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 PROFESSORS SAMUEL BAGENSTOS, MICHAEL C. DORF, MARTIN S. LEDERMAN AND LEAH M. LITMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are legal scholars who teach and write on constitutional law and civil rights law. They submit this brief to call attention to a means of resolving this case not presented by the parties or other amici.[1]

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Institutional affiliations of amici are listed for identification purposes only.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution intended to fund this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 provides that in a school district receiving federal financial assistance, "[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination." 20 U.S.C. § 1681(a).

The briefing in this case has largely focused on two questions that sharply divide the parties: (i) whether discrimination *on the basis of transgender status*, as such—for example, treating a transgender boy such as Gavin Grimm (Gavin) differently from, and less favorably than, other boys—is "discrimination . . . *on the basis of sex*" under § 1681(a); and (ii) whether a particular, longstanding Title IX regulation, 34 C.F.R. § 106.33, authorizes a school district receiving federal funds to exclude transgender students from restrooms designated for use by students of their gender identity.

This Court need not resolve either of these questions, however, for there is a more straightforward reason why Title IX itself prohibits the Gloucester County School Board (the Board) from excluding Gavin Grimm from the boys' restrooms at Gloucester High School: the policy segregates students "on the basis of sex" under any definition of that term, and it subjects transgender students to "discrimination" because it is not necessary to require those students to comply with such sex-based segregation in order to advance any important institutional objective.

The Board concedes that its restroom policy classifies and segregates students according to

certain "objective physiological characteristics" (Board Br. 32) or "physical sexual attributes" (*id.* at 20)—namely, the students' external reproductive organs. As all parties agree, that classification differentiates and separates students "on the basis of sex," regardless of whether *other* types of classifications (e.g., differential treatment of transgender students) might also be "sex"-based. And under Title IX, segregation "on the basis of sex" (including classifying students on the basis of their external reproductive organs) generally—but not invariably—subjects students to a form of prohibited "*discrimination* . . . on the basis of sex." That is so because Title IX not only prohibits unequal treatment on the basis of sex, but also presumptively condemns policies that classify and segregate on the basis of sex, even in cases where such separate treatment might appear, on its face, to be "equal."

To be sure, the assignment of students to particular restrooms on the basis of their reproductive organs is one of the rare contexts in which such sex-based segregation does not necessarily subject all such students to prohibited "discrimination." Indeed, Title IX generally permits such sex-based assignment of restrooms with respect to the vast majority of students, even though it *is* "on the basis of sex," because such a separate-restroom policy can advance a school's legitimate interests in preserving traditional expectations of privacy respecting the performance of bodily functions, and in lowering the risk of improper student conduct, without promoting any harmful sex stereotypes and without inflicting any significant harm on the mine

run of students, most of whom are likely to prefer such sex-based separation.

As applied to transgender students, however, such segregation on the basis of sex—on the basis of anatomical differences in external reproductive organs—*does* subject them to "discrimination," and is therefore prohibited in schools receiving federal funds, because the profound and uncontroverted harms it inflicts upon transgender students cannot be justified by the interests that might otherwise support this particular, traditional practice of sex-based segregation, or by the other institutional interests on which the Gloucester policy here is expressly predicated. Strikingly, the Board makes no effort at all to demonstrate to this Court that excluding Gavin from the "male" restrooms is necessary to accomplish the stated reasons for its exclusionary policy—i.e., "to provide a safe learning environment for all students and to protect the privacy of all students" (J.A. 16 (quoting Gloucester policy)). It is no accident that the Board does not attempt such a showing, because relegating transgender students such as Gavin to stigmatizing single-stall restrooms plainly is not necessary in order for the Board to realize those goals.

ARGUMENT

I. THE CHALLENGED POLICY, WHICH SEGREGATES STUDENTS BASED UPON THEIR EXTERNAL REPRODUCTIVE ORGANS, IS A CLASSIFICATION "ON THE BASIS OF SEX."

The Gloucester School District receives federal funds. Therefore § 1681(a) of Title IX prohibits the Gloucester Board from, among other things, "subject[ing]" any student to "discrimination" "on the basis of sex." The Board's school restroom policy at issue here is a classification "on the basis of sex" under anyone's definition of "sex."[2] The policy provides:

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[2] The "broadly written general prohibition on discrimination" in § 1681(a) is "followed by specific, narrow exceptions." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). The eight currently operational exceptions describe entities to which, or contexts in which, it is permissible to subject students to discrimination "on the basis of sex." The Gloucester County Board and its restroom policy do not fall within any of those eight statutory exceptions. *See* 20 U.S.C. §§ 1681(a)(1) (exempting admissions policies of all schools other than "of vocational education, professional education, and graduate higher education, and . . . public institutions of undergraduate higher education"); 1681(a)(3) (exempting some educational institutions that are "controlled by a religious organization"); 1681(a)(4) (exempting an institution the primary purpose of which is to train individuals for the military services); 1681(a)(5) (exempting four schools of undergraduate education (*see* 118 CONG. REC. 5814 (1972) (remarks of Sen. Bentsen)) that have "traditionally and continually from its establishment . . . had a policy of admitting only students of one sex"); 1681(a)(6) (exempting the membership practices of tax-

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

J.A. 69 (emphasis added).

The critical term of classification—"corresponding biological genders"—is unclear. Indeed, it does not on its face even determine which Gloucester High School restrooms Gavin Grimm himself can use. In most "biological" respects, after all, Gavin is—and appears to be—male. He has received testosterone hormone therapy, his voice has

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exempt fraternities and sororities, the YMCA and YWCA, Boy and Girl Scouts, Camp Fire Girls, and voluntary, tax-exempt youth service organizations the membership of which has traditionally been limited to persons of one sex and principally to persons under 19); 1681(a)(7) (exempting "any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or any program or activity of any secondary school or educational institution specifically for . . . the promotion of" such conferences); 1681(a)(8) (exempting "father-son or mother-daughter activities at an educational institution" as long as "opportunities for reasonably comparable activities shall be provided for students of the other sex"); 1681(a)(9) (exempting scholarships or other financial assistance awarded by an institution of higher education in the context of a pageant in which the aid is based upon "a combination of factors related to . . . personal appearance").

deepened, and he has undergone chest reconstruction surgery. J.A. 14, 30; *see also Radtke v. Misc. Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (chromosomal, anatomical, hormonal, and reproductive characteristics "could be ambiguous or in conflict within an individual"). As far as other students and administrators can discern, then—including in restrooms—Gavin is not materially different from other boys his age.

As the Board interprets its policy, however, Gavin and other transgender boys are treated as female—and thus forbidden from using restrooms labeled "male"—by virtue of what the Board calls "objective physiological characteristics" (Board Br. 32) or "physical sexual attributes" (*id.* at 20). The Board is a bit coy about what it means by these terms, but it is not difficult to see that it is referring to such students' external reproductive organs—or, in any event, to what the Board presumes those physiological features must be. As the Board puts it, Gavin "has not undergone any genital surgery and is still anatomically female" (*id.* at 11).

In other words, the Gloucester Board policy permits students—transgender or otherwise—to use restrooms labeled "male" and "female" *based upon their external sexual anatomy*.[3]

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[3] We assume the Board does not mean to refer to "physical sexual attributes" that are not external. Surely, for instance, the Board would not prohibit a young woman from using the "female" restrooms because she has had a total hysterectomy for medical reasons.

As the Board itself insists throughout its brief,[4] such a classification of students on the basis of their reproductive organs is unquestionably action taken "on the basis of sex" for purposes of Title IX, regardless of whether distinctions between transgender boys and other boys is *also* discrimination "on the basis of sex." *See, e.g.*, XV THE OXFORD ENGLISH DICTIONARY 107–08 (1989) (defining "sex" as, *inter alia*, "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these"); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1754 (2d ed. 1998) (defining "sex" as, *inter alia*, "either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"). Indeed, among the primary evils Congress sought to eradicate by enacting Title IX was the use of federal funds to disadvantage or otherwise classify persons *on the basis of their biological sex characteristics, including reproductive organs or capacity*, or to perpetuate stereotypes that correlate physiological sex characteristics with other qualities and abilities that are not determined by such characteristics.

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[4] *See, e.g.*, *id.* at 21 ("Title IX-era dictionaries unanimously defined sex based on [physiological distinctions between men and women] . . . .").

II. WHEN A SCHOOL DISTRICT SEGREGATES STUDENTS "ON THE BASIS OF SEX," IT PRESUMPTIVELY SUBJECTS THEM TO "DISCRIMINATION" IN VIOLATION OF TITLE IX.

Admittedly, the fact that a school's classification of students on the basis of their reproductive anatomy is "on the basis of sex" does not conclusively establish that the school has "subjected" any or all such students to "*discrimination*" on the basis of sex. Segregating students on the basis of sex, however, creates a strong presumption of unlawful discrimination under Title IX.

"[T]he concept of 'discrimination' . . . is susceptible of varying interpretations." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J.). "'[T]he most easily understood type of discrimination'" is what this Court has called "disparate treatment," *i.e.*, treating someone "'less favorably than others'" because of a protected trait (race, sex, disability, etc.). *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985-86 (1988) (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). A broader, and more common, meaning of the word "discrimination," however, is simply to make any distinction or differentiation between two different things—even if both things are, at least formally, treated equally. *See, e.g.*, 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1971) ("the making or perceiving of a distinction or difference"); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 564 (2d ed. 1998) ("treatment or consideration of . . . a person or thing based on the group, class, or category to which that

person or thing belongs rather than on individual merit"). Federal civil rights statutes proscribing "discrimination" employ other definitions, too. For example, under Title VII of the Civil Rights Act of 1964, it is a form of "discrimination" on the basis of religion for an employer to refuse "to reasonably accommodate . . . an employee's . . . religious observance or practice," even if the policy at issue is facially neutral as to religion. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e(j); *TWA, Inc. v. Hardison*, 432 U.S. 63, 71–74 (1977).

As used in Title IX—and in Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, on which Title IX is closely modeled—"discrimination" has long been understood to encompass most, but not all, classifications on the basis of the specified criterion or criteria (in Title IX, sex; in Title VI, race, color and national origin). Accordingly, when these Spending Clause statutes prohibit funding recipients from "subjecting" people to "discrimination" on the basis of a specified criterion, they do not merely prohibit facially disparate and unfavorable treatment—they also presumptively proscribe the use of the criterion to make classifications for the basis of so-called "separate but equal" segregation, as well.

The language of § 1681(a) of Title IX is "virtually identical" to that of Title VI, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 (1982), except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, and for the limitation of Title IX to 'education' programs or activities. Moreover, as this Court has repeatedly recognized, Congress "passed Title IX with the explicit understanding that it would be interpreted as

Title VI was." *Fitzgerald v. Barnstable Sch. Comm.,* 555 U.S. 246, 258 (2009) (citations omitted). And one of Congress's principal aims in enacting Title VI was to establish a strong presumption that recipients of federal funds may not *segregate* persons on the basis of race.

In several statutes enacted in the decades before 1964, Congress had prohibited racial "discrimination" in federally funded programs, but had included express exemptions for so-called "separate but equal" facilities.[5] In enacting Title VI, Congress retained the prohibition on subjecting people to "discrimination"—and extended it to *all* federally funded programs—but omitted the earlier exceptions that had allowed funding recipients to discriminate in the form of "separate but equal" facilities. The congressional debates revealed "that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation *or providing them with separate facilities*. Again and again supporters of Title VI emphasized that the purpose of the statute

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[5] The Hill-Burton Act, for example, provided that states receiving federal funds had to implement plans for hospital facilities "without discrimination on the basis of race," but then also stated that "an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision ... for each such group." Pub. L. 79-725, § 2, 60 Stat. 1040, 1043–44 (1946) (creating § 622(f) of the Public Health Service Act); *see Simkins v. Moses H. Cone Mem. Hosp.*, 323 F.2d 959 (4th Cir. 1963).

was *to end segregation* in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes." *Bakke*, 438 U.S. at 334 (plurality opinion) (emphasis added). The Congress that enacted Title VI, therefore, specifically understood that segregation on the basis of race, as such, generally was itself a form of "discrimination" that the law would prohibit within federally funded programs and activities.

During the debates on Title IX eight years later, the legislation's principal sponsor, Senator Birch Bayh, explained that the bill's prohibition and enforcement provisions "generally parallel the provisions of title VI." 118 CONG. REC. 5807 (1972). It is not surprising that Senator Bayh therefore identified "sex segregation in vocational education" as an example of the problem Title IX was designed to address. *Id.* at 5806. Importantly, Senator Bayh further explained that sex segregation would be permitted under the statute only in "*very unusual* cases where such treatment is *absolutely necessary* to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." *Id.* at 5807 (emphasis added). Because Senator Bayh's prepared remarks were virtually "the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902," the Court has recognized his views as an "authoritative guide" to the meaning of Title IX. *North Haven*, 456 U.S. at 526–27; *accord Grove City College v. Bell*, 465 U.S. 555, 567 (1984).

The structure of Title IX confirms Senator Bayh's understanding that any treatment that segregates

students on the basis of sex presumptively subjects students to "discrimination." Section 1681(a) sets out a "broad prohibition." *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 175 (2005). Congress included the ban on "subjecting" persons to sex-based "discrimination" *in addition to* two other injunctions—against "exclud[ing]" persons "from participation in" the funded program, and "den[ying]" persons "the benefits of" the program, on the basis of sex. This tripartite enumeration demonstrates that Title IX's "discrimination" prong prohibits something more than sex-based exclusions and denials—forms of disparate treatment that the other two clauses specifically proscribe.

Congress also included a rule of construction, for one particular application of Title IX, that confirmed Senator Bayh's assumption that § 1681(a) would usually—but not always—prohibit separation of students on the basis of their sex: Section 1686 provides that "[n]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. If § 1681(a) did not generally prohibit separation on the basis of sex, there would have been no need for Congress to include § 1686.

The political branches' subsequent treatment of Title IX, shortly after its enactment, further confirmed this understanding of "discrimination" to include most, albeit not quite all, cases in which schools separate students on the basis of their sex.

Section 1682 of Title IX directs federal agencies that provide federal assistance to education programs and activities "to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability." *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (agencies "have authority to promulgate and enforce requirements that effectuate [§ 1681's] nondiscrimination mandate"). The former Department of Health, Education, and Welfare ("HEW") promulgated the first such regulations in 1975, following an extensive public comment process in which the agency received more than 9700 comments. *See* 40 Fed. Reg. 24128 (1975); *see also* 39 Fed. Reg. 22228 (1974) (proposed regulations).

One section of HEW's initial rule, then denominated 45 C.F.R. § 86.31, reiterated the basic prohibitions stated in § 1681(a) of Title IX itself. The rule then proceeded to articulate "[s]pecific prohibitions," i.e., *applications* of those general prohibitions. *Id.* § 86.31(b). One of those "specific prohibitions" was that, "[e]xcept as provided in this subpart," a federal funding recipient "shall not, on the basis of sex" . . . "[s]ubject any person *to separate or different rules of behavior or other treatment*." *Id.* § 86.31(b)(4) (emphasis added); *see* 40 Fed. Reg. at 24141. In other words, the rule not only presumptively prohibited "*different*" (disparate or *unfavorable*) treatment on the basis of sex, but also "*separate* . . . treatment" on the basis of sex (except as the regulations elsewhere provided).

After HEW issued its final rule, but before the rule became effective in July 1975, the House of

Representatives held six days of hearings to examine the proposed regulations. *See Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., 1st Sess. (1975). In those hearings, witnesses and members of Congress raised numerous specific and general objections to HEW's handiwork. No one, however, questioned § 86.31(b)(4)'s prohibition of "separate treatment" on the basis of sex.

The regulatory provision expressly prohibiting "separate . . . treatment" on the basis of sex has been in place since 1975; today it appears, in materially identical form, as 34 C.F.R. § 106.31(b)(4).[6] Thus, the basic rule—that *separating* students on the basis of their sex presumptively subjects them to prohibited "discrimination"—has been an integral part of Title IX law, without controversy or congressional disapproval, for more than 40 years.[7] Accordingly,

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[6] The current version includes the word "sanctions" between "rules of behavior" and "other treatment," but that addition is not germane here.

[7] In 1976, Congress enacted a statutory amendment that further confirmed HEW's construction of § 1681(a)'s prohibition of "discrimination" to include sex segregation. The 1976 amendment added what is now subsection 1681(a)(8); it provides that § 1681 "shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex." Pub. L. 94-482, § 412(a), 90 Stat. 2234. Such an exception would not have made much sense unless Congress was acting on the basis of a background understanding that

Title IX's prohibition on discrimination roughly parallels the "'strong presumption'" this Court has developed under the Equal Protection Clause of the Fourteenth Amendment, namely, "'that gender classifications are invalid.'" *United States v. Virginia (VMI)*, 518 U.S. 515, 532 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment)); *see also Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (viewing statutes prohibiting "discrimination" on the basis of sex as reflecting a congressional "conclu[sion] that classifications based upon sex are inherently invidious").

III. TITLE IX DOES NOT PROHIBIT SEPARATION OF STUDENTS "ON THE BASIS OF SEX" ONLY IN LIMTED AND UNUSUAL CIRCUMSTANCES.

Title IX allows a bit more leeway than Title VI when it comes to the separation of persons on the basis of the identified trait(s) where the treatment of such persons is not formally unequal. Under Title VI, segregating persons on the basis of race is almost never permissible, because "separate-but-equal" practices will virtually always propagate invidious racial stereotypes and result in concrete harms to racial minorities. "Separate but equal" treatment on the basis of sex, by contrast, can be more benign in certain rare cases where the institution's interest is related to actual physiological differences. Thus, as

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§ 1681(a) generally prohibited (or at least rendered suspect) "separate-but-equal" treatment on the basis of sex.

Senator Bayh indicated in describing Title IX, there might be "very unusual cases" in which "differential treatment" on the basis of sex would not amount to prohibited "discrimination," such as "where such treatment is absolutely necessary to the success" of a school program. 118 CONG. REC. at 5807. He explained that the relevant federal agencies could, through regulation, identify such circumstances, *id.*, and he mentioned, as one example, differential treatment "in sports facilities or other instances where personal privacy must be preserved," *id.*; *see also* 20 U.S.C. § 1686 (statutory clarification that § 1681(a) does not prohibit maintenance of "separate living facilities for the different sexes").

In the decades since Congress enacted Title IX, the Department of Education (previously HEW) has promulgated several regulations identifying specific circumstances in which "differential treatment" of the sexes does not, in the agency's view, subject students to a form of prohibited "discrimination."[8] It is

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[8] The current regulations include the following half-dozen examples:

> -- 34 C.F.R. § 106.32(b), which implements section § 1686 of Title IX. This rule states that although a funding recipient "may provide separate housing on the basis of sex," "[h]ousing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: (i) Proportionate in quantity to the number of students of that sex applying for such housing; and (ii) Comparable in quality and cost to the student."

-- 34 C.F.R. § 106.33 provides that a recipient "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

-- 34 C.F.R. § 106.34(a)(1) states that the general prohibition on "separate" treatment in § 106.34(a) "does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact."

-- 34 C.F.R. § 106.34(a)(3) provides that "[c]lasses or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls."

-- 34 C.F.R. § 106.34(b) provides that nonvocational coeducational elementary or secondary schools may provide nonvocational single-sex classes or extracurricular activities if doing so is "substantially related to achieving" an "important" objective, but only if, *inter alia*, "[t]he recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity."

-- 34 C.F.R. § 106.41 explains that although a recipient is generally prohibited from offering interscholastic, intercollegiate, club or intramural athletics "separately" on the basis of sex, a recipient may operate or sponsor separate teams for members of each sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." It goes on, however, to

important to emphasize that these regulations do not establish *exemptions* from the prohibitions of § 1681(a); the agency has no authority to permit "discrimination" on the basis of sex or otherwise to waive the conditions of § 1681(a). Rather, § 1682 only affords an agency the authority to promulgate rules "to *effectuate* the provisions of section 1681." Therefore, the regulations in question describe circumstances in which the Department of Education has concluded that sex segregation does *not* constitute "discrimination"—*i.e.*, the "unusual cases," 118 CONG. REC. at 5807 (Sen. Bayh), in which the general rule of 45 C.F.R. § 86.31(b)(4) (a federal funding recipient "shall not . . . . [s]ubject any person to separate or different rules of behavior or other treatment") does not apply.

It is not necessary in this case for the Court to determine whether any or all of these agency regulations are permissible constructions of § 1681(a).[9] What is most important for present purposes is that these regulations are written against the longstanding background rule that "separate . . . treatment" on the basis of sex is *generally* a form of

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clarify that for noncontact sports, if separate men's and women's teams are not available, members of the "excluded" sex must be permitted to try out for the one team that is offered.

[9] Indeed, amici have doubts about some of them, including § 106.34(b), which permits the use of single-sex classes in particular subjects (e.g., math) for students of one sex but not the other. That regulation not only fails to guarantee comparable treatment for both sexes; it might also be predicated on dubious assumptions that boys and girls learn differently.

prohibited "discrimination" (*see* 34 C.F.R. § 106.31(b)(4)). At the same time, most of these regulatory provisions also reflect important limitations that circumscribe the situations in which "separate treatment" might not amount to "discrimination."

For example, as Senator Bayh indicated, such separation on the basis of sex is permitted only where, at a minimum, it is *necessary* to advance an important school interest that is actually correlated to physiological differences. In the terms used in this Court's constitutional sex discrimination cases, Title IX permits separation only when it does not "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," *VMI*, 518 U.S. at 533, and does not "demean the ability or social status" of affected individuals, *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 478 (1981) (internal citation omitted). Moreover, in order to avoid "subject[ing]" students to "discrimination," § 1681(a), the school must provide all students, regardless of sex, with "comparable" facilities and opportunities. *See, e.g.*, 34 C.F.R. § 106.32(b) (sex-segregated student housing must be "comparable in quality and cost" to students of both sexes); *cf.* 20 U.S.C. § 1681(a)(8) (establishing Title IX exception for father-son/mother-daughter activities, but only where "opportunities for reasonably comparable activities shall be provided for students of the other sex"). Accordingly, for a policy of sex segregation to qualify as one of those "very unusual cases" (Sen. Bayh) in which differential treatment on the basis of sex would not subject students to prohibited discrimination, the school must do everything

reasonably within its ability to ensure what this Court (in the Equal Protection context) has called "substantial equality" for all students. *VMI*, 518 U.S. at 554.

This requirement of comparable treatment extends to each individual student—not to aggregate groups of all students of a particular sex. The text of the statute, after all, provides that "*no person* in the United States" shall be subjected to sex-based discrimination in a federally funded school. 20 U.S.C. § 1681(a) (emphasis added); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (explaining that the purpose of Title IX is to "provide individual citizens effective protection against [prohibited] practices"); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978) (because practices that "classify employees in terms of … sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals," the "basic policy of [Title VII] … requires that we focus on fairness to individuals rather than … classes"); *cf. J.E.B.*, 511 U.S. at 152–53 (Kennedy, J. concurring) (an anti-discrimination provision "extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups").

Thus, even where a school policy of separating persons on the basis of sex might generally be permissible because (among other things) it does not harm the vast majority of affected students, the question is very different when a school applies

that policy to students who do suffer significant harm as a result of being segregated on the basis of their reproductive or other sex-based characteristics.[10] As applied to *those* students, the policy would subject them to discrimination on the basis of sex, which § 1681(a) forbids, particularly if the segregation is not, in Senator Bayh's words, "absolutely necessary to the success" of what this Court has, in an analogous setting, called "'important governmental objectives.'" *VMI*, 518 U.S. at 533 (*quoting Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

IV. A SCHOOL'S POLICY OF SEGREGATING RESTROOMS ON THE BASIS OF SEXUAL ANATOMY DOES NOT ORDINARILY SUBJECT MOST STUDENTS TO IMPERMISSIBLE DISCRIMINATION.

Since 1975, the Title IX regulations have included a provision concerning restrooms and other "facilities." *See* 40 Fed. Reg. at 24141 (promulgating 45 C.F.R. § 86.33, which is now 34 C.F.R. § 106.33). It provides that a recipient of federal funding "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities

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[10] For example, if a particular accommodation for disabled persons were available only in one particular "male" restroom, and one or two girls in the school could not use restroom facilities without such an accommodation, a rule excluding them from the configured "male" restroom would impermissibly subject them to sex discrimination, not only to disadvantage based on disability.

provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[11]

The "toilet . . . facilities" provision creates an exception to another regulation HEW promulgated in 1975, which establishes the baseline Title IX rule that "[e]xcept as provided in this subpart," a federal funding recipient "shall not, on the basis of sex . . . [s]ubject any person to separate or different rules of behavior or other treatment." 34 C.F.R. § 106.31(b)(4); *see supra* at 14-15. HEW did not offer any explanation, in 1975 or thereafter, for why segregation on the basis of sex in "toilet facilities" is permissible under Title IX. With respect to "locker room" and "shower" facilities, HEW presumably concluded that it would be reasonable for a school to

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[11] The Board argues (Board Br. 8, 47-48) that § 106.33 is an implementation *of Section 1686* of Title IX—that it is the agency's attempt to "flesh out" the statutory reference to "living facilities." That is mistaken. In order to implement § 1686, HEW promulgated a different regulatory provision, currently 34 C.F.R. § 106.32, which governs housing and actual *living* facilities, such as dormitories. The agency specifically cited § 1686 as authority for that "living facilities" provision, and entitled it "Housing." *See* 40 Fed. Reg. at 24141; *see also* 39 Fed. Reg. at 22229 (discussing proposed regulation). Section 106.33, by contrast, is a distinct, additional regulatory provision, dealing specifically with "toilet, locker room and shower facilities," presumably *within* the school buildings themselves rather than (or in addition to) "living facilities." Notably, the agency did not cite § 1686 as authority for its promulgation of what is now § 106.33—it only cited the general provisions of Sections 1681 and 1682. *See* 40 Fed. Reg. at 24141.

facilitate certain societal expectations of privacy in contexts involving communal nudity—and that such segregation does not promote sex-based stereotypes nor ordinarily cause significant harms to any students. With respect to "toilet . . . facilities," however, students are rarely, if ever, seen unclothed by their peers. Therefore, as we explain further below, concerns about bodily exposure are inapposite when it comes to restrooms.

Even so, amici agree that if a school chooses to segregate students in separate restrooms on the basis of their sexual anatomy, that policy ordinarily would not subject *most* students to impermissible "discrimination."

A school might have either or both of two interests in requiring such restroom sex-segregation. First, a school might assume that such segregation decreases the risk of harassment, taunting, or voyeurism that students might occasionally engage in if all bathrooms were open to all students.[12] Second, the school might wish to respect common privacy expectations associated with students' personal bodily functions. *See* Ruth Bader Ginsburg, "The Fear of the Equal Rights Amendment," WASH. POST (Apr. 7, 1975), https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg (explaining that even if the

[12] Of course, the strength of this interest would depend on whether it is empirically true that such conduct occurs more frequently in unisex or co-educational restrooms than in sex-specific restrooms. Amici are not familiar with the evidence, if any, that bears on this question.

Equal Rights Amendment to the Constitution were ratified, "[s]eparate places to disrobe, sleep, [and] *perform personal bodily functions*" would be "permitted . . . by regard for individual privacy"). To be sure, the privacy concerns and anxieties associated with bodily functions do not necessarily depend on the sex of others present in the restroom—which explains, in part, why unisex and co-educational restrooms are becoming increasingly common in colleges and other institutions. Nevertheless, it remains the case that some people are less comfortable, for whatever reason, when people of the other sex are present in the room while they perform such functions.

Whatever the strength of these rationales might be, what is most salient for present purposes is that the vast majority of students would not suffer any appreciable harm if a school imposed sex-based restrictions in restrooms. Notably, various state laws have *required* sex-segregation in workplace restrooms since the late Nineteenth Century. *See* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 39 (2007); *see also* 29 C.F.R. § 1910.141(c)(1)(i) (existing federal safety and health regulation requiring sex-segregated restrooms in certain workplaces). Perhaps as a result of such longstanding, legally compelled separation in employment settings, and similar, voluntary restroom customs in other settings, most students, and their parents, have come to expect such separation in schools, as well—indeed, many see it as a welcome convenience. Moreover, although some laws requiring sex-segregated restrooms might have

had their origin in unjustified generalizations about women's vulnerability and delicacy, *see* Kogan, *supra*, 14 MICH. J. GENDER & L. at 41-51, today there is considerably less risk that such segregation rules rest upon "overbroad generalizations about the different talents, capacities, or preferences of males and females," *VMI*, 518 U.S. at 533, or perpetuate unwarranted sex stereotypes. Therefore, as to the mine run of individuals, this is a case of no harm, no foul—which might explain why very few people have raised any Title IX complaints about such practices in the more than 40 years since HEW promulgated its "toilet . . . facilities" regulation.

Accordingly, when a school consigns students to separate but otherwise equal restroom facilities on the basis of their sexual anatomy, it necessarily acts "on the basis of sex." This is, however, one of the rare instances in which action taken on the basis of sex does not subject *most* students to the sort of "discrimination" that Title IX was designed to prevent.

V. APPLICATION OF THE BOARD'S RESTROOM POLICY TO TRANSGENDER STUDENTS SUBJECTS THEM TO SEX-BASED DISCRIMINATION THAT TITLE IX PROHIBITS.

Things are very different, however, when a school, applying that same restroom policy, consigns *transgender* students to restrooms on the basis of their external reproductive organs. Such a policy profoundly harms such students. And, far from being "necessary," 118 CONG. REC. 5807 (remarks of Sen. Bayh), to achieve any important school interests,

such exclusion does not even help to advance such interests. Accordingly, such sex-based segregation subjects transgender students to "discrimination" in violation of Title IX.

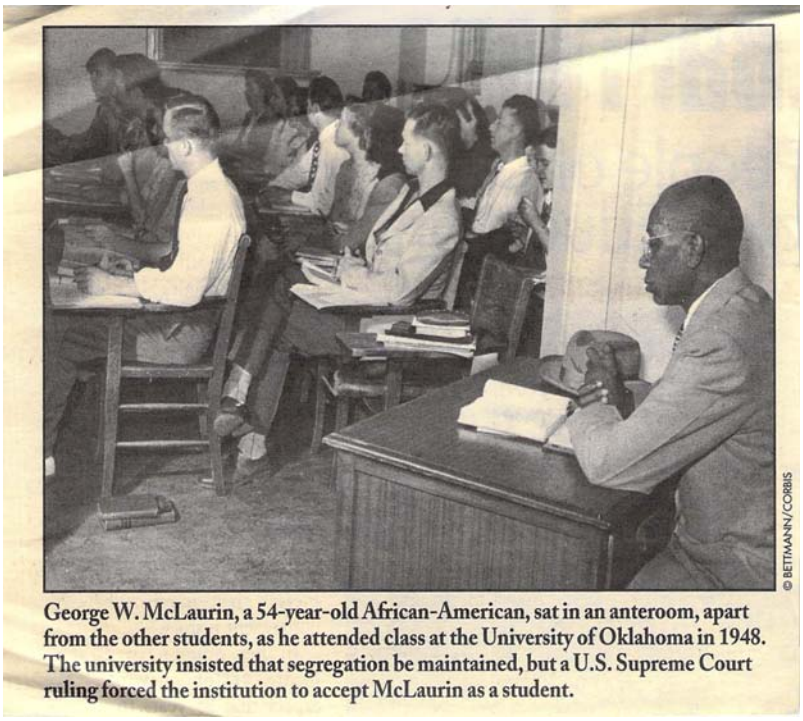
A. Harms to Transgender Students

The Gloucester Board prohibits Gavin Grimm from using the high school restrooms designated "male" because of his external reproductive organs. Gavin alleged (J.A. 73), and it is not controverted, he would suffer "severe psychological distress" if he were to use the restrooms designated "female," and that to do so "would be incompatible with his medically necessary treatment for Gender Dysphoria." Presumably, however, the Board does not expect, and does not want, Gavin to use the "female" restrooms. Gavin, after all, appears to be, and presents himself as, a boy. If he or other transgender boys entered a "female" restroom, many girls would undoubtedly object; confrontations would be likely; and, as Respondent notes (Resp. Br. 28), it would "undermine the very privacy expectations regarding single-sex restrooms that the Board claims to be protecting."

Accordingly, the Board policy, by design and in effect, effectively excludes Gavin from all common restrooms, and consigns Gavin and other transgender students to use single-stall restrooms—what the Policy itself refers to as "alternative appropriate private facilit[ies]." J.A. 69. Gavin himself uses the nurse's single-stall restroom. Every time he does so, "I am reminded that nearly every person in my community now knows I am transgender and that I have now been publically identified as 'different,'" which "increases my feelings of dysphoria, anxiety,

and distress." Pet. App. 151a. And every time Gavin enters that restroom, it "feels humiliating" because "I am effectively reminding anyone who sees me go to the nurse's office that, even though I am living and interacting with the world in accordance with my gender identity as a boy, my genitals look different." *Id*. 151a-152a.

Indeed, Gavin's situation is in many respects analogous to that of George McLaurin at the University of Oklahoma in 1950. *See McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950). The University permitted McLaurin to use the same classroom, library and cafeteria as students of other races. But it also assigned McLaurin "to a seat in the classroom in a row specified for colored students," and to separate tables in the library and cafeteria. *Id.* at 640. Although there was "no indication that the seats to which he [was] assigned in these rooms ha[d] any disadvantage of location, and such separations might have been "in form merely nominal," this Court held that the separation itself nonetheless "signif[ied] that the State, in administering the facilities it affords for professional and graduate study, set[] McLaurin apart from the other students," such that McLaurin was "handicapped in his pursuit of effective graduate instruction." *Id.* at 640–41.



George W. McLaurin, a 54-year-old African-American, sat in an anteroom, apart from the other students, as he attended class at the University of Oklahoma in 1948. The university insisted that segregation be maintained, but a U.S. Supreme Court ruling forced the institution to accept McLaurin as a student.

The same is true of Gavin Grimm: By relegating Gavin to single-stall restrooms, the Board sets him apart from all his peers, and does so in an especially humiliating and stigmatizing way (whether or not that is the Board's intent), thereby "handicap[ing]" him in his educational pursuits.

Other students in the Gloucester School District who are likewise already known to be transgender would undoubtedly suffer the same severe harms as Gavin. And things would only be worse for students who were *not* previously known to be transgender, because application of the policy to them would frequently "out" them to their fellow students in cases where they had previously successfully

presented themselves to others as being of the sex corresponding to their gender identities.

Therefore there can be no denying that the Board's rigid, unyielding policy of sex segregation in school restrooms inflicts grievous emotional and stigmatic harms on transgender students, and that it does so precisely because the school has segregated them on the basis their "sex" under the Board's own definition of that term.

B. The School's Asserted Interests in Preventing Transgender Students from Using Restrooms Corresponding to Their Gender Identity

What is worse, the Board utterly fails to invoke any "'important . . . objectives,'" *VMI*, 518 U.S. at 533 (*quoting Hogan*, 458 U.S. at 724), that might conceivably justify inflicting such harms on Gavin and other transgender students. Strikingly, its brief to this Court barely mentions any such objectives at all.

The challenged restroom policy itself, on the other hand, does at least point to two reasonable-sounding institutional objectives, albeit ones that have little bearing on the Policy's application to Gavin and other transgender students. The policy states that "GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students." J.A. 16. The Board has not, however, demonstrated that prohibiting transgender students from using restrooms correlated with their gender identities will even advance any interests in student safety or privacy—let alone that such exclusion is necessary to secure those goals. *Cf. VMI*,

518 U.S. at 533 ("The burden of justification is demanding and it rests entirely with the state.").

1. Safety. The Board offers not a word in support of the notion that excluding Gavin from "male"-designated restrooms is necessary "to provide a safe learning environment for all students." And of course neither the Board nor its many amici advances the groundless notion that Gavin and other transgender students are likely to harm other students in such restrooms—or, more to the point, that they pose any different or greater such risks than other students who are present in those same restrooms.[13]

Instead, some of the Board's amici argue that a policy of permitting transgender students to use restrooms corresponding to their gender identity will prompt other, ill-intentioned individuals to *feign* transgender status "in order to gain easier access to these sensitive spaces" to harm others, William J. Bennett Amicus Br. at 22, or to "seek[] cheap thrills," Public Safety Experts Amicus Br. at 7—an idea that does appear to have motivated at least one member of

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[13] In his dissenting opinion in the court of appeals, Judge Niemeyer obliquely referred to "safety concerns . . . [that] could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." Pet. App. 52a. Suffice it to say that neither Judge Niemeyer nor the Board has cited any reason to believe that some imagined "sexual responses" of transgender students would pose any unique or special risks to student "safety," even in the unlikely event that other students exposed their "private body parts" in restrooms.

the Gloucester community who spoke at the Board meeting where the restroom policy was debated. *See* J.A. 70 ("Some speakers claimed that transgender students' use of restrooms that match their gender identity . . . would lead to sexual assault in bathrooms. *Another suggested that boys who are not transgender would come to school wearing a dress and demand to use the girls' restroom for nefarious purposes*.") (emphasis added).

The Board itself does not press this safety argument—and with good reason. For one thing, many jurisdictions around the nation have, for many years, guaranteed transgender persons access to restrooms corresponding to their gender identity, and "[n]one of these jurisdictions has reported a rise in sexual violence or other public safety issues following the enactment of these laws." Anti-Sexual-Assault, et al. Orgs. Amicus Br. at 4. Moreover, neither the Board nor its amici suggest there has been any appreciable increase in restroom-related violence or threats at those colleges and universities in which co-educational restrooms have become ubiquitous.

Regardless of whether and to what extent there might be such risks in other settings, however, there is certainly no basis for surmising that any such improper "transgender feigning" will occur in high schools. The notion that, for example, male students at Gloucester High School will try to masquerade as transgender in order to access the girls' restroom for "cheap thrills" or other nefarious purposes, is nonsense, especially in light of the stigma that ordinarily accompanies transgender status. There is, as far as we know, no evidence of any such thing happening at any school, ever. And if any student

were to be so bold as to try such a gambit, the school principal would undoubtedly call him out on it right away, or at least seek some verification.

There is, in short, nothing at all to the idea, implicit in the Board's policy, that prohibiting transgender students from using restrooms correlated with their gender identities is necessary in order to "provide a safe learning environment for all students."

2. Privacy/"Disrobing." Nor does the Board explain how its exclusion of Gavin and other transgender students from restrooms corresponding to their gender identity might "protect the privacy of all students." J.A. 16. Presumably the Board means to invoke Judge Niemeyer's statement, in his dissenting opinion in the court of appeals, that "[a]n individual has a legitimate and important interest in bodily privacy *such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex*." Pet. App. 57 (emphasis added); *see also* Board Br. at 7 (referring to students' interest in not "disrobing in front of the other sex") (citation omitted).

Protecting such student privacy concerns—ensuring that they do not unwillingly expose to others their "nude or partially nude bod[ies], genitalia, and other private parts" while in school—can certainly be an important institutional interest, especially when it comes to adolescents. But it does not follow that it is necessary to exclude transgender students from restrooms in order to advance that interest. For one thing, architecture (rather than law) has effectively eliminated any potential problem associated with this privacy-related interest in

restrooms: There is hardly a school restroom in the nation where any student must expose "his or her nude or partially nude body, genitalia, and other private parts" to *anyone*.[14] Indeed, it is fair to assume that future developments in bathroom design will provide even greater such privacy protection—which helps explain why unisex restrooms are becoming increasingly common, and uncontroversial, in other nations and at many U.S. colleges and universities.[15] Moreover, it is not clear why this

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[14] For example, no student is required to use urinals; but if a school wishes to preserve boys' ability to do so without exposing their genitals to others in the restroom, the school can build barriers between urinals. There is also no reason for the school to be concerned about the hypothetical prospect that some *transgender* students might expose *their* genitals to other students. In restrooms, virtually no one exposes their reproductive organs to anyone else *except* at urinals. Transgender boys typically will not use urinals, however; and there will rarely if ever be urinals in the girls' restrooms that transgender students could use even if they wanted to.

[15] This case does not require the Court to decide whether such an institutional interest would be more acutely implicated in locker room and shower settings and, if so, whether it would be necessary to exclude transgender students from such a setting in order to advance that interest. At Gloucester High School there are no functional showers; and Gavin Grimm uses a home-bound program for physical education and therefore does not use the school locker rooms. J.A. 68. In any event, we suspect that courts will rarely, if ever, be called upon to address that question. In many, perhaps most, contemporary schools, there are no settings of compelled communal nudity, and thus students are never required to expose their nude bodies to others.

privacy interest is more frequently implicated when it comes to the presence of transgender students in particular, compared to other students who present as the same sex as those transgender students. After all, most students prefer to avoid such exposure of their bodies to *any* peers, and that concern is not obviously correlated with whether the peers in question have one or another set of external reproductive organs.[16]

In the court of appeals, the Board also referred in passing to another sort of privacy interest, distinct from securing students' ability to avoid unwelcome "disrobing" or unwanted exposure of nudity to one's peers: "The School Board has a responsibility to its students to ensure their privacy *while engaging in personal bathroom functions*." Brief of Appellee at 28 (emphasis added). This is the same interest we discussed in Part IV, *supra*—an interest that is part of the justification for why schools may have sex-segregated restrooms in the first place, consistent with Title IX.

We question whether advancing this particular variation of a privacy interest would be sufficiently important to justify the substantial, acute harms that

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[16] Perhaps Judge Niemeyer was assuming that, e.g., transgender girls are more likely to be sexually attracted to other girls in a "female" restroom than nontransgender girls will be. It is now widely understood, however, that people's sexual orientation, regardless of whether they are transgender, will not uniformly be directed to persons with different reproductive organs.

a school inflicts upon transgender students by excluding them from restrooms associated with their gender identity. The Court need not resolve that question, however, because the Board has offered no basis for thinking that the presence of *transgender* boys elsewhere in a "male" restroom—or transgender girls elsewhere in a "female" restroom—implicates this privacy concern any more than when other, *non*transgender students are similarly in the vicinity. There is certainly no material difference on this score in a case where the transgender student is not *known* by his peers to be transgender. But even in a case such as Gavin's, where other students know he is transgender, the Board has offered no reason to conclude that this privacy concern is materially more implicated when students perform bodily functions while Gavin is present elsewhere in the restroom, in contrast to cases in which other boys, who are in every outward respect indistinguishable from Gavin, are present.

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The Board therefore has not identified any important institutional interests in safety or privacy that would be undermined—and that the Board could not otherwise adequately address—if it permitted Gavin to use the "male" restrooms at Gloucester High School. Therefore, to cause Gavin to suffer the acute and serious harms associated with his exclusion from those restrooms, solely because of the external reproductive organs he happens to have, is to "subject" him to "discrimination . . . on the basis of sex," in violation of Title IX.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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