351 F. Supp. 224, United States District Court for the District of Connecticut (1972).

Connecticut Legislative Hearing Testimony

Soon after the court declared Connecticut's abortion laws unconstitutional—and just one day before Governor Rockefeller vetoed the New York legislature's attempt to repeal the state's 1970 liberal abortion statute—Connecticut's governor Thomas Meskill called for the legislature to enact a new law. The new abortion bill, introduced in a special ses-

MARCH 9TH: CRIMINALIZING PREGNANCY

URL: https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html

The New York Times

Opinion

Women grieving after a lost pregnancy or a newborn's accidental death are being charged with crimes.

A WOMAN'S RIGHTS: PART 1

When Prosecutors Jail a Mother for a Miscarriage

BY THE EDITORIAL BOARD DEC. 28 2018

The statutes granting personhood rights to fetuses are never more pernicious than when they criminalize acts of God.

Stomach pains woke Keysheonna Reed late one night last December. She climbed into the bathtub, hoping she would not wake any of the other nine people living in her small home in eastern Arkansas. Within minutes, she'd delivered twins, a boy and a girl. Both babies were born dead, the medical examiner would later determine. Their mother — 24 and already the mother of three — panicked. She found an old purple suitcase, put the bodies inside and got into her car. She "began to pray and just drove," she said, according to a court affidavit, eventually leaving the suitcase on the side of County Road 602.

This personal tragedy was soon heightened by a legal one: When the suitcase was found several weeks later, the Cross County Sheriff's Office, understandably, began an investigation and asked the public for information.

Ms. Reed turned herself in. An autopsy was performed, confirming that the babies had died in the womb. No illegal substances were found in their bodies. “Please pray for all the officers and people involved,” the sheriff, J.R. Smith, asked in a statement. Ms. Reed was charged with two counts of abuse of a corpse, a felony in Arkansas carrying a minimum sentence of three years and up to a decade in prison. A judge set bail at $50,000, a sum more than twice the per capita income for Cross County. Ms. Reed still awaits trial.

Few reasonable people could read the statute under which she is charged and not believe she is guilty of violating it — “A person commits abuse of a corpse if, except as authorized by law, he or she knowingly … physically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities.” But sending this young woman to prison for even three years, and denying her living children a mother, can serve no public good.

It’s hard to find a compelling reason for prosecuting pregnancy loss. Nearly one million known pregnancies end in miscarriage or stillbirth annually, according to government statistics, and, despite improvements in prenatal care and medical technologies, the rate of early stillbirths has stayed stubbornly the same over the past 30 years. The cause is rarely, if ever, definitively found.

The involvement of law enforcement only compounds these traumas. It may deter pregnant women who are miscarrying — and even those with unremarkable pregnancies — from seeking medical help, and it forces health care providers who ought to be caring for their patients to collect evidence. Time and time again, it also jeopardizes the well-being of children left behind when their mothers are jailed.

So what motivates these prosecutions? The reality is that, in many cases, these women are collateral damage in the fight over abortion. As the legal debate over a woman’s right to terminate her pregnancy has intensified, so too has

the insistence of anti-abortion groups that fertilized eggs and fetuses be granted full rights and the protection of the law — an extreme legal argument with little precedent in American law before the 1970s.

Frustrated by the Roe v. Wade decision that legalized abortion, many in the anti-abortion movement hope for a sweeping rollback under a conservative Supreme Court — one that would block access to abortion even in states that protect women's access to such health services.

"We need to end this," Matt Sande, legislative director for Pro-Life Wisconsin, told Time magazine in 2013. "We need to end surgical abortion, without exception, without compromise, without apology. And that's what personhood does."

THE REALITY IS THAT, IN MANY CASES, THESE WOMEN ARE COLLATERAL DAMAGE IN THE FIGHT OVER ABORTION.

If a fetus were counted as a person under the Constitution, some legal theorists believe, there could be no legal abortion anywhere. Justice Harry Blackmun noted as much in his majority opinion in Roe. "If this suggestion of personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [14th] Amendment." Justice Blackmun went on to suggest there is no legal precedent for that stance.

Such a finding would go far beyond restricting abortion. Some common forms of birth control could become illegal if personhood becomes accepted law. And, for many anti-abortion activists, that's the goal.

In 2013, when Senator Rand Paul, a Republican from Kentucky and a physician, introduced the Life at Conception Act to ban abortion and grant the unborn all the legal protections of the 14th Amendment beginning at "the moment of fertilization," he insisted that it would not curtail access to birth control, including the so-called morning-after pill. Tony Perkins of the Family

Research Council disagreed, tweeting: "W/due respect to @SenRandPaul, Plan B isn't 'basically' birth control. Its function is to create conditions hostile to human life in utero." Though Plan B is, in fact, birth control — it prevents pregnancy from occurring — Mr. Paul got in line.

Republicans have made several attempts to advance the premise of fetal personhood in both state and federal law, including in a proposed version of President Trump's tax bill passed by Congress last December. Last month Alabama voters approved a ballot initiative to change the State Constitution to read, "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion," and to say it is public policy to "recognize and support the sanctity of unborn life and the rights of unborn children." A federal appeals court upheld a similar Tennessee measure earlier this year.

These activists are as unapologetic about pressuring prosecutors to treat miscarriage as murder, if it serves the cause of ending abortion. The fact that they're targeting women who had no intention of aborting their fetuses — and who are often deeply grieving for a lost pregnancy — is a societal price they appear willing to accept. Provided someone else pays it. The vehicles for these prosecutions tend to be ancient statutes that were enacted for entirely different purposes.

Arkansas, where Keysheonna Reed is being charged, is one of several states that have outlawed the abuse of a corpse for decades. Most likely, the original intention of such regulations was to curb necrophilia or to have legal recourse when a murderer destroyed a body. Today, however, prosecutors consistently turn to them to punish pregnancy loss.

Abusing a corpse is only one example — the twin laws of concealing a birth and concealing a death are also felonies in Southern states like Arkansas and Virginia (and a misdemeanor in several more). It's no coincidence that women until the 1850s were put to death for these crimes. While courts have ruled

that to be cruel and unusual punishment, these laws are now frequently deployed as a workaround for anti-abortion vigilantes.

Katherine Dellis felt dizzy one day in 2016, passed out and woke up on her bathroom floor to find her stillborn fetus beside her. The baby's lungs had never been exposed to air, a medical examiner in Virginia's Franklin County later concluded, meaning the fetus, about 30 to 32 weeks along, had died up to three days before. Ms. Dellis cut the umbilical cord, wrapped the remains in her bath mat, which she then put in a garbage bag, and sought medical care. Unaware of the bag's contents, her father disposed of it in a public dumpster.

After a doctor raised the alarm, a local prosecutor tried Ms. Dellis, 25, and convicted her of concealing a dead body. She was sentenced to five months in jail. Her appeal, which argued that the "fetus was never alive" so it "cannot be dead," generated interest in the case from both opponents and proponents of abortion rights.

Gov. Ralph Northam of Virginia pardoned Ms. Dellis this past June, though not before an appellate court upheld the decision, making the argument that anti-abortion activists wanted: that under the law a stillborn fetus is the dead body of a person.

Women facing these harrowing situations have few advocates beyond a handful of scholars and lawyers, with one nonprofit group, National Advocates for Pregnant Women, frequently organizing their defense.

SOME COMMON FORMS OF BIRTH CONTROL COULD BECOME ILLEGAL IF PERSONHOOD BECOMES ACCEPTED LAW. AND, FOR MANY ANTI-ABORTION ACTIVISTS, THAT'S THE GOAL.

Even New York is no stranger to these types of prosecutions. In 2008, a car driven by a 28-year-old woman named Jennifer Jorgensen crossed the double-yellow line of Whiskey Road in Ridge, on Long Island. The head-on collision that ensued cut three lives short. The driver of the car Ms. Jorgensen

hit, Robert Kelly, 75, died at the scene; his wife, Mary Kelly, 70, died of her injuries three weeks later. The infant that Ms. Jorgensen, eight months pregnant, delivered via emergency cesarean section shortly after the accident died five days later.

In 2012, a Suffolk County jury acquitted Ms. Jorgensen of two counts of second-degree manslaughter in the deaths of the Kellys, one count of operating a motor vehicle while under the influence of drugs and alcohol, and one count of aggravated vehicular homicide.

The jury found Ms. Jorgensen guilty of a single manslaughter charge, holding that she recklessly caused the death of her daughter because she had not been wearing a seatbelt. She was sentenced to up to nine years in prison.

New York's highest court threw out the conviction three years later, ruling that the state's law doesn't hold women criminally responsible in such cases. If it did, a pregnant woman who ignored doctor's orders to stay in bed, took prescription or illegal drugs, shoveled snow or carried groceries could be charged with manslaughter if those acts resulted in the premature birth and death of the fetus, wrote Judge Eugene Pigott Jr. for the court's majority.

"The imposition of criminal liability upon pregnant women for acts committed against a fetus that is later born and subsequently dies … should be clearly defined by the Legislature, not the courts," Judge Pigott wrote. "It should also not be left to the whim of the prosecutor."

That ruling sent a strong signal to Empire State prosecutors but, of course, has no effect outside the state's borders. In this matter, however, the rule in New York should be the rule for the country. Legislatures and courts around the nation should make it clear that women who miscarry or accidentally harm their fetuses should be treated as grieving parents, not criminals.



Federal Court of Appeals Decision Prevents Pregnant Woman's Challenge to Wisconsin's "Unborn Child Protection Act"

June 18, 2018 - Today a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit vacated a well-reasoned decision by a federal district court that had struck down Wisconsin's Unborn Child Protection Act (Act 292) as unconstitutional. The appeals court panel avoided grappling with Act 292's numerous constitutional problems by ruling that the woman challenging it, Tamara Loertscher, could not continue to do so because she had moved out of Wisconsin.

Lynn M. Paltrow, Executive Director of National Advocates for Pregnant Women said "As a result of this decision, women in Wisconsin who are pregnant and seek health care must continue to fear that the government will detain them, force them into treatment, and even send them to jail if they use - or even disclose past use of - alcohol or a controlled substance."

This is the second time that a federal court has relied on "mootness" grounds to prevent a Wisconsin woman from challenging Act 292. In the first case, a federal court held that because Alicia Beltran was no longer being forced to submit to treatment, she did not have standing to challenge the law. Nancy Rosenbloom, Director of Legal Advocacy at National Advocates for Pregnant Women explained that "The decision today demonstrates that it is extremely difficult for a woman to get justice in the federal courts when a law deprives her of her constitutional rights because she is pregnant."

The federal trial court decision that is vacated as a result of the 7th Circuit decision had concluded that Act 292 is a vaguely worded law that violates the U.S. Constitution's guarantee of due process of law. That court explained that Act 292 "affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement." As a result, the district court concluded, "erratic enforcement, driven by the stigma attached to drug and alcohol use by expectant mothers, is all but ensured."

Ms. Loertscher's own experience confirmed this conclusion. As a result of her seeking health care for a thyroid condition and to confirm pregnancy -- what the federal district court described as "her commitment to having a healthy baby and to take care of herself"-- the government seized her, ordered her into forced treatment and jailed her pursuant to Act 292. As the district court explained, "her history of modest drug and alcohol use, which she self-reported while seeking medical care," became the basis for Taylor County's claim that she "habitually lacked self-control" and a court hearing to determine whether she could be deprived of her freedom.

Under Act 292 Ms. Loertscher had no right to legal counsel appointed at that first hearing, but a lawyer was immediately appointed to represent her 14-week fetus. Following the hearing at which she was not represented, she essentially had the choice between being forcibly detained indefinitely in unnecessary residential drug treatment, or going to jail for 30 days. Ms. Loertscher ended up incarcerated in a county jail for weeks, where she was also held in solitary confinement for several days because she declined to take a pregnancy test.

Today's appeals court opinion does not address any of the evidence presented and ruled on by the district court. It ignores fundamental questions of whether Act 292 is constitutional in its wording, procedures, or in authorizing the state to lock up pregnant women who are not represented by counsel and without requiring any diagnosis or qualified medical evidence. The opinion merely denies this particular woman the opportunity to bring the challenge, despite her having diligently pursued three and one-half years of litigation and presented an extensive record showing how Act 292 strips pregnant women of their constitutional rights.

Nancy Rosenbloom explained, "In vacating on supposed mootness, the 7th Circuit opinion suggests that Act 292 is both clear and benign. It is neither. For example it omits the facts that Ms. Loertscher

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was not diagnosed with a substance use disorder and that she did not use any substances after confirming that she was pregnant. The opinion ignores that the doctor whose testimony was used to order unnecessary forced treatment admitted she was not an expert on the effects of drugs and had no idea her testimony would be used as a basis for jailing a pregnant woman."

Sarah Burns of the NYU School of Law Reproductive Justice Clinic said, "Competent, confidential, patient-centered prenatal care, above all else, is the greatest guarantee of a healthy pregnancy. Ms. Loertscher voluntarily sought that and the government took that away from her. The state violated her confidentiality, ordered her into a treatment facility that did not provide prenatal care, and incarcerated her in a county jail designed to hold suspected criminals, which also did not provide prenatal care."

National Advocates for Pregnant Women, the NYU School of Law Reproductive Justice Clinic, and the Perkins Coie law firm in Madison, Wisconsin represent plaintiff Tamara Loertscher.

For more information, please contact Shawn Steiner, Media and Communications Manager
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Posted by Lisa McClain-Freeney on June 18, 2018 09:29 PM | Permalink

Check Back For NAPW's New Website. Coming in 2019!

Arkansas Court of Appeals Overturns Criminal Conviction for Concealing a Birth

March 14, 2018

The Arkansas Court of Appeals has issued a unanimous ruling reversing Anne Bynum's conviction for "concealing a birth" that resulted in a sentence of six years in prison. The criminal charge and conviction stemmed from the state's claims about Ms. Bynum's actions after she experienced a stillbirth at home in 2015. The three-judge panel found that the trial court in Drew County had abused its discretion by allowing the jury to consider evidence about Ms. Bynum's past pregnancies and outcomes including abortion, that "clearly prejudiced" the verdict in the case.

It is rare to have a conviction overturned on the grounds of "abuse of discretion." As the court found in throwing out Ms. Bynum's conviction, the trial court here "act[ed] improvidently, thoughtlessly, or without due consideration." Because the prosecutor introduced and the trial court allowed prejudicial evidence, the Court of Appeals remanded the case back to the trial level, which allows the prosecutor to choose whether to retry Ms. Bynum on the same charge.

National Advocates for Pregnant Women (NAPW) Director of Legal Advocacy Nancy Rosenbloom said, "The appeals court did not rule on several constitutional challenges to the law and how it was used, finding that the original trial attorney did not preserve those issues for appellate review. If the prosecutor opts to bring Ms. Bynum to trial again, constitutional claims will be raised."

Ms. Bynum, an Arkansas mother, was arrested and charged with abuse of a corpse and concealing a birth after she had a pregnancy that ended with a stillbirth at home. After the stillbirth, Ms. Bynum safeguarded the fetal remains and several hours later brought those remains to a hospital, asking to see a doctor. Ms. Bynum was arrested five days later on charges of "concealing a birth," a felony carrying a potential six-year prison sentence and fine of up to $10,000, and "abuse of a corpse," a felony carrying a sentence of up to 10 years in prison and a fine of up to $10,000. Local law enforcement alleged that Ms. Bynum took a number of pills to induce an abortion, after which her pregnancy ended with a stillbirth. In fact, as the Court of Appeals recognized, Ms. Bynum had planned to give birth and have her baby adopted.

After a motion made by defense counsel, the trial court dismissed the abuse of a corpse charge before the case went to the jury. The jury, however, convicted her of concealing a birth. This law has only been used rarely and only in cases where people attempted to conceal the fact of a birth altogether. In this case the prosecutor argued that the jury should convict Ms. Bynum – an adult in her 30's - for concealing a birth because she had not told her mother she was pregnant and because she temporarily placed the stillborn fetus in her car for several hours before going to the hospital. He made this claim despite the evidence that established she notified many people about her pregnancy, contacted several people after the stillbirth, and then went to the hospital with the fetal remains. Notably, in the decision, the court recognizes that the Arkansas concealing birth law, which "does not provide for any exceptions, including a 'grace period' for concealment," is "harsh." NAPW Executive Director Lynn M. Paltrow said, "The concealing birth law and this prosecution will leave pregnant women in Arkansas with extreme confusion about what to do when they have a stillbirth or miscarriage at home. If a woman waits even one minute before calling the authorities, she could potentially be charged with concealing a birth."

Paltrow continued, "Pregnant women should not have to endure the threat of criminal prosecution for pregnancy or for failing to guarantee a healthy pregnancy outcome."

NAPW represented Ms. Bynum on the appeal. Consulting attorney Daniel Arshack argued for NAPW in front of a three-judge panel in January. The National Perinatal Association offered a friend of the court (amicus) brief in support of Ms. Bynum in this case, which the court did not accept without

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explaining why. Pending the final outcome of the case, Ms. Bynum has been home with her young son.

For more information, please contact Shawn Steiner, Media and Communications Manager, NAPW: SCS@AdvocatesforPregnantWomen.org | 212.255.9252 | 917.497.3037

Posted by Caity on March 15, 2018 10:14 AM | Permalink

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-16-879

ANNE O'HARA BYNUM APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 14, 2018 APPEAL FROM THE DREW COUNTY CIRCUIT COURT [NO. 22CR-15-58] HONORABLE SAM POPE, JUDGE REVERSED AND REMANDED

DAVID M. GLOVER, Judge

Anne O'Hara Bynum was charged in Drew County Circuit Court with the offenses of concealing birth and abuse of a corpse. The circuit court granted Bynum's motion for directed verdict as to the offense of abuse of a corpse.[1] A jury, after deliberating for only four minutes, convicted Bynum of concealing birth, a Class D felony, and sentenced her to the maximum sentence of six years in prison. Bynum appeals, arguing the circuit court (1) erred in denying her motion to dismiss, timely renewed as a motion for directed verdict, both as a matter of statutory construction and constitutional law; (2) abused its discretion in allowing discussion of abortion, evidence of her abortion history, and evidence she ingested medication before giving birth; and (3) erred in allowing evidence of her purported admission during a pretrial competency exam when competency was not an issue at trial.

[1] The State cross-appealed the circuit court's grant of Bynum's directed-verdict motion for this offense but makes no argument on appeal regarding this issue. Therefore, the State has abandoned its cross-appeal.

We find merit in Bynum's argument that the circuit court abused its discretion in allowing the discussion of prior abortions, evidence of her abortion history, and evidence that she ingested medication prior to giving birth; therefore, we reverse and remand.

Factual Summary

There are no factual disputes. In early 2015, Bynum, a 37-year-old divorced woman living with her mother, stepfather, brother, and four-year-old son, T.B., outside of Monticello, discovered she was pregnant. She believed her mother would not allow her and T.B. to continue living in her home if her mother learned Bynum was pregnant; therefore, Bynum did not tell her mother about the pregnancy. However, Bynum told friends, her attorneys, and her priest about the pregnancy and of her intent to put the child up for adoption when it was born.

On March 27, 2015, when Bynum was more than thirty weeks pregnant, she traveled to a hotel in Little Rock and met her friends, Andrea Hicks and Karen Collins (the person whom she wanted to adopt her baby), the next day. Driving to Little Rock, Bynum ingested 44 casings from the drug Arthrotec, which contained the drug Misoprostol; she believed the Misoprostol would induce labor. Bynum's reasoning was it was becoming more difficult to lie all the time, she was getting larger, she was becoming attached to the baby, and she was concerned she would not be able to give the baby up if she carried it much longer. She claimed she was not trying to hurt the baby but was just trying to safely deliver it. Her plan was for Collins to take the baby to Children's Hospital after delivery; however, Bynum did not go into labor while in Little Rock. She returned home to Monticello, where she ingested eight more Arthrotec casings. Then, on March 31, 2015,

she learned from her attorneys, Sara Hartness and Sandra Bradshaw, that Collins would not be able to adopt her child due to domestic-abuse issues concerning her own children and her ex-husband; that information did not dissuade Bynum from pursuing other adoption alternatives with another family.

Bynum went into labor in the middle of the night on April 1, 2015, at her mother's mobile home. By herself, she delivered the fetus, which was still in its intact amniotic sac, in the bathroom after 3:00 a.m.[2] She said although she called for her brother, who was sleeping in the living room, he did not answer, and she did not awaken any other person in the house. According to Bynum, the baby did not move or cry, and she concluded the baby was deceased. In her third interview with Deputy Tim Nichols of the Drew County Sheriff's Department, Bynum stated she placed the baby in plastic sacks, put the bundle on a towel, cleaned up the bathroom, and took the baby to her vehicle, where she placed it on the front seat. She admitted she took those actions to keep her mother from finding out about the birth. Bynum stated she would have left the fetal remains in the bathroom if she had "felt like getting kicked out of the house immediately"; further, she placed the baby in the front seat of her vehicle because her vehicle was parked in front of the house and her mother always went out the back door.

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[2] Bynum had been pregnant with twins, but one fetus died earlier in the pregnancy, at an estimated gestational age of 16 weeks, while the second fetus died at an estimated gestational age of 33 weeks. The fact there were two fetuses was unknown to Bynum until the fetal remains were examined by a medical examiner. While there were two fetuses, Bynum was charged with only one count of concealing birth, and for the purposes of this opinion, we will refer to a single fetus.

Bynum's recall of events was that she became lightheaded after placing the baby in her vehicle, and she knew she could not drive; so she went back inside and went back to bed. Her mother awakened her a little after 6:00 a.m. Bynum got T.B. dressed, and her mother took him to school. Bynum ate a bowl of cereal and texted Hartness, who advised her to go see a doctor. Bynum had to wait until 8:00 a.m., when the doctor's office opened, to make an appointment; she attempted to see two doctors, but was unable to secure an appointment for that day with either of them. In the meantime, Hartness called a funeral home and was advised to have Bynum take the fetal remains to the hospital. Bynum arrived at Drew Memorial Hospital at approximately 10:40 a.m. on April 1. The fetal remains were subsequently examined by a medical examiner at the Arkansas State Crime Lab, where it was determined that the fetus was stillborn.

Sufficiency of the Evidence

On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Stearns v. State*, 2017 Ark. App. 472, 529 S.W.3d 654. Our court views the evidence in the light most favorable to the State and affirms if there is substantial evidence to support the verdict; only evidence supporting the verdict will be considered. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Kauffeld v. State*, 2017 Ark. App. 440, 528 S.W.3d 302. Our court does not weigh the evidence presented at trial or assess the credibility of the witnesses, as those are matters for the fact-finder. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Mercouri v. State*, 2016 Ark. 37, 480 S.W.3d 864.

When reviewing a sufficiency-of-the-evidence challenge, appellate courts consider evidence both properly and improperly admitted. *Means v. State*, 2015 Ark. App. 643, 476 S.W.3d 168.

Arkansas Code Annotated section 5-26-203(a) (Repl. 2013) provides that a person commits the offense of concealing birth "if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child's birth or to prevent a determination of whether the child was born alive."

Bynum argues Arkansas Code Annotated section 5-26-203(a) cannot apply to the facts of this case because the statute "does not criminalize a woman's choice to withhold the fact of pregnancy or a stillbirth from her own mother," and the State "presented no proof of hiding or prevention of the determination of whether there was a live birth." Bynum argues she did not conceal the delivery of her stillborn child, as she disclosed the fact she had delivered the child by contacting her attorney via text, seeking medical assistance, and taking the fetal remains to the hospital within hours after the delivery, thereby facilitating the determination that it was a stillbirth. Bynum contends this statute seeks to punish people who seek to permanently conceal a birth, not those who do not immediately tell their mothers about a stillbirth. She alleges that section 5-26-203(a) does not include a requirement to report a stillbirth, much less prescribe a time limit for doing so.

We hold that sufficient evidence supports Bynum's conviction under the statute. To support a conviction under this statute, the State must prove that a person hid a newborn's corpse with purpose (1) to conceal the fact of the child's birth; or (2) to prevent a

determination of whether the child was born alive.[3] One's intent or purpose at the time of an offense, being a state of mind, can seldom be positively known by others. *Turner v. State*, 2018 Ark. App. 5, ___ S.W.3d ___. Since intent cannot ordinarily be proved by direct evidence, jurors are allowed to draw on their common knowledge and experience to infer intent from the circumstances. *Id.* Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

Here, Bynum admitted she hid her stillborn child from her mother when she wrapped the child in plastic sacks, laid the bundle on a towel, placed it in the front seat of her vehicle, and locked the car. Bynum testified she knew her mother would not see the stillborn child because her mother left the house through the back door, not the front door, and Bynum's vehicle was parked in front of the house. The statute does not specify how long a newborn's corpse must be concealed to be found guilty of this offense, nor does it provide for the prospect that a person can conceal a birth by hiding the corpse temporarily but then can be exempt from the statute's dictates if he or she reveals the birth to a person a few hours later.

Viewing the evidence in the light most favorable to the State, as we must, we hold that the jury, as the finder of fact and the assessor of witness credibility, could, on the evidence presented, determine that Bynum purposely concealed the fact of the child's birth

[3] The evidence shows medical personnel were able to determine that the child was stillborn; therefore, the second purpose for concealing the birth—to prevent the determination of whether the child was born alive—does not apply in this case.

when she hid the corpse of her stillborn child in her vehicle, thus committing the offense of concealing birth. Therefore, we affirm on this point.

Constitutional Arguments (Void for Vagueness)

In her motion to dismiss, Bynum argued Arkansas Code Annotated section 5-26-203 is void for vagueness because "it lacks ascertainable standards of guilt such that persons of average intelligence must necessarily guess at its meaning and differ as to its application." (citing *Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998)). She argues a person of reasonable intelligence "could not have known that experiencing a stillbirth at home at 3 a.m. and not telling her mother, but telling her lawyer, physicians, and medical authorities and bringing the unaltered fetal remains to a hospital within eight hours constitutes a crime." Bynum further contends the statute is vague because it encroaches upon a defendant's fundamental constitutional privacy rights and infringes on a defendant's due-process rights to liberty and privacy under the Fourteenth Amendment.

Preclusion. First, we must determine if Bynum can make a constitutional argument on appeal. The State argues Bynum cannot raise a challenge regarding the constitutionality of section 5-26-203 because she failed to notify the Attorney General of her intent to mount a constitutional challenge. Arkansas Code Annotated section 16-111-111 (Repl. 2016) (formerly codified at Arkansas Code Annotated section 16-111-106), provides, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . . [I]f [a] statute is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be

entitled to be heard." The purpose of notifying the Attorney General of constitutional attacks on statutes is to prevent a statute from being declared unconstitutional in a proceeding that might not be a complete and fully adversarial adjudication. *In re Guardianship of A.M.*, 2012 Ark. 278. We disagree with the State's argument that Bynum's arguments regarding the constitutionality of section 5-26-203, if preserved, cannot be heard for failure to notify the Attorney General. The cases cited by the State in support of this contention are civil matters, not criminal matters. In a criminal trial, the prosecutor, who is the person who determines what criminal charges to bring against a defendant, is necessarily a party to the matter and is available to provide a complete and fully adversarial adjudication of the matter of the constitutionality of a criminal statute. As the State was a party to the proceedings and had the opportunity to fully defend against the constitutional challenge, we hold the State's preclusion argument must fail.

Encroachment. Even though Bynum is not precluded from making constitutional arguments on appeal, we nevertheless hold that her arguments that the statute is vague due to encroachment on a defendant's privacy rights and is a violation of due-process rights to liberty and privacy under the Fourteenth Amendment are not preserved for our review. These arguments were mentioned in passing to the circuit court; no substantial argument was presented. In criminal cases, issues raised, including constitutional issues, must be presented to the circuit court to preserve them for appeal; the circuit court must have the benefit of the development of the law by the parties to adequately rule on the issues. *Gooch v. State*, 2015 Ark. 227, 463 S.W.3d 296. We will not consider an argument raised for the first time on appeal or that is fully developed for the first time on appeal. *Id.* Furthermore,

a party cannot change his or her grounds for an objection or motion on appeal but is bound by the scope of arguments made at trial. *Id.*

Fair Notice. Bynum next argues that finding the concealing-birth statute to be constitutional is an impermissible judicial expansion of the law and makes the statute too vague to give any pregnant woman and newly delivered mother clear notice of what constitutes concealment of birth. While this argument was preserved for appellate review, we cannot agree with Bynum's contention.

There is a presumption of validity attending every consideration of a statute's constitutionality that requires the incompatibility between it and the constitution to be clear before the statute is held to be unconstitutional; if possible, the appellate courts will construe a statute so that it is constitutional. *Anderson v. State*, 2017 Ark. 357, 533 S.W.3d 64. Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and the heavy burden of demonstrating the unconstitutionality is on the one attacking the statute. *Id.* As statutes "are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable." *Bowker v. State*, 363 Ark. 345, 355, 214 S.W.3d 243, 249 (2005). "Invalidating a statute on its face is, manifestly, strong medicine that has been employed sparingly and only as a last resort." *Anderson*, 2017 Ark. 357, at 3, 533 S.W.3d at 67.

A law is unconstitutionally vague under due-process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement. *Bowker, supra.* The constitutionality of a statutory provision being attacked as void for vagueness is determined

by the statute's applicability to the facts at issue. *Id.* When challenging the constitutionality of a statute on grounds of vagueness, the person challenging the statue must be one of the "entrapped innocent" who has not received fair warning; if, by his or her action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Id.*

Concealment. A person conceals a birth if the corpse of a newborn child is hidden for the purpose of either concealing the fact of the child's birth or preventing a determination of whether the child was born alive. The portion of the statute at play in this case is whether the child was hidden to conceal the child's birth. Bynum argues she could not have known that experiencing a stillbirth at home at 3 a.m. and not telling her mother, but telling her attorney, physicians, and medical authorities later in the morning and taking the fetal remains to a hospital eight hours later constitutes a crime. Bynum further argues that the statute was impermissibly expanded by the circuit court from a statute prohibiting an intentional action—concealing—to effectively mandating specific actions—reporting within a time frame. We cannot agree.

There is no question Bynum hid the stillborn fetus by placing it in her vehicle, where only she knew of it. Furthermore, as discussed above, the jury was tasked, as the finder of fact, to decide why Bynum had placed the stillborn fetus in her vehicle, and the jury determined it was to conceal the fact of the birth. This statute does not provide for any exceptions, including a "grace period" for concealment, nor does it require the concealment be permanent. A jury could determine that the offense was committed when Bynum hid the fetus in her vehicle. While harsh, this statute is clear enough to survive Bynum's

constitutional challenge. Bynum cannot, in other words, successfully claim to be an "entrapped innocent," as her actions fell within the conduct proscribed by the statute. We affirm on this point.

Evidentiary Issues

Bynum next argues the trial court abused its discretion by allowing discussion of abortion, Bynum's abortion history, and evidence that Bynum had ingested medication prior to giving birth. We agree that the trial court abused its discretion in allowing this information to be presented to the jury; therefore, we reverse and remand on this issue.

A circuit court has broad discretion in evidentiary rulings, and the appellate courts will not reverse an evidentiary ruling absent an abuse of that discretion. *Jefferson v. State*, 2017 Ark. App. 536, 532 S.W.3d 593. Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires the circuit court act improvidently, thoughtlessly, or without due consideration. *Id.* Furthermore, we will not reverse absent a showing of prejudice, as prejudice is not presumed. *Id.*

Bynum filed a motion in limine on August 10, 2015, seeking to prohibit the State from referencing or introducing evidence she had ingested pharmaceutical substances prior to her delivery of the stillborn fetus and to prevent any mention of abortion. She argued there was no contention pharmaceutical drugs had caused the stillbirth; therefore, evidence of such ingestion was not probative of any element of the offense charged and was therefore not relevant. She further argued that even if there was some relevance, prejudice would outweigh any probative value. The State opposed the motion, arguing her plan to achieve concealment was to take the labor-inducing drugs to induce premature delivery in secret,

and such actions were proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The State claimed it was entitled to present evidence that explained the act, provided a motive for acting, or illustrated the accused's state of mind. After a hearing on the motion on February 16, 2016, the circuit court denied Bynum's motion, holding that the State bore the burden of showing the purpose to conceal, and proof of a plan or motive was helpful and made the motive or plan admissible.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." Ark. R. Evid. 401. Rule 402 of the Arkansas Rules of Evidence provides, "All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible." Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b).

Bynum makes a passing argument that constitutional due process guarantees "fundamental fairness," which the State argues is not preserved for appellate review because it was not made below. The State is correct; no constitutional argument was made to the circuit court. Appellate courts will not consider an issue raised for the first time on appeal. *Gooch*, *supra*.

The State argues that Bynum failed to object to the admission of the three recorded statements she gave to the sheriff's department, and that this court should not address her expanded arguments that are raised for the first time on appeal. We do not agree with the State's assertion. Bynum made a motion in limine to exclude evidence of her ingestion of the pharmaceutical substances prior to delivery and to exclude any discussion of abortion. The circuit court denied her motion. Therefore, Bynum has properly preserved this issue for appellate review.

The State argues the circuit court properly admitted evidence of abortion, Bynum's Arthrotec consumption, and her abortion history under Rule 404(b) of the Arkansas Rules of Evidence because, even though it did not speak directly to an element of the charges against her, it was relevant to demonstrate proof of her motive to induce labor through abortion-related drugs and then conceal the birth. Bynum counters that the evidence was not relevant and served only to support the State's theory that she had intended to have an abortion rather than an early delivery. She further argues such evidence inflamed the jurors' passions and encouraged them to deliver a guilty verdict in four minutes on the improper basis of her abortion history and ingestion of Arthrotec.

We find merit in Bynum's argument and hold that the circuit court abused its discretion in admitting this evidence. The elements of the offense of concealing birth that must be proved by the State are that the corpse of a newborn child is hidden with purpose (1) to conceal the fact of the child's birth or (2) to prevent a determination of whether the child was born alive. It is undisputed that the child was not born alive. Neither whether Bynum had taken pharmaceutical drugs prior to delivery nor any evidence of abortions (or

the number of them) she had previously undergone is relevant to the charge that she had committed the offense of concealing birth; they did not tend to make it more or less probable Bynum had hidden her newborn's corpse with purpose to conceal the birth. Even if they could be deemed relevant, their probative value was substantially outweighed by the danger of unfair prejudice. No evidence was presented to show Bynum's ingestion of Arthrotec was the reason the child was stillborn, and rightly so, as Arkansas Code Annotated section 5-61-102(c) (Repl. 2016), the statutory provision addressing unlawful abortion, provides, "Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero." Therefore, Bynum could not be charged with, or convicted of, a criminal offense in the death of her stillborn child; yet the State was allowed—through the introduction of the evidence of Bynum's prior abortion history and that she had taken medication prior to delivery of her stillborn child that might induce early labor—to imply Bynum's "[M]otive or plan" was to have another abortion. Bynum's attorney rhetorically asked at oral argument, "motive or plan to do what?" The only evidence of plan or motive was that Bynum intended to have her baby adopted, that she had taken substantial steps to do just that by contacting an adoption attorney, that she was attempting to have one of her friends adopt the child, and when that was not possible, that she pursued alternative adoptive placements. Bynum was clearly prejudiced by the introduction of this irrelevant evidence, as shown by the four-minute verdict and maximum prison sentence allowed by law.

Purported Admission During Pretrial Competency Examination

In her last argument, Bynum contends the circuit court abused its discretion in allowing her purported admission during a pretrial competency exam, when competency was not an issue at trial. Prior to trial, Bynum's defense counsel requested an evaluation of Bynum's mental competence at the time of her alleged conduct, and the circuit court ordered a competency exam. Dr. Myeong Kim performed the mental evaluation, determining Bynum was competent at the time of the offense and was competent to stand trial. Dr. Kim noted in his report that Bynum was advised of the nature and purpose of the exam, the exam was voluntary and not confidential, a report would be made to the circuit court, and the examiner might be required to testify. Having been apprised of these parameters, Bynum agreed to be interviewed. Over Bynum's objection, Dr. Kim was called as a witness for the State at trial, and his testimony was that Bynum had told him she was guilty of concealing birth but not guilty of abusing a corpse. Bynum argues it was error for that statement to be admitted.

A circuit court's decision to admit expert testimony is reviewed for an abuse of discretion. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264. To show that a circuit court abused its discretion, it must be established the circuit court acted improvidently, thoughtlessly, or without due consideration, thereby causing prejudice. *Id.*

Bynum argues that even though there was no issue raised at trial regarding her competency, the circuit court nevertheless, over her objection, allowed Dr. Kim to testify about statements she allegedly made during the competency exam. Dr. Kim was declared to be an expert in the field of forensic psychological examinations. He testified to, and

included in his report, his recollection that Bynum told him during her examination that she was guilty of concealing birth but not guilty of abusing a corpse.

Bynum argues admission of this statement violated her federal constitutional rights to due process and against self-incrimination. In support of her argument, Bynum cites *Porta v. State*, 2013 Ark. App. 402, 428 S.W.3d 585, in which our court held it was error for the circuit court to allow a forensic psychologist to testify about incriminating statements made by Porta during the mental-health examination during the State's case-in-chief because allowing the incriminating statements placed Porta in a situation that required him to sacrifice one constitutional right (exercising his Fifth Amendment right to not incriminate himself) in order to claim another (his due-process right to seek out available defenses).

We cannot reach the merits of Bynum's constitutional arguments because these specific arguments were never made to the circuit court. Even constitutional arguments must be first raised in the circuit court to preserve them for appellate review. *Gooch, supra.*

Bynum next argues that allowing her statement to Dr. Kim that she had committed the offense of concealing birth violated the physician-patient privilege under Rule 503 of the Arkansas Rules of Evidence. Arkansas Code Annotated section 5-2-307 provides that a statement made by a person during an examination is admissible as evidence only to the extent permitted by the Arkansas Rules of Evidence and if the statement is constitutionally admissible. Arkansas Rule of Evidence Rule 503(d)(2) provides, "If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule

with respect to the particular purpose for which the examination is ordered unless the court orders otherwise."

Like her constitutional arguments, Bynum has raised the violation of evidentiary rules for the first time on appeal. Because she did not make this argument to the circuit court, it is not preserved for appellate review. *Gooch, supra.*

Bynum's last argument is that Dr. Kim's testimony regarding her statements made during her competency exam amount to a legal conclusion. We do not agree. A legal conclusion is opinion testimony that "tells the jury what to do." *Marts v. State*, 332 Ark. 638, 642, 968 S.W.2d 41, 48 (1998). As the State points out, Dr. Kim did not offer any opinion testimony about whether Bynum was guilty of concealing birth; he merely reported that Bynum made the statement during her examination that she was guilty of concealing birth. He did not testify whether he believed Bynum was guilty of concealing birth. Dr. Kim provided a factual account of Bynum's admission; this recitation alone did not make the statement become Dr. Kim's opinion. It was not an inadmissible legal conclusion. We affirm on this point.

Reversed and remanded.

GRUBER, C.J., agree.

HARRISON, J., concurs.

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-16-879

	Opinion Delivered March 14, 2018
ANNE O'HARA BYNUM APPELLANT	APPEAL FROM THE DREW CIRCUIT COURT [NO. 22CR-15-58]
V.	HONORABLE SAM POPE, JUDGE
STATE OF ARKANSAS APPELLEE	CONCURRING OPINION

BRANDON J. HARRISON, Judge

I join my colleagues' thorough opinion in every respect except one point of dictum. The majority cites Ark. Code Ann. § 5-61-102(c) and states that Bynum could not have been charged with or convicted of a criminal offense in the death of her stillborn child. The statement is made in the context of explaining why a prejudicial evidentiary error was injected into the case. My concern is that this statute is not at issue in this case because Bynum was not charged with committing a crime under it, and the jury was not instructed to return a verdict on such a charge. In its entirety, that statute states:

> (a) It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.
>
> (b) Any person violating a provision of this section is guilty of a Class D felony.
>
> (c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

Ark. Code Ann. § 5-61-102 (Repl. 2016).

First, the statute appears to be at war with itself: is subsection(a) not in conflict with subsection(c)? If not, why not? Whatever the answers, the main hang-up for me is that the parties did not brief the role that section -102 had in the case, the circuit court never made any decisions based on it, and the jury was not tasked to return a verdict on whether section -102 had been violated. I therefore prefer to express no view on the statute's potential application or scope.

Gender, Sex, and Sexual Orientation

MARCH 23RD: IS SEXUAL ORIENTATION DISCRIMINATION A FORM OF SEX DISCRIMINATION?

firmed the reasonableness of the fee request. Additionally, the District Court's analysis of the *Gunter* factors was well-reasoned and thorough and therefore further supports the conclusion that the District Court's award of fees was not an abuse of discretion.

IV. Conclusion

For the reasons set forth above, we will affirm the orders of the District Court granting final approval of the Zurich Settlement and the Gallagher Settlement and approving the motion for an award of attorneys' fees in the Zurich Settlement.

Brian D. PROWEL, Appellant,

v.

WISE BUSINESS FORMS, INC., Appellee.

No. 07–3997.

United States Court of Appeals, Third Circuit.

Argued Oct. 1, 2008.

Filed: Aug. 28, 2009.

Background: Former employee brought action against former employer under Title VII and the Pennsylvania Human Relations Act alleging harassment and retaliation based on sex and religion. The United States District Court for the Western District of Pennsylvania, Terrence F. McVerry, J., 2007 WL 2702664, granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, Hardiman, Circuit Judge, held that:

(1) issue of material fact existed as to whether alleged harassment suffered by male employee was because of his homosexuality or because of his effeminacy, and

(2) employee's religious harassment claim was based entirely on his status as a gay man.

Affirmed in part, vacated in part, and remanded.

Before: FISHER, CHAGARES and HARDIMAN, Circuit Judges.

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

Brian Prowel appeals the District Court's summary judgment in favor of his former employer, Wise Business Forms, Inc. Prowel sued under Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act, alleging that Wise harassed and retaliated against him because of sex and religion. The principal issue on appeal is whether Prowel has marshaled sufficient facts for his claim of "gender stereotyping" discrimination to be submitted to a jury. We also consider whether the District Court erred in granting summary judgment to Wise on Prowel's religious discrimination claim.

II.

Prowel began working for Wise in July 1991. A producer and distributor of business forms, Wise employed approximately 145 workers at its facility in Butler, Pennsylvania. From 1997 until his termination, Prowel operated a machine called a nale encoder, which encodes numbers and organizes business forms. On December 13, 2004, after 13 years with the company, Wise informed Prowel that it was laying him off for lack of work.

A.

Prowel's most substantial claim is that Wise harassed and retaliated against him because of sex. The theory of sex discrimination Prowel advances is known as a "gender stereotyping" claim, which was

first recognized by the Supreme Court as a viable cause of action in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Prowel identifies himself as an effeminate man and believes that his mannerisms caused him not to "fit in" with the other men at Wise. Prowel described the "genuine stereotypical male" at the plant as follows:

> [B]lue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. If they drank, they drank beer, they didn't drink gin and tonic. Just you know, all into football, sports, all that kind of stuff, everything I wasn't.

In stark contrast to the other men at Wise, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit"; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nale encoder with "pizzazz."

Some of Prowel's co-workers reacted negatively to his demeanor and appearance. During the last two years of his employment at Wise, a female co-worker frequently called Prowel "Princess." In a similar vein, co-workers made comments such as: "Did you see what Rosebud was wearing?"; "Did you see Rosebud sitting there with his legs crossed, filing his nails?"; and "Look at the way he walks." [1]

Prowel also testified that he is homosexual. At some point prior to November 1997, Prowel was "outed" at work when a newspaper clipping of a "man-seeking-man" ad was left at his workstation with a note that read: "Why don't you give him a call, big boy." Prowel reported the incident to two management-level personnel and asked that something be done. The culprit was never identified, however.

After Prowel was outed, some of his co-workers began causing problems for him, subjecting him to verbal and written attacks during the last seven years of his tenure at Wise. In addition to the nicknames "Princess" and "Rosebud," a female co-worker called him "fag" and said: "Listen, faggot, I don't have to put up with this from you." Prowel reported this to his shift supervisor but received no response.

At some point during the last two years of Prowel's employment, a pink, light-up, feather tiara with a package of lubricant jelly was left on his nale encoder. The items were removed after Prowel complained to Henry Nolan, the shift supervisor at that time. On March 24, 2004, as Prowel entered the plant, he overheard a co-worker state: "I hate him. They should shoot all the fags." Prowel reported this remark to Nolan, who said he would look into it. Prowel also overheard conversations between co-workers, one of whom was a supervisor, who disapproved of how he lived his life. Finally, messages began to appear on the wall of the men's

1. In its brief, Wise notes that Prowel's affidavit included incidents of harassment that were not mentioned during Prowel's deposition. Wise argued to the District Court that these incidents should not be considered because they contradicted Prowel's prior sworn testimony in violation of *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir.1991). Although the District Court disagreed with Wise's argument in this regard, it nevertheless held that these facts did not create a genuine issue of material fact on Prowel's gender stereotyping claim.

bathroom, claiming Prowel had AIDS and engaged in sexual relations with male co-workers. After Prowel complained, the company repainted the restroom.

C.

Prowel alleges that his co-workers shunned him and his work environment became so stressful that he had to stop his car on the way to work to vomit. At some point in 2004, Prowel became increasingly dissatisfied with his work assignments and pay. Prowel believed he was asked to perform more varied tasks than other nale encoder operators, but was not compensated fairly for these extra tasks, even though work piled up on his nale encoder.

In April 2004, Prowel considered suing Wise and stated his intentions to four non-management personnel, asking them to testify on his behalf. Prowel allegedly told his colleagues that the lawsuit would be based on harassment for not "fitting in"; he did not say anything about being harassed because of his homosexuality. These four colleagues complained to management that Prowel was bothering them.

On May 6, 2004, General Manager Jeff Straub convened a meeting with Prowel and supervisors Nolan and John Hodak to discuss Prowel's concern that he was doing more work for less money than other nale encoder operators. Prowel's compensation and workload were discussed, but the parties did not reach agreement on those issues. Straub then asked Prowel if he had approached employees to testify for him in a lawsuit, and Prowel replied that he had not done so. Prowel has since conceded that he did approach other employees in this regard.

On December 13, 2004, Prowel was summoned to meet with his supervisors, who informed him that he was terminated effective immediately for lack of work.

IV.

In evaluating Wise's motion for summary judgment, the District Court properly focused on our decision in *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257 (3d Cir.2001), wherein we stated: "Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Id.* at 261 (citations omitted). This does not mean, however, that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII, which plainly prohibits discrimination "because of sex." 42 U.S.C. § 2000e–2(a). As the District Court noted, "once a plaintiff shows that harassment is motivated by sex, it is no defense that it may also have been motivated by anti-gay animus." Dist. Ct. Op. at 6 (citing *Bibby,* 260 F.3d at 265). In sum, "[w]hatever the sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex." *Bibby,* 260 F.3d at 265.

Both Prowel and Wise rely heavily upon *Bibby.* Wise claims this appeal is indistinguishable from *Bibby* and therefore we should affirm its summary judgment for the same reason we affirmed summary judgment in *Bibby.* Prowel counters that reversal is required here because gender stereotyping was not at issue in *Bibby.* As we shall explain, *Bibby* does not dictate the result in this appeal. Because it guides our analysis, however, we shall review it in some detail.

John Bibby, a homosexual man, was a long-time employee of the Philadelphia Coca Cola Bottling Company. *Id.* at 259. The company terminated Bibby after he sought sick leave, but ultimately reinstated him. *Id.* After Bibby's reinstatement, he alleged that he was assaulted and harmed by co-workers and supervisors when he was subjected to crude remarks and derogatory sexual graffiti in the bathrooms. *Id.* at 260.

Bibby filed a complaint with the Philadelphia Commission on Human Relations (PCHR), alleging sexual orientation discrimination. *Id.* After the PCHR issued a right-to-sue letter, Bibby sued in federal court alleging, *inter alia,* sexual harassment in violation of Title VII. *Id.* The district court granted summary judgment for the company because Bibby was harassed not "because of sex," but rather because of his sexual orientation, which is not cognizable under Title VII. *Id.* at 260–61.

2. Prowel did not oppose Wise's motion for summary judgment with regard to his termination claims or his PHRA claims.

3. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 2000e–5(f)(3). We have jurisdiction pursuant to 28 U.S.C. § 1291.

On appeal, this Court affirmed, holding that Bibby presented insufficient evidence to support a claim of same-sex harassment under Title VII. Despite acknowledging that harassment based on sexual orientation has no place in a just society, we explained that Congress chose not to include sexual orientation harassment in Title VII. *Id.* at 261, 265. Nevertheless, we stated that employees may—consistent with the Supreme Court's decision in *Price Waterhouse*—raise a Title VII *gender stereotyping* claim, provided they can demonstrate that "the[ir] harasser was acting to punish [their] noncompliance with gender stereotypes." *Id.* at 264; *accord Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 762 (6th Cir.2006); *Nichols v. Azteca Rest. Enters., Inc.,* 256 F.3d 864, 874 (9th Cir.2001); *Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 259 (1st Cir.1999). Because Bibby did not claim gender stereotyping, however, he could not prevail on that theory. We also concluded, in dicta, that even had we construed Bibby's claim to involve gender stereotyping, he did not marshal sufficient evidence to withstand summary judgment on that claim. *Bibby,* 260 F.3d at 264–65.

In light of the foregoing discussion, we disagree with both parties' arguments that *Bibby* dictates the outcome of this case. *Bibby* does not carry the day for Wise because in that case, the plaintiff failed to raise a gender stereotyping claim as Prowel has done here. Contrary to Prowel's argument, however, *Bibby* does not require that we reverse the District Court's summary judgment merely because we stated that a gender stereotyping claim is cognizable under Title VII; such has been the case since the Supreme Court's decision in *Price Waterhouse.* Instead, we must consider whether the record, when viewed in the light most favorable to Prowel, contains sufficient facts from which a reasonable jury could conclude that he was harassed and/or retaliated against "because of sex."

Before turning to the record, however, we must revisit *Price Waterhouse,* which held that a woman who was denied a promotion because she failed to conform to gender stereotypes had a claim cognizable under Title VII as she was discriminated against "because of sex."

In *Price Waterhouse,* Ann Hopkins had been denied partnership in an accounting firm because she used profanity; was not charming; and did not walk, talk, or dress in a feminine manner. 490 U.S. at 235, 109 S.Ct. 1775. A plurality of the Supreme Court concluded that "[i]n 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." *Id.* at 250, 109 S.Ct. 1775. The plurality also noted: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " *Id.* at 251, 109 S.Ct. 1775 (quoting *L.A. Dep't of Water & Power v. Manhart,* 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)) (some internal quotations omitted). Thus, the Supreme Court held that Title VII prohibits discrimination against women for failing to conform to a traditionally feminine demeanor and appearance.

Like our decision in *Bibby,* the Supreme Court's decision in *Price Waterhouse* provides the applicable legal framework, but does not resolve this case. Unlike in *Price Waterhouse*—where Hopkins's sexual orientation was not at issue—here there is

no dispute that Prowel is homosexual. The difficult question, therefore, is whether the harassment he suffered at Wise was because of his homosexuality, his effeminacy, or both.

[1] As this appeal demonstrates, the line between sexual orientation discrimination and discrimination "because of sex" can be difficult to draw. In granting summary judgment for Wise, the District Court found that Prowel's claim fell clearly on one side of the line, holding that Prowel's sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination. However, our analysis—viewing the facts and inferences in favor of Prowel—leads us to conclude that the record is ambiguous on this dispositive question. Accordingly, Prowel's gender stereotyping claim must be submitted to a jury.

Wise claims it laid off Prowel because the company decided to reduce the number of nale encoder operators from three to two. This claim is not without support in the record. After Prowel was laid off, no one was hired to operate the nale encoder during his shift. Moreover, market conditions caused Wise to lay off 44 employees at its Pennsylvania facility between 2001 and September 2006, and the company's workforce shrank from 212 in 2001 to 145 in 2008. General Manager Straub testified that in determining which nale encoder operator to lay off, he considered various factors, including customer service, productivity, cooperativeness, willingness to perform other tasks (the frequency with which employees complained about working on other machines), future advancement opportunities, and cost. According to Wise, Prowel was laid off because: comments on his daily production reports reflected an uncooperative and insubordinate attitude; he was the highest paid operator; he complained when asked to work on different machines; and he did not work to the best of his ability when operating the other machines.

Prowel asserts that these reasons were pretextual and he was terminated because of his complaints to management about harassment and his discussions with co-workers regarding a potential lawsuit against the company. In this respect, the record indicates that Prowel's work compared favorably to the other two nale encoder operators. Specifically, Prowel worked on other equipment fifty-four times during the last half of 2004 while a co-worker did so just once; Prowel also ran more jobs and impressions per hour than that same co-worker; and Prowel's attendance was significantly better than the third nale encoder operator. Finally, although Wise laid off forty-four workers between 2001 and 2006, it laid off no one in 2003, only Prowel in 2004, and just two in 2005. Although Prowel is unaware what role his sexual orientation played in his termination, he alleges that he was harassed and retaliated against not because of the quality of his work, but rather because he failed to conform to gender stereotypes.

The record demonstrates that Prowel has adduced evidence of harassment based on gender stereotypes. He acknowledged that he has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, Prowel testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit." Prowel also discussed things like art, music, interior design, and decor, and pushed the buttons on his nale encoder with "pizzazz." Prowel's effeminate traits did not go unnoticed by his co-workers, who commented: "Did you see what Rosebud was wearing?"; "Did you see Rosebud sitting there with

his legs crossed, filing his nails?"; and "Look at the way he walks." Finally, a coworker deposited a feathered, pink tiara at Prowel's workstation. When the aforementioned facts are considered in the light most favorable to Prowel, they constitute sufficient evidence of gender stereotyping harassment—namely, Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation.

To be sure, the District Court correctly noted that the record is replete with evidence of harassment motivated by Prowel's sexual orientation. Thus, it is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes. *See* 42 U.S.C. § 2000e–2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice."). Because both scenarios are plausible, the case presents a question of fact for the jury and is not appropriate for summary judgment.

In support of the District Court's summary judgment, Wise argues persuasively that every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII. Nevertheless, Wise cannot persuasively argue that *because* Prowel is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. As long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred "because of sex," the case is not appropriate for summary judgment. For the reasons we have articulated, Prowel has adduced sufficient evidence to submit this claim to a jury.[4]

4. The District Court correctly reasoned that Prowel's retaliation claim was derivative of his gender stereotyping claim. Since Prowel is entitled to a jury trial on that claim, it follows *a fortiori* that Prowel is entitled to put his retaliation claim before the jury as well.

Kimberly HIVELY, Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE OF INDIANA, Defendant-Appellee.

No. 15-1720

United States Court of Appeals,
Seventh Circuit.

Argued November 30, 2016

Decided April 4, 2017

Background: Part-time adjunct professor brought action against community college, alleging she was denied full-time employment and promotions based on sexual orientation in violation of Title VII. The United States District Court for the Northern District of Indiana, No. 3:14-cv-1791, Rudy Lozano, J., dismissed complaint, and professor appealed. The Court of Appeals, 830 F.3d 698, affirmed. Rehearing en banc was granted, 2016 WL 6768628.

Holding: The Court of Appeals, Wood, Chief Judge, held that person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes; overruling *Doe v. City of Belleville, Ill.*, 119 F.3d 563, *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701, *Spearman v. Ford Motor Co.*, 231 F.3d 1080.

Reversed and remanded.

Posner, Circuit Judge, concurred and filed opinion.

Flaum, Circuit Judge, concurred and filed opinion in which Ripple, Circuit Judge, joined.

Sykes, Circuit Judge, dissented and filed opinion in which Bauer and Kanne, Circuit Judges, joined.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:14-cv-1791—**Rudy Lozano**, *Judge*.

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Adam Lee Bartrom, Jason T. Clagg, Attorneys, Barnes & Thornburg LLP, Fort Wayne, IN, John Robert Maley, Attorney, Barnes & Thornburg LLP, Indianapolis, IN, for Defendant–Appellee.

Shannon Price Minter, Attorney, National Center for Lesbian Rights, San Francisco, CA, for Amicus Curiae National Center for Lesbian Rights.

Mary Lisa Bonauto, Attorney, Gay & Lesbian Advocates & Defenders, Boston, MA, for Amicus Curiae GLBTQ Legal Advocates & Defenders.

Gail S. Coleman, Attorney, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae Equal Employment Opportunity Commission.

Ria Tabacco Mar, Attorney, American Civil Liberties Union, New York, NY, for Amicus Curiae America Civil Liberties Union.

Evan Chesler, Attorney, Cravath, Swaine & Moore, New York, NY, for Amicus Curiae Five Members of Congress.

Before WOOD, Chief Judge, and BAUER, POSNER, FLAUM, EASTERBROOK, RIPPLE, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, Circuit Judges.

WOOD, Chief Judge.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person's "race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a

fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court's judgment dismissing Kimberly Hively's suit against Ivy Tech Community College and remand for further proceedings.

I

Hively is openly lesbian. She began teaching as a part-time, adjunct professor at Ivy Tech Community College's South Bend campus in 2000. Hoping to improve her lot, she applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful; worse yet, in July 2014 her part-time contract was not renewed. Believing that Ivy Tech was spurning her because of her sexual orientation, she filed a pro se charge with the Equal Employment Opportunity Commission on December 13, 2013. It was short and to the point:

> I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from full-time employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated.

After receiving a right-to-sue letter, she filed this action in the district court (again acting pro se). Ivy Tech responded with a motion to dismiss for failure to state a claim on which relief can be granted. It argued that sexual orientation is not a protected class under Title VII or 42 U.S.C. § 1981 (which we will disregard for the remainder of this opinion). Relying on a line of this court's cases exemplified by *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), the district court granted Ivy Tech's motion and dismissed Hively's case with prejudice.

Now represented by the Lambda Legal Defense & Education Fund, Hively has appealed to this court. After an exhaustive exploration of the law governing claims involving discrimination based on sexual orientation, the panel affirmed. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016). It began its analysis by noting that the idea that discrimination based on sexual orientation is somehow distinct from sex discrimination originated with dicta in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *Ulane* stated (as if this resolved matters) that Title VII's prohibition against sex discrimination "implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* at 1085. From this truism, we deduced that "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination. . . ." *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997), *cert. granted, judgment vacated sub nom. City of Belleville v. Doe*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

Later cases in this court, including *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003), *Hamner*, and *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000), have accepted this as settled law. Almost all of our sister circuits have understood the law in the same way. See, *e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285,

290 (3d Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997). A panel of the Eleventh Circuit, recognizing that it was bound by the Fifth Circuit's precedent in *Blum*, 597 F.2d 936, recently reaffirmed (by a 2–1 vote) that it could not recognize sexual orientation discrimination claims under Title VII. *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017). On the other hand, the Second Circuit recently found that an openly gay male plaintiff pleaded a claim of gender stereotyping that was sufficient to survive dismissal. The court observed that one panel lacked the power to reconsider the court's earlier decision holding that sexual orientation discrimination claims were not cognizable under Title VII. *Christiansen v. Omnicom Group, Inc.*, No. 16-748, 852 F.3d 195, 2017 WL 1130183 (2d Cir. Mar. 27, 2017) (per curiam). Nonetheless, two of the three judges, relying on many of the same arguments presented here, noted in concurrence that they thought their court ought to consider revisiting that precedent in an appropriate case. *Id.* at 198–99, 2017 WL 1130183 at *2 (Katzmann, J., concurring). Notable in its absence from the debate over the proper interpretation of the scope of Title VII's ban on sex discrimination is the United States Supreme Court.

That is not because the Supreme Court has left this subject entirely to the side. To the contrary, as the panel recognized, over the years the Court has issued several opinions that are relevant to the issue before us. Key among those decisions are *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). *Price Waterhouse* held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination, and *Oncale* clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim. Our panel frankly acknowledged how difficult it is "to extricate the gender nonconformity claims from the sexual orientation claims." 830 F.3d at 709. That effort, it commented, has led to a "confused hodge-podge of cases." *Id.* at 711. It also noted that "all gay, lesbian and bisexual persons fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men." *Id.* Especially since the Supreme Court's recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), bizarre results ensue from the current regime. As the panel noted, it creates "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." 830 F.3d at 714. Finally, the panel highlighted the sharp tension between a rule that fails to recognize that discrimination on the basis of the sex with whom a person associates is a form of sex discrimination, and the rule, recognized since *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), that discrimination on the basis of the race with whom a person associates is a form of racial discrimination.

Despite all these problems, the panel correctly noted that it was bound by this court's precedents, to which we referred

earlier. It thought that the handwriting signaling their demise might be on the wall, but it did not feel empowered to translate that message into a holding. "Until the writing comes in the form of a Supreme Court opinion or new legislation," 830 F.3d at 718, it felt bound to adhere to our earlier decisions. In light of the importance of the issue, and recognizing the power of the full court to overrule earlier decisions and to bring our law into conformity with the Supreme Court's teachings, a majority of the judges in regular active service voted to rehear this case en banc.

II

A

The question before us is not whether this court can, or should, "amend" Title VII to add a new protected category to the familiar list of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.[1] This is a pure question of statutory interpretation and thus well within the judiciary's competence.

Much ink has been spilled about the proper way to go about the task of statutory interpretation.

1. For present purposes, we have no need to decide whether discrimination on the basis of ''gender'' is for legal purposes the same as discrimination on the basis of ''sex,'' which is the statutory term. Many courts, including the Supreme Court, appear to have used ''sex'' and ''gender'' synonymously. Should a case arise in which the facts require us to examine the differences (if any) between the terms, we will do so then.

B

[3] Hively offers two approaches in support of her contention that "sex discrimination" includes discrimination on the basis of sexual orientation. The first relies on the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way? The second relies on the *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), line of cases, which she argues protect her right to associate intimately with a person of the same sex. Although the analysis differs somewhat, both avenues end up in the same place: sex discrimination.

1

[4] It is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed to change. The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once. Framing the question that way swaps the critical characteristic (here, sex) for both the complainant and the comparator and thus obscures the key point—whether the complainant's protected characteristic played a role in the adverse employment decision. The counterfactual we must use is a situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner.

Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. (We take the facts in the light most favorable to her, because we are here on a Rule 12(b)(6) dismissal; naturally nothing we say will prevent Ivy Tech from contesting these points in later proceedings.) This describes paradigmatic sex discrimination. To use the phrase from *Ulane*, Ivy Tech is disadvantaging her *because she is a woman*.

Nothing in the complaint hints that Ivy Tech has an anti-marriage policy that extends to heterosexual relationships, or for that matter even an anti-partnership policy that is gender-neutral.

Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

[5] This was the critical point that the Supreme Court was making in *Hopkins*. The four justices in the plurality and the two justices concurring in the judgment recognized that Hopkins had alleged that her employer was discriminating only against women who behaved in what the employer viewed as too "masculine" a way—no makeup, no jewelry, no fashion sense.[2] And even before *Hopkins*, courts had found sex discrimination in situations where women were resisting stereotypical roles. As far back as 1971, the Supreme Court held that Title VII does not permit an employer to refuse to hire women with pre-school-age children, but not men. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971). Around the same time, this court held that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), and struck down a rule requiring only the female employees to be unmarried. In both those instances, the employer's rule did not affect every woman in the workforce. Just so here: a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex.[3] The discriminato-

2. The dissent correctly points out that *Hopkins* was a plurality opinion, but that fact is of no moment in understanding what we are to take from the plurality's discussion of sex stereotyping. On the critical issue—whether the conduct about which Hopkins complained could support a finding of sex discrimination for purposes of Title VII—at least six justices were in agreement that the answer was yes. Justice Brennan's opinion for the four-person plurality was clear: "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." 490 U.S. at 250, 109 S.Ct. 1775. Justice White, concurring in the judgment, stated that he agreed that an unlawful motive was a substantial factor in the adverse employment action Hopkins suffered. *Id.* at 259, 109 S.Ct. 1775. Justice O'Connor, also concurring in the judgment, "agree[d] with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender." *Id.* at 261, 109 S.Ct. 1775. Justice Kennedy's dissenting opinion did not need to dwell on this point, because he found that Hopkins could not prove causation.

3. The dissent questions in its conclusion what a jury ought to do in the hypothetical case in which Ivy Tech hired six heterosexual women for the full-time positions. But, as we note, the Supreme Court has made it clear that a policy need not affect *every* woman to constitute sex discrimination. What if Hively had been heterosexual, too, but did not get the job because she failed to wear high heels, lipstick,

ry behavior does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways.

The virtue of looking at comparators and paying heed to gender non-conformity is that this process sheds light on the interpretive question raised by Hively's case: is sexual-orientation discrimination a form of sex discrimination, given the way in which the Supreme Court has interpreted the word "sex" in the statute? The dissent criticizes us for not trying to *rule out* sexual-orientation discrimination by controlling for it in our comparator example and for not placing any weight on the fact that if someone had asked Ivy Tech what its reasons were at the time of the discriminatory conduct, it probably would have said "sexual orientation," not "sex." We assume that this is true, but this thought experiment does not answer the question before us—instead, it begs that question. It commits the logical fallacy of assuming the conclusion it sets out to prove. It makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is *whether* that type of discrimination is nothing more or less than a form of sex discrimination. Repeating that the two are different, as the dissent does at numerous points, also does not advance the analysis.

2

[6] As we noted earlier, Hively also has argued that action based on sexual orientation is sex discrimination under the associational theory. It is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits. This line of cases began with *Loving*, in which the Supreme Court held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S. at 12, 87 S.Ct. 1817. The Court rejected the argument that miscegenation statutes do not violate equal protection because they "punish equally both the white and the Negro participants in an interracial marriage." *Id.* at 8, 87 S.Ct. 1817. When dealing with a statute containing racial classifications, it wrote, "the fact of equal application does not immunize the statute from the very heavy burden of justification" required by the Fourteenth Amendment for lines drawn by race. *Id.* at 9, 87 S.Ct. 1817.

In effect, both parties to the interracial marriage were being denied important rights by the state solely on the basis of their race. This point by now has been recognized for many years. For example, in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), the Eleventh Circuit considered a case in which a white man (Parr) married to an African-American woman was denied employment by an insurance company because of his interracial marriage. He sued under Title VII, but the district court dismissed the complaint on the ground that it failed to describe discrimination on the basis of race. The court of appeals reversed. It held that "[w]here a plaintiff

or perfume like the other candidates? A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.

claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Id.* at 892. It also rejected the employer's somewhat bizarre argument that, given the allegation that it discriminated against all African-Americans, Parr could not show that it would have made a difference if he also had been African-American. *Id.* The court contented itself with describing that as a lawsuit for another day.

The Second Circuit took the same position two decades later in *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008), in which a white former employee of the college sued, alleging that it fired him from his job as associate coach of the men's basketball team because he was married to an African-American woman. The court held "that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 132. It stressed that the plaintiff's case did not depend on third-party injury. To the contrary, it held, "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139. Had the plaintiff been African-American, the question whether race discrimination tainted the employer's action would have depended on different facts.

We have not faced exactly the same situation as that in *Parr* and *Holcomb*, but we have come close. In *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1998), we encountered a case in which white employees brought an action under Title VII on the theory that they were being subjected to a hostile working environment and ultimately discharged because of their association with African-American co-workers. Because the defendant conceded that an employee can bring an associational race discrimination claim under Title VII, we had no need to say much on that point. Instead, we assumed for the sake of argument that an associational race discrimination claim is possible, and that the key inquiries are whether the employee has experienced discrimination and whether that discrimination was because of race. *Id.* at 884. This is consistent with *Holcomb*.

The fact that we now accept this analysis tells us nothing, however, about the world in 1967, when *Loving* reached the Supreme Court. The dissent implies that we are adopting an anachronistic view of Title VII, enacted just three years before *Loving*, but it is the dissent's understanding of *Loving* and the miscegenation laws that is an anachronism. Thanks to *Loving* and the later cases we mentioned, society understands now that such laws are (and always were) inherently racist. But as of 1967 (and thus as of 1964), Virginia and 15 other states had anti-miscegenation laws on the books. *Loving*, 388 U.S. at 6, 87 S.Ct. 1817. These laws were long defended and understood as non-discriminatory because the legal obstacle affected *both* partners. The Court in *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on "distinctions drawn according to race," which were unjustifiable and racially discriminatory. [4]

4. The dissent seems to imply that the discrimination in *Loving* was problematic because the miscegenation laws were designed to maintain the supremacy of one race—and by extension that sexual orientation discrimination is not a problem because it is not designed to maintain the supremacy of one sex. But while this was certainly a repugnant fea-

Loving, 388 U.S. at 11, 87 S.Ct. 1817. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.

The dissent would instead have us compare the treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women. But even setting to one side the logical fallacy involved, *Loving* shows why this fails. In the context of interracial relationships, we could just as easily hold constant a variable such as "sexual or romantic attraction to persons of a different race" and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations.

The fact that *Loving*, *Parr*, and *Holcomb* deal with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses—a fact recognized by the *Hopkins* plurality. See 490 U.S. at 244 n.9, 109 S.Ct. 1775. This means that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.

III

Today's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. We already have discussed the employment cases, especially *Hopkins* and *Oncale*. The latter line of cases began with *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect "homosexual, lesbian, or bisexual" persons, *id.* at 624, 116 S.Ct. 1620, violated the federal Equal Protection Clause. *Romer* was followed by *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came *United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of "spouse" in other federal statutes. The Court held that this part of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." *Id.* at 2693. Finally, the Court's decision in *Obergefell*, *supra*, held that the right to marry is a fundamental liberty right, protected by the Due Process

ture of Virginia's law, it was not the basis of the holding in *Loving*. Rather, the Court found the racial classifications to be at odds with the Constitution, "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11 n.11, 87 S.Ct. 1817.

and Equal Protection Clauses of the Fourteenth Amendment. 135 S.Ct. at 2604. The Court wrote that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality." *Id.*

It would require considerable calisthenics to remove the "sex" from "sexual orientation." The effort to do so has led to confusing and contradictory results, as our panel opinion illustrated so well.[5] The EEOC concluded, in its *Baldwin* decision, that such an effort cannot be reconciled with the straightforward language of Title VII. Many district courts have come to the same conclusion. See, *e.g.*, *Boutillier v. Hartford Pub. Sch.*, No. 3:13-CV-01303-WWE, 221 F.Supp.3d 255, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); *U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Ctr., P.C.*, No. CV 16-225, 217 F.Supp.3d 834, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F.Supp.3d 1334 (N.D. Fla. 2016); *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190 (M.D. Ala. 2015); see also *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151 (C.D. Cal. 2015) (Title IX case, applying Title VII principles and *Baldwin*). Many other courts have found that gender-identity claims are cognizable under Title VII. See, *e.g.*, *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (claim for sex discrimination under Equal Credit Opportunity Act, analogizing to Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (relying on Title VII cases to conclude that violence against a transsexual was violence because of gender under the Gender Motivated Violence Act); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016); *Schroer v. Billington*, 577 F.Supp.2d 293, 308 (D.D.C. 2008).

This is not to say that authority to the contrary does not exist. As we acknowledged at the outset of this opinion, it does. But this court sits en banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago.[6] The

5. The dissent contends that a fluent speaker of the English language would understand that ''sex'' does not include the concept of ''sexual orientation,'' and this ought to demonstrate that the two are easily distinguishable and not the same. But this again assumes the answer to the question before us: how to interpret the statute in light of the guidance the Supreme Court has provided. The dissent is correct that the term ''sexual orientation'' was not defined in the dictionary around the time of Title VII's enactment, but neither was the term ''sexual harassment''—a concept that, although it can be distinguished from ''sex,'' has at least since 1986 been included by the Supreme Court under the umbrella of sex discrimination. See WEBSTER'S NEW COLLEGIATE DICTIONARY (7th ed. 1963) (lacking an entry for ''sexual harassment'' or ''sexual orientation''); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969) (same). The dissent postulates that it is implausible that a reasonable person in 1964 could have understood discrimination based on sex to include sexual orientation discrimination. But that reasonable person similarly may not have understood it to include sexual harassment (and, by extension, not male-on-male sexual harassment). As *Oncale* said, we are concerned with the provisions of the law, not the principal concerns of those who wrote it. 523 U.S. at 80, 118 S.Ct. 998. The approach we have taken does just that.

6. The dissent criticizes us for this approach, but we find nothing surprising in the fact that lower courts may have been wrong for many years in how they understood the rule of law supplied by a statute or the Constitution. Exactly this has happened before. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), the Supreme Court disapproved a rule of statutory

logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.

interpretation that all eleven regional courts of appeals had followed—most for over three decades. When the Court decided *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 132 S.Ct. 1997, 182 L.Ed.2d 903 (2012) (deciding that the provision for compensating interpreters in 28 U.S.C. § 1920(6) does not include costs for document translation), it rejected the views of at least six circuits with regard to the proper reading of the statute. 566 U.S. at 577, 132 S.Ct. 1997 (Ginsburg, J., dissenting). See also *Milner v. Dep't of the Navy*, 562 U.S. 562, 585, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011) (Breyer, J., dissenting) (noting that the Court's decision rejected the interpretation of Exemption 2 to the Freedom of Information Act that had been consistently followed or favorably cited by every court of appeals to have considered the matter over a 30-year period). It would be more controversial to assert that this is one of the rare statutes left for common-law development, as our concurring colleague does. In any event, that common-law development, both for the antitrust laws and any other candidates, is the responsibility of the Supreme Court. See *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (recognizing that only the Supreme Court could jettison the *per se* rule against maximum pricefixing). All we can do is what we have done here: apply the relevant Supreme Court decisions to the statute to the best of our ability.

7. Indeed, in contrast to cases in which a religious employer may be exempted from Title VII liability because they have a bona fide need to discriminate on the basis of a protected characteristic, we note that Ivy Tech's position does not seem to reflect any fundamental desire to be permitted to engage in discrimination on the basis of sexual orientation. To the contrary, Ivy Tech maintains that it has its own internal policy prohibiting such discrimination. It could repeal that policy tomorrow, however, and so we will not look behind its decision to contest Hively's claim.

POSNER, Circuit Judge, concurring.

I agree that we should reverse, and I join the majority opinion, but I wish to explore an alternative approach that may be more straightforward.

It is helpful to note at the outset that the interpretation of statutes comes in three flavors. The first and most conventional is the extraction of the original meaning of the statute—the meaning intended by the legislators—and corresponds to interpretation in ordinary discourse. Knowing English I can usually determine swiftly and straightforwardly the meaning of a statement, oral or written, made to me in English (not always, because the statement may be garbled, grammatically intricate or inaccurate, obtuse, or complex beyond my ability to understand).

The second form of interpretation, illustrated by the commonplace local ordinance which commands "no vehicles in the park," is interpretation by unexpressed intent, whereby we understand that although an ambulance is a vehicle, the ordinance was not intended to include ambulances among the "vehicles" forbidden to enter the park. This mode of interpretation received its definitive statement in Blackstone's analysis of the medieval law of Bologna which stated that "whoever drew blood in the streets should be punished with the utmost severity." William Blackstone, *Commentaries on the Laws of England* *60 (1765). Blackstone asked whether the law should have been interpreted to make punishable a surgeon "who opened the vein of a person that fell down in the street with a fit." (Bleeding a sick or injured person was a common form of medical treatment in those days.) Blackstone thought not, remarking that as to "the effects and consequence, or the spirit and reason of the law . . . the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them." *Id.* *59–60. The law didn't mention surgeons, but Blackstone thought it obvious that the legislators, who must have known something about the medical activities of surgeons, had not intended the law to apply to them. And so it is with ambulances in parks that prohibit vehicles.

Finally and most controversially, interpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text)—a meaning that infuses the statement with vitality and significance today. An example of this last form of interpretation—the form that in my mind is most clearly applicable to the present case—is the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition. Times have changed; and for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics. The Act has thus been updated by, or in the name of, judicial interpretation—the form of interpretation that consists of making old law satisfy modern needs and understandings. And a common form of interpretation it is, despite its flouting "original meaning." Statutes and constitutional provisions frequently are interpreted on the basis of present need and present understanding rather than original meaning—constitutional provisions even more fre-

quently, because most of them are older than most statutes.

Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted. But I need to emphasize that this third form of interpretation—call it judicial interpretive updating—presupposes a lengthy interval between enactment and (re)interpretation. A statute when passed has an understood meaning; it takes years, often many years, for a shift in the political and cultural environment to change the understanding of the statute.

Hively, the plaintiff, claims that because she's a lesbian her employer declined to either promote her to full-time employment or renew her part-time employment contract. She seeks redress on the basis of the provision of Title VII that forbids 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 ... sex...." 42 U.S.C. § 2000e-2(a)(1).

The argument that firing a woman on account of her being a lesbian does *not* violate Title VII is that the term "sex" in the statute, when enacted in 1964, undoubtedly meant "man or woman," and so at the time people would have thought that a woman who was fired for being a lesbian was not being fired for being a woman unless her employer would not have fired on grounds of homosexuality a man he knew to be homosexual; for in that event the only difference between the two would be the gender of the one he fired. Title VII does not mention discrimination on the basis of sexual orientation, and so an explanation is needed for how 53 years later the meaning of the statute has changed and the word "sex" in it now connotes both gender *and* sexual orientation.

It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. I had graduated from law school two years before the law was enacted. Had I been asked then whether I had ever met a male homosexual, I would have answered: probably not; had I been asked whether I had ever met a lesbian I would have answered "only in the pages of *À la recherche du temps perdu*." Homosexuality was almost invisible in the 1960s. It became visible in the 1980s as a consequence of the AIDS epidemic; today it is regarded by a large swathe of the American population as normal. But what is certain is that the word "sex" in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality.

A diehard "originalist" would argue that what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by Congress's amending or replacing the statute. But as I noted earlier, statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning. Think for example of Justice Scalia's decisive fifth vote to hold that burning the American flag as a political protest is protected by the free-speech clause of the First Amendment, provided that it's your flag and is not burned in circumstances in which the fire might spread. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). Burning a flag is not speech in the usual sense and there is no indication that the framers or ratifiers of the First Amendment thought that the

word "speech" in the amendment embraced flag burning or other nonverbal methods of communicating.

Or consider the Supreme Court's holding that the Fourth Amendment requires the issuance of a warrant as a precondition to searching a person's home or arresting him there. E.g., *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). There is nothing in the amendment about requiring a warrant *ever*. All that the amendment says about warrants is that general warrants, and warrants that are vague or issued without probable cause, are invalid. In effect the Supreme Court rewrote the Fourth Amendment, just as it rewrote the First Amendment in the flag-burning cases, and just as it rewrote the Sherman Act, and just as today we are rewriting Title VII. We are Blackstone's heirs.

And there is more: think of how the term "cruel and unusual punishments" has morphed over time. Or how the Second Amendment, which as originally conceived and enacted was about arming the members of the state militias (now the National Guard), is today interpreted to confer gun rights on private citizens as well. Over and over again, old statutes, old constitutional provisions, are given new meaning, as explained so eloquently by Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433–34, 40 S.Ct. 382, 64 L.Ed. 641 (1920):

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. *We must consider what this country has become in deciding what that amendment has reserved* (emphasis added).

So by substituting Title VII for "that amendment" in Holmes's opinion, discrimination on grounds of "sex" in Title VII receives today a new, a broader, meaning. Nothing has changed more in the decades since the enactment of the statute than attitudes toward sex. 1964 was more than a decade before Richard Raskind underwent male-to-female sex reassignment surgery and took the name Renée Richards, becoming the first transgender celebrity; now of course transgender persons are common.

In 1964 (and indeed until the 2000s), and in some states until the Supreme Court's decision in *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), men were not allowed to marry each other, nor women allowed to marry each other. If in those days an employer fired a lesbian because he didn't like lesbians, he would have said that he was not firing her because she was a woman—he would not have fired her had she been heterosexual—and so he was not discriminating on the basis of sex as understood by the authors and ratifiers of Title VII. But today "sex" has a broader meaning than the genitalia you're born with. In *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), our court, anticipating *Obergefell* by invalidating laws in Indiana and Wisconsin that forbade same-sex marriage, discussed at length whether homosexual orientation is innate or chosen, and found that the scientific literature strongly supports the proposition that it is biological and innate, not a choice like deciding how to dress. The position of a woman discriminated against

on account of being a lesbian is thus analogous to a woman's being discriminated against on account of being a woman. That woman didn't choose to be a woman; the lesbian didn't choose to be a lesbian. I don't see why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman.

But it has taken our courts and our society a considerable while to realize that sexual harassment, which has been pervasive in many workplaces (including many Capitol Hill offices and, notoriously, Fox News, among many other institutions), is a form of sex discrimination. It has taken a little longer for realization to dawn that discrimination based on a woman's failure to fulfill stereotypical gender roles is also a form of sex discrimination. And it has taken still longer, with a substantial volume of cases struggling and failing to maintain a plausible, defensible line between sex discrimination and sexual-orientation discrimination, to realize that homosexuality is nothing worse than failing to fulfill stereotypical gender roles.

It's true that even today if asked what is the sex of plaintiff Hively one would answer that she is female or that she is a woman, not that she is a lesbian. Lesbianism denotes a form of sexual or romantic attraction; it is not a physical sex identifier like masculinity or femininity. A broader understanding of the word "sex" in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains as a form of sex discrimination. That broader understanding is essential. Failure to adopt it would make the statute anachronistic, just as interpreting the Sherman Act by reference to its nineteenth-century framers' understanding of competition and monopoly would make the Sherman Act anachronistic.

We now understand that homosexual men and women (and also bisexuals, defined as having both homosexual and heterosexual orientations) are normal in the ways that count, and beyond that have made many outstanding intellectual and cultural contributions to society (think for example of Tchaikovsky, Oscar Wilde, Jane Addams, André Gide, Thomas Mann, Marlene Dietrich, Bayard Rustin, Alan Turing, Alec Guinness, Leonard Bernstein, Van Cliburn, and James Baldwin—a very partial list). We now understand that homosexuals, male and female, play an essential role, in this country at any rate, as adopters of children from foster homes—a point emphasized in our *Baskin* decision. The compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose "interpretation" of the word "sex" in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in light of (to quote Holmes) "*what this country has become*," or, in Blackstonian terminology, to embrace as a sensible deviation from the literal or original meaning of the statutory language.

I am reluctant however to base the new interpretation of discrimination on account of sex in Title VII on such cases as *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a case of sexual harassment of one man by other men, held by the Supreme Court to violate Title VII's prohibition of sex discrimination. The Court's opinion is rather evasive. I quote its critical language:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal

> evil Congress was concerned with when it enacted Title VII. But 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. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id. at 79–80, 118 S.Ct. 998.

Consider the statement in the quotation that "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" (emphasis added). That could be thought "originalism," if by "provisions" is meant statutory language. Consider too the statement in *Oncale* that "Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." Although "of any kind" signals breadth, it is narrowed by the clause that follows: "that meets the statutory requirements." So we're back to the essential issue in this case, which is whether passage of time and concomitant change in attitudes toward homosexuality and other unconventional forms of sexual orientation can justify a fresh interpretation of the phrase "discriminat[ion] . . . because of . . . sex" in Title VII, which fortunately however is a half-century-old statute ripe for reinterpretation.

Another decision we should avoid in ascribing present meaning to Title VII is *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which Hively argues protects her right to associate intimately with a person of the same sex. That was a constitutional case, based on race. It outlawed state prohibitions of interracial marriage. It had nothing to do with the recently enacted Title VII.

The majority opinion in the present case states that "Ivy Tech is disadvantaging [Hively] *because she is a woman*," not a man, who wants to have romantic attachments with female partners (emphasis in original). In other words, Ivy Tech is disadvantaging her because she is a woman who is not conforming to its notions of proper behavior. That's a different type of sex discrimination from the classic cases of old in which women were erroneously (sometimes maliciously) deemed unqualified for certain jobs. That was the basis on which fire departments, for example, discriminated against women—an example of discrimination plainly forbidden by the language of Title VII.

The most tenable and straightforward ground for deciding in favor of Hively is that while in 1964 sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women, the concept of sex discrimination has since broadened in light of the recognition, which barely existed in 1964, that there are significant numbers of both men and women who have a sexual orientation that sets them apart from the heterosexual members of their genetic sex (male or female), and that while they constitute a minority their sexual orientation is not evil and does not threaten our society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase Holmes, "*We must con-*

sider what this country has become in deciding what that [statute] has reserved."

The majority opinion states that Congress in 1964 "may not have realized or understood the full scope of the words it chose." This could be understood to imply that the statute forbade discrimination against homosexuals but the framers and ratifiers of the statute were not smart enough to realize that. I would prefer to say that theirs was the then-current understanding of the key word—sex. "Sex" in 1964 meant gender, not sexual orientation. What the framers and ratifiers understandably didn't understand was how attitudes toward homosexuals would change in the following half century. They shouldn't be blamed for that failure of foresight. *We* understand the words of Title VII differently not because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture. Congress in the 1960s did not foresee the sexual revolution of the 2000s. What our court announced in *Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997), is what Congress had declared in 1964: "the traditional notion of 'sex.' "

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. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

SYKES, Circuit Judge, with whom BAUER and KANNE, Circuit Judges, join, dissenting.

Any case heard by the full court is important. This one is momentous. All the

more reason to pay careful attention to the limits on the court's role. The question before the en banc court is one of statutory interpretation. The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

In a handful of statutory contexts, Congress has vested the federal courts with authority to consider and make new rules of law in the common-law way. The Sherman Act is the archetype of the so-called "common-law statutes," but there are very few of these and Title VII is not one of them. *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95–97, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981); *id.* at 98 n.42, 101 S.Ct. 1571. So our role is interpretive only; we lack the discretion to ascribe to Title VII a meaning it did not bear at its inception. Sitting en banc permits us to overturn our own precedents, but in a statutory case, we do not sit as a common-law court free to engage in "judicial interpretive updating," as Judge Posner calls it,[1] or to do the same thing by pressing hard on tenuously related Supreme Court opinions, as the majority does.

Judicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design. The Constitution establishes a procedure for enacting and amending statutes: bicameralism and presentment. *See* U.S. CONST. art. I, § 7. Needless to say, statutory amendments brought to you by the judiciary do not pass through this process. That is why a textualist decision method matters: When we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours. The Constitution assigns the power to make and amend statutory law to the elected representatives of the people. However welcome today's decision might be as a policy matter, it comes at a great cost to representative self-government.

I

Title VII of the Civil Rights Act of 1964 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). Sexual orientation is not on the list of forbidden categories of employment discrimination,

1. He describes this method of statutory interpretation throughout his opinion and gives it the name "judicial interpretive updating" on page 353.

and we have long and consistently held that employment decisions based on a person's sexual orientation do not classify people on the basis of sex and thus are not covered by Title VII's prohibition of discrimination "because of sex." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). This interpretation has been stable for many decades and is broadly accepted; all circuits agree that sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination. *See* Majority Op. at pp. 341–42 (collecting cases).

Today the court jettisons the prevailing interpretation and installs the polar opposite. Suddenly sexual-orientation discrimination *is* sex discrimination and thus is actionable under Title VII. What justification is offered for this radical change in a well-established, uniform interpretation of an important—indeed, transformational—statute? My colleagues take note of the Supreme Court's "absence from the debate." *Id.* at p. 342. What debate? There is no debate, at least not in the relevant sense. Our long-standing interpretation of Title VII is not an outlier. From the statute's inception to the present day, the appellate courts have unanimously and repeatedly read the statute the same way, as my colleagues must and do acknowledge. *Id.* at pp. 341–42. The Supreme Court has had no need to weigh in, and the unanimity among the courts of appeals strongly suggests that our long-settled interpretation is correct.

Of course there *is* a robust debate on this subject in our culture, media, and politics. Attitudes about gay rights have dramatically shifted in the 53 years since the Civil Rights Act was adopted. Lambda Legal's proposed new reading of Title VII—offered on behalf of plaintiff Kimberly Hively at the appellate stage of this litigation—has a strong foothold in current popular opinion.

This striking cultural change informs a case for legislative change and might eventually persuade the people's representatives to amend the statute to implement a new public policy. But it does not bear on the sole inquiry properly before the en banc court: Is the prevailing interpretation of Title VII—that discrimination on the basis of sexual orientation is different in kind and not a form of sex discrimination—*wrong as an original matter*?

MARCH 30TH: IS TRANSGENDER DISCRIMINATION A FORM OF SEX DISCRIMINATION?

Advice of Rights" form was not executed until 10:30–10:35 p.m., approximately 30–35 minutes after the search of the suitcase, and approximately an hour and 15 minutes after his arrival at the airport. Judge Steckler's opinion looked at the facts carefully, noting inconsistencies as to what discussions took place and their placement in time vis-a-vis the signing of the forms—the "Interrogation, Advice of Rights" form and the "Constitutional Rights Warning: Search by Consent" form. The evidence supports his conclusion that before the consent and the search, the detention had matured into a seizure of Verrusio's person following which there was not a timely nor clearly proved giving of the *Miranda* warning.

[2] On review our role is to accept the district court's factual findings unless they are clearly erroneous. *United States v. Santucci*, 674 F.2d 624 (7th Cir.1982); *United States v. Conner*, 478 F.2d 1320 (7th Cir.1973). The determination of whether the consent to search was free and voluntary must be made with reference to the totality of the circumstances and not merely with regard for whether one form or another was signed. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The trial judge has the opportunity to observe the demeanor of the witnesses and to assess their credibility. It was peculiarly within the scope of his responsibilities to weigh any conflicts in the evidence. His discussion of these conflicts bears witness to his performance of that responsibility. His decision that Verrusio had not been given all of his rights before his personal seizure further matured into an evidentiary seizure is amply supported by the evidence and in particular by the time notation on the "Interrogation, Advice of Rights" form. The judge's decision reflects what appear from the record to have been a lack of credibility on the part of the agents and irreconcilable inconsistencies between the narrations of events by Agent McGivney and Officer Leske. Finally, the propriety of this decision collaterally was corroborated by an exhibit the judge admitted into evidence. It was a government report excluded from discovery by Agent McGivney. This report stated that the government initially declined prosecution based on Assistant United States Attorney Kennard Foster's decision that the evidence could not be used because the search of Verrusio's suitcase was faulty.

We find that the district court approximately granted the defendant's motion to suppress. Accordingly, the decision is affirmed.

AFFIRMED.

Karen Frances ULANE, Plaintiff-Appellee,

v.

EASTERN AIRLINES, INC., a Delaware corporation, Defendant-Appellant.

No. 84–1431.

United States Court of Appeals, Seventh Circuit.

Argued June 5, 1984.

Decided Aug. 29, 1984.

Rehearing and Rehearing In Banc Denied Nov. 16, 1984.

Transsexual brought suit alleging that employer airline violated Title VII by discharging her from her position as pilot. The United States District Court for the Northern District of Illinois, 581 F.Supp. 821, John F. Grady, J., ruled in favor of employee on count alleging that she was discriminated against as employee and on count alleging that she was discriminated against as transsexual, and employer ap-

pealed. The Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that: (1) Title VII does not protect transsexuals, and (2) even if transsexual was considered female, trial judge made no factual findings necessary to support conclusion that employer discriminated against her on this basis.

Reversed.

Dean A. Dickie, Sachnoff, Weaver & Rubenstein, Ltd., Chicago, Ill., for plaintiff-appellee.

David M. Brown, Gambrell & Russell, Atlanta, Ga., for defendant-appellant.

Before CUMMINGS, Chief Judge, WOOD, Circuit Judge, and DUMBAULD, Senior District Judge.*

HARLINGTON WOOD, Jr., Circuit Judge.

Plaintiff, as Kenneth Ulane, was hired in 1968 as a pilot for defendant, Eastern Air Lines, Inc., but was fired as Karen Frances Ulane in 1981. Ulane filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission, which subsequently issued a right to sue letter. This suit followed. Counts I and II allege that Ulane's discharge violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17 (1982): Count I alleges that Ulane was discriminated against as a female; Count II alleges that Ulane was discriminated against as a transsexual. The judge ruled in favor of Ulane on both counts after a bench trial.[1] 581 F.Supp. 821. The court awarded her[2] reinstatement as a flying officer with full seniority and back pay, and attorneys' fees. This certified appeal followed pursuant to Federal Rule of Civil Procedure 54(b).

FACTUAL BACKGROUND

Counsel for Ulane opens their brief by explaining: "This is a Title VII case brought by a pilot who was fired by Eastern Airlines for no reason other than the fact that she ceased being a male and became a female." That explanation may give some cause to pause, but this briefly is the story.

Ulane became a licensed pilot in 1964, serving in the United States Army from that time until 1968 with a record of combat missions in Vietnam for which Ulane received the Air Medal with eight clusters. Upon discharge in 1968, Ulane began flying for Eastern. With Eastern, Ulane progressed from Second to First Officer, and

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

1. Counts III through IX, which allege violations of 42 U.S.C. §§ 1985(3), 1986, 18 U.S.C. § 371 (conspiracy), and 45 U.S.C. § 184 (Railway Labor Act), defamation, and intentional or reckless causing of emotional and mental distress, have not yet been tried.

2. Since Ulane considers herself to be female, and appears in public as female, we will use feminine pronouns in referring to her.

also served as a flight instructor, logging over 8,000 flight hours.

Ulane was diagnosed a transsexual[3] in 1979. She explains that although embodied as a male, from early childhood she felt like a female. Ulane first sought psychiatric and medical assistance in 1968 while in the military. Later, Ulane began taking female hormones as part of her treatment, and eventually developed breasts from the hormones. In 1980, she underwent "sex reassignment surgery."[4] After the surgery, Illinois issued a revised birth certificate indicating Ulane was female, and the FAA certified her for flight status as a female. Ulane's own physician explained, however, that the operation would not create a biological female in the sense that Ulane would "have a uterus and ovaries and be able to bear babies." Ulane's chromosomes,[5] all concede, are unaffected by the hormones and surgery. Ulane, however, claims that the lack of change in her chromosomes is irrelevant.[6] Eastern was not aware of Ulane's transsexuality, her hormone treatments, or her psychiatric counseling until she attempted to return to work after her reassignment surgery. Eastern knew Ulane only as one of its male pilots.

3. Transsexualism is a condition that exists when a physiologically normal person (*i.e.*, not a hermaphrodite—a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This discomfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role. The diagnosis is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia. *See* Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 26, 1983, 10:00 a.m., at 35–37; *see generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 302.5x (3d ed. 1980); Edgerton, Langman, Schmidt & Sheppe, *Psychological Considerations of Gender Reassignment Surgery,* 9 Clinics in Plastic Surgery 355, 357 (1982); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma,* 7 Conn.L. Rev. 288, 288 n. 1 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law,* 56 Cornell L.Rev. 963, 963 n. 1 (1971).

To be distinguished are homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress, *i.e.*, dress as females, for sexual arousal rather than social comfort; both homosexuals and transvestites are content with the sex into which they were born. *See Diagnostic and Statistical Manual of Mental Disorders* § 302.30; Wise & Meyer, *Transvestism: Previous Findings and New Areas for Inquiry,* 6 J. of Sex & Marital Therapy 116, 116–20 (1980); Comment, 7 Conn.L.Rev., *supra,* at 292; Comment, 56 Cornell L.Rev., *supra,* at 963 n. 3.

4. Sex reassignment surgery for male-to-female transsexuals "involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics," such as breast development. Comment, 56 Cornell L.Rev., *supra* note 3, at 970 n. 37 (citations omitted); *see also* Jones, *Operative Treatment of the Male Transsexual,* in Transsexualism and Sex Reassignment 313, 314–16 (R. Green & J. Money eds. 1969); Stoller, *Near Miss: "Sex Change" Treatment and Its Evaluation,* in Eating, Sleeping, and Sexuality 258, 259 (M. Zales ed. 1982); Shaw, *Sex-change Capital: Surgeon is Town's Top Draw,* Chicago Tribune, Aug. 14, 1984, § 5, at 1, 3, col. 3.

5. The normal individual has 46 chromosomes, two of which designate sex. An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered. Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria,* 1983 Medic.Trial Tech.Q. 167, 170.

6. Biologically, sex is defined by chromosomes, internal and external genitalia, hormones, and gonads. Wise, *supra* note 5, at 169. Chromosomal sex cannot be changed, and a uterus and ovaries cannot be constructed. This leads some in the medical profession to conclude that hormone treatments and sex reassignment surgery can alter the evident makeup of an individual, but cannot change the individual's innate sex. *See, e.g.,* Wise, *supra* note 5, at 170; Stoller, *supra* note 4, at 273; Comment, Cornell L.Rev., *supra* note 3, at 970 n. 37. Others disagree, arguing that one must look beyond chromosomes when determining an individual's sex and consider factors such as psychological sex or assumed sex role. Comment, 7 Conn.L.Rev., *supra* note 3, at 290–91 & n. 6, 292 (psychological sex may be most important factor); Comment, Cornell L.Rev., *supra* note 3, at 965. These individuals conclude that post-operative male-to-female transsexuals do in fact qualify as females and are not merely "facsimiles." *E.g.,* Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 27, 1983, 10:35 a.m., at 226 & 252.

LEGAL ISSUES

A. *Title VII and Ulane as a Transsexual.*

[1] The district judge first found under Count II that Eastern discharged Ulane because she was a transsexual, and that Title VII prohibits discrimination on this basis.[7] While we do not condone discrimination in any form,[8] we are constrained to hold that Title VII does not protect transsexuals, and that the district court's order on this count therefore must be reversed for lack of jurisdiction.

Section 2000e–2(a)(1) provides in part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to ... discharge any individual ... because of such individual's ... sex ....

Other courts have held that the term "sex" as used in the statute is not synonymous with "sexual preference." *See, e.g., Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (per curiam); *De Santis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329–30 (9th Cir.1979); *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 326–27 (5th Cir.1978); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir.1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978). The district court recognized this, and agreed that homosexuals and transvestites do not enjoy Title VII protection, but distinguished transsexuals as persons who, unlike homosexuals and transvestites, have sexual *identity* problems; the judge agreed that the term "sex" does not comprehend "sexual preference," but held that it does comprehend "sexual identity." The district judge based this holding on his finding that "sex is not a cut-and-dried matter of chromosomes," but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.[9] The district judge further supported his broad view of Title VII's coverage by recognizing Title VII as a remedial statute to be liberally construed. He concluded that it is reasonable to hold that the statutory word "sex" literally and scientifically applies to transsexuals even if it does not apply to homosexuals or transvestites.[10] We must disagree.

Even though Title VII is a remedial statute, and even though some may define "sex" in such a way as to mean an individual's "sexual identity," our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex. *See United States Department of Labor v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir.1981). The district judge did recognize that Congress manifested an intention to exclude homosexuals from Title VII coverage. Nonetheless, the judge defended his conclusion that Ulane's broad interpretation of the term "sex" was reasonable and could therefore

7. Not all of the experts who testified agreed that Ulane is a transsexual. (Although doctors attempt to perform sex reassignment surgery only on transsexuals—as opposed, for example, on transvestites or schizophrenics, that an individual has undergone such surgery is not determinative of whether he or she is a true transsexual. *See supra* note 3 and sources cited therein.) If Ulane is not a transsexual, then she is a transvestite. Even in the trial judge's view, transvestites are not covered by Title VII.

8. Eastern presented a substantial amount of testimony and evidence at trial to prove that Ulane's discharge was not due to discrimination against her either as a transsexual or as a female, but we need not reach that issue.

9. The judge did recognize that there may be some argument in the medical community about the definition of sex that he adopted. *See, e.g., supra* notes 5 & 6.

10. Judge Grady explained:

> I have no problem with the idea that the statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex. It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, "sex."

be applied to the statute by noting that transsexuals are different than homosexuals, and that Congress never considered whether it should include or exclude transsexuals. While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.

[2] It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.

When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. "Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir.1977) (citations omitted); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1167 (1971). This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. *See Bradford v. Peoples Natural Gas Co.*, 60 F.R.D. 432, 434–35 & n. 1 (W.D.Pa.1973).

The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation.

Members of Congress have, moreover, on a number of occasions, attempted to amend Title VII to prohibit discrimination based upon "affectational or sexual orientation." [11] Each of these attempts has failed. While the proposed amendments were directed toward homosexuals, *see, e.g., Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 1–2 (1982) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., author of bill); *Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. 6 (1980) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., coauthor

11. *E.g., 94th Congress:* H.R. 166, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 5452, 94th Cong., 1st Sess. (1975); *95th Congress:* H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 775, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 8269, 95th Cong., 1st Sess. (1977); *96th Congress:* H.R. 2074, 96th Cong., 2d Sess. (1980); *97th Congress:* H.R. 1454, 97th Cong., 2d Sess. (1982).

of bill), their rejection strongly indicates that the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals. Furthermore, Congress has continued to reject these amendments even after courts have specifically held that Title VII does not protect transsexuals from discrimination. *Compare* H.R. 1454, 97th Cong., 2d Sess. (1982) (hearing held on Jan. 27, 1982) *with Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. Jan. 8, 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir.1977); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md.1977); *Grossman v. Board of Education*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J.1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 261, 50 L.Ed.2d 181 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978); *see also United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981) (Congress is presumed to know the law and judicial interpretations of it); *United States v. Ambrose*, 740 F.2d 505 at 514 (7th Cir.1984) (Wood, J., concurring and dissenting) (same).

[3] Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress. In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. *See Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir.1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute). This we must not and will not do.

Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

Our view of the application of Title VII to this type of case is not an original one. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (per curiam), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir.1977), the only two circuit court cases we found that have specifically addressed the issue, both held that discrimination against transsexuals does not fall within the ambit of Title VII.[12] In *Sommers*, Budget Marketing fired an anatomical male who claimed to be female once Budget Marketing discovered that he had misrepresented himself as female when he applied for the job. In *Holloway*, Arthur Andersen, an accounting firm, dismissed the plaintiff after he informed his superior that he was undergoing treatment in preparation for sex

12. For examples of district courts that have refused transsexuals Title VII protection, see *Terry v. EEOC*, 25 Empl.Prac.Dec. (CCH) ¶ 31,638, at 19,732–33 (E.D.Wis.1980); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md.1977); *Grossman v. Board of Education*, 11 Fair Empl.Prac.Cas. (BNA) 1196, 1199 (D.N.J.1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 261, 50 L.Ed.2d 181 (1976); *Voyles v. Ralph K. Davies, Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978).

change surgery. We agree with the Eighth and Ninth Circuits that if the term "sex" as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.

B. *Title VII and Ulane as a Female.*

[4] The trial judge originally found only that Eastern had discriminated against Ulane under Count II as a transsexual. The judge subsequently amended his findings to hold that Ulane is also female and has been discriminated against on this basis. Even if we accept the district judge's holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on this basis. All the district judge said was that his previous "findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female." This is insufficient to support a finding that Ulane was discriminated against because she is *female* since the district judge's previous findings all centered around his conclusion that Eastern did not want "[a] *transsexual* in the cockpit" (emphasis added).

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. If Eastern had considered Ulane to be female and had discriminated against her because she was female (*i.e.*, Eastern treated females less favorably than males), then the argument might be made that Title VII applied, *cf. Holloway v. Arthur Andersen*, 566 F.2d at 664 (although Title VII does not prohibit discrimination against transsexuals, "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII") (dicta), but that is not this case. It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual [13]—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.

Since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexuals, we reverse the order of the trial court and remand for entry of judgment in favor of Eastern on Count I and dismissal of Count II.

REVERSED.

13. Because of our holding in section A, however, we need not and do not decide whether Eastern did actually discriminate against Ulane because of her transsexuality.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Mia Macy,
Complainant,

v.

Eric Holder,
Attorney General,
Department of Justice,
(Bureau of Alcohol, Tobacco, Firearms and Explosives),
Agency.

Appeal No. 0120120821

Agency No. ATF-2011-00751

DECISION

On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND[1]

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

[1] The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"),[2] the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.[3]

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011,[4] she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

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[2] It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a "joint employment" relationship may exist where both the Agency and the "staffing firm" may be deemed employers. The Commission makes no determination at this time as to whether or not a "joint employment" relationship exists in this case as this issue is not presently before us.

[3] On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency's Personnel Security Branch had received Complainant's completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he "hope[d] to finish your investigation the first of next week."

[4] In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency's EEO Counselor on May 5, 2011. However, the EEO Counselor's report indicates that the initial contact occurred on May 10, 2011.

else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation.[5] Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office." The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy." The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at http://www.justice.gov/jmd/ps/chpt4-1.html (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

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[5] The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping." However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination - one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims -- is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination

based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim "based on sex (female)" as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC's Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant's complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping." In response to her complaint, the Agency stated that claims of gender identity discrimination "cannot be adjudicated before the [EEOC]." See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency's communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII's sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint's procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC's responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government's efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination *based on ...sex ....*" 42 U.S.C. § 2000e-16(a) (emphasis added). *Cf.* 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or 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 . . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the

statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230-31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n 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." Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." Schwenk, 204 F.3d at 1201-02; see also Price Waterhouse, 490 U.S. at 254-55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.'" See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.[6]

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." See Schwenk, 204 F.3d at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not

[6] There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, see Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways.[7] And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

[7] See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' – i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201-02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner "considered herself a transsexual and that she planned to seek sex reassignment surgery in the future." Id. at 1202. According to the court, the guard had targeted the transgender prisoner "only after he discovered that she considered herself female[,]" and the guard was "motivated, at least in part, by [her] gender"—that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor." Id. On these facts, the Ninth Circuit readily concluded that the guard's attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure "to conform to socially-constructed gender expectations." Id. at 1201-02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females - i.e., "as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity" - is actionable discrimination "because of sex." Id. (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank's refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

Similarly, in Smith v. City of Salem, the plaintiff was "biologically and by birth male." 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). Id. Smith's co-workers began commenting that her appearance and mannerisms were "not masculine enough." Id. Smith's employer later subjected her to numerous psychological evaluations, and ultimately suspended her. Id. at 569-70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, "both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual." Id. at 571 (emphasis added).

The district court rejected Smith's efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on "transsexuality." Id. The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court's conclusion:

> cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex

> stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574–75.[8]

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition." Id. at 1320–21. According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, the Eleventh Circuit explained:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality,* 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

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[8] See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'" and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes'").

> Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).[9]

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." Id. at 305. In any case, Schroer was "entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping . . . ." Id.[10]

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

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[9] But see Etsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4-5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

[10] The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is "*literally* discrimination 'because of . . . sex.'" Schroer, 577 F. Supp. 2d at 308; see also id. at 306-07 (analogizing to cases involving discrimination based on an employee's religious conversion, which undeniably constitutes discrimination "because of . . . religion" under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

> [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] 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. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; see also Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility,[11] by a desire to protect people of a certain gender,[12] by assumptions that disadvantage men,[13] by gender stereotypes,[14] or by the desire to accommodate other people's prejudices or discomfort.[15] While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the Price Waterhouse Court

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[11] See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination "because of sex"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[12] See Int'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

[13] See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

[14] See, e.g., Price Waterhouse, 490 U.S. at 250-52.

[15] See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

noted, while "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment action, the central question is always whether the "employer actually relied on [the employee's] gender in making its decision." Id. at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title VII in this manner does not create a new "class" of people covered under Title VII—for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318-19 (noting that "all persons, whether transgender or not" are protected from discrimination and "[a]n individual cannot be punished because of his or her perceived gender non-conformity").

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on . . . sex," and such discrimination therefore violates Title VII. [16]

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

[16] The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that "[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of . . . sex" under Title VII." EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

—v.—

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

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Gloucester County School Board's policy, which prohibits school administrators from allowing boys and girls who are transgender to use the restrooms that other boys and girls use, constitutes "discrimination" "on the basis of sex" under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)?

2. Whether the Department of Education's conclusion that 34 C.F.R. § 106.33 does not authorize schools to exclude boys and girls who are transgender from the restrooms that other boys and girls use—as set forth in an opinion letter, statement of interest, and amicus brief—is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997)?

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INTRODUCTION

Gavin Grimm ("Gavin") is a 17-year-old boy who is a senior at Gloucester High School in Gloucester, Virginia. He is transgender and has been formally diagnosed with gender dysphoria. In accordance with his prescribed medical treatment, Gavin has received testosterone hormone therapy and undergone chest reconstruction surgery. He has legally changed his name, and he has a Virginia ID card and an amended birth certificate stating that he is male. He appears no different from any other boy his age and uses the men's restrooms at restaurants, shopping malls, the doctor's office, the library, movie theaters, and government buildings.

When Gavin came out as a boy, administrators at his school agreed he should use the boys' restrooms, just as he does outside of school. With their support, Gavin did so for almost two months without incident. But in response to complaints from some adults in the community, the Gloucester County School Board (the "Board") overruled its own administrators and enacted a new policy targeting students it deemed to have "gender identity issues." The policy's purpose, design, and inevitable effect was to treat Gavin differently from other boys and exclude him from the restrooms that all other boys use. JA 69.

Under the Board's policy, Gavin is excluded from the common restrooms and publicly stigmatized as unfit to use the same restrooms as all other students. That discriminatory treatment has far-reaching consequences for Gavin, interfering with his ability to access the educational opportunities of high school more generally. At school, at work, or in

society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community.

Title IX and its regulations allow schools to provide restroom facilities "on the basis of sex," 34 C.F.R. § 106.33, but those restrooms must be equally available to all boys and all girls, including boys and girls who are transgender. The only way Gavin can access those restrooms is if he uses the same common restrooms as other boys. That is the only option that provides restrooms on the basis of sex without "subject[ing]" Gavin "to discrimination." 20 U.S.C. § 1681(a). It is, therefore, the only option that complies with Title IX.

STATEMENT OF THE CASE

A. Factual Background.[1]

When Gavin was born, the hospital staff identified him as female, but from a young age, Gavin knew that he was a boy. JA 65. Like other boys, Gavin has a male gender identity. JA 61.

Everyone has a gender identity. JA 86. It is an established medical concept, referring to "a person's deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female." *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862

[1] The uncontroverted facts alleged in the Complaint and declarations must be taken as true on both a motion to dismiss and a motion for preliminary injunction. *See Schindler Elev. Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 n.2 (2011); *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976).

(Dec. 2015) ("APA Guidelines"), https://goo.gl/JJ98l3. Most people have a gender identity that matches the sex they are identified as at birth. But people who are transgender have a gender identity that differs from the sex they are identified as at birth.[2]

Like many transgender students, Gavin succeeded at school until the onset of puberty, when he began to suffer debilitating levels of distress. JA 65. By the end of his freshman year of high school, Gavin's distress became so great that he was unable to attend class. *Id.* Gavin came out to his parents as a boy and, at his request, began seeing a psychologist with experience counseling transgender youth. *Id.*

The psychologist diagnosed Gavin with gender dysphoria, a condition marked by the persistent and clinically significant distress caused by incongruence between an individual's gender identity and sex identified at birth. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 5th edition (302.85) (5th ed. 2013). Although gender

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[2] Guidelines from the American Psychological Association no longer use the term "biological sex" when referring to sex identified at birth, usually based on a cursory examination of external anatomy. *See* APA Guidelines at 861-62. "Biological sex" is an inaccurate description of a person's sex identified at birth because there are many biological components of sex "including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual." *Radtke v. Misc. Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund,* 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012). In addition, research indicates that gender identity has a biological component. *See* AAP Amicus. When the components of sex do not all align as typically male or typically female, individuals live their lives according to gender identity. *See* interACT Amicus.

dysphoria is a serious medical condition, it "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender & Gender Variant Individuals* (2012), at https://goo.gl/iXBM0S.

There is a medical and scientific consensus that the proper treatment for gender dysphoria is for boys who are transgender to live as boys and for girls who are transgender to live as girls.[3] That includes using names and pronouns consistent with one's identity, and grooming and dressing in a manner typically associated with that gender. When medically appropriate, treatment also includes hormone therapy and surgery. JA 88.[4] The goal of

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[3] *See, e.g.*, Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198 (July 2013) ("AAP Policy"), https://goo.gl/Fk3fZ5; Am. Med. Ass'n, *Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients* (2016), https://goo.gl/lG50xS; Am. Psychiatric Ass'n, *Position Statement on Access to Care for Transgender and Gender Variant Individuals* (2012), https://goo.gl/U0fyfv; Am. Psychological Ass'n, *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, 64 Am. Psychologist 372-453 (2008), https://goo.gl/8idKBP; Wylie C. Hembree, et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94(9) J. Clinical Endocrinology & Metabolism 3132-54 (Sept. 2009) ("Endocrine Society Guidelines"), https://goo.gl/lOroQj.

[4] Under widely accepted standards of care, chest reconstruction surgery is authorized for 16-year-olds but genital surgeries are generally not recommended for minors. *See* World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 21 (7th ed. 2012), https://goo.gl/WiHTmz.

treatment is to eliminate the debilitating distress. *Id*. If left untreated, gender dysphoria can lead to anxiety, depression, self-harm, and even suicide. JA 93. When gender dysphoria is properly treated, transgender individuals experience profound relief and can go on to lead healthy, happy, and successful lives. *See* Am. Acad. of Pediatrics Amicus ("AAP Amicus"); Dr. Ben Barnes Amicus (describing life experiences of transgender Americans).

The ability of transgender individuals to live consistently with their identity is critical to their health and well-being. JA 89-90; Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198, 201 (July 2013)("AAP Policy"); APA Guidelines at 846-47. Because so much of their daily lives takes place at school, transgender students' activities at school have a particularly significant impact on their ability to thrive. *See* Am. Psychological Ass'n & Nat'l Ass'n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015) ("APA & NASP Resolution"), https://goo.gl/AcXES2.

As part of treatment for Gavin's gender dysphoria, Gavin's psychologist helped him begin living as a boy and referred him to an endocrinologist to be evaluated for hormone therapy. JA 66-67. The psychologist also gave Gavin a "treatment documentation letter" confirming that he was receiving treatment for gender dysphoria and stating that he should be treated as a boy in all respects, including when using the restroom. JA 66. Based on his treatment protocol, Gavin legally changed his

name to Gavin and began using male pronouns. JA 67. He wore his clothing and hairstyles in a manner typical of other boys and began using the men's restrooms in public venues, including restaurants, libraries, and shopping centers, without encountering any problems. *Id.*

In August 2014, before beginning his sophomore year, Gavin and his mother met with the high school principal and guidance counselor to explain that Gavin is transgender and, consistent with his identity and medical treatment, would be attending school as a boy. JA 67-68. At that time, the Board did not have policies addressing transgender students. *See* App. 2a. Gavin initially requested to use a restroom in the nurse's office, but soon felt stigmatized and isolated using a different restroom from everyone else. JA 68.

After a few weeks of using the restroom in the nurse's office, Gavin sought permission to use the boys' restrooms. On October 20, 2014, with the principal's support, Gavin began using the boys' restrooms, and he did so for seven weeks without incident. *Id.* The principal and superintendent informed the Board but otherwise kept the matter confidential. *Id.*; App. 3a.[5]

Some adults in the community, however, learned that a boy who is transgender was using the boys' restrooms at school. JA 68. They contacted the Board to demand that the student (who was not publicly identified as Gavin until later) be barred

[5] Gavin uses a home-bound program for physical education and, therefore, does not use the school locker rooms. JA 68.

from the boys' restrooms. JA 68-69. The Board has not disclosed the nature or source of the complaints.

The Board considered the matter at a private meeting and took no action for several weeks. App. 3a-4a. Apparently unsatisfied with the results of the private meeting, one Board member alerted the broader community by proposing a policy for public debate at the Board's meeting on November 11, 2014. JA 69. The policy's operative language stated:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. The policy categorically prohibits administrators from allowing any boy who is transgender to use any boys' restroom (or allowing any girl who is transgender to use any girls' restroom). The policy does not define "biological gender."[6]

The school gave Gavin and his parents no notice that the Board would discuss his restroom use at its meeting. JA 70. After learning about the meeting through social media, Gavin and his parents decided to speak against the proposed policy. JA 69-70. Gavin told the Board:

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[6] Petitioner sometimes refers to genital characteristics, Pet. Br. 11, sometimes to chromosomes, *id.* at 28, sometimes to reproductive organs, *id.*, and sometimes to characteristics that "subserve biparental reproduction," *id.* at 32.

> I use the restroom, the men's public restroom, in every public space in Gloucester County and others. I have never once had any sort of confrontation of any kind.
>
> . . .
>
> All I want to do is be a normal child and use the restroom in peace, and I have had no problems from students to do that—only from adults.
>
> . . .
>
> I did not ask to be this way, and it's one of the most difficult things anyone can face.
>
> . . .
>
> I am just a human. I am just a boy.

Recorded Minutes of the Gloucester Cty. Sch. Bd., Nov. 11, 2014, at 25:00 – 27:22 ("Nov. 11 Minutes"), https://goo.gl/dXLRg7. The Board deferred voting on the policy until its next meeting. JA 71.

Before its next meeting, the Board issued a press release announcing plans for "adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms." App. 3a. In addition, the press release announced "plans to designate single stall, unisex restrooms . . . to give all students the option for even greater privacy." *Id.* The Board also acknowledged that it had reviewed guidance from the Department of Education advising schools that transgender students should generally be treated consistently with their gender identity. App. 1a-2a.

Speakers at the December Board meeting nonetheless demanded that Gavin be excluded from the boys' restrooms, and they threatened to vote Board members out of office if they refused to pass the new policy. JA 72. With Gavin in attendance, several speakers pointedly referred to Gavin as a "young lady." *Id.* One speaker called Gavin a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* "Put him in a separate bathroom if that's what it's going to take," said another. Recorded Minutes of the Gloucester Cty. Sch. Bd., Dec. 9, 2014, at 58:56 ("Dec. 9 Minutes"), https://goo.gl/63Vi4Q.

The Board passed the policy by a 6-1 vote. JA 72. The dissenting Board member warned that the policy conflicted with guidance and consent agreements from the Department of Justice and the Department of Education. *See* Dec. 9 Minutes at 2:07:02.

The Board subsequently converted a faculty restroom and two utility closets into single-user restrooms. JA 73. Although any student is allowed to use those restrooms, no one actually does so. JA 73-74; Pet. App. 151a. Everyone knows they were created for Gavin. JA 74; Pet. App. 151a. The converted single-user restrooms are located far away from Gavin's classes and the restrooms used by his classmates. JA 73; Pet. App. 150a-151a.

Using the single-stall restrooms would also be demeaning and stigmatizing. They signal to Gavin and the world that he is different, and they send a public message to all his peers that he is not fit to be treated like everyone else. JA 74, 91-92; Pet. App. 151a. In the words of one of the policy's supporters,

the separate restrooms divide the students into "a thousand students versus one freak." Dec. 9 Minutes at 1:22:53.

Of course, the prospect of using the girls' restrooms is unimaginable for Gavin. JA 73-74. It would not only be humiliating; it would also conflict with Gavin's treatment for gender dysphoria, placing his health and well-being at risk. JA 73-74, 90. The girls' restrooms are just as untenable for Gavin as they would be for any other boy.

Gavin does everything he can to avoid using the restroom at school. JA 74. As a result, he has developed painful urinary tract infections and is distracted and uncomfortable in class. *Id.* If Gavin has to use the restroom, he uses the nurse's restroom, but he feels ashamed doing so. *Id.* Everyone who sees Gavin enter the nurse's office knows he is there because he has been barred from the restrooms other boys use. *Id.*; Pet. App. 151a-152a. It makes him feel "like a walking freak show" and "a public spectacle" before the entire community. Pet. App. 150a-151a.

Any teenager, whether transgender or not, would be harmed by being singled out and shamed in front of his peers. JA 90-93; AAP Amicus. But transgender students are particularly vulnerable. JA 90-91. Preventing transgender students from living in a manner that is consistent with their gender identity puts them at increased risk of debilitating depression and suicide. *See id.*; AAP Amicus. According to a nationally recognized expert in the treatment of gender dysphoria who evaluated Gavin, the policy "places him at extreme risk for

immediate and long-term psychological harm." JA 74-75, 94.[7]

The Board's policy has been in place since December of Gavin's sophomore year; he is now a senior, scheduled to graduate in June 2017.[8] During that time, Gavin has continued to receive treatment for gender dysphoria. In December 2014, Gavin began hormone therapy, which has altered his physical appearance and deepened his voice. JA 67. In June 2015, Gavin received an ID card from the Virginia Department of Motor Vehicles identifying him as male. JA 80-82. In June 2016, Gavin had chest reconstruction surgery. Following that surgery, the Virginia courts issued an order legally changing his gender under state law, and the Virginia Department of Health issued an amended birth certificate listing Gavin's sex as male.[9]

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[7] The preliminary injunction record was compiled in July 2015, after Gavin's sophomore year. On remand, Gavin will present evidence of the continued harm he has endured under the policy. For example, Gavin's distress under the policy was so severe that he spent several months taking online courses at an off-site facility so as to avoid being stigmatized in front of his classmates at school. Gavin has also been unable to attend school events where there are no accessible single-user restrooms for him to use.

[8] After graduation, Gavin will remain subject to the policy for purposes of any alumni activities or attendance at school events.

[9] On review of a motion to dismiss, this Court may take judicial notice of these documents as public records. *See Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986); Wright & Miller, *et al.*, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004). On January 28, 2017, respondent filed a request to lodge these documents with the Court.

Despite all this, the Board continues to exclude Gavin from the common boys' restrooms.[10]

B. Experience of Other Transgender Students.

Boys and girls who are transgender are attending schools across the country. While transgender students have long been part of school communities, it is only in the last couple decades that there has been more widespread access to the medical and psychological support that they need. *See* AAP Amicus. Beginning in the early 2000s, as a result of advances in medical and psychological care, transgender youth finally began to receive the treatment necessary to alleviate the devastating pain of gender dysphoria and live their lives in accordance with who they really are. *See* Endocrine Society Guidelines at 3139-40.

With hormone blockers and hormone therapy, transgender students develop "physical sexual attributes," Pet. Br. 20, typical of their gender identity—not the sex they were identified as at birth. Hormone therapy affects bone and muscle structure,

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[10] The Board's position is even more extreme than the controversial North Carolina statute challenged in *Carcaño v. McCrory*, No. 1:16-CV-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016), which establishes a concept of "biological sex" defined as the sex "stated on a person's birth certificate." N.C. Gen. Stat. Ann. § 143-760. Under the North Carolina statute, "transgender individuals may use facilities consistent with their gender identity—notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery—as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States." *Carcaño*, 2016 WL 4508192, at *6 n.13.

alters the appearance of a person's genitals, and produces secondary sex characteristics such as facial and body hair in boys and breasts in girls. *See* Endocrine Society Guidelines at 3139-40. Transgender children who receive hormone blockers never go through puberty as their birth-designated sex. *Id.* at 3140-43. For example, a boy who is transgender and receives hormone blockers and hormone therapy will develop the height, muscle mass, and bone structure typical of other boys. He will be exposed to the same levels of testosterone as other boys as he goes through puberty. *Id.*

Many transgender students begin school without classmates and peers knowing they are transgender. Many others transfer to a new school after transitioning. Requiring these students to use separate restrooms forces them to reveal their transgender status to peers or to constantly make up excuses for using separate restrooms. *See, e.g.*, *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *2-3 (S.D. Ohio Sept. 26, 2016), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016) (recounting testimony from a girl who is transgender in elementary school that "when other students line up to go to the restroom, she leaves the line to go to a different restroom, and other kids say, 'Why are you going that way? You're supposed to be over here.'" (internal quotation marks and brackets omitted)); *see also* Transgender Student Amicus; School Administrators Amicus.

When excluded from the common restrooms, transgender students often avoid using the restroom entirely, either because it is too stigmatizing or too

difficult to access. They suffer infections and other negative health consequences as a result of avoiding urination. JA 90. The exclusion also increases their risk of depression and self-harm. *Id.*; *Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016), *appeal docketed*, No. 16-3522 (7th Cir. Sept. 26, 2016) (suicidal ideation, depression, migraines, attempts to avoid urination).

In addition to the documented medical harms, limiting transgender students to single-user restrooms has practical consequences. In many schools, the single-user restrooms (if they exist at all) are far away and difficult to access. With only a few minutes between classes, and long distances to travel, transgender students frequently have trouble using the restroom and attending class on time. *See Highland*, 2016 WL 5372349, at *3 (for fourth-grade girl who is transgender to use staff restroom, "a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class"); *Whitaker*, 2016 WL 5239829, at *2 (boy who is transgender could not use single-user restrooms because they "were far from his classes and because using them would draw questions from other students"); *see also* Transgender Student Amicus.

In light of these harms, the American Psychological Association and the National Association of School Psychologists have adopted resolutions calling upon schools to provide transgender students "access to the sex-segregated facilities, activities, and programs that are consistent with their gender identity." APA & NASP Resolution.

The National Association of Secondary School Principals, the National Association of Elementary School Principals, and the American School Counselor Association have taken the same position. *See* Gender Spectrum, Transgender Students and School Bathrooms: Frequently Asked Questions (2016), https://goo.gl/Z4xejp; Nat'l Ass'n of Secondary Sch. Principals, *Position Statement on Transgender Students* (2016) ("NASSP Statement"), https://goo.gl/kcfImn.

Those recommendations are consistent with policies that already exist across the country. Institutions ranging from the Girl Scouts[11] and Boy Scouts[12] to the United States military[13] to the Seven Sisters colleges[14] to the National Collegiate Athletic Association[15] already recognize boys who are transgender as boys and recognize girls who are transgender as girls.

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[11] *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, https://goo.gl/364fXI ("[I]f the child is recognized by the family and school/community as a girl and lives culturally as a girl, then Girl Scouts is an organization that can serve her in a setting that is both emotionally and physically safe.").

[12] *See* Boy Scouts of America, *BSA Addresses Gender Identity* (Jan. 30, 2017), https://goo.gl/WxNoGY.

[13] *See* Dep't of Def. Instruction No. 1300.28: In-Service Transition for Transgender Service Members (June 30, 2016), https://goo.gl/p9xsaB.

[14] *See* Susan Svrluga, *Barnard Will Admit Transgender Students. Now All 'Seven Sisters' Colleges Do.*, Wash. Post (June 4, 2015), https://goo.gl/g0rALA.

[15] Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2.

C. Title IX and 34 C.F.R. § 106.33.

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).

Pursuant to Congress's delegation of authority, the Department of Health, Education, and Welfare ("HEW") promulgated implementing regulations, which were subsequently adopted by the Department of Education (the "Department"), the agency with primary responsibility for enforcing Title IX.[16] The regulations state, as a general matter, that schools may not, on the basis of sex, "provide aid, benefits, or services in a different manner" or "[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31. In certain narrow circumstances, the regulations permit differential treatment on the basis of sex, but only so long as the differential treatment does not subject anyone to discrimination in violation of the statute. One of those regulations authorizes schools to "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." 34 C.F.R. § 106.33.[17]

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[16] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52858-01.

[17] There is no statutory exception for single-sex restrooms. Petitioner mistakenly asserts that the restroom regulation

The restroom regulation was enacted in 1975. Thereafter, as a growing number of transgender students began to medically and socially transition, schools sought guidance regarding which restrooms these students should use. App. 10a.

In 2010, the Department began soliciting information from schools about the experience of transgender students. App. 10a. In 2013, after several years of study, the Department concluded that the only way to ensure that transgender students are not "subjected to discrimination" prohibited under Title IX is to allow transgender students to use the same common restrooms as other students, in keeping with their gender identity. App. 13a-14a. The Department also concluded that transgender students could be integrated into common restrooms while accommodating the privacy of all students in a non-stigmatizing manner. *Id.*

Since 2013, the Department has advised schools that they may not, consistent with Title IX and 34 C.F.R. § 106.33, discriminate against students who are transgender. In 2013 and 2014, the Department resolved two enforcement actions against school districts to protect transgender

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implements one of Title IX's statutory exceptions, Pub. L. 92-318 § 907 (codified at 20 U.S.C. § 1686), which authorizes schools to provide "separate living facilities." Pet. Br. 8. That statutory provision is implemented by a different regulation, 34 C.F.R. § 106.32, which is titled "Housing" and specifically references Pub. L. 92-318 § 907 as a source of authority. In contrast, the restroom regulation does not reference the statutory exception for living facilities.

students' access to common restrooms that match their identity. Pet. App. 124a. In 2014, the Department also advised schools in a guidance document that "a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Pet. App. 100a-101a.

After the Board adopted its new policy, the Department issued an opinion letter—which petitioner refers to as the "Ferg-Cadima letter"—reaffirming the Department's position that the restroom regulation does not authorize schools to exclude boys who are transgender from the boys' restrooms or girls who are transgender from the girls' restrooms. Pet. App. 121a-125a. The next month, the United States filed a statement of interest elaborating on its interpretation of Title IX in *Tooley v. Van Buren Pub. Sch.*, No. 2:14-CV-13466 (E.D. Mich. Feb. 20, 2015). App. 62a. The United States filed an additional statement of interest before the district court in this case, Pet. App. 160a-82a, and an amicus brief before the Fourth Circuit, App. 40a-67a.

The Department's interpretation of the statute and regulation is consistent with the interpretations of other agencies that enforce statutory protections against sex discrimination, including interpretations promulgated after extensive notice-and-comment rulemaking. Pet. App. 24a.[18]

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[18] *See* Discrimination on the Basis of Sex, Final Rule, RIN 1250-AA05, 81 Fed. Reg. 39,108-01 (June 15, 2016) (to be codified at

D. Proceedings Below.

The day after the 2014-15 school year ended, Gavin filed a complaint and motion for preliminary injunction against the Board, arguing that the Board's new policy discriminates against him on the basis of sex, in violation of Title IX and the Equal Protection Clause. JA 1, 61-79. The Complaint seeks injunctive relief and damages for both claims. JA 78.

The district court denied Gavin's motion for a preliminary injunction and granted the Board's cross-motion to dismiss the Title IX claim. Pet. App. 82a-117a. The Board's cross-motion to dismiss the Equal Protection claim is still pending. Pet. App. 13a n.3.

Gavin appealed the denial of a preliminary injunction and asked the Fourth Circuit to exercise pendent appellate jurisdiction over the dismissal of his Title IX claim. Pl.'s C.A. Br. 1. The Fourth Circuit reversed the dismissal of the Title IX claim and vacated the denial of a preliminary injunction. Pet. App. 7a.

Applying *Auer v. Robbins*, 519 U.S. 452 (1997), the court determined that the Department's

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41 C.F.R. pt. 60-20); Family Violence Prevention and Services Programs, Final Rule, 81 Fed. Reg. 76,446 (Nov. 2, 2016) (to be codified at 45 C.F.R. pt. 1370); Nondiscrimination in Health Programs and Activities, Final Rule, RIN 0945–AA02, 81 Fed. Reg. 31,376 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Final Rule, 81 Fed. Reg. 64,763, 64,779 (Sept. 21, 2016) (to be codified at 22 C.F.R. pt. 5).

interpretation of 34 C.F.R. § 106.33 was not plainly erroneous or inconsistent with the regulation's text. Pet. App. 13a-24a. The court also concluded that the Department's interpretation reflected its fair and reasoned judgment and was not a post-hoc litigating position. Pet. App. 23-24a.

The court noted that privacy interests of other students regarding nudity would not be implicated by "[Gavin's] use—or for that matter any individual's appropriate use—of a restroom." Pet. App. 25a-26a n.10. Students who want even greater privacy, the court noted, may also use one of the new single-stall restrooms. Pet. App. 37a-38a (Davis, J., concurring).

Senior Judge Davis concurred and emphasized that "[t]he uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, [Gavin] experiences daily psychological harm that puts him at risk for long-term psychological harm." Pet. App. 37a.

Judge Niemeyer dissented. Pet. App. 40a-60a. He did not identify any privacy concerns raised by the facts of this case and acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a. Judge Niemeyer instead focused on transgender students' use of locker rooms and potential exposure to "private body parts" in that setting. Pet. App. 52a.

After the Fourth Circuit's ruling, the Department of Education and Department of Justice issued a "Dear Colleague letter" providing guidance to school districts on how to provide transgender students equal access to school resources, as required by Title IX. Pet. App. 126a-142a. The Department

also provided examples of school policies from across the country that integrate transgender students into single-sex programming and facilities.[19]

On remand, the district court entered a preliminary injunction allowing Gavin to use the boys' restrooms at school, Pet. App. 71a-72a, and the district court and Fourth Circuit denied the Board's request to stay the injunction pending appeal, Pet. App. 73a-81a.

On August 3, 2016, this Court granted the Board's application to stay and recall the mandate and stay the preliminary injunction pending disposition of the Board's petition for certiorari. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).[20]

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[19] U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2, 7-8 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM.

[20] Following this Court's stay, an additional five district courts have evaluated whether the Department's interpretation of 34 C.F.R. § 106.33 is entitled to deference. All but one agreed with the Fourth Circuit. *See Whitaker*, 2016 WL 5239829, at *3; *Highland*, 2016 WL 5372349, at *18; *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *see also Carcaño*, 2016 WL 4508192, at *13 (following *G.G.* as binding precedent). *But see Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), *appeal docketed*, No. 16-11534 (5th Cir. Oct. 21, 2016).

Two of those courts issued preliminary injunctions to transgender students based both on *Auer* deference and the courts' independent interpretation of Title IX and the Equal Protection Clause. *See Highland*, 2016 WL 5372349, at *8-19;

SUMMARY OF ARGUMENT

I. Under the plain text of Title IX, Gavin has stated a claim on which relief can be granted. Under the Board's policy, Gavin is "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a). Gavin simply asks the Court to apply the statute as written.

A. The Board's policy discriminates against Gavin by excluding him from the common boys' restrooms. Gavin cannot use the girls' restrooms. To do so would be deeply stigmatizing, impossible as a practical matter, and it would be directly contrary to his medical treatment for gender dysphoria. His only other option is to use the nurse's office or separate single-user restrooms that no other student is required to use.

Whitaker, 2016 WL 5239829, at *3-4. The Sixth and Seventh Circuits denied the school districts' motions to stay those injunctions pending appeal. *See Dodds v. U.S. Dep't of Educ.*, No. 16-4117, 2016 WL 7241402, at *2 (6th Cir. Dec. 15, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, ECF 19 (7th Cir. Nov. 10, 2016).

Lower courts have also held that excluding men who are transgender from men's restrooms and women who are transgender from women's restrooms violates Title VII. *See Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016).

By forcing Gavin, and Gavin alone, to use these separate facilities, the Board's policy humiliates and stigmatizes Gavin in front of his peers and marks him as unfit to use the same restrooms as everyone else. This discriminatory treatment has far-reaching consequences. According to experts in child health and welfare, singling out transgender students and excluding them from common restroom facilities has a devastating impact on their physical and mental well-being and their ability to thrive in school.

B. The Board's discriminatory treatment of Gavin is "on the basis of sex." The policy uses the undefined criterion of "biological *gender*" to target students who are transgender and exclude them from common restrooms. The sole purpose and effect of the policy is to single out Gavin for different treatment from other boys. By targeting Gavin in this manner, the policy discriminates against him because of the sex-based characteristics that make him transgender. And the policy treats him differently because his transgender status contravenes sex-based stereotypes and assumptions, a long-recognized form of sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[21] Accordingly, the Board's discriminatory treatment of Gavin as a boy who is transgender is "on the basis of sex."

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[21] This Court looks to its Title VII precedents when interpreting Title IX. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). To the extent there are differences between the two statutes, Title IX is broader. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

C. Petitioner argues that Title IX provides no relief to Gavin because the legislators who passed the statute were "principally motivated to end discrimination against women," Pet. Br. 6, not sex discrimination against transgender individuals. But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Although Congress may not have had a boy like Gavin in mind, the statute's literal terms protect all persons from all sex-based discrimination.

D. The restroom regulation, 34 C.F.R. § 106.33, does not authorize the Board's discriminatory policy. While the regulation authorizes *differential* treatment on the basis of sex, it cannot—and does not purport to—authorize *discrimination*. Accordingly, the regulation authorizes schools to provide separate restrooms for boys and girls, but it does not allow schools to use additional sex-based criteria to exclude transgender students from those common restrooms. By singling out transgender students and excluding them from the common restrooms, the Board's policy does what the statute forbids.

II. Petitioner seeks to justify its discriminatory policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But administrative concerns cannot justify discrimination forbidden by the statute. And, in any event, the actual experience of schools, colleges, athletic organizations, and other institutions across the country shows that schools can integrate transgender individuals without any of these

speculative concerns arising. Petitioner's allegedly intractable problems have simple solutions, and none of them is actually relevant to Gavin and his use of the restroom.

A. Gavin has never argued that the Board should accept his "mere assertion" that he is transgender. He has provided ample corroboration from his doctors, his parents, and his state identification documents. He is following a treatment protocol from his healthcare providers in accordance with widely accepted standards of care for treating gender dysphoria. If school administrators have legitimate concerns that a person is pretending to be transgender, a letter from the student's doctor or parent can easily provide corroboration.

B. Schools need not—and cannot—discriminate in order to protect the privacy interests of students. Gavin's use of the restrooms does not implicate any privacy concerns related to nudity, especially in light of the simple urinal dividers and privacy strips the Board installed. Difference can be discomfiting, but it cannot justify discrimination based on "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

C. Petitioner's speculation about locker rooms and sports teams is similarly unfounded. School districts across the country have addressed these issues without categorically banning transgender students. Indeed, school athletic associations—including the National Collegiate Athletic Association and the Virginia High School

League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams.

III. The Department agrees that its regulation does not authorize the Board's discriminatory policy, and its interpretation provides an additional reason for rejecting the Board's argument. None of petitioner's arguments for withholding *Auer* deference withstands scrutiny.

IV. Finally, the doctrine of constitutional avoidance cannot support the Board's interpretation of Title IX and the restroom regulation. *Pennhurst* does not apply to Gavin's claims for injunctive relief, and the Board has long been on notice that it is potentially liable for any form of intentional discrimination under the statute.

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

ARGUMENT

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). Even if the Department's guidance documents are withdrawn by the new administration, *see* Pet. Br. 25, the meaning of Title IX and 34 C.F.R. § 106.33 will remain the same. Respondent agrees with petitioner that this Court can—and should—resolve the underlying question of whether the Board's policy violates Title IX.

I. THE BOARD'S POLICY VIOLATES THE PLAIN TEXT OF TITLE IX.

The "starting point in determining the scope of Title IX is, of course, the statutory language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Under the plain text of the statute, Gavin has stated a claim on which relief can be granted: He has been "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a).

A. The Board's Policy Subjects Gavin To Discrimination.

Before the Board adopted its new policy, Gavin was treated the same as other boys. But because he is transgender, the Board's new policy singles Gavin out for different treatment and bars him from using the common restrooms for boys. Instead, he is relegated to single-stall facilities that no other student uses. He, and only he, must use restrooms that humiliate him in front of his peers and stigmatize him as unfit to use the same restrooms as others. He, and only he, is "subjected to discrimination" "on the basis of sex" under the policy. 20 U.S.C. § 1681(a).

1. Forcing Gavin to use the girls' restrooms subjects him to discriminatory treatment.

Gavin is recognized as a boy by his family, his medical providers, the Virginia Department of Health, and the world at large. He has medically and socially transitioned, and he interacts with his teachers and peers as the boy that he is.

Additionally, he is receiving hormone therapy, has had chest reconstruction surgery, and changed his sex to male both on his state-issued identification card and his birth certificate. To confirm his medical care, he also supplied school administrators with a "treatment documentation letter" from his psychologist.

Although petitioner asserts that Gavin is permitted to use the girls' restrooms, Pet. Br. 39, petitioner does not explain how Gavin could actually do so. He can no more use a girls' restroom than could any other boy at Gloucester High School. If Gavin attempted to enter the girls' restrooms, he would create a disturbance and possibly a confrontation with other students or staff who would (accurately) perceive him as a boy intruding upon the girls' restrooms. Additionally, sending Gavin to the girls' restrooms would contravene his medical treatment and stigmatize him as unfit to use the common restrooms all other boys use.

By excluding Gavin from the boys' restrooms, the Board's policy therefore excludes Gavin from using *any* common restrooms. And the Board's policy recognizes this fact. It is premised on the understanding that students "with gender identity issues" will be provided "an alternative . . . facility," JA 69—not that boys who are transgender would use the girls' restrooms. Placing Gavin in the girls' restrooms would undermine the very privacy expectations regarding single-sex restrooms that the Board claims to be protecting.

2. Forcing Gavin to use single-stall restrooms subjects him to discriminatory treatment.

Forcing Gavin into the single-stall restrooms stigmatizes him as unfit to use the same restrooms as others and undermines his medical treatment. No other student is required to use the separate restrooms, and no other student does so. JA 73-74.

The single-stall restrooms are not an accommodation for Gavin as petitioner suggests. Pet. Br. 21. Rather, they were designed to "[p]ut him in a separate bathroom," away from other students. Dec. 9 Minutes at 58:56. The Board's policy sends a message to Gavin and the entire school community that Gavin is unacceptable and not fit to use the same restrooms as others. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on sex "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that refusal to recognize marriages of same-sex couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition"). Using separate restrooms makes Gavin feel like "a public spectacle" and "a walking freak show." Pet. App. 150a-151a.

Our laws have long recognized the "daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625

(1984). "[D]iscrimination itself, . . . by stigmatizing members of the disfavored group[,] . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

Title IX, which protects the equal dignity of all students, regardless of sex, requires courts to take these social realities into account. *Compare Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (claiming that assumption that racial segregation "stamps the colored race with a badge of inferiority" exists "solely because the colored race chooses to put that construction upon it"); *with Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (recognizing that racial segregation of students "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"). *See also* NAACP LDF Amicus. By any objective measure, the Board's policy subjects Gavin to discrimination.

3. The Board's policy deprives Gavin of equal educational opportunity.

Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of'" educational programs and activities on the basis of sex. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)). These specific prohibitions "help give content to the term 'discrimination' in [the educational] context." *Id.* Here, as elsewhere, "discriminatory treatment exerts a pervasive

influence on the entire educational process." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

"The most obvious example" of a Title IX violation is "the overt, physical deprivation of access to school resources." *Davis*, 526 U.S. at 650. At work or at school, access to a restroom is a basic necessity of life. The Occupational Health and Safety Administration has long recognized that "adverse health effects . . . can result if toilets are not available when employees need them."[22]

When boys who are transgender are not allowed to use the boys' restrooms and girls who are transgender are not allowed to use the girls' restrooms, they often avoid using restrooms altogether because the restrooms they are allowed to use are either too stigmatizing or too difficult to access. This can lead to significant health problems and interfere with a student's ability to learn and focus in class. *See* School Administrators Amicus; Transgender Student Amicus. It is also common for the exclusions to increase students' risk of depression and self-harm. *See Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker*, 2016 WL 5239829, at *1 (depression, migraines, suicidal ideation, attempts to avoid urination).

According to experts in mental health, education, and child welfare, the humiliation of being forced to use separate restrooms significantly interferes with transgender students' ability to participate and thrive in school. It disrupts their

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[22] Memorandum on the Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), https://goo.gl/86s5IC.

course of medical treatment; it can compromise their privacy and "out" them as transgender to community members and peers; and it impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. *See* JA 91-92; AAP Amicus. Developing these skills is a fundamental part of the educational process for all adolescents. *See* GLSEN Amicus.

In addition to the policy's harmful stigma, the limited number of single-stall restrooms at Gloucester High School also has practical consequences for Gavin's access to the school's educational benefits. Because the single-stall restrooms and the nurse's office are located far from Gavin's classes, being forced to use separate restrooms means that he is physically unable to take a restroom break between classes without being late and unable to take a restroom break during class without missing a significant amount of class time. Pet. App. 150a-151a. Transgender students in other cases have encountered similar problems. *See Highland*, 2016 WL 5372349, at *3; *Whitaker*, 2016 WL 5239829, at *2.[23]

These harms have been recognized before. "For more than a decade the women of Harvard Law had to sprint across campus to a hastily converted basement janitors' closet." Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*,

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[23] Although forcing Gavin to use separate facilities would stigmatize him and undermine his medical treatment no matter how many facilities were installed, this is not a case in which every set of boys' and girls' restrooms is accompanied by an equally accessible single-user facility. Pet. App. 150a-51a.

53 J. Legal Educ. 475, 479 (2003). Similarly, women entering previously all-male work environments "often discover[ed] that the facilities for women [were] inadequate, distant, or missing altogether." *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (Rovner, J., dissenting). This disparity could "affect their ability to do their jobs in concrete and material ways," even if it sometimes struck men as "of secondary, if not trivial, importance." *Id.* *See also* Justice Sandra Day O'Connor, "'Out Of Order' At The Court: O'Connor On Being The First Female Justice," NPR (March 5, 2013), https://goo.gl/4llXNV ("In the early days of when I got to the court, there wasn't a restroom I could use that was anywhere near that courtroom.").

At school, at work, or in society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community. *See* Transgender Student Amicus; Dr. Ben Barnes Amicus.

B. The Board's Discrimination Is "On The Basis of Sex."

The Board's discriminatory treatment of Gavin is explicitly "on the basis of sex." The Board's policy states that restrooms "shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility." JA 69. The policy adopts an undefined criterion of "biological gender"—a facially sex-based term—for the purpose of excluding transgender students from the restrooms that everyone else uses.

The express purpose and sole effect of the Board's policy is to target Gavin because he is transgender. The preface to the policy recites that "some students question their gender identities," and the only function of the policy is to move those students out of the common restrooms and into "an alternative . . . facility." JA 69. The policy was passed as a direct response to Gavin's use of the boys' restrooms, and the goal of the policy was to "[p]ut him in a separate bathroom." Dec. 9 Minutes at 58:56.

The change in policy had no effect on other students, all of whom continue to use the same restrooms they used before. Transgender students are the only students who are affected. *Cf. City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("The proper focus of the . . . inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[24]

By targeting Gavin for different treatment because he is transgender, the policy impermissibly discriminates "on the basis of sex."[25]

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[24] As discussed *infra* II.A., the Board does not have any generally applicable "objective physiological criteria" for defining what it calls "biological gender," Pet. Br. 39, and cannot explain how the term applies to people who are not transgender.

[25] The vast majority of lower courts have already recognized that discrimination against transgender individuals is discrimination "on the basis of sex." As Senior Judge Davis noted in his concurrence, "[t]he First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination

A person's transgender status is an inherently sex-based characteristic. Gavin is being treated differently because he is a boy who was identified as female at birth. The incongruence between his gender identity and his sex identified at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination "on the basis of sex." *Cf.* interACT Amicus (describing intersex conditions).

Similarly, discrimination against people because they have undergone a gender transition is inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes not just discrimination against boys and girls, but also discrimination against boys who have undergone a gender transition from the sex identified for them at birth. *Cf. Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy).

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against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Pet App. 78a (Davis, J., concurring). *See* App. 52a (collecting cases); Impact Fund Amicus.

In addition, discrimination against transgender people is sex discrimination because it rests on sex stereotypes and gender-based assumptions. By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed, "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Unlike other boys, Gavin had a different sex identified for him at birth. He therefore upsets traditional assumptions about boys, and the Board has singled him out precisely because of that discomfort.

Discriminating against Gavin for upsetting those expectations is sex discrimination. As this Court recognized in *Price Waterhouse*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. at 251 (plurality).[26] Sex discrimination is prohibited by Title IX and other statutes precisely because "[p]ractices that classify [students] in terms of . . . sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

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[26] *Price Waterhouse* thus "eviscerated" earlier lower court decisions that wrongly limited sex discrimination to discrimination based on biological characteristics. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (discussing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984)).

These protections are not limited to "myths and purely habitual assumptions," but also apply to generalizations that are "unquestionably true." *Id.* at 707. To be sure, most boys are identified as boys at birth. It is only a small group of boys for whom this is not true. But generalizations that are accurate for most boys cannot justify discrimination against boys who "fall outside the average description." *Cf. United States v. Virginia*, 518 U.S. 515, 550 (1996). "Even a true generalization about the class is an insufficient reason" to discriminate against "an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708.

Thus, discriminating against Gavin because he is a boy who is transgender discriminates against him on the basis of sex. The fact that the sex discrimination is targeted exclusively at students who are transgender does not change it from discrimination on the basis of sex to a distinct form of discrimination on the basis of being transgender. This Court's precedents make clear that sex discrimination does not have to affect *all* boys or *all* girls the same way in order to be "on the basis of sex." *See Price Waterhouse*, 490 U.S. at 257-58 (discrimination against women who are "macho" and "abrasive" is based on sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against women with children is based on sex); *cf. Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (Title VII does "not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her . . . sex were [not injured].").

The same is true here. The Board's discrimination against Gavin because he is a boy who is transgender is discrimination on the basis of sex, even if no other boy is affected.

C. Title IX's Broad Text Cannot Be Narrowed By Assumptions About Legislative Intent.

Relying heavily on assumptions about legislative intent, petitioner argues that Gavin's claim falls outside the scope of Title IX because the legislators who passed the statute were "principally motivated to end discrimination against women." Pet. Br. 6. But this Court long ago rejected that approach to statutory interpretation. As Justice Scalia explained on behalf of a unanimous Court in *Oncale*: "[S]tatutory 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.

Here, too, the legislators who passed Title IX may have been "principally motivated to end discrimination against women," Pet. Br. 6, but they wrote a broad statute that protects all "person[s]" from discrimination "on the basis of sex." 20 U.S.C. § 1681(a). The statute is not limited to discrimination against women and extends to sex discrimination "of whatever kind." *Oncale*, 523 U.S. at 80. Indeed, this Court has repeatedly instructed courts to construe Title IX broadly to encompass "a wide range of intentional unequal treatment." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Sex-based discrimination that harms transgender individuals is a "reasonably comparable evil" that

falls squarely within the statute's plain text. *Oncale*, 523 U.S. at 79; s*ee* Impact Fund Amicus; Nat'l Women's Law Ctr. Amicus.

There is no question that our understanding of transgender people has grown since Congress passed Title IX. But "changes, in law or in world" may "require [a statute's] application to new instances," *West v. Gibson*, 527 U.S. 212, 218 (1999), and a broadly written statute "embraces all such persons or things as subsequently fall within its scope," *De Lima v. Bidwell*, 182 U.S. 1, 217 (1901). *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980); *Browder v. United States*, 312 U.S. 335, 339 (1941).

For example, Title IX protects students from sexual harassment even though, when Congress enacted the statute, "the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis*, 526 U.S. at 664 (Kennedy, J., dissenting). "If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945).

Petitioner argues that sex discrimination against transgender people is implicitly excluded from Title IX because Congress passed unrelated statutes in 2009 and 2013 that explicitly protect individuals based on "gender identity." *See* Pet. Br. 34 (citing 18 U.S.C. § 249(a)(2) and 42 U.S.C. § 13925(b)(13)(A)). This "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*

LLC, 562 U.S. 223, 242 (2011). Congress's use of the term "gender identity" in 2009 and 2013 says little about what Congress intended in 1972. "When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (internal quotation marks and ellipses omitted).

Failed proposals to add language explicitly to protect transgender individuals are even less probative. *See United States v. Craft*, 535 U.S. 274, 287 (2002). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). *Cf. Massachusetts*, 549 U.S. at 529-30 ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant . . . in 1970 and 1977.").

By 2010, when Congress first considered the Student Non-Discrimination Act, which included express protection for gender identity, lower courts had already held that transgender individuals are protected by existing statutes prohibiting sex discrimination. *See Glenn*, 663 F.3d at 1317-19 (collecting cases). In this context, "another reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer*, 577 F. Supp. at 308. *See* Members of Congress Amicus.

D. The Restroom Regulation Does Not Authorize The Board's Discriminatory Policy.

Petitioner argues that its discriminatory policy is authorized by 34 C.F.R. § 106.33. Pet. Br. 21. The Board assumes that as long as it can show that its new policy assigns restrooms based on "sex," the policy is authorized no matter how discriminatory or harmful it may be.

But a regulation cannot authorize what the statute it implements prohibits. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 62 (2011). The restroom regulation must be read "with a view to [its] place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (internal citation and quotation marks omitted). Unlike the statutory exemptions in 20 U.S.C. § 1681(a), the restroom regulation does not state that the statute's ban on sex-based discrimination "shall not apply" to restrooms. To the contrary, the regulation specifically states that single-sex restrooms may be provided *only* if the facilities are "comparable" for all students. 34 C.F.R. § 106.33. Interpreting the regulation to authorize sex-based distinctions that are discriminatory, as petitioner suggests, would go beyond the regulation's plain text and bring the regulation into conflict with Title IX.

As the Department explained in its amicus brief below, the regulation authorizes schools to provide separate restrooms for boys and girls because it is a social practice that "does not disadvantage or stigmatize any student." App. 60a n.8. This *differential* treatment is authorized as long as it is truly comparable; *discriminatory* practices that deny

equal treatment to all students are not. Gavin does not challenge the provision of separate restrooms. It is not the existence of sex-separated restrooms that harms Gavin, but the Board's new policy that is designed solely to prevent him from using those restrooms.

Before it passed its new policy, the Board provided access to common restrooms in a manner that was consistent with the statute. The Board then abandoned that nondiscriminatory practice and adopted a new policy designed to exclude transgender students from restrooms used by other students. That new policy does what the statute forbids. It "subject[s] [Gavin] to discrimination," "exclude[s] [him] from participation," and "denie[s] [him] the benefits" of school. 20 U.S.C. § 1681(a).

Petitioner wrongly asserts that the regulation permits schools to adopt any restroom policies they wish so long as the criteria are based on sex in any way. But the Board makes a concession that underscores the flaw in its argument. The Board admits that if it created a policy that limited access to restrooms based on "behavioral peculiarities" related to sex—that is, admitting only boys who behaved in stereotypically masculine ways to the boys' restrooms and only girls who behaved in stereotypically feminine ways to the girls' restrooms—that would violate Title IX's statutory language under *Price Waterhouse*. See Pet. Br. 31-32 n.11.

This concession illustrates the error in petitioner's argument that it can create any policy for restroom access as long as it uses some dictionary's definition of the word sex. As petitioner

acknowledges, a policy assigning restrooms based on sex stereotypes would impermissibly discriminate on the basis of sex by denying certain students access to the common single-sex restrooms, thereby violating Title IX. Similarly, by singling out Gavin for different treatment because he is a boy who is transgender, the Board's policy provides restrooms on the basis of sex in a discriminatory manner.

Accordingly, petitioner's focus on various dictionary definitions of "sex" is beside the point. The regulation does not authorize schools to discriminate against a group of students on the basis of sex, regardless of which dictionary definition the school chooses.

Even if the scope of "sex" in the regulation were relevant here, petitioner's argument about the meaning of "sex" in 1972, Pet. Br. 20, misapprehends history, this Court's precedents, and how the Board's own policy operates.

First, the plain meaning of sex in 1972 extended beyond physical characteristics such as anatomy or chromosomes. The term "sex" referred to men and women in general, including both physical differences and cultural ones. *See* "sex, n., 4a," OED Online, Oxford University Press (defining sex as "a social or cultural phenomenon, and its manifestations" and collecting definitions dating back to 1651).[27]

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[27] In 1972 there was no common distinction between "sex" and "gender." At the time, the term "gender" was used primarily as a grammatical classification, not as a term to describe people. *See* "gender, n., 3a," OED Online, Oxford University Press; *see also* Am. Heritage Dictionary 1187 (1973) (defining sex to

Second, this Court has made clear that the statutory term "sex" is not limited to physical traits, but extends to behavioral and social characteristics. *See Price Waterhouse*, 490 U.S. at 251; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing "mutually reinforcing" stereotypes about the roles of men and women). Petitioner offers no explanation for why the term "sex" should be interpreted more narrowly in the regulation than in the statute. Indeed, petitioner argues that the two terms should be interpreted identically. Pet. Br. 47.

Third, as a factual matter, the Board's policy does not assign restrooms based on "physiological sex." Pet. Br. 27. Many transgender individuals, including Gavin, have physiological and anatomical characteristics typically associated with their identity, not the sex identified for them at birth. *See* Endocrine Society Guidelines at 3140-43. Due to his medical treatment, Gavin has a typically male chest, facial hair, and testosterone circulating in his body. Petitioner assumes that HEW would have wanted Gavin to use the girls' restrooms, but that is hardly self-evident.

Gavin is recognized by his family, his medical providers, the Virginia Department of Health, and the world at large as a boy. Allowing him to use the

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include "psychological differences that distinguish the male and the female"); Webster's Seventh New Collegiate Dictionary 795 (1970) (defining sex to include "behavioral peculiarities" that "distinguish males and females"); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (collecting definitions).

same restrooms as other boys is the only way to provide him single-sex restrooms without discrimination. It is, therefore, the only way to do so that is consistent with the regulation and the underlying requirements of Title IX.

II. PETITIONER'S POLICY ARGUMENTS DO NOT JUSTIFY ITS DISCRIMINATION AGAINST GAVIN.

Petitioner justifies its sweeping policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But policy arguments and administrative convenience cannot override Title IX's unqualified prohibition of sex-based discrimination. In any event, petitioner's speculations conflict with the reality that school districts, women's colleges, the military, and the Boy Scouts and Girl Scouts already treat boys and girls who are transgender the same as other boys and girls. *See supra* nn.11-15. Petitioner's "intractable problems" have simple solutions, and in any event, are not applicable to Gavin and his use of restrooms.

A. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Require The Board To Accept A Student's "Mere Assertion" Of Gender Identity.

Petitioner asserts that allowing Gavin to use the boys' restrooms would mean that any student could gain access to a restroom "simply by announcing their gender identity." Pet. Br. 37. Gavin has never asked the Board to allow him to use the restrooms based on a "mere assertion" that he is a boy. Gavin supplied school administrators a

"treatment documentation letter" from his psychologist. He has legally changed his name, is undergoing hormone therapy, had chest reconstruction surgery, and received a state ID card and birth certificate stating that he is male. His status as a transgender boy is not in dispute.

Petitioner's speculation about "obvious and intractable problems" caused by individuals falsely claiming to be transgender "for less worthy reasons," Pet. Br. 37, is unfounded, and, indeed, contradicted by the actual experiences of school districts across the country. *See* School Administrators Amicus; *Cf. Carcaño*, 2016 WL 4508192, at *5 (evidence shows that "transgender individuals have been quietly using facilities corresponding with their gender identity"); *Students & Parents for Privacy*, 2016 WL 6134121, at *39 (evidence shows that transgender students used restrooms for three years without other students noticing or complaining).

Transgender students do not gain access to the restrooms for the day by "simply announcing their gender identity." Pet. Br. 37. Usually, students and their parents meet with school administrators to discuss the student's transgender status and plan a smooth social transition, just as Gavin and his mother did here. *See* School Administrators Amicus; NASSP Statement, *supra*. Allowing Gavin to use the same restrooms as other boys does not mean "that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion." *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014); *accord Students & Parents for Privacy*, 2016 WL 6134121, at *26 (rejecting same argument).

Nor does allowing Gavin to use the same restrooms as other boys require school administrators to guess a student's gender identity based on sex stereotypes. Pet. Br. 39. If a school has a legitimate concern that a student is falsely claiming to be transgender, a letter from a doctor or parent can easily provide corroboration. *See* School Administrators Amicus; U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM (discussing additional ways to confirm a person's transgender status).[28]

In truth, it is the Board's policy that raises intractable administrative problems. *See* interACT Amicus. How will the policy apply if a student is not known to be transgender in the school community, either because he transitioned before entering school or because he moved from another district? As the Fourth Circuit noted, without "mandatory verification of the 'correct' genitalia before admittance to a restroom," the Board must "assume 'biological sex' based on appearances, social expectations, or explicit declarations." Pet. App. 24a n.8 (internal quotation marks omitted).[29]

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[28] Although Gavin was able to amend his birth certificate, that is not possible for transgender youth in states that require genital surgery or provide no mechanism for changing the gender listed on a birth certificate. *See Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015) (discussing "onerous and in some cases insurmountable obstacles" for some transgender individuals seeking to amend their birth certificates).

[29] In support of its assertions regarding "practical problems," petitioner cites to an amicus brief from McHugh & Mayer. Pet.

Nor does the Board appear to have "objective physiological criteria" for defining what it calls "biological gender." Pet. Br. 39; *see Carcaño*, 2016 WL 4508192, at *15 (agreeing that "the Board policy in *G.G.* did not include any criteria for determining the 'biological gender' of particular students"). Petitioner continues to equivocate about how it would define the "biological gender" of a person who has had genital surgery. Pet. Br. 30-31 n.9. Petitioner also cannot say how it would define the "biological gender" of individuals with intersex traits who may have genital characteristics, chromosomes or internal reproductive organs that are neither typically male nor typically female. Pet. Br. 30-31 n.9; *see* interACT Amicus. To be sure, such circumstances are rare, but so is being transgender. *See* Williams Institute Amicus.

B. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Violate The Privacy Of Other Students.

There are no privacy concerns related to nudity implicated by the facts of this case. As the Fourth Circuit explained, Gavin's "use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in cases involving nudity. Pet. App. 25a n.10. Even the dissent below acknowledged that "the

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Br. 41 n.17. The assertions in that amicus brief have been rejected by the mainstream medical community as reflected in the AAP amicus brief. To the extent that there is any dispute about these facts, they must be resolved in favor of respondent.

risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a (Niemeyer, J., dissenting). *Accord Highland*, 2016 WL 5372349, at *17 (rejecting argument that transgender student's use of restrooms would violate privacy of others); *Whitaker*, 2016 WL 5239829, at *6 (same); *cf. Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing woman who is transgender to use women's restrooms created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present").

The Board has also taken steps "to give all students the option for even greater privacy." App. 3a. It has installed partitions between urinals and privacy strips for stall doors. All students who want greater privacy for any reason may also use one of the new single-stall restrooms. Pet. App. 11a; *accord* Pet. App. 37-38a (Davis, J., concurring).[30]

Petitioner attempts to draw support from *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), but the case only undermines petitioner's argument. The parties in *Virginia* agreed that including women in the Virginia Military Institute would require adjustments such as "locked doors and coverings on windows." *Id.* at 588. This Court

[30] Excluding transgender students from the common restrooms instead of making these sorts of minor adjustments would be "unreasonable and discriminatory." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412-13 (1979) (interpreting similar language in Rehabilitation Act of 1973); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 612 (1999) (Kennedy, J., concurring in the judgment).

concluded that these minor changes to provide "privacy from the other sex" would not disrupt the essential nature of the program and could not justify excluding women from admission. *Id.* at 550 n.19. The teaching of the case is not that privacy justifies discrimination. It is that privacy interests, where actually implicated, must be accommodated in a manner that does not exclude individuals from equal educational opportunity. *See id.* at 555 n.20. The same is true here.

Moreover, if the goal of the policy is to promote privacy, that goal is not advanced by placing Gavin in the girls' restrooms. As noted above, many students transition before entering a particular school and are not known to be transgender. And even when they are known by their friends to be transgender, students at large high schools, colleges, or universities will often use restrooms in which no one else knows them, much less their transgender status. A boy who is transgender will be far more disruptive to expectations of privacy if he is forced to use the girls' restrooms than if he uses the same restrooms as other boys.

Difference can be discomfiting, but there are ways to respond to that discomfort without discrimination. Gloucester High School has installed additional privacy protections and provides a private restroom for anyone uncomfortable using the same restroom as Gavin (or any other student). Schools have many ways to accommodate privacy, but Title IX does not permit them to categorically exclude transgender students from common restrooms based on "some instinctive mechanism to guard against people who appear to be different in some respects

from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). *Cf. Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 283 n.9 (1987) (recounting how students with disabilities were excluded from school because their appearance allegedly "produced a nauseating effect" on classmates); *see also* NAACP LDF Amicus.[31]

C. The Board's Speculation About Other "Intractable Problems" Is Unfounded.

1. Locker rooms.

The dissent below focused primarily on the specter of nudity in locker rooms, Pet. App. 53a, but this case involves only access to restrooms, which do not implicate such concerns. Even in the context of locker rooms, the dissent's speculations about inevitable exposure to nudity do not reflect the actual experience of students in many school districts. *See* School Administrators Amicus. In many schools, students preparing for gym class change into t-shirts and gym shorts without fully undressing. They often do not shower; at Gloucester High School, there are

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[31] Religiously affiliated schools may exempt themselves from Title IX. 20 U.S.C. § 1681(a)(3). Petitioner's *amici* raise concerns that students at secular schools may have religious objections to sharing restroom facilities with transgender students. Those objections can be accommodated by providing additional privacy options, but "when that sincere, personal opposition becomes" official school policy, "the necessary consequence is to put the imprimatur of the [school] itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

no functional showers at all. *See* Dec. 9 Minutes at 2:12:37; *see also Students & Parents for Privacy*, 2016 WL 6134121, at *28 (transgender students and non-transgender students used same locker rooms without ever seeing "intimate parts" of one another's bodies); Transgender Student Amicus.[32]

In any event, schools across the country already include transgender students in locker rooms while accommodating the privacy of all students in a non-stigmatizing manner. *See* School Administrators Amicus; *Examples of Policies* at 7-8. Experience has shown that there are many ways to address privacy concerns without a "blanket ban that forecloses any form of accommodation for transgender students other than separate facilities." *Carcaño*, 2016 WL 4508192, at *15. *See Students & Parents for Privacy*, 2016 WL 6134121, at *29 (privacy accommodations prevented any risk of "involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth").

Moreover, although petitioner argues that it would be absurd for a girl who is transgender to use the girls' locker room, petitioner does not attempt to argue it would be appropriate for such a girl—who may have undergone puberty as a girl, developed breasts and be indistinguishable from any other girl—to use the boys' locker room. The only logical conclusion from petitioner's arguments is that transgender students are inherently incompatible

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[32] Transgender students have their own sense of modesty and often go to great lengths to prevent exposure of any anatomical differences between themselves and other students. *See* GLSEN Amicus; School Administrators Amicus.

with common facilities and must be excluded from those facilities entirely. Indeed, the policy is premised on the understanding that transgender students will use "an alternative . . . facility," away from everyone else. JA 69.

2. Athletic teams.

Petitioner also asserts that transgender students could not plausibly participate on sports teams consistent with their gender identity because doing so would give them a competitive advantage. But athletic associations—including the NCAA and the Virginia High School League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams without requiring genital surgery. *See* Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2; Va. High Sch. League, Criteria for VHSL Transgender Rule Appeals, https://goo.gl/fgQe2l.

III. THE DEPARTMENT'S INTERPRETATION OF 34 C.F.R. § 106.33 SHOULD RECEIVE *AUER* DEFERENCE.

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). In any event, none of the Board's arguments for withholding deference withstands scrutiny.

A. The Department's Interpretation Includes More Than The "Ferg-Cadima Letter."

Petitioner argues that deference is unwarranted when an agency interpretation comes from a low-level official or is issued in response to ongoing litigation. Pet. Br. 60-61. It is true that *Auer* deference is not warranted when an opinion letter does not reflect the fair and reasoned judgment of the agency or is a post hoc rationalization to defend past agency action under attack. *Auer*, 519 U.S. at 462.

But this is not a case about a lone opinion letter, and the Department's view was not developed in the context of a challenge to agency action. The Ferg-Cadima letter was neither the first time, nor the last time, that the Department explained its interpretation of 34 C.F.R. § 106.33. *See* App. 14a-23a (summarizing enforcement actions and guidance). It also thoroughly explained its interpretation in two statements of interest and in an amicus brief before the Fourth Circuit. Pet. App. 160a-82a; App. 40a-67a. The Fourth Circuit specifically relied upon the amicus brief as a basis for its decision. Pet. App. 16a-19a, 23a-24a. And these amicus briefs are independently entitled to deference under *Auer*. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 214 (2011). Thus, petitioner's assertion that the Department's interpretation was "issued for the first time in an effort to affect the outcome of a specific judicial proceeding" is inaccurate. Pet. Br. 60.

B. The Restroom Regulation Is Not A "Parroting" Regulation.

The mere fact that the regulation and the statute both use the term "sex" does not turn the regulation into a "parroting regulation" that "does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). *See* Pet. Br. 46-49. There is no statutory analog to 34 C.F.R. § 106.33. The decision to permit differential treatment in the context of restrooms is "a creature of the Secretary's own regulations." *Gonzales*, 546 U.S. at 256.

Moreover, the Fourth Circuit did not allow the Department to define "sex" as gender identity throughout the statute, as petitioner suggests. *See* Pet. Br. 48-49. Rather, it deferred to the Department's judgment that, in the context of providing access to common restrooms, the only way to provide restrooms on the basis of sex in a nondiscriminatory manner is to let transgender students use restrooms that match their gender identity.

C. The Department Appropriately Interpreted The Regulation In Light Of Changed Circumstances.

Petitioner discounts the Department's interpretation as a newfound position. Pet. Br. 53. But this is not a situation in which "an agency's interpretation of a . . . regulation . . . conflicts with a prior interpretation" and is thus "entitled to considerably less deference." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). The Department has not reversed earlier guidance

indicating that the exclusion of transgender students is permitted. Instead, the "issue in these cases did not arise until recently," once transgender students became able to medically and socially transition at school. *Talk Am.*, 564 U.S. at 64. The agency's position has been consistent from the outset.

Petitioner argues that *Auer* deference should extend only to interpretations that "would have been foreseeable at the time the regulation was promulgated." Pet. Br. 53. But the purpose of regulatory guidance is to interpret regulations in light of new circumstances. For example, in *Talk America*, this Court deferred to the FCC's "novel interpretation of its longstanding interconnection regulations," explaining that "novelty alone is not a reason to refuse deference." 564 U.S. at 64. It was appropriate for the FCC to interpret the regulations to address an issue "that did not arise until recently." *Id.* The same is true here.

Nor is this a situation in which the Department's interpretation would "impose potentially massive liability on [a party] for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). There is no risk of "massive liability" because, under *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), the Department lacks power to seek disgorgement of funds disbursed before it issued its interpretation. And under *Barnes v. Gorman*, 536 U.S. 181 (2002), private parties may not seek punitive damages. Moreover, even if there were insufficient notice for damages, lack of notice does not relieve parties of their prospective obligation to

"conform their conduct to an agency's interpretations once the agency announces them." *Christopher*, 132 S. Ct. at 2168.[33]

D. Petitioner's Procedural Arguments Are Foreclosed By *Perez*.

In arguing that the Department failed to follow proper procedures, petitioner repeats the same arguments that this Court rejected in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). *See* Pet. Br. 55-63. Like petitioner here, the respondent in *Perez* argued that "because an agency's interpretation of its own regulations may be entitled to deference under *Auer*," those interpretations "have the force of law" and should require notice-and-comment rulemaking. *Perez*, 135 S. Ct. at 1208 n.4. This Court rejected that argument, explaining that "[e]ven in cases where an agency's interpretation receives *Auer* deference . . . it is the court that ultimately decides whether a given regulation means what the agency says." *Id.* at 1208. *Auer* deference does not transform an agency's informal interpretation of its regulations into binding law.

Petitioner also argues that "members of the public would have wanted to comment on this 'novel' question." Pet. Br. 53. Again, *Perez* rejected the same argument: "Beyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are

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[33] As explained in respondent's opposition to the motion for divided argument, West Virginia's arguments based on *Nat'l Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2601 (2012), have never been briefed by the parties or addressed by any court.

best or most likely to further some vague, undefined public good." *Perez*, 135 S. Ct. at 1207 (internal quotation marks and brackets omitted).

IV. PETITIONER HAS NOT BEEN DEPRIVED OF FAIR NOTICE UNDER *PENNHURST*.

Finally, the Board cannot bolster its interpretation by resorting to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and the doctrine of constitutional avoidance. Pet. Br. 41-43. For Title IX's private cause of action, *Pennhurst* affects only the availability of "money damages," not "the scope of the behavior Title IX proscribes." *Davis*, 526 U.S. at 639; *accord Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("Our central concern . . . is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." (internal quotation marks and brackets omitted)).

Pennhurst thus provides no defense to Gavin's claim for injunctive relief or subsequent enforcement actions by the Department to terminate future funding. "[A] court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money," and then "the recipient has the option of withdrawing and hence terminating the prospective force of the injunction."

Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y., 463 U.S. 582, 596 (1983) (White, J.).[34]

Moreover, even with respect to money damages, the plain terms of Title IX put funding recipients on notice that the statute covers all forms of intentional discrimination, including in the context of restrooms. Any reader of the statute and regulations can see that restrooms are not included in the list of statutory exceptions to Title IX's prohibition on "discrimination." Consistent with that statutory prohibition, the regulation authorizes certain differential treatment for purposes of restrooms but does not override the statute's prohibition on discrimination.

But even if the regulation were ambiguous on that point, there is no inconsistency between requiring Congress to speak with a clear statement under *Pennhurst* and deferring to an agency's interpretation of its own regulations under *Auer*. In *Bennett v. Kentucky Department of Education* this Court made clear that *Pennhurst* does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications of the requirements." 470 U.S. at 669. Rather, in the context of an ongoing program, notice is provided "by the statutory provisions, regulations, and other guidelines provided by the Department at t[he] time" each disbursement of funds is received. *Id.* at 670. The recipient is not required to disgorge funds

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[34] Gavin's claims for injunctive relief will not become moot when he graduates in June 2017 because he will remain subject to the Board's policy when attending alumni events or school events.

already received, but agency guidelines can clarify ambiguities for any future disbursements. *Id.*

That distinction is critical. As alleged in the Complaint, the Board was made aware of the Department's interpretation of the regulation before it enacted the policy at issue in this case. JA 71. When it chose to disregard that interpretation, the Board proceeded at its own risk.

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006), did not overturn these settled principles. In *Arlington*, the Court interpreted the scope of remedies available under the Individuals with Disabilities in Education Act, which allows prevailing plaintiffs to recover "reasonable attorneys' fees as part of the costs" of a lawsuit. 20 U.S.C. § 1415(i)(3)(B). *Arlington* held that the terms "costs" and "attorneys' fees" did not put recipients on notice that they would be liable for expert fees. 548 U.S. at 297.

Arlington thus applied *Pennhurst* in the context of assessing particular financial penalties. It did not apply *Pennhurst* to narrow the scope of the underlying statute. For that question, the controlling precedent is *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)—a decision that *Arlington* did not limit or overrule.

Jackson reaffirmed a long line of cases holding that recipients of Title IX funding have been put on notice that they are subject to money damages for all forms of intentional discrimination. *Id.* at 181-83. Even though Title IX does not explicitly mention retaliation, *Jackson* held that the statutory text prohibits retaliation because it is a form of

intentional sex discrimination and therefore prohibited. *See id.* The Board has thus been put on notice that it may be liable for damages if found to have engaged in intentional discrimination that violates the statute. Because the discrimination here is indisputably intentional and violates the statute's plain terms, *Pennhurst* poses no barrier.

CONCLUSION

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

Respectfully Submitted,

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Dated: February 23, 2017

APPENDIX

Gloucester (Va.) County School Board

PRESS RELEASE

FOR IMMEDIATE RELEASE ON DECEMBER 3, 2014

CONTACT: George R. (Randy) Burak, Chairperson
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Gloucester School Board prepares to discuss, likely vote at Dec. 9 meeting on restroom/locker room use for transgender students

Gloucester, Va. -- As the Gloucester County School Board members prepare to discuss and likely vote on how to handle the use of school restrooms and locker rooms by transgender students, they continue to seek guidance and input from many sources around the county, state and nation.

"Issues around transgender students are facing schools districts across the country, and we are seeking to learn from the best resources available," said School Board Chair George (Randy) Burak. "This issue is not about one student; rather, it's about all our students. We as a Board are seeking to do what's best for our district in an open, transparent manner."

Process and Perspectives

The Gloucester School Board has received legal guidance from several sources, both locally and around the state. It has reviewed guidance from the U.S. Department of Education's Office for Civil

Rights, along with a variety of literature from interested organizations around the country.

The Board has received a great deal of input from the local public through emails, phone calls, comments at the Nov. 11 School Board meeting, and community meetings. Several Board members and Superintendent Walter Clemons recently attended the Virginia School Boards Association's annual conference in Williamsburg, which had an entire working session, "Transgender Protections in Public Schools: Recent Developments," presented by a law firm.

Burak said: "Our Gloucester School Board has undergone a very detailed, professional, and deliberative process, examining many differing opinions and guidance viewpoints. I believe that our district will become stronger for all our students as a result of the research we've done, the discussions we've had, and the ultimate conclusions we'll reach."

Current Situation and Options

While the Gloucester County Public School district adheres to general non-discrimination principles similar to most U.S. school districts, it currently does not have guidelines specifically addressing gender identity and the use of restrooms and locker rooms.

That means that the School Board could decide to adopt specific guidelines to address these issues; or the Board could further define what fully accommodating transgender students would look like and how it would operate on a daily basis.

Good news for all students

One positive outcome of all the discussion is that the District is planning to increase the privacy options for all students using school restrooms, according to Superintendent Dr. Walter Clemons.

Plans include adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms. The District also plans to designate single- stall, unisex restrooms, similar to what's in many other public spaces, to give all students the option for even greater privacy.

"This situation has created the opportunity for us to make things better for all our students and to make our school buildings more accommodating to a wide variety of needs," said Dr. Clemons. **"We have listened to what our parents, students, and other constituents have told us, and we are working to act on their suggestions for the benefit of everyone."**

Background

This issue of restroom use consistent with gender identity first came to the attention of Gloucester schools in October when a transgender student asked campus leaders to use the bathroom of that student's gender identity. Due to student privacy concerns, the issue was initially handled confidentially, and the School Board was informed immediately afterward. While the Board is not legally required to act on the matter, the Board is taking the opportunity to consider developing new guidelines, or further defining the current general practice of non-discrimination.

Since that time, the Board has been reviewing the various options and determining how to best meet the needs of all students in Gloucester schools.

Next Steps

The Board will discuss and likely make a decision at their upcoming monthly meeting at **7 p.m. Tuesday, Dec. 9, at the T.C. Walker Auditorium**. As always, the public is invited to attend.

Anyone interested in expressing views on this or other matters to School Board members can email SchoolBoard@gc.k12.va.us, or call (804) 693-1424 to leave a message.

About the Gloucester (Va.) School Board

The Gloucester School Board is the official policy-making body for Gloucester County Public Schools. The elected Board is composed of seven members representing the five magisterial districts, along with two who serve at large. The 2014 School Board members are Randy Burak, chair; Kevin Smith, vice-chair; Troy Andersen; Kimberly Hensley; Carla Hook; Anita Parker; and Charles Records.

More information about the Gloucester School Board and the Gloucester County Schools may be found at http://gets.gc.k12.va.us/.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS WICHITA FALLS DIVISION

STATE OF TEXAS, et al., Plaintiffs, v. **UNITED STATES OF AMERICA**, et al., Defendants.	)))))))	Case No. 7:16-cv-54-O

DECLARATION OF CATHERINE E. LHAMON

I, Catherine E. Lhamon, hereby make the following declaration with respect to the above-captioned matter:

1. I am the Assistant Secretary for Civil Rights in the U.S. Department of Education (ED or the Department), Office for Civil Rights (OCR), in Washington, D.C. I have held this position since August 2013. My current work address is 400 Maryland Avenue, SW, Washington, D.C.

2. In my current capacity as Assistant Secretary for Civil Rights, I am the principal advisor to the Secretary of Education on civil rights matters. I oversee a full-time staff of nearly 600 employees in OCR's headquarters in Washington, D.C., and OCR's 12 regional enforcement offices around the country.

3. I make this declaration on the basis of personal knowledge and information made

available to me in the course of my official duties.

The Department's Mission and Title IX Enforcement

4. The Department's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. Congress created the Department to strengthen the federal commitment to equal educational opportunity for every individual.[1] In support of the Department's mission, OCR's core purpose is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.[2]

5. OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination is prohibited by Title IX of the Education Amendments of 1972 (Title IX); discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and age discrimination is prohibited by the Age Discrimination Act of 1975. These civil

[1] U.S. Department of Education Organization Act, 20 U.S.C. § 3402(1).

[2] *See* U.S. Department of Education, About OCR, www.ed.gov/ocr/aboutocr.html.

rights laws enforced by OCR extend to all state educational agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive ED funds (recipients). Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination by public entities, whether or not they receive federal financial assistance). In addition, as of January 8, 2002, OCR enforces the Boy Scouts of America Equal Access Act (Section 9525 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001).

6. OCR's core activities include: (i) responding to civil rights complaints filed by the public and conducting proactive investigations, typically called compliance reviews; (ii) monitoring recipients' adherence to resolution agreements reached with OCR; (iii) answering stakeholder inquiries and issuing policy guidance to increase recipients' understanding of their civil rights obligations and students' awareness of their civil rights; (iv) responding to requests for information from and providing technical assistance to the public; and (v)

administering and disseminating the Civil Rights Data Collection (data on key education and civil rights issues in U.S. public schools, including student enrollment and educational programs and services).

7. Virtually all of the civil rights violations that OCR finds are resolved through voluntary agreements, known as "resolution agreements." It is the strong preference of OCR, consistent with the statute, to seek voluntary compliance by recipients. Under a resolution agreement, a recipient of federal funds who is the subject of a complaint (such as a school district) voluntarily agrees to take remedial actions that, when fully and effectively implemented, will address all of OCR's compliance concerns and any identified violations.

8. If OCR determines that a fund recipient is not complying with its civil rights obligations, including its Title IX obligations, OCR can initiate administrative proceedings to withhold further funds; or it can refer the matter to the U .S. Department of Justice (DOJ) to file a civil action to enjoin further violations. See 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a).

9. Resolution agreements are effective to the extent that they are implemented. To ensure that parties follow through with their commitments, OCR actively monitors cases that have resolution agreements until the recipient meets all provisions. When a case is in monitoring, OCR's role is to assess the

recipient's implementation of the resolution agreement to ensure that the institution effectively implements its commitments and that the recipient is in compliance with the statute(s) and regulation(s) at issue. This monitoring function is a significant and important tool in OCR's overall enforcement scheme and is essential to OCR's mission of ensuring compliance with civil rights laws and ensuring equal access to educational excellence for all students.

10. OCR also provides technical assistance in the form of presentations to educators, students, families, and other stakeholders, as well as answering individual questions about the laws that OCR enforces. Providing technical assistance is a core part of OCR's enforcement of federal civil rights laws and helps to better inform recipients, students, and others, about what the law is and how OCR interprets these laws.

ED's Interpretation of Discrimination on the Basis of Sex and Issuance of the May 2016 Dear Colleague Letter

11. ED has proactively sought to better understand the educational experiences and challenges facing a diverse range of students, including transgender students. "Transgender" is a term describing those individuals whose gender identity is different from the sex they were assigned at birth. For instance, a transgender male is someone who identifies as male, but was assigned the sex of female at

birth.

12. As part of its examination of the application of civil rights laws to transgender students, OCR and other ED representatives, including then-Secretary Arne Duncan, held listening sessions beginning in 2010 with various stakeholders, including transgender students and parents or guardians of both transgender and non-transgender students, as well as representatives from school board organizations, school administrators, faith leaders, athletics associations, educators, and institutions of higher education. Through these numerous engagements, ED chiefly learned about the issues transgender students and their peers face at school, the concerns of parents or guardians of transgender students as well as of parents or guardians of students who are not transgender, and the various ways that school administrators have ensured equal treatment of and created supportive environments for transgender students, and all students, in their schools.

13. ED also received many inquiries from educators, state education agencies, students, families, legislators, and the public about the application of Title IX to transgender students. In addition, many stakeholders wrote letters documenting the challenges transgender students face and urging the Department to issue guidance clarifying recipients' obligations under Title IX. For example, in May 2014, "a diverse group of advocates in the education, civil rights, youth development and

mental health communities, including educators and school-based professionals, parents, and consumers of educational and mental health services" signed a letter urging the Department "to release guidance clearly outlining the appropriate treatment of transgender and gender non-conforming students under Title IX." *See* Exhibit 1, Letter to Catherine Lhamon, Assistant Secretary for Civil Rights (May 15, 2014). The letter laments that "[w]ithout explicit guidance on this issue, transgender students must attend school in an unwelcoming, or harmful, school environment while school administrators and parents attempt to negotiate a solution." The letter cites the 2011 School Climate Survey conducted by the Gay, Lesbian and Straight Education Network (GLSEN), which found that "[a]mong the more than 700 transgender students in grades 6 through 12 who responded to the survey, 80% reported feeling unsafe at school, 75.4% reported being verbally harassed, and 16.8% reported being physically assaulted. This and other surveys have found that this victimization contributes to a host of negative outcomes for transgender youth, including decreased educational aspirations, academic achievement, self-esteem, and sense of belonging in school, and increased absenteeism and depression. Transgender youth experience serious negative mental health outcomes as the result of factors such as discrimination and victimization; nearly half of young transgender people have seriously thought about taking

their lives and one quarter report having made a suicide attempt. Without proper guidance, school policies can often contribute to negative outcomes for transgender youth in schools."

14. ED analyzed current medical and scientific information regarding gender identity, gender dysphoria, and gender transition. For example, OCR consulted the American Psychological Association's *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression*, www.apa.org/topics/lgbt/transgender.aspx ("Transgender people experience their transgender identity in a variety of ways and may become aware of their transgender identity at any age." ... "It is not helpful to force the child to act in a more gender-conforming way."), and the World Professional Association for Transgender Health's *Standards of Care*, www.wpath.org/site_page.cfm?pk_association_webpage_menu=l351&pk_association_webpage=3926 ("Children as young as two may show features that could indicate gender dysphoria" ... "Changing gender role can have profound personal and social consequences, and the decision to do so should include an awareness of what the familial, interpersonal, educational, vocational, economic, and legal challenges are likely to be, so that people can function successfully in their gender role.").

15. ED also reviewed relevant decisions from numerous federal courts as well as federal agency decisions related to sex discrimination under laws such as Title VII of the Civil

Rights Act of 1964 and under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

16. Finally, ED met with employees of DOJ and other federal agencies in developing its interpretation of Title IX's application to transgender students.

17. Under ED's Title IX implementing regulations, which were originally promulgated by ED's predecessor agency in 1975, a recipient may provide separate facilities - e.g,, toilet, locker room, and shower facilities - on the basis of sex, provided that any facilities provided for students of one sex are comparable to such facilities provided for students of the other sex. *See* 34 C.F.R. § 106.33. Nonetheless, ED's regulations do not define "one sex" and "the other sex," nor do they state whether transgender students must be provided access to sex-segregated facilities consistent with their gender identity.

18. After multiple years of studying this issue in consultation with school administrators, educators, transgender students and students who are not transgender, other federal agencies, among others, and after consulting existing case law and scientific research, ED concluded that preserving transgender students' equal access to sex-segregated facilities required that they have access to the facilities that match their gender identity. ED also reviewed and considered the accommodations provided by recipients to transgender students and other students who

may wish additional privacy, and found that recipients have been able to accommodate the privacy concerns of transgender and non-transgender students alike while still allowing transgender students to access sex-segregated facilities consistent with their gender identity. ED has indicated that schools may make individual-user options available to all students who voluntarily seek additional privacy.

19. Thus, for the first time, in 2013, after a two-year investigation, OCR jointly with DOJ, resolved a Title IX complaint against Arcadia Unified School District in California. In that case, a transgender boy alleged that he had been denied access to the boys' restroom and locker room, and instead was required to use the private restroom in the school health office as both a restroom and a changing area for physical education class. The Student reported that:

    - Because the school health office was located some distance away from the school gym and the location of the Student's classes, the Student regularly missed class time.
    - On several occasions, the Student missed instructions not to change into gym clothes because the Student was not in the locker room, which attracted unwanted attention.
    - Because he was required to store his gym clothes in a bin under the cot used by

students who were not feeling well, when retrieving his gym clothes the Student sometimes faced questions from other students in the health office.

- To use the restroom during class time, the Student was required to walk across campus, missing class time and facing questions from classmates about the length of time he was away.
- The Student occasionally found the health office locked, requiring him to find an employee to unlock it for him.

The Student also reported that similar difficulties occurred on other occasions, such as during an evening dance, when the Student was unwilling to ask for special permission to leave the dance area and look for an employee to unlock the health office for him. Eventually, the Student reported that he avoided using the restroom altogether. The Student also alleged that he was not allowed to stay with other boys during a class trip, and instead was required to stay in a separate cabin with his parent. Before the trip, the Student was very upset by the District's decision to require him to stay in his own cabin and became very distracted from his school work. Until several days before the camp, the Student told OCR he considered not participating in the trip at all. He told OCR that during the trip, he was sad and upset. The Student reported that he faced questions from other students about his cabin arrangement and that because the Student was not comfortable being truthful about his

> circumstances, the Student felt that this dishonesty created a distance between him and his peers. Among other measures, the resolution agreement[3] provided the transgender boy with access to sex- segregated facilities designated for male students consistent with his gender identity, ensured that he would be treated the same as other male students in all respects in the education programs and activities offered by the District, and ensured that any school records containing the Student's birth name or reflecting the Student's assigned sex would be treated as confidential and maintained separately from the Student's records, and would not be disclosed without written consent. The resolution agreement also included District-wide measures, including revised policies, procedures, regulations, and documents and materials related specifically to discrimination based on a student's gender identity, gender expression, gender transition, transgender status, or gender nonconformity. In addition, the District agreed to revise existing policies to ensure that all students are provided with equal access to its programs and activities, modify current policies or develop a comprehensive gender-based non-discrimination policy, and develop an implementation guide addressing the

[3] OCR Case No. 09-12-1020, *Arcadia Unified Sch. Dist., CA* (July 24, 2013), www.justice.gov/crt/about/edu/documents/arcadialetter.pdf (closure letter); and www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf (resolution agreement).

application of the District's gender-based discrimination policy. I also read the *amicus curiae* brief filed by several school administrators in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056), in which the Superintendent of Arcadia Unified School District, David Vannasdall, is quoted as saying that, "If [students are] worrying about the restroom, they're not fully there to learn, but instead just trying to navigate their day. Give students the opportunity to just be a kid, to use the bathroom, and know that it's not a disruption, it just makes sense."

20. Consistent with the majority of recent judicial decisions and agency determinations described above, in April 2014, OCR issued policy guidance explicitly articulating the broad notion that-just like other federal sex discrimination laws-Title IX protects against discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.[4] This policy guidance, as with all of OCR's significant guidance documents,[5] underwent interagency review.

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[4] OCR, Questions and Answers on Title IX and Sexual Violence (2014), www.ed.govv/ocr/docs/qa-201404-title-ix.pdf.

[5] Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.a,ov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

21. The number of complaints filed with OCR that allege discrimination against transgender students has increased significantly in the time since OCR opened its investigation of Arcadia Unified School District in 2011, and clarified its interpretation of Title IX and its implementing regulations with respect to discrimination based on gender identity. OCR received two such complaints in 2011, three such complaints in 2012, nine such complaints in 2013, seven such complaints in 2014, 46 such complaints in 2015, and 84 such complaints in 2016 (as of October 20, 2016). This may result from an increase in students' willingness to acknowledge to school officials that they are transgender, and that they seek being treated consistent with their gender identity, including being given access to facilities consistent with their gender identity.

22. Between 2013 and June 2016, OCR entered into nine other resolution agreements with recipients to resolve allegations of discrimination against transgender students. Six of those cases involved allegations that transgender students were denied access to sex-segregated facilities consistent with gender identity and suffered harm as a result. All of the schools involved in those resolutions are located in non-plaintiff states. For example:

    a. In August 2015, after an investigation that lasted over a year, OCR settled with Central Piedmont Community College in

North Carolina.[6] The complaint alleged that the College discriminated against the Student based on her gender when College personnel asked her to provide identification and medical documentation to verify her sex and suspended her as a result of her failure to do so. Because of this incident, the Student told OCR that she failed all of her classes that semester, would be required to retake them, and had to attend regular psychotherapy. Under the resolution agreement, the College has voluntarily agreed to notify all students of their right to use the restroom corresponding with their gender identity, ensure personnel honor requests by students wishing to be referred to by a different name and/or gender, and establish a policy for students requesting to change the name and gender in their official school records. As a result of the agreement, students at the College, including transgender students, are permitted to use sex-segregated facilities and their chosen names and pronouns without presenting medical records or identification documents and without fear of reprisal.

b. In December 2015, after a two-year investigation, OCR settled with Township

[6] OCR Case No. 11-14-2265, *Cent. Piedmont Cmty. Coll., SC* (Aug. 14, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-a.pdf (letter of findings); and www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (resolution agreement).

> High School District 211 in Illinois.[7] OCR determined that the District denied a 14-year-old transgender girl access to the girls' locker room and instead required her to use separate facilities to change clothes for her mandatory physical education classes. As result of the District's denial of access for the Student to its girls' locker rooms, the Student not only received an unequal opportunity to benefit from the District's educational program, but also experienced an ongoing sense of isolation and ostracism throughout her high school enrollment. In addition, the Student missed receiving information and access to rental gym uniforms provided to other students in the locker rooms and missed opportunities for bonding with her teammates in the locker rooms. In the resolution agreement, the District agreed to provide the Student with access to female locker room facilities consistent with her gender identity, and to take steps to protect the privacy of all its students by installing and maintaining sufficient privacy curtains within the girls' locker rooms to accommodate the Student and any other student who wishes to be assured of privacy while

[7] OCR Case No. 05-14-1055, *Township High School Dist. 211, IL* (Dec. 3, 2015). www.ed.gov/ocr/docs/investigations/more/05141055-a.pdf (closure letter); and www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (resolution agreement).

changing.

c. In December 2015, after a two-year investigation, OCR resolved a complaint against Broadalbin-Perth Central School District in New York. In that case a 9-year-old transgender girl alleged that she was required to use a gender-neutral restroom in the nurse's office or a family restroom. As OCR noted in its letter of findings in this case, "The Student was reluctant to use the nurse's office or the family restroom because the student felt stigmatized and 'like a freak.'" In addition, the Student's mother reported that the Student had limited trips to the restroom and on some school days did not even visit the restroom at all, in order to avoid feelings of isolation. This case was resolved on December 22, 2015. Under the resolution agreement, the District voluntarily agreed to adopt and publish revised grievance procedures and notices of nondiscrimination in all relevant policies, and to provide assurance that the District will take steps that will prevent the recurrence of discrimination and harassment and will remedy the effects of discriminatory actions.

d. In June 2016, after a nine-month investigation, OCR settled with Dorchester County School District in South Carolina.[8] ln that case, parents of a

[8] OCR Case No. 11-15-1348, *Dorchester Cnty. Sch. Dist., SC* (June 21, 2016). www.ed.gov/ocr/docs/investigations/more

transgender girl filed a complaint with OCR because their daughter was denied access to the sex-segregated restrooms in the third grade, and instead was required to use the private restroom in the nurse's office, which was located in a different wing of the school, or the private restroom in the assistant principal's office, which was at the end of the hallway from where the Student's classroom was located. During group restroom breaks on their way to or from lunch or recess, the Student was required to leave her female friends and to use the private restroom in the assistant principal's office. This embarrassed the Student because she was forced to separate from her friends, who would often request to accompany her to the restroom, and because it required the Student to address questions from her classmates about why she was using a different restroom. The resolution agreement provided that the District would allow the Student access to sex-segregated facilities designed for female students and equal access to other programs and activities, as well as District-wide measures: to include gender-based discrimination in its nondiscrimination notice, revise and ensure all policies, procedures and

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/11151348-a.pdf (letter of findings); and www.ed.gov/ocr/docs/investigations/more/11151348-b.pdf (resolution agreement).

regulations provide equal access to transgender and gender-nonconforming students, provide training on gender-based discrimination, and include gender-based discrimination in student bullying prevention materials.

23. During that same time period, resolution agreements were reached in eight complaints involving transgender students through OCR's Early Complaint Resolution process (ECR). ECR facilitates the resolution of complaints by providing an early opportunity for the parties involved to voluntarily resolve the complaint allegations. Unlike other resolution agreements with recipients, OCR does not sign, approve, endorse, or monitor any agreement reached between the parties.

24. On May 13, 2016, OCR and DOJ jointly issued a Dear Colleague Letter (DCL) on transgender students' rights under Tide IX. In the DCL, OCR and DOJ articulated our interpretation that Title IX and its implementing regulations require recipients to allow a transgender student access to restrooms and other sex-separate facilities that match the student's gender identity.[9]

25. Also in May 2016, in conjunction with the DCL, the Department' s Office of Elementary and Secondary Education released a document, entitled *Examples of Policies and Emerging Practices for Supporting*

[9] OCR, DCL on Transgender Students (2016), www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf.

Transgender Students, that is a compilation of policies and practices that schools across the country were already using to support transgender students.[10] The policies and practices highlighted in that document include examples of state and local efforts to support transgender students in the context of sex-segregated facilities. For example:

a. In Washington State, guidelines provide: "School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school." In addition, no student "should be required to use an alternative restroom because they are transgender or gender nonconforming." These guidelines further provide that any student who wants increased privacy should be provided access to an alternative restroom or changing area.

b. A regulation issued by Nevada's Washoe County School District provides: "Students shall have access to use facilities that correspond to their gender identity as expressed by the student and asserted at school, irrespective of the gender listed on the student's records, including but not limited to locker rooms."

c. In Alaska, the Anchorage School District's Administrative Guidelines emphasize the

[10] Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 20 16), www.ed.gov/oese/oshs/emergingpractices.pdf.

following provision: "However, staff should not require a transgender or gender nonconforming student/employee to use a separate, nonintegrated space unless requested by the individual student/employee."

d. The New York State Department of Education guidance gives an example of accommodating all students' interest in privacy: "In one high school, a transgender female student was given access to the female changing facility, but the student was uncomfortable using the female changing facility with other female students because there were no private changing areas within the facility. The principal examined the changing facility and determined that curtains could easily be put up along one side of a row of benches near the group lockers, providing private changing areas for any students who wished to use them. After the school put up the curtains, the student was comfortable using the changing facility."

Effect of the Injunction on OCR's Title IX Enforcement

26. Before the October 18, 2016, clarification, OCR had suspended investigations and monitoring of resolution agreements for 73 pending matters involving transgender students to comply with the Court's August 21, 2016, preliminary injunction, including 37 pending

complaints filed from states that are not involved in this litigation as Plaintiffs.

27. In light of the October 18, 2016, clarification, OCR has continued to suspend investigation and monitoring of 21 pending matters in full and 14 pending matters in part because they involve allegations related to access to sex-segregated facilities. Of those pending matters that continue to be suspended, there are 25 pending complaints suspended in whole (13) or in part (12) that were filed from states that are not involved in this litigation as Plaintiffs.

28. Despite the August 21, 2016, preliminary injunction, OCR continues to receive Title IX complaints alleging discrimination against transgender students, including six complaints since August 21, 2016. Many of those complaints allege harms similar to the harms that have been remedied in the resolution agreements OCR negotiated before the preliminary injunction was issued. Those allegations related to access to sex-segregated facilities cannot be investigated in light of the preliminary injunction and the clarification order.

29. Because OCR has not opened any of these complaints for investigation, OCR has been unable to assist any of the affected recipients (i.e., schools or school districts) in reaching the kinds of resolution agreements that have proven successful in the past, such as in the cases described above. Therefore, as a result of the preliminary injunction, even recipients who would be entirely willing to work with

OCR to find ways to accommodate the needs of their transgender students consistent with federal law are unable to obtain OCR 's assistance in doing so. The preliminary injunction thus frustrates OCR's ability to apply its resources and expertise to assist schools in achieving these cooperative outcomes, even in states that are not plaintiffs to this litigation (and, indeed, even in those states that have participated as amicus curiae in this litigation to emphasize their agreement with OCR's interpretation of federal law).

30. OCR has received and continues to receive many requests for technical assistance from schools, state education agencies, students, and parents-including many from entities or individuals in non-plaintiff states-regarding the Title IX rights and obligations related to transgender students. OCR has declined to answer these requests, including hundreds of letters and emails, because of the uncertainty created by the preliminary injunction.

31. The scope of the preliminary injunction prevents OCR from satisfying our regulatory charge to enforce, and ensure recipients' compliance with, Title IX. OCR's regulatory charge is to take action "whenever" we have evidence that a student's rights may be being violated.[11] Because OCR now operates

[11] *See* 34 C.F.R. *§* 100.7 ("The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part.") and 34 C.F.R. § 106.71 ("The procedural provisions

pursuant to the August 21, 2016, injunction as clarified by the October 18, 2016, Order, OCR cannot provide Title IX anti-discrimination protection to a discrete group of students, setting them apart from all other students.

32. In addition, the August 21, 2016, injunction imposes particular harm on transgender elementary and secondary students because, by law, they must attend school every day but, because of the injunction, they no longer enjoy the federal civil rights protection to which all other students are entitled. For these students, there is no time to wait and determine how to treat them equitably; their state laws mandate their school attendance now and every school day.

33. Facts from OCR investigations confirm the concrete harms daily experienced by transgender students who are denied access to sex-segregated facilities consistent with their gender identity. Our investigations have confirmed, for example, elementary school students have been required to line up by gender before a teacher grants permission for the students to go to restrooms. Today, and every school day, transgender students in this situation must either line up consistent with their sex assigned at birth or, if a specific teacher so decides, line up consistent with their gender identity. That daily choice of

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applicable to title VI of the. Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR l 00.6-100.11 and 34 CFR, part 101.").

course, as OCR investigations confirm, leaves a student subject to commentary and questions from peers if the student joins a line that is inconsistent with the student's apparent gender identity, or if the transgender student does not join a line at all. Students and their families have reported to OCR, during investigations, that the students feel shame, humiliation, and experience depression resulting from these harms. In addition, students as young as elementary school students as well as high school and college students, and their families have reported to OCR that the students have attempted death by suicide, among other self-injurious expressions and consequences of these harms. Furthermore, through OCR's investigations and ED's analysis of reports and medical and scientific literature—including material from the APA and WPATH—ED is aware that transgender students who are denied access to restrooms and other sex-segregated facilities that match their gender identity, and who are otherwise not treated consistent with their gender identity, may suffer significant dignitary, psychological, medical, and other harms. By being prohibited from working on these cases, we are unable to fulfill the Department's mission and OCR's core purpose because we cannot protect the civil rights of all students at school, including those students who must face such discriminatory environments daily. Given that practical reality, the August 21, 2016, injunction imposes harm on all students in schools

because it sends them a message that discrimination against an identifiable group is permissible and without federal redress. That discriminatory message conflicts directly with the equality principle in Title IX.

Date

Catherine E. Lhamon

Exhibit 1

Letter to Catherine Lhamon,
Assistant Secretary for Civil Rights
(May 15, 2014)

May 15, 2014

Assistant Secretary Catherine Lhamon
Office for Civil Rights
U.S. Department of Education
Lyndon Baines Johnson Department of Education Bldg.
400 Maryland Avenue, SW
Washington, DC 20202-1100

Dear Assistant Secretary Lhamon,

The undersigned organizations represent a diverse group of advocates in the education, civil rights, youth development and mental health communities, including educators and school-based professionals, parents, and consumers of educational and mental health services. We thank you for the Department of Education Office for Civil Rights' (OCR) continuing work to ensure that all students have equal access to education, regardless of background, circumstances, or identity. We write you today to express our gratitude for your recent clarification that Title IX protections against sex-based discrimination extend to discrimination based on gender identity and failure to conform to sex stereotypes. This clarification is an important step towards ensuring that transgender and gender non-conforming students have access to a safe and equal education. We urge you to take the next step and release guidance clearly outlining the appropriate treatment of transgender and gender non-conforming students under Title IX of the Education Amendments of 1972.

Transgender youth and young adults are increasingly visible in our schools, with an estimated 225,000 of our pre-K through postsecondary students identifying as transgender. As you are aware, the legal landscape reflecting the treatment of transgender and gender non-conforming people under federal non-discrimination law has changed significantly in recent years. Many courts, along with the EEOC, have recognized that discrimination on the basis of a person's gender identity, gender transition, or transgender status constitutes sex discrimination under statutes such as Title VII of the Civil Rights Act of 1964.[i] Courts and state and federal agencies, including the Department of Justice's Office on Violence against Women, are also consistently taking the view that gender identity nondiscrimination requires equal access to programs and facilities that are consistent with a person's gender identity.[ii]

Many states (such as Massachusetts, Colorado, Connecticut, Maine, and Washington), universities, colleges, and school districts (including Los Angeles Unified School District, one of the nation's largest school districts) have already adopted clear policies to protect transgender students. Unfortunately, many school districts continue to ignore this vulnerable student population due to uncertainty about whether Title IX extends to transgender students. Without explicit guidance on this issue, transgender students must attend school in an unwelcoming, or harmful, school environment while school administrators and parents attempt to negotiate a

solution. Our collective constituents would all benefit from guidance in this area from OCR.

We ask you to clarify the scope of Title IX's prohibition on discrimination based on a student's gender identity, transgender status, or gender transition, specifically the extent to which the law:

- Requires schools to respect students' gender identity for all purposes;
- Protects the private nature of a student's transgender status;
- Requires existing dress code policies to be enforced based on a student's gender identity and gender expression;
- Ensures access to all school programs, activities, and facilities based on gender identity; and
- Obligates schools to offer participation on athletic teams based on gender identity.

The Department of Education has already been confronted with these issues. For example, this past July, the Office of Civil Rights announced an historic resolution agreement in *Student v. Arcadia Unified School District*, which has resulted in that district developing and implementing comprehensive board policies and administrative regulations that provide transgender students the opportunity to succeed in school. Providing guidance and clarification in this regard would be more efficient and cost-effective for all parties than continued costly litigation under Title IX. Beyond the practical

and financial benefits of such guidance, clarification of these rights is critical to protect the health and wellbeing of transgender and gender non-conforming youth in schools, and is consistent with accepted medical and mental health standards. Discrimination against transgender and gender non-conforming students often leads to lower academic achievement, poor psychological outcomes, and school push out.

GLSEN's 2011 School Climate Survey found that while LGBT students often faced hostile school climates, transgender students face the most hostile climates. Among the more than 700 transgender students in grades 6 through 12 who responded to the survey, 80% reported feeling unsafe at school, 75.4% reported being verbally harassed, and 16.8% reported being physically assaulted. This and other surveys have found that this victimization contributes to a host of negative outcomes for transgender youth, including decreased educational aspirations, academic achievement, self-esteem, and sense of belonging in school, and increased absenteeism and depression.[iii] Transgender youth experience serious negative mental health outcomes as the result of factors such as discrimination and victimization; nearly half of young transgender people have seriously thought about taking their lives and one quarter report having made a suicide attempt.[iv]

Without proper guidance, school policies can often contribute to negative outcomes for transgender youth in schools. Dress codes, access to sex-

segregated spaces, use of proper names and pronouns, and participation on athletics teams are all school policy issues that have the potential to either powerfully affirm or stigmatize a transgender student.

Based on case law development of Title VII and Title IX, it is clear that transgender and gender non-conforming youth are protected from discrimination and harassment, but many school districts do not have a clear understanding about how these legal protections should translate to non-discriminatory school policies. As a result, transgender and gender non-conforming youth are experiencing significant health and educational disparities. Schools, parents, professionals, and most importantly, students, would benefit significantly if schools nation-wide were informed and equipped to accommodate these students in a safe, appropriate, and non-discriminatory way.

All transgender and gender non-confirming students deserve an education free from discrimination and harassment. We strongly urge you to stand by this principle and issue guidance clarifying the application of Title IX to gender identity and expression.

Respectfully,

Advocates for Youth
African American Ministers In Action-Equal Justice Task Force
American Civil Liberties Union

American Foundation for Suicide Prevention/SPAN USA
American Group Psychotherapy Association
American Psychiatric Association
American School Counselor Association
Anti-Defamation League
CenterLink: The Community of LGBT Centers
Disability Rights Education & Defense Fund
Equality Federation
Families United Against Hate (FUAH)
Family Equality Council
Gay-Straight Alliance Network
GLMA: Health Professionals Advancing LGBT Equality
GLSEN (Gay, Lesbian and Straight Education Network)
Human Rights Campaign
Ithaca LGBT Task Force
Jewish Council for Public Affairs
Keshet
League of United Latin American Citizens
NAADAC, the Association for Addiction Professionals
National Association for Children's Behavioral Health
National Association for Multicultural Education
National Association for the Education of Homeless Children and Youth
National Association of County Behavioral Health and Developmental Disability
National Association of School Psychologists
National Association of Secondary School Principals
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women

National Disability Rights Network
National Education Association
National Gay and Lesbian Task Force
National Queer Asian Pacific Islander Alliance
PFLAG National
Safe Schools Coalition (SSC)
School Social Work Association of America
Sexuality Information and Education Council of the U.S. (SIECUS)
Sikh American Legal Defense and Education Fund (SALDEF)
Southeast Asia Resource Action Center (SEARAC)
The International Foundation for Gender Education
The Trevor Project
TransActive Gender Center
Transgender Law Center
Youth Guardian Services

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[i] See, e.g., Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem; 378 F.3d 566 (6th Cir. 2004); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001); Rentos v. OCE-Office Systems, No. 95 Civ. 7908, 1996 WL 737215, *8 (S.D.N.Y. Dec. 24, 1996); Maffei v. Kolaeton Industry, Inc., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995); Macy v. Holder, E.E.O.C. Appeal No. 0120120821 (Apr. 23, 2012).

[ii] See, e.g., U.S. Dept. of Justice, Office on Violence Against

Women, *Frequently Asked Questions: Nondiscrimination Grant Condition of the Violence Against Women Reauthorization Act of 2013* (Apr. 9, 2014), available at: http://www.ovw.usdoj.gov/docs/faqs-ngc-vawa.pdf; Doe v. Regional School Unit 26, 86 A.3d 600 (Me. 2014); Dept. of Fair Employment & Housing v. Amer. Pacific Corp., Case No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. Mar. 13, 2014); Mathis v. Fountain-Fort Carson Sch. Dist. 8, Charge No. P20130034X (Col. Div. Civ. Rts. Jun. 17, 2013); Jones v. Johnson County Sheriff's Department, CP # 12-11-61830, Finding of Probable Cause (Iowa Ct. Rts. Comm'n Feb. 11, 2013).

[iii] Greytak, E. A., Kosciw, J. G., and Diaz, E. M. (2009). Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools. New York: GLSEN.

[iv] Arnold H. Grossman & Anthony R. D'Augelli, *Transgender Youth and Life-Threatening Behaviors*, 37(5) SUICIDE LIFE THREAT BEHAV. 527 (2007).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2056

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

Plaintiff-Appellant

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

INTEREST OF THE UNITED STATES

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, prohibits sex discrimination in educational programs and activities receiving federal financial assistance. The

United States Department of Education (ED) provides federal funding to many educational programs and activities and oversees their compliance with Title IX. 20 U.S.C. 1682. Through its Office for Civil Rights (OCR), ED investigates complaints and conducts compliance reviews; it also promulgates regulations effectuating Title IX, 34 C.F.R. 106, and guidance to help recipients understand their Title IX obligations. See, *e.g.*, OCR, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014) (OCR Single-Sex Q&A), www.ed.gov/ocr/docs/faqs-title-ix-single-sex-201412.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

The Department of Justice (DOJ) coordinates ED's and other agencies' implementation and enforcement of Title IX. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 0.51. DOJ may file federal actions in Title IX cases where DOJ provides financial assistance to recipients or where ED refers a matter to DOJ. 42 U.S.C. 2000d-1. Pursuant to 28 U.S.C. 517, the United States filed a Statement of Interest in the district court in this case to protect its interest in the proper interpretation of Title IX and its implementing regulations. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

We address the following question:

Whether a school district violates Title IX's prohibition on discrimination "on the basis of sex"

when it bars a student from accessing the restrooms that correspond to his gender identity because he is transgender.

STATEMENT OF THE CASE

1. Background

A transgender person is someone whose gender identity (*i.e.*, internal sense of being male or female) differs from the sex assigned to that person at birth. Someone who was designated male at birth but identifies as female is a transgender girl or woman; someone who was designated female at birth but identifies as male is a transgender boy or man. Gender dysphoria is a medical diagnosis given to individuals who experience an ongoing "marked difference between" their "expressed/experienced gender and the gender others would assign" them. American Psychiatric Association, *Gender Dysphoria*, at 1 (2013), http://dsm5.org/documents/gender dysphoria fact sheet.pdf.

To alleviate the psychological stress that this disconnect creates, transgender individuals often undertake some level of gender transition to bring external manifestations of gender into conformity with internal gender identity. The clinical basis for gender transition, and the protocol for transitioning, are well-established. Since the 1970s, the World Professional Association for Transgender Health (WPATH), an internationally recognized organization devoted to the study and treatment of gender-identity-related issues, has published "Standards of Care," which set forth recommendations for the treatment of gender dysphoria and the research supporting those recommendations. WPATH,

Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People (7th ed. 2012) (WPATH Standards), http://www.wpath.org/uploaded_files/140/files/Standards Of Care, V7 Full Book.pdf.

A critical stage of gender transition is the "real-life experience," during which a transgender person experiences living full-time as the gender to which he or she is transitioning. See *O'Donnabhain* v. *Commissioner*, 134 T.C. 34, 38 (2010). This experience necessarily includes using the sex-segregated facilities (*e.g.*, restrooms) corresponding with that gender. See WPATH Standards, at 61 ("During this time, patients should present consistently, on a day-to-day basis and across all settings of life, in their desired gender role.").

For individuals for whom genital surgery is appropriate, the WPATH Standards require that they live full-time in their new gender for at least one year. WPATH Standards at 21, 58, 60-61. Contrary to popular misconception, however, the majority of transgender people do not have genital surgery. See Jaime M. Grant *et al.*, *Injustice At Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, at 2, 26 (2011), http://www.thetaskforce.org/downloads/reports/ntds_full.pdf (NCTE Survey) (survey of 6450 transgender and gender non-conforming adults revealed that just 33% of respondents had surgically transitioned). Determinations about medical care must be made by physicians and their patients on an individualized basis. WPATH Standards at 5, 8-9, 58, 97. For some, health-related conditions make

invasive surgical procedures too risky; for others, the high cost of surgical procedures, which are often excluded from insurance coverage, poses an insurmountable barrier. See *id.* at 58. Moreover, and of special salience to the operation of Title IX, sex reassignment surgery is generally unavailable to transgender children under age 18. See WPATH Standards at 21, 104-106.

2. Statement Of Facts

G.G., a 16-year-old transgender boy, is a junior at Gloucester High School in Gloucester County, Virginia. Although G.G. was designated female at birth, in April 2014, a psychologist diagnosed him with gender dysphoria and started him on a course of treatment, which included a full social gender transition. JA29. As part of that transition, G.G. legally changed his name to a traditionally male name, changed the gender marker on his driver's license to male, is referred to by male pronouns, uses men's restrooms when not at school, and began hormone treatment, which has deepened his voice, increased his facial hair, and given him a more masculine appearance. JA29-30, 60.

In August 2014, at the start of his sophomore year, G.G. and his mother informed Gloucester High School officials about his gender transition and name change. JA30. School officials changed his name in his school records and instructed G.G. to email his teachers to explain his transition and request that they refer to him by his new name and male pronouns. JA30. Although G.G. initially agreed to use a separate restroom in the nurse's office, he soon found this option stigmatizing and inconvenient, as well as unnecessary, as his teachers and peers

generally respected that he is a boy. JA30-31. Accordingly, upon G.G.'s request, the school permitted him to begin using the boys' restrooms, which he did for seven weeks without incident. JA31.

In November 2014, however, some adults in the community learned that G.G. was using the boys' restroom and demanded that the Gloucester County School Board (GCSB) bar him from doing so. JA15. On December 9, 2014, after two public meetings, GCSB enacted a policy limiting students to restrooms corresponding to their "biological genders" and requiring students with "gender identity issues" to use "an alternative appropriate private facility." JA16.

The next day, G.G.'s principal informed him that, due to GCSB's new policy, he could no longer use the boys' restroom and would be disciplined if he attempted to do so. JA32. Although the school subsequently installed three unisex, single-stall restrooms,[1] G.G. found using these restrooms even more stigmatizing than using the nurse's restroom. JA32. Therefore, for the rest of his sophomore year, G.G. tried to avoid using the restroom altogether while at school, leading him to develop painful urinary tract infections. JA32-33.

3. Procedural History

On June 11, 2015, G.G. sued GCSB alleging that its policy violated Title IX and the Equal Protection Clause. JA9-24. G.G. also filed a motion

[1] The school also made several privacy-related improvements to its communal restrooms, including raising the doors and walls around the stalls and installing partitions between the urinals in the boys' restrooms. JA17, 143-144.

for a preliminary injunction to enjoin GCSB from enforcing the policy and thereby permit him to resume using the boys' restrooms when school started in September. JA25-27. The United States filed a Statement of Interest in support of G.G.'s preliminary injunction motion. JA4-5. On July 7, 2015, GCSB filed a motion to dismiss G.G.'s complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). JA5.

At a July 27, 2015, hearing to address both motions, the court announced that it was dismissing G.G.'s Title IX claim based solely on the fact that ED's Title IX regulations permit schools to provide separate boys' and girls' restrooms. JA114-116. The court stated that it would allow G.G.'s equal protection claim to proceed but postponed ruling on his preliminary injunction motion. JA129-131.

On September 4, 2015, the district court denied G.G.'s preliminary injunction motion (JA137-138), and on September 17, 2015, it issued its memorandum opinion (JA139-164). As to Title IX, the court stated that it need not decide whether Title IX's prohibition on sex discrimination includes transgender discrimination because, in its view, G.G.'s Title IX claim "is precluded by" 34 C.F.R. 106.33, ED's regulation authorizing sex-segregated restrooms. JA149.

ARGUMENT

WHERE A SCHOOL PROVIDES SEPARATE RESTROOMS FOR BOYS AND GIRLS, BARRING A STUDENT FROM THE RESTROOMS THAT CORRESPOND TO HIS OR HER GENDER IDENTITY BECAUSE THE STUDENT IS TRANSGENDER CONSTITUTES UNLAWFUL SEX DISCRIMINATION UNDER TITLE IX

A. GCSB's Restroom Policy Violates Title IX

Title IX provides that no person shall "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 "on the basis of sex." 20 U.S.C. 1681(a). Since the Supreme Court's decision in *Price Waterhouse* v. *Hopkins*, it is well-established that discrimination on the basis of "sex" is not limited to preferring males over females (or vice versa) but includes differential treatment based on any "sex-based consideration[]." 490 U.S. 228, 242 (1989) (plurality).

Here, GCSB's restroom policy denies G.G. a benefit that all of his peers enjoy—access to restrooms consistent with their gender identity—because, unlike them, his birth-assigned sex does not align with his gender identity. The policy subjects G.G. to differential treatment, and the basis for that treatment—the divergence between his gender identity and what GCSB deemed his "biological gender"—is unquestionably a "sex-based consideration[]." *Price Waterhouse*, 490 U.S. at 242 (plurality). GCSB's generalized assertions of safety

and privacy cannot override Title IX's guarantee of equal educational opportunity. Accordingly, G.G. established a likelihood of success on his claim that GCSB's policy violates Title IX.

1. Treating A Transgender Student Differently From Other Students Because He Is Transgender Constitutes Differential Treatment On The Basis Of Sex

GCSB's restroom policy denies G.G. a benefit that every other student at his school enjoys: access to restrooms that are consistent with his or her gender identity. Whereas the policy permits non-transgender students to use the restrooms that correspond to their gender identity (because their gender identity and "biological gender" are aligned), it prohibits G.G. from doing so because, although he identifies and presents as male, the school deems his "biological gender" to be female. Indeed, prohibiting G.G. from using the boys' restrooms was precisely GCSB's purpose in enacting the policy.

Treating a student differently from other students because his birth-assigned sex diverges from his gender identity constitutes differential treatment "on the basis of sex" under Title IX. Although federal courts initially construed prohibitions on sex discrimination narrowly—as prohibiting only discrimination based on one's biological status as male or female, see, *e.g.*, *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-1085 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985)—the Supreme Court "eviscerated" that approach in *Price Waterhouse*. *Smith* v. *City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). There, the Court held that an

accounting firm violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when it denied a female senior manager partnership because she was considered "macho," "aggressive," and not "feminine[]" enough. *Price Waterhouse*, 490 U.S. at 235 (plurality) (citations omitted). In doing so, *Price Waterhouse* rejected the notion that "sex" discrimination occurs only in situations in which an employer prefers a man over a woman (or vice versa); rather, a prohibition on sex discrimination encompasses any differential treatment based on a consideration "related to the sex of" the individual.[2] *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

A transgender person's transgender status is unquestionably related to his sex: indeed, the very definition of being "transgender" is that one's gender identity does not match one's "biological" or birth-assigned sex. See *Glenn* v. *Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (recognizing "a congruence between discriminating against transgender * * * individuals and discrimination on the basis of gender-based behavioral norms"); see also *Finkle* v. *Howard Cnty.*, 12 F.Supp. 3d 780, 788 (D. Md. 2014); *Rumble* v. *Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015). Thus, discrimination against a transgender person based on the divergence between his gender identity and birth-assigned sex denies that person an

[2] Although *Price Waterhouse* arose under Title VII, this court and others "look to case law interpreting Title VII * * * for guidance in evaluating a claim brought under Title IX." *Jennings v. University of N.C.*, 482 F.3d 686, 695 (4th Cir.), cert. denied, 552 U.S. 887 (2007); see also JA146.

opportunity or benefit based on a consideration "related to" sex. *Schwenk*, 204 F.3d at 1202.

Whether viewed as discrimination based on the divergence between G.G.'s gender identity and "biological" sex or discrimination due to gender transition, GCSB's policy "*literally* discriminat[es] 'because of . . . sex.'" *Schroer* v. *Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008). As the *Schroer* court explained, firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion,'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts,'" because "[n]o court would take seriously the notion that 'converts' are not covered by the statute." *Id.* at 306. By the same logic, the court concluded, discrimination against a person because he has "changed" his sex, *i.e.*, he is presenting as a different sex from the one he was assigned at birth, would be "a clear case" of discrimination because of sex. *Ibid.*

Following the reasoning of *Price Waterhouse*, *Glenn*, and *Schroer*, the Equal Employment Opportunity Commission (EEOC) has concluded that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex'" in violation of Title VII. *Macy* v. *Department of Justice*, No. 0120120821, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012). Although *Macy* involved an employer's refusal to hire a transgender individual, in *Lusardi*, the EEOC applied *Macy*'s holding to a claim involving a restriction on a transgender employee's restroom access akin to the restriction GCSB placed on G.G. As here, it was undisputed that

Lusardi's transgender status "was *the* motivation for [the employer's] decision to prevent [her] from using the common women's restroom." *Lusardi* v. *Department of the Army*, No. 0120133395, 2015 WL 1607756, at *7 (EEOC Apr. 1, 2015). Thus, the EEOC held, because discrimination against a person because she is transgender "is, by definition, discrimination 'based on . . . sex,'" *ibid.*, the employer violated Title VII when it barred Lusardi from using the women's restroom—a resource "that other persons of her gender were freely permitted to use," *id.* at *9—because she is transgender.

To be sure, a few courts have held, largely based on assumptions about what Congress must have intended when it enacted Title VII in 1964, that the prohibition against sex discrimination does not apply to discrimination against transgender individuals. See, *e.g.*, *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1221-1222 (10th Cir. 2007) (relying on *Ulane*, 742 F.2d at 1084-1087). But as *Schroer* observed, those decisions "represent an elevation of 'judge-supposed legislative intent over clear statutory text.'" 577 F. Supp. 2d at 307 (quoting *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting)). It may well be that the Congresses that enacted Title VII in 1964 and Title IX in 1972 did not have transgender individuals in mind. But the same can be said for other conduct that is now recognized as prohibited sex discrimination under those statutes. See, *e.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). As the Supreme Court explained in *Oncale*, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79.

Nonetheless, the Court emphasized that "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." *Ibid.* Excluding from the statute's purview conduct that falls within its plain text simply because Congress may not have contemplated it "is no longer a tenable approach to statutory construction." *Schroer*, 577 F. Supp. 2d at 307.

In the wake of *Oncale* and *Price Waterhouse*, numerous courts now recognize that prohibitions against sex discrimination protect transgender individuals from discrimination. See, *e.g.*, *Glenn*, 663 F.3d at 1317; *Smith*, 378 F.3d at 573; *Schwenk*, 204 F.3d at 1201; *Finkle*, 12 F. Supp. 3d at 788; *Lewis* v. *High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 589-590 (E.D.N.C. 2015); *Schroer*, 577 F. Supp. 2d at 308; *United States* v. *Southeastern Okla. State Univ.*, No. 5:15-CV-324, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015); *Rumble*, 2015 WL 1197415, at *2. This Court should too. Treating a student adversely because the sex assigned to him at birth does not match his gender identity is literally discrimination "on the basis of sex." 20 U.S.C. 1681.

2. Where A School Provides Sex-Segregated Restrooms, Denying A Student Access To The Restrooms Consistent With His Or Her Gender Identity Denies That Student Equal Educational Opportunity

Just as "[e]qual access to restrooms is a significant, basic condition of employment," *Lusardi*, 2015 WL 1607756, at *9, so too is it a basic condition of full and equal participation in a school's

educational programs and activities. See 20 U.S.C. 1687(2)(B) (defining "program[s] or activit[ies]" to mean "all of the operations" of a school). Prohibiting a transgender male student from using boys' restrooms, when other non-transgender male students face no such restriction, deprives him not only of equal educational opportunity but also "of equal status, respect, and dignity." *Lusardi*, 2015 WL 1607756, at *10.

Under GCSB's policy, G.G. may only use either the girls' restroom or a separate "unisex" restroom. That other students may choose to use the unisex restroom does not change the fact that this policy, which was directed at G.G., not only denies G.G.'s "very identity" as a boy, *Lusardi*, 2015 WL 1607756, at *10, but also singles him out in a way that is humiliating and stigmatizing. For example, even when there is a boys' restroom next to his classroom or locker, G.G. must seek out a unisex restroom in a different part of the school. See JA32. In placing this restriction on G.G., GCSB essentially labels him as "other."

The only other "option" made available to G.G.—using the girls' restroom—is illusory. It is unrealistic to suggest that a student like G.G., who identifies and presents as a boy and whom the school treats as a boy in every other respect, could walk into a girls' restroom without creating a situation that is disruptive to his female classmates and humiliating to him.[3] Not surprisingly, students put in such an

[3] Indeed, even before he began masculinizing hormone treatment, G.G.'s female classmates, perceiving him to be a boy, reacted negatively to his presence in the girls' restroom. JA32

untenable position often try to avoid using the restroom all day—putting them at risk for urinary tract infections and other health problems (see JA33)—rather than use a facility that either conflicts with their gender identity or physically and symbolically marks them "as some type of 'other.'" JA32. In other words, denying a transgender boy access to the boys' restroom is often much more than a mere inconvenience or limitation on his ability to use the restroom—it can be an effective denial of a restroom altogether.

As a result of such a policy, transgender students like G.G. are denied the ability to participate fully in and take advantage of their school's educational programs. No one could reasonably expect a student to make it through an entire school day without access to a restroom; any student who attempted to do so would likely experience discomfort and anxiety affecting his ability to concentrate during class, further diminishing his educational experience. See JA32-33. And even if a student could avoid using the restroom during regular school hours, such a restriction would still limit his ability to participate in after-school extracurricular activities that are important to a child's intellectual, social, and emotional development.[4]

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[4] And even if a transgender student were willing to use a unisex restroom, the number and location of such restroom(s) may be such that a transgender student at a large school would have difficulty reaching the "authorized" restroom in the allotted time between classes. See, *e.g.*, JA32 (G.G.'s affidavit stating that only one of the unisex restrooms is "located anywhere near the restrooms used by other students" and that none of the unisex restrooms is "located near [his] classes"). A student in

Just as an employee is denied equal employment opportunity if he is denied access to an on-site restroom that co-workers of his same gender may use, see *Lusardi*, 2015 WL 1607756, at *9,[5] so too is a student denied equal educational opportunity when restrictions of these kinds are placed on his ability to use the restroom. It is for this reason that the Department of Education—the agency with primary enforcement authority over Title IX—has concluded that, although recipients may provide separate restrooms for boys and girls, when a school does so, it must treat transgender students consistent with their gender identity. Doing so is the only way to ensure that the school's provision of sex-segregated restrooms complies with Title IX's

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such situation may feel as though he needed to limit his movement over the course of the day to ensure proximity to an "authorized" restroom, to avoid being late to class or, even worse, having an accident that would humiliate and stigmatize him further.

[5] The Department of Labor's Occupational Safety and Health Administration (OSHA) guidelines require agencies to provide employees access to adequate sanitary facilities. See Memorandum to Regional Administrators and State Designees from John B. Miles, Jr., Director of Compliance Programs, Regarding OSHA's Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932. To that end, OSHA has issued guidance clarifying that employees "should be permitted to use the facilities that correspond with their gender identity" and that "[t]he employee," not the employer, "should determine the most appropriate and safest option for him- or herself." OSHA, *A Guide to Restroom Access for Transgender Workers*, at 2 (June 1, 2015) (OSHA Transgender Guidance), http://www.osha.gov/Publications/OSHA3795.pdf.

mandate not to subject any student to discrimination on the basis of sex.[6]

3. General Invocations Of Privacy And Safety Do Not Override Title IX's Prohibition Against Sex Discrimination

Although GCSB claims that its policy "seeks to provide a safe learning environment for all students and to protect the privacy of all students" (JA142), such asserted concerns do not justify barring G.G. from accessing the restrooms consistent with his gender identity. While a school certainly may take steps designed to ensure the safety of its students, general invocations of "safety" provide no basis for denying a student access to the gender-identity appropriate restroom. To the extent GCSB claims to

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[6] ED's view is consistent with that of numerous other federal agencies, including the EEOC, the Department of Housing and Urban Development (HUD), the Office of Personnel Management (OPM), and OSHA, which have all concluded that, in situations in which a distinction based on sex is permissible under the law, a transgender person's "sex" must be determined by his or her gender identity, not by the sex assigned at birth. See *Lusardi*, 2015 WL 1607756, at *8; HUD, *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities*, at 3 (Feb. 20, 2015), https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf; OPM, *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, http://www.opm.gov/policydata-oversight/diversity-and-inclusion/reference-materials/gender-identity guidance (last visited Oct. 27, 2015); OSHA Transgender Guidance, *supra* note 5; cf. DOJ, Office for Civil Rights, Office of Justice Programs, *FAQ: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, at 8-9 (Apr. 9, 2014), www.justice.gov/ovw/docs/faqs-ngc-vawa.pdf.

be concerned about *other students*' safety, it has not provided any factual basis for concluding that G.G.'s use of the boys' restroom poses a safety risk to any student. A school cannot deny a transgender boy educational opportunities based on a blanket and unfounded assumption that all transgender boys pose a danger to other boys in the restroom just by virtue of being transgender.

To the extent GCSB claims to be concerned about *transgender students'* safety, such a claim is belied by the fact that the policy it enacted makes it *more likely* that transgender students will be subject to harassment (or worse). In many cases, a transgender student's classmates do not even know he is transgender; requiring him to use either a restroom contrary to his gender identity or a separate unisex restroom thus functions to "out" him, putting the student at increased risk of harm. See NCTE Survey at 154, p. 4, *supra* (noting that "outing" a person as transgender "presents the possibility for disrespect, harassment, discrimination or violence"). Where the student is already "out" publicly—as G.G. was here, largely due to the public hearings putting his transgender status front-and-center—the school can, and should, monitor other students' treatment of him and put measures in place to ensure that he not suffer sex-based harassment in the restroom or anywhere else. See *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (school violates Title IX when it is deliberately indifferent to known student-on student sexual harassment). The appropriate solution, in other words, is to monitor, prevent, and punish the students *doing* the harassing, not to deny the

vulnerable student an equal educational opportunity in the name of protecting him.[7]

Likewise, however commendable an interest in student privacy may be in the abstract, general appeals to "privacy" cannot justify denying transgender students the right to use gender-identity appropriate restrooms. With regard to its existing restrooms, a school can take—and, in fact, Gloucester High School has taken—measures to enhance privacy, such as "adding or expanding partitions between urinals in male restrooms," and "adding privacy strips to the doors of stalls in all restrooms." JA17. If a school wishes to accommodate students who are particularly modest, it may create—and, in fact, Gloucester High School has created—additional single-user restroom options. JA19. What it cannot do in the name of "privacy" is exclude a male student from the boys' restroom and require him to use a separate restroom because he was assigned a different sex at birth than other boys. The desire to accommodate other students' (or their parents') discomfort cannot justify a policy that singles out and disadvantages one class of students on the basis of sex. *Macy*, 2012 WL 1435995, at *10 & n.15; cf. *Cruzan* v. *Special Sch. Dist. No. 1*, 294 F.3d 981, 983-984 (8th Cir. 2002) (dismissing female employee's claim alleging that transgender female co-worker's use of women's restroom created hostile work environment).

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[7] It goes without saying that if a student is being harassed in the restroom because of his religion or his disability, the appropriate solution is to restrict and punish the harasser, not to single out the victim of harassment and require *him* to use a separate bathroom.

GCSB's claim that it has "had a long-standing practice" of restricting restroom use by "biological sex" to "respect the safety and privacy of all students" (Doc. 32, at 6 (brief in support of motion to dismiss); see also Doc. 46, at 3 (reply to appellant's response to motion to dismiss)), is belied by the fact that it needed to enact a formal policy establishing such a restriction. Indeed, the reality is that, in the context of restrooms outside the home, people generally use the facilities that are appropriate for them based on their gender identity and expression; nobody is stationed at the door asking for a birth certificate or the results of a chromosome test, or checking to see what genitals the people entering the facility have. It is only in response to transgender people gaining more visibility that schools and other entities have begun to depart from that practice and demand that restroom access be based on "birth" or "biological" sex. And even then, as this case suggests, employers and educational institutions appear to enforce such bathroom policies predicated on "birth" or "biological" sex against only those individuals who have self-identified as transgender or been outed by others.

In short, although promoting safety and privacy are legitimate goals in the abstract, neither of these rationales can justify a policy that denies G.G.—and other students like him—not just access to the gender-appropriate restroom but, more fundamentally, an equal opportunity at an education.

B. The Department Of Education's Title IX Regulations Do Not Permit Schools To Enact Discriminatory Restroom Policies Like GCSB's

Contrary to the district court's conclusion, ED's Title IX regulations do not "preclude[]" G.G.'s Title IX claim. JA149. The regulation in question states only that a school "may provide separate toilet * * * facilities on the basis of sex" under Title IX, as long as the "facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 34 C.F.R. 106.33. It is silent on the question at issue here: whether, once a school has provided separate boys' and girls' restrooms pursuant to Section 106.33, it may prohibit a male student from accessing the boys' restrooms because he is transgender.[8]

The district court's conclusion that Section 106.33 "clearly" permits GCSB's restroom policy (JA152) directly contradicts the interpretation of the Department of Education—the agency that promulgated the regulation. ED interprets Section 106.33 to mean that recipients may provide separate restrooms for boys and girls. Section 106.33 does not, in ED's view, give schools the authority to decide that only those males who were assigned the male

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[8] G.G. does not challenge the existence of male and female restrooms, Appellant's Br. 31, and for good reason. ED has concluded that the mere act of providing separate restroom facilities for males and females does not violate Title IX (as long as the facilities are comparable), see 34 C.F.R. 106.33, which is reasonable because such segregation does not disadvantage or stigmatize any student but simply comports with a historical practice when using multi-user restroom facilities outside the home. See also Appellant's Br. 36-37.

sex at birth can use the boys' restroom. To the contrary, ED has stated explicitly that although "[t]he Department's Title IX regulations permit schools to provide sex-segregated restrooms," when a school elects to do so, it "generally must treat transgender students consistent with their gender identity" so as not to violate Title IX. JA55 (Letter from James A. Ferg-Cadima, OCR Acting Deputy Assistant Secretary of Policy (Jan. 7, 2015)); see also OCR Single-Sex Q&A at 25 (same guidance for classes and activities).[9]

That interpretation is consistent with how ED has enforced Title IX in this context. ED has reached voluntary resolution with two school districts that had imposed restrictions on transgender students' restroom access similar to GCSB's policy; the agreements provide that those districts will treat transgender students consistent with their gender identity in all aspects of their education, including their restroom access.[10] ED has also, in conjunction with DOJ's Civil Rights Division, filed two Statements of Interest and the instant *amicus* brief asserting that, although recipients may provide

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[9] ED's guidance does not limit a school's ability to accommodate a transitioning student's voluntary request to phase in his access to restrooms of his new gender, as was done here. Absent such a request, however, schools must treat a transitioning student consistent with his gender identity.

[10] Resolution Agreement Between the United States and Downey Unified School District (Oct. 8, 2014), http://www2.ed.gov/documents/pressreleases/downey-school-district-agreement.pdf; Resolution Agreement Between the United States and Arcadia Unified School District (July 24, 2013), http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.

separate boys' and girls' restrooms pursuant to Section 106.33, a recipient violates Title IX when it prohibits transgender students from using restrooms consistent with their gender identity. See Doc. 38; Statement of Interest of the United States, *Tooley* v. *Van Buren Pub. Sch.*, No. 2:14-CV-13466 (E.D. Mich. Feb. 20, 2015). Thus, ED plainly does not interpret Section 106.33 to permit schools to enact policies like GCSB's.

Where there is dispute about the meaning of a regulation, the agency's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotation marks omitted). That "deferential standard," *ibid.*, is certainly met here.[11] ED interprets its regulation as clarifying that schools may provide separate restrooms for boys and girls without running afoul of Title IX. That is the most natural reading of the regulatory language. See 34 C.F.R. 106.33 ("A recipient *may provide* separate toilet * * * 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*.") (emphasis added). Because the regulation is silent on what the phrases "students of one sex" and "students of the other sex" mean in the context of transgender

[11] *Auer* deference is owed to agency interpretations expressed in *amicus* briefs and Statements of Interest filed pursuant to 28 U.S.C. 517, see *Auer*, 519 U.S. at 462 (*amicus* brief); *M.R.* v. *Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2011) (Statement of Interest), as well as those issued "through an informal process" like an "opinion letter," *D.L.* v. *Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256, 259 (4th Cir. 2013).

students, ED has provided guidance on that question. ED interprets the regulation as requiring schools to treat students consistent with their gender identity because doing so ensures that transgender students are not denied equal educational opportunity for the reasons described above. ED's interpretation is a reasonable one, and is thus entitled to deference. See *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 207 (2011) (where regulation is silent as to the "crucial interpretive question," court must look to the agency's "own interpretation of the regulation"); *Humanoids Group* v. *Rogan*, 375 F.3d 301, 306 (4th Cir. 2004) (deferring to agency interpretation of how its trademark regulation should apply in situation not explicitly addressed by regulation's language).

Section 106.33 is comparable to a Maine statute requiring that restrooms in school buildings be "[s]eparated according to sex." Me. Rev. Stat. Ann. Tit. 20-a, § 6501 (2013). In *Doe* v. *Regional School Unit 26*, 86 A.3d 600 (Me. 2014), the Maine Supreme Court concluded that this statute "does not mandate, or even suggest, the manner in which transgender students should be permitted to use sex-separated facilities." *Id.* at 605-606. Thus, the court concluded, an elementary school could not rely on the statute to justify its decision to bar a transgender girl from the girls' restroom. *Id.* at 606. As the court explained, although the statute requires schools to provide "separate bathrooms for each sex," it "does not—and school officials cannot—dictate the use of the bathrooms in a way that discriminates against students in violation of" the State's nondiscrimination law. *Ibid.* ED reasonably reached the same conclusion with regard to 34 C.F.R. 106.33.

The district court's conclusion that Section 106.33's plain language supports *only* the court's interpretation and therefore "is not ambiguous" (JA152), does not withstand scrutiny.[12] The district court's strained reading—that by using the term "on the basis of sex," Section 106.33 authorizes schools to use whatever sex-based criterion they wish to determine who qualifies as a boy or girl for restroom use—divorces the phrase from the context in which it appears. In contrast to Title IX's statutory language banning sex-based discrimination, the phrase "on the basis of sex" in the context of Section 106.33 most naturally refers to the commonplace, and long-accepted, practice of providing separate male and female restrooms. It would be incongruous for the Department of Education, in a regulation implementing Title IX's antidiscrimination provision, to have given schools free rein to use whatever sex-based criterion they want in determining who gets to use each restroom. Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom. To do so would engage in precisely the sort of sex stereotyping that *Price Waterhouse* forbids. Yet, the district court's interpretation of Section 106.33 would seem to allow just that. That is not a sensible reading.

But even if the district court's interpretation of Section 106.33 were plausible, that does not render

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[12] Whether a regulation is ambiguous is a legal question that this Court determines de novo. Humanoids, 375 F.3d at 306.

ED's reading incorrect; at most it would mean that the regulation is ambiguous. This is not a case like *Christensen* v. *Harris County*, which involved a regulation whose plain language precluded the agency's interpretation. 529 U.S. 576, 587-588 (2000) (regulation's use of "may" instead of "must" made regulation permissive, thus foreclosing agency's interpretation setting forth a mandatory requirement). Here, Section 106.33's language does not "clearly preclude[]" ED's interpretation; indeed, as explained, ED's interpretation is the best reading of its own regulation. *Humanoids*, 375 F.3d at 306. But to the extent there is any ambiguity, this Court must give "binding deference" to ED's reasonable interpretation of its own regulation. *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003).

The district court's suggestion that ED arrived at its interpretation "for the purposes of litigation" is inaccurate. JA153. ED is "not a party to this case"; it advances its interpretation of Section 106.33, both below and on appeal, as an *amicus curiae*, just as the Department of Labor did in *Auer*. *Chase Bank*, 562 U.S. at 209. Thus, its position "is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462 (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)). To the contrary, the interpretation of Section 106.33 that ED advances here "is entirely consistent with its past views," as expressed in the agreements it has reached with school districts, in its guidance on single-sex activities, in OCR's 2014 letter, and in its Statement of Interest in *Tooley*. *Chase Bank*, 562 U.S. at 210.

The district court's characterization of ED's interpretation as "newfound" (JA153) is also misplaced. Section 106.33's application to the context of transgender students' restroom access "did not arise until recently." *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011) (according *Auer* deference to agency's new interpretation of its "longstanding" regulations). For most of its existence, there was no dispute about Section 106.33's meaning; it was understood simply to mean what it says, *i.e.*, that Title IX recipients can provide separate boys' and girls' facilities. It is only in recent years, as schools have confronted the reality that some students' gender identities do not align with their birth-assigned sex, that schools have begun citing Section 106.33 as justification for enacting new policies restricting transgender students to facilities based on their "birth" or "biological" sex. It is to those "newfound" policies that ED's interpretation of the regulation responds. Providing guidance on how its regulations apply in new contexts is precisely the role of a federal agency.

ED has reasonably concluded that, although Section 106.33 permits schools to provide separate boys' and girls' restrooms, when a school elects to do so, it must permit students to use the restrooms that are consistent with their gender identity. Because ED's interpretation of its own regulation controls, the district court erred in dismissing G.G.'s Title IX claim on the ground that Section 106.33 authorizes GCSB's restroom policy.

CONCLUSION

GCSB's restroom policy singles G.G. out and treats him differently from all other students because the sex he was assigned at birth does not align with his gender identity. Because that policy is "*literally* discrimination 'because of . . . sex,'" *Schroer*, 577 F. Supp. 2d at 308, G.G. established a likelihood of success on his Title IX claim, and the district court thus erred in dismissing it.

Respectfully Submitted,

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