No. 15-2056

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GAVIN GRIMM,

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division

REPLY SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

No one disputes that Gavin Grimm is a boy who is transgender. He has socially transitioned and lives his entire life as the boy that he is. He has a treatment documentation letter from his medical providers. He has legally changed his name and obtained a Virginia I.D. card with a male gender marker. He already uses the men's restrooms in restaurants, shopping malls, and governmental buildings throughout Gloucester County. He has male physiological characteristics as a result of chest surgery and years of hormone therapy. And for most of his senior year, he even had a Virginia court order and amended birth certificate reflecting that he is male. Despite all of this, the Gloucester County School Board (the "Board") claims the authority to declare that Gavin's "biological gender" is female and exclude him from using the same common restroom facilities that every other boy is allowed to use.

The Board does not attempt to defend its treatment of Gavin as an individual or address Gavin's actual arguments. Instead, the Board spends page after page arguing that the term "sex" includes reference to physiological characteristics (Def. Supp. Br. 23-27), even though Gavin has never argued otherwise. The Board also pretends that Gavin is seeking to access restrooms based "*sole[ly]*" on his "internal perception of a male gender identity" (*id.* at 21 n.7 (emphasis in original)), even though Gavin has never argued for such a policy. The Board is preoccupied with

the idea of "physiological males" suddenly declaring they have an internal female gender identity in order to gain access to women's locker rooms (*id.* at 39) or to gain a competitive advantage in sports teams (*id.* at 41). And the Board claims that it must banish Gavin from using the same restrooms as other boys in order to forestall these imaginary scenarios that have nothing to do with Gavin, nothing to do with restrooms, and nothing to do with the experiences of actual transgender students.

The Board's baseless speculation conflicts with the views of every major medical organization,[1] school counselors and psychologists,[2] and teachers and administrators across the country working with real transgender students as opposed to hypothetical ones.[3] *See* Pl.'s Supp. Br. 5-6. While the Board speculates about imaginary scenarios, it willfully blinds itself to the reality that already exists in Virginia and throughout the country. Boys and girls who are transgender are already using sex-separated facilities at school,[4] participating in interscholastic

[1] *See* Amicus Br. of Am. Acad. of Pediatrics, *et al.*, ECF 135-1("AAP Amicus"); Pl.'s Supp. Br. 5-6.

[2] *See* Amicus Br. of Nat'l PTA, *et al.*, ECF 145-1; Pl.'s Supp. Br. 5-6.

[3] *See* Amicus Br. of Sch. Administrators, ECF 155 ("Sch. Admin. Amicus"); Amicus Br. of Nat'l Educ. Ass'n, *et al.*, ECF 143-1.

[4] *See* Amicus Br. of Transgender Students, ECF 137-1 (describing personal experiences of transgender students in Virginia and Maryland); Amicus Br. of PFLAG, *et al.*, ECF 139-1 (describing personal experiences of parents of transgender students); Sch. Admin. Amicus Br. (brief on behalf of school

athletic teams in both high school and college,[5] and joining girl-scout and boy-scout troops.[6] The Board's refusal to acknowledge that reality is not a "sensible compromise" based on "deliberation." Def.'s Supp. Br. 15. It is willful blindness based on myths of predation, invidious stereotypes, moral disapproval, and unfounded fears about people who are different.

The Board's policy discriminates against Gavin in violation of both Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause. This Court should reinstate Gavin's Title IX claim and instruct the district court to issue a preliminary injunction based on both Title IX and the Fourteenth Amendment. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, -- F.3d --, 2017 WL 2331751 (7th Cir. May 30, 2017) (affirming preliminary injunction in factually similar case).

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administrators from 33 States and D.C.); Amicus Br. of New York, *et al*., ECF 148-1 (brief on behalf of 17 States and D.C.)

[5] Va. High Sch. League, Criteria for VHSL, Transgender Rule Appeals, https://goo.gl/fgQe2l; Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2.

[6] *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, https://goo.gl/364fXI. *See* Boy Scouts of America, *BSA Addresses Gender Identity* (Jan. 30, 2017), https://goo.gl/WxNoGY.

ARGUMENT

I. The Board Cannot Meet Its "Heavy Burden" Of Establishing Mootness.

The burden of establishing mootness rests with the Board. *See Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000). In suggesting that the appeal has become moot, the Board does not dispute that, as an alumnus who will be attending a local college in the Gloucester area, Gavin will continue to be present on campus and at alumni activities, football games, and other community events. *See* Pl.'s Supp. Br. 18-21; Def.'s Supp. Br. 19. But the Board obliquely states that it is not "evident that the Board's policy even applies to alumni." Def.'s Supp. Br. 19.

That noncommittal statement by counsel falls far short of a representation that the Board will voluntarily cease discriminating against Gavin after he graduates, and it certainly does not satisfy the Board's "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (internal quotation marks and brackets omitted). "[B]ald assertions of a defendant—whether governmental or private—that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot." *Id.* (footnote omitted). Here, the Board is not even willing to provide bald assertions.

The Board also asserts that Gavin would no longer have a cause of action under Title IX after graduation because, according to the Board, the statute does not apply to "*non*-student alumni" and "*non*-educational events." Def.'s Supp. Br. 19 (emphases in original). Even if that were true—and it is not—the question whether Gavin still has a cause of action under Title IX goes to the merits of his claim, not to mootness. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013). And even if the Board's arguments about the scope of Title IX were relevant to mootness, they would not apply to Gavin's equal protection claim, which provides an independent basis for his preliminary injunction motion.

In any event, Title IX protects all "person[s]," not merely current students. 20 U.S.C. § 1681(a). "Title IX does not limit its coverage at all, outlawing discrimination against any 'person,' broad language the Court has interpreted broadly." *Elwell v. Oklahoma*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) (citation omitted). The statute thus prohibits schools from discriminating against employees on the basis of sex because "employees, like other 'persons,' may not be 'excluded from participation in,' 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982) (quoting 20 U.S.C. § 1681(a)). The same principle applies here. Alumni, like other "persons," may not be excluded from participation in, denied the benefits of, or subjected to

discrimination at Gloucester High School on the basis of sex. *Cf. United States v. Virginia*, 518 U.S. 515, 552 (1996) (explaining that educational benefits of school include the social and professional benefits of being an alumnus).

Moreover, despite the Board's suggestions to the contrary, Title IX also applies to an educational program's social and extracurricular activities, not merely academics. *See* 20 U.S.C. § 1681(a)(8) (permitting "father-son or mother-daughter activities"); 45 C.F.R. § 106.31(a) (defining educational programs to include any "extracurricular . . . program and activity"); 45 C.F.R. § 106.34(b) (discussing extracurricular activities); 45 C.F.R. § 106.41 (educational program includes club and intramural athletics); 45 C.F.R. § 106.51(b)(9) (prohibiting discrimination against employees with respect to school-sponsored "social or recreational" events).

Because Gavin's appeal from the denial of a preliminary injunction is not moot, the Court also retains pendent appellate jurisdiction over the dismissal of Gavin's Title IX claim, including his claim for nominal damages. Although the Board speculates that Gavin would not pursue nominal damages (Def.'s Supp. Br. 19-20), the entire purpose of seeking nominal damages is to ensure continued standing to vindicate civil rights even if injunctive relief becomes moot. *Cf. Mercer v. Duke Univ.*, 401 F.3d 199, 207 (4th Cir. 2005) (although Title IX

plaintiff graduated and recovered only nominal damages, her case "marked a milestone in the development of the law under Title IX").

II. Gavin Has Stated A Claim Under Title IX.

A. Under Title IX, discrimination based on transgender status is a form of discrimination on the basis of sex.

As explained in Gavin's supplemental brief (Pl.'s Supp. Br. 21-26), discriminating against individuals because they are transgender—that is, because their gender identity is different from the sex assigned to them at birth—is literally discrimination "on the basis of sex." Regardless of whether the discrimination is conceived of as discrimination based on sexual characteristics, discrimination based on change of sex, or discrimination based on gender nonconformity, it is impossible to discriminate against a person for being transgender without taking the impermissible "criterion" of "sex" into account. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989) (plurality); *id.* at 262 (O'Connor, J., concurring); *id.* at 282 (Kennedy, J., dissenting); *see also Whitaker*, 2017 WL 2331751, at *9 (joining circuit consensus). None of the Board's statutory arguments can overcome that simple fact.[7]

[7] The Supreme Court interprets the term "sex" in Title IX in accordance with precedent interpreting "sex" in Title VII. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

First, the Board stubbornly insists that applying Title IX to this type of sex discrimination would improperly "define" sex as "gender identity," to the exclusion of all physiological characteristics. Def.'s Supp. Br. 23-26. To the contrary, far from excluding physiological characteristics, a person's transgender status reflects the *interrelationship* between a person's gender identity and the physiological characteristics that caused that person to be assigned a different sex at birth. "[D]iscrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination" on the basis of "sex." *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016).

Second, falling back on its own assumptions about legislative intent, the Board argues that this particular type of sex discrimination falls outside of Title IX because the legislators who passed the statute were principally focused on ending discrimination against women. *See* Def.'s Supp. Br. 28. The Supreme Court rejected that approach to statutory interpretation long ago. As Justice Scalia explained on behalf of a unanimous Court in *Oncale v. Sundowner Offshore Servs., Inc.*: "[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. 75, 79 (1998).

Here, too, the legislators who passed Title IX may have been principally motivated to end discrimination against women, but they wrote a statute that "broadly prohibits a funding recipient from subjecting any person to 'discrimination' 'on the basis of sex.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a)). "'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Id.* at 175. 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, and the courts must give the statute "a sweep as broad as its language," *N. Haven*, 456 U.S. at 521.

The plain meaning of "discrimination" "on the basis of sex" cannot be narrowed to reach only the particular forms of sex discrimination recognized by Congress in 1972. The Supreme Court has repeatedly warned "that a statute is not to be confined to the particular applications contemplated by the legislators." *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (internal quotation marks omitted; alterations incorporated). "[C]hanges, in law or in the world," may often "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); *cf. Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (Clean Air Act covers carbon dioxide emissions even though legislators "might not have appreciated the possibility that burning fossil fuels could lead to global warming"). "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).

The same principles apply to Title IX. The statute 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 v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting). The statute also extends to harassment between members of the same sex even though many judges have stated they "cannot believe that Congress … could have intended it to reach such situations." *McWilliams v. Fairfax Cty. Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996), *abrogated by Oncale*, 523 U.S. 75. "It is not for [the courts] to rewrite the statute

so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).[8]

In the years since Title IX was enacted, the plain meaning of the text has not changed, but our understanding of transgender people has grown. While transgender students have long been part of school communities, it is only in the last couple of decades that there has been more widespread access to the medical and psychological support that they need. *See* AAP Amicus Br. 6. Just as our increased understanding of the '[t]he real social impact of workplace behavior," *Oncale*, 523 U.S. at 81-82, prompted courts to recognize that sexual harassment is a form of discrimination on the basis of sex, our increased understanding of people who are transgender makes clear that discrimination based on transgender status is a form of sex discrimination that violates Title IX's plain terms. *Cf. Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014) ("Here, it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian.").

Finally, in a last-ditch effort, the Board contends 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

[8] *See also Wrightson v. Pizza Hut of Am., Inc*., 99 F.3d 138, 144 (4th Cir. 1996) ("[W]here Congress has unmistakably provided a cause of action, as it has through the plain language of Title VII, we are without authority in the guise of interpretation to deny that such exists, whatever the practical consequences.").

on "gender identity." *See* Def.'s. Supp. Br. 29-30 (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 the meaning of a statute adopted by Congress 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 the term "gender identity" to Title IX 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); c*f. 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, H.R. 4530, 111th Cong. (2010), 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 v. Brumby*, 663 F.3d 1312, 1317-

19 (11th Cir. 2011) (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 v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008); *see also Whitaker*, 2017 WL 2331751, at *10.

B. Neither Title IX nor 34 C.F.R. § 106.33 authorizes the Board to discriminate against boys and girls who are transgender.

Title IX and 34 C.F.R. § 106.33 allow schools to provide sex-separated restroom facilities based on the premise that such facilities do not disadvantage or stigmatize any student. The Board now seeks not only to provide separate restrooms for boys and girls, but to use discriminatory criteria designed solely to exclude boys and girls who are transgender. *See* Pl.'s Supp. Br. 27-28, 35-40. The Board's discriminatory policy is based on "sex," but neither Title IX nor 34 C.F.R. § 106.33 authorizes the Board to enact whatever sex-based restroom policy it chooses—no matter how discriminatory or harmful. When a school provides separate restrooms on the basis of sex pursuant to 34 C.F.R. § 106.33, it must do so in a manner that complies with the statute's unambiguous prohibition on discrimination. Pl.'s Supp. Br. 33-37.

Although the Board attempts to draw support from *Virginia*, 518 U.S. at 550 n.19 (*see* Def.'s Supp. Br. 32-33), the case only undermines its 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. The Court nevertheless 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 concerns justify 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.

Similarly, this Court's decision in *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), provides no support for the Board's argument that Title IX allows schools to discriminate based on physiological characteristics. In that case, this Court held that employers may use gender-normed physical-fitness standards without violating Title VII because "the physiological differences between men and women impact their relative abilities to demonstrate *the same* levels of physical fitness." *Id.* at 351 (emphasis added). The gender-normed standards were designed to treat employees equally by measuring *the same* levels of physical fitness for everyone. *Cf. Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (California law taking into account physical differences resulting from pregnancy treats employees equally because it "allows women, as well as men, to have families without losing their jobs"). Nothing in *Bauer* supports the notion that

schools or employers can use physical differences as a basis for unequal and stigmatizing treatment. [9]

It also bears repeating that, no matter how many times the Board invokes physiological differences, the actual policy does not assign restrooms based on physiological characteristics. *See* Pl.'s Supp. Br. 38-39. It assigns restrooms based on "biological gender," which the Board uses as a proxy for physiological characteristics that may or may not be present in any particular student. *See* Amicus Br. of interACT, *et al.*, ECF 138-1; *Whitaker*, 2017 WL 2331751, at *13. The reality is that boys and girls who are transgender and who have received puberty blockers and hormone therapy have physiological and anatomical characteristics—including breasts in girls who are transgender, facial and body hair in boys who are transgender, muscle and bone structure, and the appearance of a person's genitals—that do not typically align with the sex designated for them at birth. *See* Pl.'s Supp. Br. 38-39.

Moreover, even if the Board's policy were actually based on physiological characteristics, those differences are not relevant to restroom use. The Board's

[9] The National College Athletic Association's policy (Def.'s Supp. Br. 41 n.14) demonstrates that physiological differences between boys and girls who are transgender and other boys and girls—where those differences are actually relevant—can be addressed without categorically excluding transgender students from sports teams. *See also* Dep't of Justice and Dep't of Educ., "Dear Colleague" Letter at 3 & nn.14-15 (May. 13, 2016), https://goo.gl/p4z3Ch.

asserted interest in avoiding exposure to nudity is not implicated by Gavin's use—or any other person's use—of the restrooms, especially in light of the additional privacy protections the Board has already installed. *See* Pl.'s Supp. Br. 38-39. A boy who is transgender (and who may be indistinguishable from any other boy) 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. *See Whitaker*, 2017 WL 2331751, at *15. Any purported discomfort with Gavin's use of the restroom at Gloucester High School would be based on other people's social knowledge that he is transgender, not any actual exposure to private anatomy.[10]

C. The Board mischaracterizes Gavin's claims as based solely on "internal perception" of gender identity.

The Board ignores the substance of Gavin's actual legal claims and asserts that Gavin's treatment documentation letter, hormone therapy, name change, surgery, State I.D. card, and amended birth certificate are "irrelevant" because Gavin seeks access to the restroom based solely on his "internal perception of a male gender identity." Def.'s Supp. Br. 21 n.7.

[10] Even in the context of locker rooms, the actual experience of school districts across the country reflects that transgender students and non-transgender students already use the same locker rooms without seeing "intimate part[s]" of one another's bodies. *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *28-29 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *see* Sch. Admin. Amicus Br. 18-19; NY Amicus Br. 21-25; Student Amicus Br. 10-19; Pl.'s Supp. Br. 45 n.32.

That is obviously not true. Gavin has brought an as-applied challenge alleging that because he has transitioned and lives his entire life as the boy that he is, excluding him from using the same restrooms as other boys discriminates against him on the basis of sex. JA 20-22. The undisputed facts of Gavin's transition are extremely relevant to that challenge. *Cf. Whitaker*, 2017 WL 2331751, at *2-3; *Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, 2017 WL 770619, at *2-5 (W.D. Pa. Feb. 27, 2017). Although a person's gender identity is internal, Gavin's gender transition is external, verifiable, and extensively documented. *Cf. Whitaker*, 2017 WL 2331751, at *11 ("This is not a case where a student has merely announced that he is a different gender.").

The Board's mischaracterization of Gavin's claims reflects the Board's mischaracterization of what it means to be a boy or girl who is transgender. Students do not become transgender by virtue of declaring at different points in time that they perceive themselves to be male or female. Boys and girls who are transgender are people who "consistently, persistently, and insistently" do not identify with the sex assigned to them at birth and who experience the debilitating distress of gender dysphoria when they are not able to live as the boys and girls

that they are. AAP Amicus Br. 8-11. The gender identity of these adolescents is stable and fixed. *Id.*; *see also* Sch. Admin. Amicus Br. 19-21.[11]

There is no dispute that Gavin is a boy who is transgender. If a person's transgender status is ever legitimately in doubt, the Board can easily ask for external verification from a medical provider or a parent. *See* Pl.'s. Supp. Br. 42-43. Gavin has no objection to providing a treatment documentation letter; he already presented one to school administrators before his sophomore year began.

D. Gavin's claims do not implicate *Pennhurst*.

Finally, the Board resorts to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and the doctrine of constitutional avoidance. Def.'s Supp. Br. 45-47. If the Court chooses to consider this argument (which the Board did not previously raise in this Court or the district court) it is foreclosed by binding precedent.

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[11] Some of the Board's *amici* reject this medical consensus and rely upon the fringe views of Dr. Paul McHugh and an organization that calls itself the American College of Pediatricians. *See* Amicus Br. of McHugh, *et al.*, ECF 210. Those views fall far outside the mainstream medical community. *See* AAP Amicus Br. 17-18. Dr. McHugh and the American College of Pediatricians have a history of making similar fringe arguments regarding sexual orientation. *See* Amicus Br. of Liberty Counsel & Am. Coll. of Pediatricians, *Bostic v. Schaeffer*, 760 F.3d 352 (4th Cir. 2014) (No. 14-1167), 2014 WL 1333847, at *10 (rejecting medical consensus and advancing fringe arguments regarding "the inherent harms of living a homosexual lifestyle"); Amicus Br. of McHugh, *Bostic v. Schaeffer*, 760 F.3d 352 (4th Cir. 2014) (No. 14-1167), 2014 WL 1333850, at *13 (comparing homosexuality to polyamory and zoophilia and arguing that "there is serious doubt whether sexual orientation is a valid concept at all").

First, *Pennhurst* provides no defense to Gavin's claim for injunctive relief. In applying *Pennhurst*, the "central concern . . . is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (internal quotation marks and brackets omitted). *Pennhurst* thus affects only the available remedy for violations of Title IX, not "the scope of the behavior Title IX proscribes." *Davis*, 526 U.S. at 639; *see Gebser*, 524 U.S. at 284 (distinguishing between "the scope of the implied right" and "the scope of the available remedies"). "[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.); *see Gebser*, 524 U.S. at 287 (applying Justice White's *Guardians* opinion to Title IX).[12]

Second, even with respect to damages, the Supreme Court has—in an unbroken line of cases—applied *Pennhurst* to Title IX by restricting liability for damages to acts of intentional discrimination, as opposed to negligence or

[12] *See also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (applying *Pennhurst* in determining recipients' financial liability for costs under the Individuals with Disabilities in Education Act).

vicarious liability. It has never applied *Pennhurst* to Title IX by restricting the scope of the statutory text. *See Jackson*, 544 U.S. at 182-83; *Davis*, 526 U.S. at 639; *Gebser*, 524 U.S. at 287; *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74-75 (1992). As the Court has reaffirmed multiple times: "The *Pennhurst* notice problem does not arise in a case . . . in which intentional discrimination is alleged." *Jackson*, 544 U.S. at 182-83 (alterations incorporated). Because the discrimination here is indisputably intentional and violates the statute's plain terms, *Pennhurst* poses no barrier.

In arguing that Title IX must explicitly refer to discrimination against transgender students, the Board and its *amici* repeat the same argument that this Court rejected in *West Virginia Department of Health & Human Resources v. Sebelius*, 649 F.3d 217, 223 (4th Cir. 2011). In that case, this Court held that West Virginia's "'super-clear statement' rule . . . misreads *Pennhurst* and its progeny." *Id. Pennhurst* does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a statute. *Id.* at 224 (quoting *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985)).

That is particularly true in the context of Title IX, which has an implied cause of action and does "not list *any* specific discriminatory practices" that are prohibited. *Jackson*, 544 U.S. at 175. "[A] State that accepts funds under [a statute with an implied cause of action] does so with the knowledge that the rules for . . .

liability will be subject to judicial determination." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 285 (2d Cir. 2003). Thus, "funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when [the Supreme Court] decided *Cannon*[*v. University of Chicago*, 441 U.S. 677, 691 (1979)]," and "have been put on notice by the fact that [Supreme Court] cases since *Cannon* . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 544 U.S. at 182. A recipient who accepts federal funding does so with the knowledge that disagreements over whether a particular practice constitutes "discrimination" "on the basis of sex" will be resolved by the courts in accordance with these precedents.[13]

The Board's reliance on *Pennhurst* also fails for an additional reason: Congress's powers under the Fourteenth Amendment provide independent

[13] Instead of relying on decisions interpreting Title IX, an amicus brief from West Virginia (*see* Amicus Br. of W. Va., *et al*, ECF 141, at 11) relies on this Court's decision interpreting the IDEA in *Virginia Department of Education v. Riley*, 106 F.3d 559, 563 (4th Cir. 1997) (en banc), *superseded by* IDEA Amendments for 1997, Pub. L. No. 105–17, § 612. The question in *Riley* was whether the obligation to provide students with disabilities "a free appropriate public education" implicitly required Virginia to provide private tutors to students who are expelled for serious misconduct *unrelated* to their disability. *See* 106 F.3d at 562 The dispute was not about the meaning of particular statutory terms, such as "handicap" or "free appropriate public education." It was about whether an entirely new condition completely unrelated to a student's disability could be implied. Even without resorting to *Pennhurst*, this Court held that such a requirement had no basis in the statutory text. *See id*. at 563.

authority to enforce Title IX, and those powers are not subject to *Pennhurst*'s limitations. *See Franklin*, 503 U.S. at 75 n.8 (reserving this argument); *Litman v. George Mason Univ.*, 186 F.3d 544, 557 (4th Cir. 1999) (same); *see also Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1152 (10th Cir. 2006); *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360, 362 (6th Cir. 1998); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997).[14]

[14] West Virginia attempts to interject an additional issue into the case by arguing that applying Title IX to discrimination against students who are transgender is unconstitutionally coercive under *National Federation of Independent Businesses ("NFIB") v. Sebelius*, 132 S. Ct. 2566, 2605 (2012). *See* WV Amicus Br. 23-27. It would be inappropriate for the Court to address an argument raised for the first time on appeal and raised only by *amici*.

Amici's argument also fails on the merits. First, the statute in *NFIB* was unconstitutionally coercive because it threatened to terminate funds for States' existing Medicaid program unless the States agree to participate in what amounted to an entirely "new program." 132 S. Ct. at 2605 (opinion of Roberts, C.J.). Even if an unforeseen application of Title IX could be analogized to an alteration of the statute, it would not amount to the establishment of an entirely "new program" under *NFIB*. Rather, it would be analogous to the type of Medicaid amendments cited approvingly in *NFIB*, which "merely altered and expanded the boundaries" of the discrete categories States were required to cover. *Id.* at 2606.

Second, the coercion analysis in *NFIB* was limited to contexts in which Congress uses the Spending Clause to dragoon States into implementing a federal program. It does not apply to statutes such as Title IX, which merely seek "to avoid the use of federal resources to support discriminatory practices." *Cannon*, 441 U.S. at 704. *See NFIB*, 132 S. Ct. at 2603-04 (distinguishing between requiring States to implement federal programs and imposing conditions on the use of federal funds).

Third, the amount of funding at issue in Title IX is far less than the amount of Medicaid funding at issue in *NFIB*. The joint dissent specifically noted that Medicaid funding "is at least twice the size of federal education funding as a percentage of state expenditures." *Id.* at 2664 (joint dissent).

Fourth, *amici*'s argument rests on the mistaken premise that they risk losing all of their educational funding. To the contrary, Title IX's "pinpoint" provision

III. Gavin's Motion For A Preliminary Injunction Should Be Granted.

A. Gavin has established a likelihood of success under both Title IX and the Equal Protection Clause.

For the same reasons that Gavin has stated a claim under Title IX, he has also established a likelihood of success. But, even if Title IX did not protect Gavin, he would still be entitled to a preliminary injunction under the Equal Protection Clause. The Court should address Gavin's likelihood of success on both claims, and hold that Title IX and the Equal Protection Clause provide independent bases for issuing a preliminary injunction. *See Whitaker*, 2017 WL 2331751, at *8-14. A ruling based only on Title IX could subject Gavin to more petitions for certiorari and remands to separately address each alternative basis for issuing a preliminary injunction. The Court should avoid further unnecessary delay and address both claims now.

To the extent that the Board discusses equal protection at all, it relies on *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), for the proposition that different treatment based on biological differences is not the type of "gender-based stereotype" that constitutes sex discrimination. Def.'s Supp. Br. 33. In *Nguyen*, the Supreme Court upheld a statute that provided different procedures for unmarried mothers and unmarried fathers to transmit U.S. citizenship to their children. The

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limits termination of funding "to the particular program, or part thereof" where "noncompliance [is]…found." 20 U.S.C. § 1682; *see* Dep't of Justice, Title IX Legal Manual § VII.C.2 (2005), https://goo.gl/2TkL1t.

Court held that this distinction was permissible because "[t]he difference between men and women in relation to the birth process" meant that mothers, by virtue of having given birth, automatically had a biological connection to the child and an opportunity to form a meaningful relationship. 533 U.S. at 73. But the Court's analysis did not begin and end with biology. The Court emphasized that the policy was tailored so that it imposed only a "minimal" burden that could be easily met with a written acknowledgement of paternity under oath. *Id.* at 70. The Court also emphasized that the statute was not "marked by misconception and prejudice" or "disrespect." *Id.* at 73.

The Board's policy bears no resemblance to the tailored statute that survived heightened scrutiny in *Nguyen*. It is a categorical exclusion. It lacks any rational connection to the Board's stated interests in protecting privacy related to nudity. It inflicts physical and psychological harm. It is "marked by misconception," *id.* at 73, and it stigmatizes boys and girls who are transgender as unfit to use the same restrooms as their peers. Indeed, the policy rests on a fear of "people who appear to be different in some respects from ourselves" that cannot justify discrimination under any standard of scrutiny. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

B. Gavin has satisfied the remaining preliminary injunction requirements.

Although the Board does not explicitly address the requirements for a preliminary injunction, it suggests that any harms inflicted on Gavin are outweighed by the hypothetical harms that would be inflicted on other students if Gavin uses the boys' restrooms. Def.'s Supp. Br. 43. But according to the American Academy of Pediatrics and other medical organizations, "there is no evidence of any harm to the physical or mental health of other children and adolescents when transgender students use facilities that match their gender identity." AAP Amicus Br. 19-20. There is also no evidence that Gavin's use of the restrooms is a safety threat to himself or others. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 n.11 (4th Cir. 2016). And Gavin's use of the restrooms does not implicate any privacy interests related to nudity. *See id.* at 723 n.10; *Whitaker*, 2017 WL 2331751, at *12-13.

Moreover, all students are free to use one of the single-stall restrooms if they are uncomfortable with Gavin's presence, or the presence of anyone else, in the common restroom. "For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for [Gavin] using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students." *G.G.*, 822 F.3d at 729 (Davis, J., concurring).

The Board argues that hypothetical classmates should not have to use the single-stall restrooms in order to protect "their own adolescent modesty, personal sensitivities, or religious scruples." Def.'s Supp. Br. 43. As the NAACP Legal Defense Fund points out, the same arguments have been used to exclude black people, gay people, and people with disabilities from swimming pools, restrooms, and other common spaces. *See* Amicus Br. of NAACP LDF, ECF 146-1. Schools can provide options for students to enhance *their own* privacy (however broadly defined), but they cannot force transgender students to use separate facilities to accommodate *other students'* purported privacy or discomfort. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("sincere, personal opposition" of some people cannot justify policy that "demeans or stigmatizes those whose own liberty is then denied").

CONCLUSION

For the foregoing reasons, the Court should reverse the dismissal of Plaintiff's Title IX claim and reverse the denial of a preliminary injunction based on both Title IX and the Equal Protection Clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of this Court's briefing order dated April 13, 2017, because it contains 6,439 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2017, I filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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