No. 15-2056

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

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

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-2056 Caption: G.G. v. Gloucester County School Board

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(name of party/amicus)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Gail M. Deady Date: May 8, 2017

Counsel for: G.G., by his next friend and mother,

CERTIFICATE OF SERVICE

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I certify that on May 8, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Gail M. Deady (signature) May 8, 2017 (date)

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INTRODUCTION

Gavin Grimm was banished from using the same restrooms as other boys on December 9, 2014, when he was a 15-year-old sophomore at Gloucester High School. Gavin is now an 18-year-old senior and scheduled to graduate on June 10, 2017. For the past three years of high school, he has been segregated from his peers and forced to use separate single-stall facilities that no other student is required to use. Even after Gavin obtained a Virginia court order and amended birth certificate stating that he is male, the Gloucester County School Board (the "Board") has continued to single him out as unfit to use the same restrooms as every other boy at school. That degrading and stigmatizing policy has "become[] an enduring feature of his high school experience." *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 729 (4th Cir. 2017) (Davis, J., concurring).

Although Gavin will soon graduate high school, his claims for injunctive relief and damages are not moot, and he continues to "look[] to the federal courts to vindicate [his] claims to human dignity" under Title IX, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause. *Id.* When this Court first considered Gavin's appeal, it resolved the case on the narrowest available grounds by deferring to the Department of Education's (the "Department's") guidance interpreting its own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997). The Department has now withdrawn the guidance documents containing that interpretation, and the Supreme

Court has remanded the case for this Court to examine the statute and regulation without deference and "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *See Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017).

The "dispositive realit[y]" is that Gavin is recognized by his family, his medical providers, the Virginia Department of Health, and the world at large as a boy. *United States v. Virginia*, 518 U.S. 515, 550 (1996). Allowing him to use the same restrooms as other boys is the only way to provide him access to sex-separated restrooms pursuant to 34 C.F.R. § 106.33 without discrimination. It is, therefore, the only option consistent with the underlying requirements of Title IX and the Equal Protection Clause. Excluding transgender people from using the same restrooms as everyone else prevents them "from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment"—and Title IX—"cannot countenance." *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014).

Because Gavin is likely to prevail on the merits of his claims under both Title IX and the Equal Protection Clause, the Court should reverse the district court's dismissal of his Title IX claim and hold that he is entitled to a preliminary injunction as a matter of law.

SUPPLEMENTAL STATEMENT OF THE CASE

Factual background

This Court is already familiar with the facts of this case, as reflected in the allegations of the Complaint and the uncontroverted declarations submitted in support of Gavin's original motion for a preliminary injunction. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715-17 (4th Cir. 2016); *G.G.*, 853 F.3d at 729 (Davis, J., concurring). On remand, the parties may need to amend pleadings to reflect what occurred during Gavin's junior and senior years of high school. The following facts, however, are either contained in the existing record or subject to judicial notice.[1]

Over three years ago, near the end of his freshman year, Gavin came out to his family as a boy and, with the help of his medical providers, transitioned to living in accordance with his male identity as part of medically necessary treatment for gender dysphoria.[2] JA 12-13. Based on his treatment protocol, Gavin legally

[1] The uncontroverted facts alleged in the Complaint and declarations must be taken as true on both a motion to dismiss and a motion for preliminary injunction. *See Schindler Elev. Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 n.2 (2011); *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976). The Court may also consider facts subject to judicial notice, which "are deemed to be a part of every complaint by implication." 11A Wright & Miller, *et al.*, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2015); *see Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986).

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

changed his name to Gavin and began using male pronouns. JA 13-14. Gavin wore his clothing and hairstyles in a manner typical of other boys and began using the men's restrooms in public venues, including restaurants, libraries, and shopping centers, without encountering any problems. *Id.* His medical providers also referred Gavin to an endocrinologist to begin hormone therapy. JA 14.

Gavin and his mother met with the school principal and guidance counselor in August 2014, before the beginning of his sophomore year, to explain that Gavin is a boy who is transgender and would be attending school as a boy. *Id.* Gavin and his mother gave them a "treatment documentation letter" from his psychologist, which confirmed that Gavin was receiving treatment for gender dysphoria and stated that he should be treated as a boy in all respects, including when using the restroom. JA 13-14.

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dysphoria is a serious medical condition, it "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender & Gender Variant Individuals* (2012), https://goo.gl/iXBM0S. There is a medical and scientific consensus that the treatment for gender dysphoria is for boys who are transgender to live as boys and for girls who are transgender to live as girls. *See* JA 13, 38; Amicus Brief of Am. Acad. of Pediatrics, *et al*, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 1057281, at *14-24 ("AAP Amicus), https://goo.gl/Nbxk65. That includes using names and pronouns consistent with one's identity, and grooming and dressing in a manner typically associated with that gender. When medically appropriate, treatment also includes hormone therapy and surgery. JA 38. If left untreated, gender dysphoria can lead to anxiety, depression, self-harm, and even suicide. JA 40. When gender dysphoria is properly treated, transgender individuals experience profound relief and can go on to lead healthy, happy, and successful lives. *See* AAP Amicus, 2017 WL 1057281, at *36.

At that time, the Board did not have policies addressing transgender students. *See* Press Release, Gloucester Cty. School Bd. (Dec. 3, 2014) ("GCPS Press Release").[3] Gavin initially requested to use the restroom in the nurse's office, but he soon felt stigmatized and isolated using a different restroom from everyone else. JA 15. After a few weeks of using the restroom in the nurse's office, Gavin sought permission to use the boys' restrooms. On October 20, 2014, with the principal's support, Gavin began using the boys' restrooms, and did so for seven weeks without incident. *Id.* The principal and superintendent informed the Board but otherwise kept the matter confidential. *Id.*

The principal and superintendent's decision to treat Gavin the same as other boys is consistent with the recommendations of the National Association of Secondary School Principals, the National Association of Elementary School Principals, and the American School Counselor Association.[4] It is also consistent with resolutions from the American Psychological Association and the National Association of School Psychologists, which call upon schools to provide boys and

[3] The Board's press release is incorporated by reference in the Complaint. JA 17. A copy of the press release is reproduced in Brief of Respondent at 1a-4a, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 766063, at *1a-4a, https://goo.gl/9BskUf.

[4] *See* Transgender Students and School Bathrooms: Frequently Asked Questions (2016), https://goo.gl/Z4xejp; Nat'l Ass'n of Secondary Sch. Principals, *Position Statement on Transgender Students* (2016) ("NASSP Statement"), https://goo.gl/kcfImn.

girls who are transgender with "access to the sex-segregated facilities, activities, and programs that are consistent with their gender identity."[5]

Although the school administrators treated the matter as confidential, *see* GCPS Press Release, 2017 WL 766063, at *3a, some adults in the community learned that a boy who is transgender was using the boys' restrooms at school, JA 15. They contacted the Board to demand that the transgender student (who was not publicly identified as Gavin until later) be barred from the boys' restrooms. *Id.* The Board has not disclosed the nature or source of the complaints.[6]

The Board considered the matter at a private meeting and took no action for several weeks. GCPS Press Release, 2017 WL 766063, at *3a-4a. Apparently unsatisfied with the results of the private meeting, one member of the Board alerted the broader community by proposing a policy for public debate at the Board's meeting on November 11, 2014. JA 15. The policy's operative language stated:

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[5] Am. Psychological Ass'n & Nat'l Ass'n Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015) ("APA & NASP Resolution"), https://goo.gl/AcXES2.

[6] According to media reports, at least some of the complaints came from a Gloucester High School employee who runs the school Bible club and is a pastor at a local church. *See* Moriah Balingit, *Gavin Grimm just wanted to use the bathroom. He didn't think the nation would debate it.*, Wash. Post. (Aug. 30, 2016), https://goo.gl/WuZCdb. That employee told the Washington Post that he spoke out against Gavin's use of the boys' restroom because "God puts us on this Earth as who we are." *Id.*

> 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.

JA 15-16. The policy categorically prohibits administrators from allowing any boy who is transgender to use any boys' restroom (or allowing any girl who is transgender to use any girls' restroom) regardless of the student's individual circumstances. The policy does not define "biological gender."[7]

After learning about the meeting through social media, Gavin and his parents decided to speak against the proposed policy. JA 16-17. Gavin told the Board:

[7] There are many biological components of sex "including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual." *Radtke v. Misc. Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012). Moreover, as a result of hormone blockers and hormone therapy, the bodies of many transgender girls are different from the bodies of non-transgender boys, and the bodies of many transgender boys are different than the bodies of non-transgender girls. Wylie C. Hembree, *et al.*, *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94(9) J. Clinical Endocrinology & Metabolism 3132-54 (Sept. 2009) ("Endocrine Society Guidelines"), https://goo.gl/lOroQj; AAP Amicus, 2017 WL 1057281, at *19. Hormone therapy affects bone and muscle structure, alters the appearance of a person's genitals, and produces secondary sex characteristics such as facial and body hair and deepened voice in boys and breasts in girls. *See* Endocrine Society Guidelines at 3139-40. Transgender boys and girls who receive hormone blockers never go through puberty as their birth-designated sex and will develop the height, muscle mass, bone structure that are typical of other boys and girls. *Id.* at 3140-43.

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

Recorded Minutes of the Gloucester Cty. Sch. Bd., Nov. 11, 2014, at 25:00 – 27:22 ("Nov. 11 Minutes"), https://goo.gl/dXLRg7; *see also G.G.*, 853 F.3d at 729 (Davis, J., concurring). The Board deferred voting on the policy until its next meeting. JA 17.

Before its next meeting, the Board issued a press release announcing plans for "adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms." GCPS Press Release, 2017 WL 766063, at *3a. In addition, the press release announced "plans to designate single stall, unisex restrooms … to give all students the option for even greater privacy." *Id.* The Board also acknowledged that it had reviewed guidance from the Department of Education advising schools that transgender students should generally be treated consistently with their gender identity. *Id.* at *1a-2a.

Speakers at the December Board meeting nonetheless demanded that Gavin be excluded from the boys' restrooms, and they threatened to vote Board members

out of office if they refused to pass the new policy. JA 18. With Gavin in attendance, several speakers pointedly referred to him as a "young lady." *Id.* One speaker called Gavin a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* "Put him in a separate bathroom if that's what it's going to take," said another. Recorded Minutes of the Gloucester Cty. Sch. Bd., Dec. 9, 2014 ("Dec. 9 Minutes") at 58:56, https://goo.gl/63Vi4Q.

The Board passed the policy by a 6-1 vote. JA 18. The Board subsequently installed three single-user restrooms. JA 19, 32. Although any student is allowed to use those restrooms, no one else does so. *Id.* Everyone knows they were created for Gavin. *Id.* The converted single-user restrooms are located far away from Gavin's classes and the restrooms used by his classmates. JA 32.

Using the single-stall restrooms is demeaning and shameful for Gavin. JA 19, 32-33. They signal to Gavin and the entire school community that he is different, and they send a public message to all his peers that he is not fit to be treated like everyone else. *Id.* In the words of one of the policy's supporters, the separate restrooms divide the students into "a thousand students versus one freak." Dec. 9 Minutes at 1:22:53.

Gavin does everything he can to avoid using the restroom at school. JA 19. As a result, he has developed painful urinary tract infections and is distracted and uncomfortable in class. *Id.* If Gavin has to use the restroom, he uses the nurse's

restroom, but he feels ashamed doing so. JA 19, 32-33. Everyone who sees Gavin enter the nurse's office knows he is there because he has been barred from the restrooms other boys use. JA 33. It makes him feel "like a walking freak show" and "a public spectacle." *See* JA 31-33.

Any teenager, whether transgender or not, would be harmed by being singled out and shamed in front of his peers. JA 39-40. But transgender students are particularly vulnerable. JA 40-41. Preventing transgender students from living in a manner that is consistent with their gender identity puts them at increased risk of debilitating depression and suicide. *See id.*; AAP Amicus, 2017 WL 1057281, at *26, *36. According to a nationally recognized expert in the treatment of gender dysphoria who evaluated Gavin at the end of his sophomore year, the policy "places him at extreme risk for immediate and long-term psychological harm." JA 20, 42.

The Board's policy has been in place since December 9, 2014. From that time to the present, Gavin has continued to receive treatment for gender dysphoria. Later in December 2014, Gavin began hormone therapy, which has altered his physical appearance and deepened his voice. JA 14. In June 2015, Gavin received an I.D. card from the Virginia Department of Motor Vehicles identifying him as male. JA 60-61. After Gavin received chest-reconstruction surgery, the Gloucester County Circuit Court issued an order on September 9, 2016, legally changing

Gavin's sex under state law and ordering the Virginia Department of Health to issue Gavin a birth certificate listing his sex as male. *See* Pl.'s Mot. to Expedite, ECF 102, Ex. B. The Virginia Department of Health issued Gavin an amended birth certificate on October 27, 2016. *See* Pl.'s Mot. to Expedite, ECF 102, Ex. C.[8]

Despite the court order and amended birth certificate, the Board continued to prohibit its administrators from allowing Gavin to use the boys' restrooms throughout his senior year. That position is even more extreme than the policy at issue in *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), *appeal dismissed*, No. 15-2022 (3d Cir. Mar. 30, 2016), and the controversial North Carolina statute challenged in *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016). In *Johnston*, the university allowed transgender students to use facilities that matched their gender identity if the student had a court order or amended birth certificate reflecting their change of sex. *See Johnston*, 97 F. Supp. 3d at 663. Similarly, the statute in North Carolina defined "biological sex" as the sex "stated on a person's birth certificate" N.C. Gen. Stat. Ann. § 143-760, *repealed in part*, 2017 N.C. Laws S.L. 2017-4 (H.B. 142). Under the North

[8] The Virginia court order and birth certificate are public records, which are subject to judicial notice. *See, e.g.*, *Brockington v. Boykins*, 637 F.3d 503, 505 (4th Cir. 2011); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 179 (4th Cir. 2009); *see also G.G.*, 853 F.3d at 731 (Davis, J., concurring) ("[T]he record shows that the Commonwealth of Virginia has now recorded a birth certificate for G.G. that designates his sex as male.").

Carolina statute, "transgender individuals [could] use facilities consistent with their gender identity—notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery—as long as their current birth certificate has been changed to reflect their gender identity." *Carcaño*, 203 F. Supp. 3d at 627 n.13.

Gavin is now 18 and will graduate high school on June 10, 2017.[9] But as an alumnus with ties to the community, Gavin will remain subject to the Board's policy whenever on school grounds as a guest at homecoming or prom and while attending alumni activities, football games, and other community events. On remand, Gavin should be allowed to amend his Complaint and conduct discovery to identify the range of scenarios in which he will continue to be subject to the Board's policy.

Procedural history

The day after the 2014-15 school year ended, Gavin filed a Complaint and motion for preliminary injunction against the Board, arguing that the Board's new policy discriminates against him on the basis of sex, in violation of Title IX and the Equal Protection Clause. JA 3, 20-22. The Complaint seeks injunctive relief and damages for both claims. JA 23.

[9] *See* Gloucester Cty. Pub. Sch. 2016-2017 School Calendar, https://goo.gl/r2wtEO.

On July 27, 2015, Senior Judge Doumar heard consolidated argument on Gavin's motion for a preliminary injunction and the Board's cross-motion to dismiss. JA 6. At the hearing, the court dismissed Gavin's Title IX claim midway through oral argument based on the written filings. JA 114-16. The court subsequently denied Gavin's motion for a preliminary injunction on September 4, 2015, and issued a memorandum opinion on September 17, 2015. JA 139. The Board's cross-motion to dismiss the Equal Protection claim is still pending. JA 154.

The district court held that Gavin failed to state a claim under Title IX because one of the statute's implementing regulations, 34 C.F.R. § 106.33, states that schools 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." According to the district court, even if the term "sex" in the regulation includes a person's gender identity, the term also includes person's sex assigned at birth. Therefore, the court reasoned, the Board's policy was authorized because it excluded Gavin from restrooms on the basis of "sex." JA 150-51.

With respect to Gavin's motion for a preliminary injunction, the district court did not evaluate whether Gavin was likely to succeed on the merits of his Equal Protection claim. JA 154. Instead, the court concluded that Gavin had failed

to present sufficient admissible evidence to establish that he would suffer irreparable harm or that the balance of hardships tipped in his favor. *Id.*

Gavin filed an interlocutory appeal from the denial of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). As part of the appeal, Gavin asked the Court to exercise pendent appellate jurisdiction to review the dismissal of his Title IX claim. *See* Pl.'s Br., ECF 16, at 1.

In its opinion dated April 19, 2016, this Court reversed the district court's dismissal of Gavin's Title IX claim and vacated the district court's denial of the motion for a preliminary injunction. *See G.G.*, 822 F.3d at 719-27. With respect to the preliminary injunction, this Court held that the district court applied an incorrect evidentiary standard by refusing to consider evidence that would be inadmissible at trial. *Id.* at 724-27.With respect to the Title IX claim, the Court applied *Auer v. Robbins*, 519 U.S. 452 (1997), and deferred to the Department of Education's conclusion—as set forth in a January 7, 2015 opinion letter—that 34 C.F.R. § 106.33 does not authorize schools to exclude boys and girls who are transgender from the restrooms that other boys and girls use. *See G.G.*, 822 F.3d at 719-24.[10]

[10] After this Court's ruling, three district courts agreed that the Department's interpretation of 34 C.F.R. § 106.33 was entitled to deference. *See Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 867-68

The Supreme Court subsequently granted the Board's application to recall and stay the mandate. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016). The Court then granted certiorari to address (1) whether the Department's interpretation of 34 C.F.R. § 106.33 was entitled to *Auer* deference and (2) whether the Department's interpretation should be given effect. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016).

A few weeks before the Supreme Court was scheduled to hold oral argument the Department issued a "Dear Colleague" letter rescinding the January 7, 2015 opinion letter to which this Court had deferred. *See* Pl.'s Mot. to Expedite, ECF 102, Ex. A, https://goo.gl/dsJ8Cs.[11] The new "Dear Colleague" letter states that the Department decided to withdraw the January 7, 2015 letter because of conflicting

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(S.D. Ohio 2016), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *3 (E.D. Wis. Sept. 22, 2016), *appeal docketed*, No. 16-3522 (7th Cir. Sept. 26, 2016); *see also Carcaño*, 203 F. Supp. 3d at 635-36 (following *G.G.* as binding precedent). *But see Texas v. United States*, 201 F. Supp. 3d 810, 832-34 (N.D. Tex. 2016), *appeal dismissed*, No. 16-11534 (5th Cir. Mar. 3, 2017).

[11] According to news reports, the Secretary of the Department of Education initially refused to withdraw the January 7, 2015 letter "because of the potential harm that rescinding the protections could cause transgender students." Jeremy M. Peters, *et al.*, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017), https://goo.gl/k9Zwq0. The Attorney General, however, wanted to rescind the documents out of concern that the Department's interpretation would be upheld as reasonable by the Supreme Court. *Id.* Ultimately, the Attorney General appealed to the President who told the Secretary that she should either rescind the guidance documents or resign. *Id.*

lower court rulings. The letter contrasts this Court' decision deferring to the Department's guidance with a district court's refusal to defer to that guidance in *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). In light of the conflicting rulings, the letter states that the Department intends "to further and more completely consider the legal issues involved." Dear Colleague Ltr. at 2.[12] Although the Department has abstained from providing any interpretation of 34 C.F.R. § 106.33, it has not withdrawn its other guidance documents stating that transgender students are protected under Title IX and must generally be treated in a manner consistent with their gender identity.[13]

On March 6, 2017, the Supreme Court vacated and remanded this Court's decision for further consideration in light of the February 22, 2017 "Dear Colleague" letter. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017).

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[12] The February 22, 2017 Dear Colleague letter also withdraws a May 13, 2016 Dear Colleague letter issued jointly with the Department of Justice after this Court's April 2016 ruling.

[13] *See e.g.*, OCR, Questions & Answers on Title IX & Single-Sex Elementary & Secondary Classes & Extracurricular Activities (Dec. 1, 2014), https://goo.gl/N4qtwY ("Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes."); OCR, Questions & Answers on Title IX & Sexual Violence (Apr. 29, 2014), https://goo.gl/5gQquV ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.").

SUMMARY OF THE ARGUMENT

Although Gavin's "banishment from the boy's restroom [has] become[] an enduring feature of his high school experience," his claims for injunctive relief are not moot. *G.G.*, 853 F.3d at 729 (Davis, J., concurring). As an alumnus with ties to the community, Gavin will continue to be subject to the Board's policy whenever on school property. Because the Court retains jurisdiction over Gavin's appeal from the denial of his motion for a preliminary injunction, the Court also retains pendent appellate jurisdiction over his appeal from the dismissal of his Title IX claim.

Gavin has stated a valid claim under Title IX. Discriminating against individuals because they are transgender inherently constitutes discrimination "on the basis of sex." 20 U.S.C. § 1681(a). And by singling out Gavin and forcing him into separate single-stall facilities, the Board's policy "exclude[s] [him] from participation in", "denie[s] [him] the benefits of," and "subject[s] [him] to discrimination" at school. *Id.* The Board's policy thus violates the statute's plain text. The regulation authorizing schools to provide separate restrooms for boys and girls, 34 C.F.R. § 106.33, does not authorize schools to engage in discrimination prohibited by the underlying statute. Moreover, the actual experience of schools across the country demonstrates that the Board's speculations about administrative difficulties or privacy violations have no basis in reality.

Gavin has also met all the requirements for a preliminary injunction. Gavin has established a likelihood of success under both Title IX and the Equal Protection Clause. And because Gavin is likely to succeed on the merits of his claims, he has satisfied the remaining preliminary injunction requirements as a matter of law. The Court should reverse the denial of the preliminary injunction without the additional delay of further proceedings on remand.

ARGUMENT

I. This Court Retains Jurisdiction Over the Appeals of the District Court's Orders Denying a Preliminary Injunction and Dismissing the Title IX Claim.

"A case becomes moot *only* when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *United States v. Springer*, 715 F.3d 535, 540 (4th Cir. 2013). "It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to [the Supreme] Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013).

Gavin's appeal from the denial of a preliminary injunction is not moot. As an alumnus, Gavin will still be subject to the Board's policy whenever he is on school grounds at alumni events, while attending formal events such as homecoming or prom as a guest of friends who are still in high school, and at football games and other community events. *See Denmeade v. King*, No. 00-CV-0407E(F), 2002 WL 31018148, at *4 (W.D.N.Y. Aug. 1, 2002) (claims of students alleging that college campus was inaccessible for people with disabilities "are not mooted by their graduation because thereafter they are alumni in the same position that they were in as students—*i.e.*, allegedly unable to access the buildings and events on campus."); *Ross v. City Univ. of N.Y.*, No. 15-CV-4252-KAM-VMS, 2016 WL 5678560, at *3-4 (E.D.N.Y. Sept. 29, 2016) ("Although graduation obviously may reduce frequency of visits to a university, a student's graduation alone does not necessarily preclude standing to bring Title II ADA or Rehabilitation Act claims" where plaintiff "alleges intent to return to campus as an alumna for programs and activities.").

Gavin's future attendance at alumni and school-community events ensures that the "parties have a concrete interest, however small, in the outcome of" the motion for preliminary injunction that prevents the appeal from becoming moot. *Chafin*, 133 S. Ct. at 1023. Although Gavin's high school experience will be over, the "court can fashion *some* form of meaningful relief" to prevent the exclusion

from enduring through Gavin's alumni experience too. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992); *cf. BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709, 714 (10th Cir. 2010) ("Even where it is too late to provide a fully satisfactory remedy the availability of a partial remedy will prevent the case from being moot." (internal quotation marks omitted; alterations incorporated)); *Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 36 (1st Cir. 2011) ("To avoid mootness … the plaintiff need not establish that the full relief sought is available; even the availability of a partial remedy is sufficient to prevent a case from being moot." (internal quotation marks and brackets omitted)).[14]

Because the Court retains jurisdiction over the appeal from the denial of a preliminary injunction, it also retains pendent appellate jurisdiction over the appeal from the district court's dismissal of Gavin's Title IX claim. *See DeJohn v. Temple*

[14] Moreover, Gavin's continued exposure to the Board's policy is sufficiently non-speculative to overcome mootness regardless of whether it would have been sufficiently non-speculative to establish standing in the first instance. If standing exists at the outset, the burden of demonstrating that a claim has become moot shifts to the party asserting mootness. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). As a result, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.*; *accord Adarand*, 528 U.S. at 221(explaining that lower court "confused mootness with standing and as a result placed the burden of proof on the wrong party" (internal quotation marks and citation omitted)); *cf. Pender v. Bank of Am. Corp.*, 788 F.3d 354, 368 (4th Cir. 2015) (explaining that case was not currently moot but if discovery "ultimately shows that the Bank retained no profit, the case may well then become moot").

Univ., 537 F.3d 301, 313 (3d Cir. 2008). The Court should continue to exercise jurisdiction over the Title IX claim (which includes a request for both injunctive relief and damages) because it is "inextricably intertwined" with that motion for a preliminary injunction and "necessary to ensure meaningful review." *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013).

II. Gavin Has Stated a Valid Claim that the Board's Policy Violates Title IX.

A. Discrimination Based on a Person's Transgender Status Is Discrimination "On the Basis of Sex" Under Title IX

By targeting Gavin for different treatment because he is transgender, the Board's policy impermissibly discriminates "on the basis of sex" under Title IX. "The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." *G.G. v. Gloucester Cty. Sch. Bd.*, 654 Fed. Appx. 606, 607 (4th Cir. 2016) (Davis, J., concurring) (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir.2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213,

215-16 (1st Cir.2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000)). This Court should expressly join that established consensus.[15]

A person's transgender status is an inherently sex-based characteristic. Gavin is being treated differently because he is a boy who was identified as female at birth. The incongruence between his gender identity and his sex identified at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination "on the basis of sex." *See Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("[D]iscrimination … 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 'because of sex.'").

Discrimination against people because they have undergone a gender transition is also inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also

[15] Within this Circuit, two district courts have already held that discrimination against transgender people is sex discrimination, *see Lewis v. High Point Reg'l Health System*, 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015); *Finkle v. Howard County*, 12 F. Supp. 3d 780, 788 (D. Md. 2014), and another three have issued rulings where the defendant did not dispute that Title VII applied, *see Cooper v. Micros Systems, Inc.*, No. CCB-14-1373, 2015 WL 6549093, at *3 n.6 (D. Md. Oct. 27, 2015); *Muir v. Applied Integrated Tech., Inc.*, No. 13-0808, 2013 WL 6200178, at *10 (D. Md. Nov. 26, 2013); *Hart v. Lew*, 973 F. Supp. 2d 561, 581 (D. Md. 2013).

discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes not just discrimination against boys and girls, but also discrimination against boys who have undergone a gender transition from the sex identified for them at birth. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy); *see also Glenn*, 663 F.3d at 1314 (firing employee because of her "intended gender transition" is sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14-CV-00583-SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (discrimination based on "sex" includes discrimination "because of [a person's] gender transition"); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 656, 662 (S.D. Tex. 2008) (employer discriminated on the basis of sex by firing employee because "You presented yourself as a female and we later learned you are a male.").

In addition, discrimination against transgender people is sex discrimination because it inherently rests on sex stereotypes and gender-based assumptions. As the Supreme Court recognized in *Price Waterhouse v. Hopkins*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. 228, 251 (1989)

(plurality).[16] By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316. Unlike other boys, Gavin had a different sex identified for him at birth. He therefore upsets traditional assumptions about boys, and the Board has singled him out precisely because of that discomfort. *See G.G.*, 853 F.3d at 729 (Davis, J., concurring).

Discriminating against Gavin for upsetting those expectations is discrimination on the basis of sex. "[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is … discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle*, 12 F. Supp. 3d at 788; *accord Smith*, 378 F.3d at 574-75 (discriminating based on a person's failure to "act and/or identify with" one's sex assigned at birth is discrimination on the basis of sex); *Schwenk*, 204 F.3d at 1201 (transgender individuals are inherently gender nonconforming in their "outward behavior and inward identity"); *Rumble v. Fairview Health Servs*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Because the term

[16] All members of the Court agreed that discrimination on that basis would violate Title VII, although they divided over which party should bear the burden of proving causation. *See id.* at 259 (White, J., concurring); *id.* at 273 (O'Connor, J., concurring); *id.* at 295 (Kennedy, J., dissenting).

'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."); *Schroer*, 577 F. Supp. 2d at 305 (discrimination against an "inherently gender-nonconforming transsexual" is sex discrimination).[17]

To be sure, most boys are identified as boys at birth. It is only a small group of boys for whom this is not true. But protections from sex discrimination are not limited to "myths and purely habitual assumptions," and extend to generalizations that are "unquestionably true." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978). Generalizations that are accurate for most boys cannot justify discrimination against boys who fall "outside the average description." *United States v. Virginia*, 518 U.S. 515, 550 (1996). Sex discrimination is prohibited by Title IX and other statutes precisely because "[p]ractices that classify [students] in terms of … sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Manhart*, 435 U.S. at 709.

[17] In the past, some courts relied on *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984), for the proposition that "sex" discrimination does not cover discrimination against transgender people. But the Seventh Circuit, sitting en banc, recently overruled *Ulane* as inconsistent with *Price Waterhouse* and the plain statutory text. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, No. 15-1720, 2017 WL 1230393, at *1 (7th Cir. Apr. 4, 2017).

Thus, discriminating against Gavin because he is a boy who is transgender discriminates against him on the basis of sex. The fact that the sex discrimination is targeted exclusively at boys and girls who are transgender does not change it from discrimination on the basis of sex to a distinct form of discrimination on the basis of transgender status. The Supreme Court's precedents make clear that sex discrimination does not have to affect *all* boys or *all* girls the same way in order to be "on the basis of sex." *See Price Waterhouse*, 490 U.S. at 234-35 (discrimination against subset of women who are "macho" and "abrasive" is based on sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against subset of women with children is based on sex); *cf. Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (Title VII does "not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her … sex were [not injured].").

The same is true here. The Board's discrimination against Gavin as an individual is discrimination on the basis of sex, even if no other boy is affected.

B. Excluding Boys and Girls Who Are Transgender from Using the Same Restrooms as Other Boys and Girls Subjects Them to Discrimination in Violation of Title IX.

By expelling Gavin from the restrooms that other boys use and forcing him into separate single-stall facilities, the Board's policy "exclude[s] [him] from

participation in", "denie[s] [him] the benefits of," and "subject[s] [him] to discrimination" at school. 20 U.S.C. § 1681(a).[18]

Gavin is "a boy asking his school to treat him just like any other boy." *G.G.*, 853 F.3d at 729 (Davis, J., concurring). He has undergone hormone therapy, had chest reconstruction surgery, and changed his sex to male both on his state-issued identification card and on his birth certificate. He supplied school administrators with a "treatment documentation letter" from his psychologist. He is recognized as a boy by his family, his medical providers, the Virginia Department of Health, and the world at large.

But under the Board's policy, Gavin is singled out for different treatment because he is a boy who is transgender. The express purpose and sole effect of the policy is to regulate the restroom use of transgender students. The preface to the policy recites that "some students question their gender identities," and the only function of the policy is to stop the students it describes as having "gender identity issues" from using the common restrooms and move them to "an alternative …

[18] Courts across the country have recognized that excluding boys and girls who are transgender from the same restrooms as other boys and girls subjects them to discrimination on the basis of sex. *See Evancho v. Pine-Richland Sch. Dist*, No. 2:16–01537, 2017 WL 770619, at *14 (W.D. Pa. Feb. 27, 2017) (equal protection); *Highland*, 208 F. Supp. 3d at 865-77 (Title IX and equal protection), *Whitaker*, 2016 WL 5239829, at *1 (same); *cf. Mickens v. Gen. Elec. Co*., No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016) (Title VII); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016) (same).

facility." JA 15-16. The policy was passed as a direct response to Gavin's use of the boys' restrooms, and the goal of the policy was to "[p]ut him in a separate bathroom." Dec. 9 Minutes at 58:56, https://goo.gl/63Vi4Q.

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

Excluding Gavin from the same common restrooms that other boys use subjects him to discrimination. Indeed, "the most obvious example" of a Title IX violation is "the overt, physical deprivation of access to school resources." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *cf. Snyder ex rel. R.P. v. Frankfort-Elberta Area Sch. Dist.*, No. 1:05-CV-824, 2006 WL 3613673, at *1-2 (W.D. Mich. Dec. 11, 2006) (requiring black elementary school student to use separate restroom in response to harassment from others deprived her of "equal access to restroom facilities").

The physical exclusion carries a powerful stigma that marks Gavin as unfit to use the same facilities as others. Our laws have long recognized the "daily

affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). "[D]iscrimination itself, … by stigmatizing members of the disfavored group[,] … can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

The single-stall restrooms are not an accommodation for Gavin as the Board suggests. Rather, they were designed to separate him from other students. No other student is required to use the separate restrooms, and no other student does so. JA 19. Everyone who sees Gavin enter the nurse's office knows he is there because he has been barred from the restrooms other boys use. JA 33. It makes him feel "like a walking freak show" and "a public spectacle" before the entire community. JA 31. The Board's policy sends a message to Gavin and all his peers that Gavin is unacceptable and should not be treated like other boys. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on sex "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that refusal to recognize marriages of same-sex couples "tells

those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition").[19]

Gavin's injuries are not limited to dignitary harms. The Occupational Health and Safety Administration has long recognized that "adverse health effects … can result if toilets are not available when employees need them."[20] The anxiety and humiliation of having to use separate restrooms from everyone else has driven Gavin to restrict his fluid intake and avoid using the restrooms at all, which has resulted in several painful urinary tract infections. JA 19. Transgender students in other cases have experienced similar harms. *See Whitaker*, 2016 WL 5239829, at *5 (student limits "his fluid intake" to avoid using restroom, causing "migraines, fainting and dizziness" from lack of hydration); *Highland*, 208 F. Supp. 3d at 871 ("Jane often goes the entire day without using the bathroom because she hates being singled out when she is forced to use a separate bathroom.").

[19] Courts must take these social realities into account. *Compare Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (claiming that assumption that racial segregation "stamps the colored race with a badge of inferiority" exists "solely because the colored race chooses to put that construction upon it"), *with Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (recognizing that racial segregation of students "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

[20] Memorandum on the Interpretation of 29 C.F.R. 1910.141(c) (1)(i): Toilet Facilities (Apr. 6, 1998).

Preventing boys and girls who are transgender from using the same restrooms as other boys and girls can also have serious—and sometimes catastrophic—psychological consequences. The preliminary injunction record includes an expert declaration stating that the Board's policy places Gavin at extreme risk of immediate and long-term psychological harm. *See* JA 34-42; *G.G.*, 822 F.3d at 727-28 (Davis, J., concurring). Similar harms are extensively documented in other cases currently pending across the country. *See Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) ("Highland's exclusion of Doe from the girls' restrooms has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old child (i.e. multiple suicide attempts prior to entry of the injunction). These are not distant or speculative injuries."); *Whitaker*, 2016 WL 5239829, at *1 (attempts to avoid urination, depression, migraines, suicidal ideation); Amicus Brief of Nat'l PTA, *et al.*, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 894896, https://goo.gl/knVbAF.

The harm caused to transgender students' physical and psychological wellbeing necessarily interferes with their ability to thrive at school. It impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. *See* JA 40-41; AAP Amicus, 2017 WL 1057281, at *35-36; *cf. Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014)

(evidence "established that a student's psychological well-being and educational success depend[ed] upon being permitted to use the communal bathroom consistent with her gender identity").

Finally, the limited number of single-stall restrooms at Gloucester High School also has practical consequences for Gavin's access to the school's educational benefits. There are only three single-user facilities in the entire building, and they are located far from Gavin's classes, which means he is physically unable to take a restroom break without missing a significant amount of class time. JA 32. *Cf. Highland*, 208 F. Supp. 3d at 856 (for transgender fourth-grade girl to use staff restroom, "a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class"); *Whitaker*, 2016 WL 5239829, at *2 (transgender boy could not use single user restrooms because they "were far from his classes and because using them would draw questions from other students").

These harms have been recognized before. "For more than a decade the women of Harvard Law had to sprint across campus to a hastily converted basement janitors' closet." Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. Legal Educ. 475 (2003). Similarly, women entering previously all-male work environments "often discover[ed] that the facilities for women [were] inadequate, distant, or missing altogether." *DeClue v. Cent. Ill.*

Light Co., 223 F.3d 434, 437 (7th Cir. 2000) (Rovner, J., dissenting). This disparity could "affect their ability to do their jobs in concrete and material ways," even if it sometimes struck men as "of secondary, if not trivial, importance." *Id. See also* Justice Sandra Day O'Connor, "'Out Of Order' At The Court: O'Connor On Being The First Female Justice." NPR (March 5, 2013), https://goo.gl/4llXNV ("In the early days of when I got to the court, there wasn't a restroom I could use that was anywhere near the courtroom.").

At school, at work, or in society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community. *G.G.*, 853 F.3d at 729 (Davis, J., concurring). Here, as elsewhere, "discriminatory treatment exerts a pervasive influence on the entire educational process." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

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

One of Title IX's implementing regulations states that schools 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. § 106.33. In its prior opinion, this Court concluded that the regulation was "susceptible to more than one plausible reading" with respect to "how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-

segregated restrooms." *G.G.*, 822 F.3d at 720. The Court concluded that the Department's January 7, 2015 opinion letter resolved that ambiguity in a reasonable manner and was entitled to deference under *Auer*.

Now that the January 7, 2015 opinion letter has been withdrawn, the Court must interpret the regulation de novo and without deference.[21] Properly construed within the context of the overall statutory scheme, the regulation does not authorize schools to discriminate against boys and girls who are transgender by excluding them from the restrooms that other boys and girls use. Although this Court previously determined that the regulation was ambiguous when read in the broader *regulatory* context of 34 C.F.R. § 106 Subpart D, *see G.G.*, 822 F.3d at 720, that ambiguity disappears when the regulation is read in light of its place within the broader *statutory* context. *Cf. Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (explaining that the respondent's interpretation of the text "may be plausible in the abstract, but it is ultimately inconsistent with both the text and context of the statute as a whole"); *United States v. Marte*, 356 F.3d 1336, 1341 (11th Cir. 2004)

[21] Even if the Department ultimately issues new guidance, the Court will have to interpret the regulation without deference because agencies do not receive *Auer* deference when they flip-flop from one position to another. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). The circumstances surrounding the Department's withdrawal of the previous guidance also give "reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* (internal quotation marks omitted). *See infra* n.11.

("When a regulation implements a statute, the regulation must be construed in light of the statute" it implements). The only way to provide sex-separated restrooms in a manner consistent with the underlying statute is to allow boys and girls who are transgender to use the same restrooms that other boys and girls use.

The main provision of the statutory text, 20 U.S.C. § 1681(a), broadly prohibits all discrimination. Section 1681(a) then contains a series of subsections enumerating narrow contexts in which that prohibition on discrimination "shall not apply." Unlike those statutory exceptions, the restroom regulation does not state that the statute's ban on sex-based discrimination "shall not apply" to restrooms. The agency would lack authority to create such an exemption because a regulation cannot authorize what the statute it implements prohibits. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 62 (2011); *Time Warner Entm't Co. v. Everest Midwest Licensee, LLC*, 381 F.3d 1039, 1050 (10th Cir. 2004) ("[A] regulation must be interpreted in such a way as to not conflict with the objective of its organic statute.")

When read in light of its place within the overall statutory scheme, the restroom regulation permits differential treatment on the basis of sex, but only so long as the differential treatment does not subject anyone to unequal discrimination in violation of the statute. As this Court previously noted, "the plain meaning of the regulatory language is" that "the mere act of providing separate restroom

facilities for males and females does not violate Title IX." *G.G.*, 822 F.3d at 720. The regulation is thus based on the premise that providing separate restrooms for boys and girls reflects a social practice that does not disadvantage or stigmatize any student. *Cf. Virginia*, 518 U.S. at 533 ("Physical differences between men and women" may not be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity."). That premise is reinforced by the regulation's caveat that when schools establish sex-separated restrooms, they must provide access to "comparable" restrooms for all students. 34 C.F.R. § 106.33.[22]

Before it passed its new policy, the Board provided Gavin access to sex-separated restrooms in a manner that was consistent with the statute and with the underlying assumption that separate restrooms would not disadvantage or stigmatize individual students. All boys, including Gavin, were allowed to use the boys' restrooms. The Board then abandoned that nondiscriminatory practice and adopted a new policy designed to exclude boys and girls who are transgender from the restrooms used by other boys and girls. That new policy does what the statute forbids. It "subject[s] [Gavin] to discrimination," "exclude[s] [him] from participation," and "denie[s] [him] the benefits" of school. 20 U.S.C. § 1681(a). It

[22] The single-stall restrooms available to Gavin are not comparable in form or substance. There are only three restrooms; they are difficult to access; and they stigmatize Gavin as unfit to use the same facilities as others.

is not the existence of sex-separated restrooms that harms Gavin, but the Board's new discriminatory policy that is designed solely to place him in an "alternative" facility.

Ignoring the broader context of the statute as a whole, the Board argues that the regulation authorizes schools to choose whether to assign restrooms to transgender students based on sex assigned at birth, gender identity, or any other criteria that fall within some dictionary's definition of the word "sex." The panel dissent similarly argued that "if … the term 'sex' means either biological sex or gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive." *G.G.*, 822 F.3d at 737 (Niemeyer, J., dissenting). But the regulation does not authorize schools to enact any sex-based policy they choose, no matter how discriminatory or harmful. The regulation authorizes schools to provide separate restrooms for boys and girls—not to *discriminate* against a subset of students on the basis of sex by excluding them from the same restrooms other boys and girls use.

Moreover, allowing boys and girls who are transgender to use the same restrooms as other boys and girls is entirely consistent with the ordinary definition of "sex," both at the time the regulations was enacted and today. As this Court previously observed, the plain meaning of sex in 1972 extended beyond physical

characteristics such as anatomy or chromosomes. *G.G.*, 822 F.3d at 721-22. The term "sex" referred to men and women in general, including both physical differences and cultural ones. *See id.* (collecting dictionary definitions); "sex, n., 4a," OED Online, Oxford University Press (defining sex as "a social or cultural phenomenon, and its manifestations" and collecting definitions dating back to 1651).

But even if sex were defined solely based on physiology or anatomy, that still would not mean that transgender students should be assigned to restrooms based on the sex designated for them at birth. Many transgender individuals, including Gavin, have physiological and anatomical characteristics typically associated with their identity, not the sex identified for them at birth. *See* Endocrine Society Guidelines, *supra* n.7, at 3140-43. The reality is that—even without genital surgery—the bodies of many transgender boys (including Gavin) look very different from the bodies of girls, and the bodies of man transgender girls look very different from the bodies of boys. *See id.* Transgender children who receive hormone blockers never go through puberty as their birth-designated sex. *Id.* And for transgender adolescents, hormone therapy affects bone and muscle structure, alters the appearance of a person's genitals, and produces secondary sex characteristics such as facial and body hair in boys and breasts in girls. *Id.* The Board assumes that the staffers at the Department of Health, Education, and

Welfare in 1972 would have wanted these transgender boys to use the girls' restrooms and these transgender girls to use the boys' restrooms, but that is hardly self-evident.

Moreover, although the Board claims that its policy is based on physiology, it does not have a coherent explanation for what aspects of physiology are relevant. The Board has never explained how it would define the "biological gender" of a person who has had genital surgery. The Board has also never explained how it would define the "biological gender" of individuals with intersex traits who may have genital characteristics that are neither typically male or female or that do not align with their chromosomes. *See* Amicus Brief of interACT, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 930053, https://goo.gl/WLYsd7 (describing intersex conditions). To be sure, such circumstances are rare, but so is being transgender.[23]

In any event, the "dispositive realit[y]" is that Gavin is recognized by his family, his medical providers, the Virginia Department of Health, and the world at large as a boy. *Virginia*, 518 U.S. at 550. Allowing him to use the same restrooms as other boys is the only way to provide access to sex-separated restrooms without

[23] In another case with similar facts, a school board took the position that "biological sex" meant the presence or absence of a penis or vagina and that "if, for instance, a boy had lost his penis due to trauma or surgery, he would no longer 'be a boy.'" *Evancho*, 2017 WL 770619, at *6.

discrimination. It is, therefore, the only way to do so that is consistent with the underlying requirements of Title IX.

D. The Board's Speculations About Administrative Difficulties Are Baseless.

The Board speculates that it would be impossible to administer a policy that allowed boys and girls who are transgender to use the same restrooms as other boys and girls. That unfounded speculation is contradicted by the actual experiences of school districts and administrators across the country. *See* Amicus Brief of School Administrators, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 930055 ("Administrator Amicus"), https://goo.gl/7JV6Jx; Amicus Brief of 18 States & D.C., *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), --- S.Ct. ---- ("State Amicus"), at 15-27, https://goo.gl/QU7KhE; *cf. Evancho*, 2017 WL 770619, at *17 (transgender students had been using restrooms "for several years without incident"); *Students & Parents for Privacy*, 2016 WL 6134121, at *39 (transgender students used restrooms for three years without other students noticing or complaining); *Carcaño*, 203 F. Supp. 3d at 625 (evidence shows that "transgender individuals have been quietly using facilities corresponding with their gender identity"). It is also contradicted by the reality that institutions ranging from

the Girl Scouts[24] and Boy Scouts[25] to the United States military[26] to the Seven Sisters colleges[27] to the National Collegiate Athletic Association[28] and the Virginia High School League[29] already recognize boys who are transgender as boys and recognize girls who are transgender as girls.

Gavin's status as a transgender boy is not—and has never been—in dispute. Gavin supplied school administrators a "treatment documentation letter" from his psychologist. He has legally changed his name, is undergoing hormone therapy, had chest reconstruction surgery, and received a state I.D. card and birth certificate stating that he is male. No one has ever raised any doubt about his transgender status—or the transgender status of any other student in similar cases pending across the country. *See Evancho*, 2017 WL 770619, at *1; *Highland*, 208 F. Supp. 3d at 855; *Whitaker*, 2016 WL 5239829, at *6.

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[24] *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, https://goo.gl/364fXI.

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

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

[27] *See* Susan Svrluga, *Barnard will admit transgender students. Now all 'Seven Sisters' colleges do.*, Wash. Post (June 4, 2015), https://goo.gl/g0rALA.

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

[29] Va. High Sch. League, Criteria for VHSL, Transgender Rule Appeals, https://goo.gl/fgQe2l.

The Board attempts to portray a student's "biological gender" as an objective criterion and a student's transgender status as subjective and unverifiable. But Gavin and other transgender students do not merely feel that their gender identity is different than the sex designated for them at birth. They are people who have transitioned and are living as the boys and girls that they are. Usually students and their parents meet with school administrators to discuss the student's transgender status and plan a smooth social transition, just as Gavin and his mother did here. *See* Administrator Amicus, 2017 WL 930055; NASSP Statement, *supra*, https://goo.gl/kcfImn. Allowing Gavin to use the same restrooms as other boys does not mean "that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion." *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014); *accord Students & Parents for Privacy*, 2016 WL 6134121, at *26 (rejecting same argument); *Evancho*, 2017 WL 770619, at *15 n.39 (same).

Acknowledging the reality of a student's gender transition does not require schools to guess a student's gender identity based on sex stereotypes of how the student behaves. If a school has a legitimate concern that a student is falsely

claiming to be transgender, a letter from a doctor or parent can easily provide corroboration. *See* Administrators Amicus, 2017 WL 930055, at *14-16.[30]

In truth, it is the Board's policy that raises intractable administrative problems. How will the policy apply if a student is not known to be transgender in the school community, either because he transitioned before entering school or moved from another district?[31] Does the Board intend to disregard all birth certificates and inquire into whether students' sex assigned at birth matches the sex on their legal documents? Without "mandatory verification of the 'correct' genitalia before admittance to a restroom," the Board must "assume 'biological sex' based on appearances, social expectations, or explicit declarations." *G.G.*, 822 F.3d at 722 n.8 (internal quotation marks omitted).

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[30] Although Gavin was able to amend his birth certificate, that is not possible for transgender youth in states that require genital surgery or provide no mechanism for changing the gender listed on a birth certificate. *See Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015) (discussing "onerous and in some cases insurmountable obstacles" for some transgender individuals seeking to amend their birth certificates).

[31] Many transgender students begin school—or transfer to a new school—without classmates and peers knowing they are transgender. Requiring these students to use separate restrooms forces them to reveal their transgender status to peers or constantly to make up excuses for using separate restrooms. *See, e.g.*, *Highland*, 208 F. Supp. 3d at 857 (recounting testimony from transgender girl in elementary school that "when other students line up to go to the restroom, she leaves the line to go to a different restroom, and other kids say, "Why are you going that way? You're supposed to be over here.'" (internal quotation marks and brackets omitted)).

E. Allowing Gavin to Use the Same Restrooms as Other Boys Does Not Violate Anyone Else's Privacy.

Gavin's use of the boys' restrooms does not infringe on anyone else's privacy rights. To the extent that privacy concerns are based on potential exposure to nudity, those concerns do not apply to Gavin's "use—or for that matter any individual's appropriate use—of a restroom." *G.G.*, 822 F.3d at 723 n.10. Even the panel dissent acknowledged that "the risks to privacy and safety are far reduced" in that context. *Id.* at 736 (Niemeyer, J., dissenting). *Accord Highland*, 208 F. Supp. 3d at 874-75 (rejecting argument that transgender student's use of restroom would violate privacy of others); *Whitaker*, 2016 WL 5239829, at *6 (same); *Evancho*, 2017 WL 770619, at *14 (same); *cf. Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing transgender woman to use women's restroom created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present").

The Board has also taken steps "to give all students the option for even greater privacy." GCPS Press Release, 2017 WL 766063, at *3a. It has installed partitions between urinals and privacy strips for stall doors. All students who want

greater privacy for any reason may also use one of the new single-stall restrooms. JA 20; *accord G.G.*, 822 F.3d at 728-29 (Davis, J., concurring).[32]

Moreover, if the goal of the policy is to promote privacy, that goal is not advanced by placing Gavin in the girls' restroom. As noted above, many students transition before entering a particular school and are not known to be transgender. And even when they are known by their friends to be transgender, students at large

[32] Judge Niemeyer's dissent from the panel's decision focused primarily on the specter of nudity in locker rooms, but even in the context of locker rooms, the dissent's speculations about inevitable exposure to nudity do not reflect the actual experience of students in many school districts. *See* Administrator Amicus, 2017 WL 930055 at *13-14; *Students & Parents for Privacy*, 2016 WL 6134121, at *28 (transgender students and non-transgender students used same locker rooms without ever seeing "intimate part[s]" of one another's bodies). In many schools, students preparing for gym class change into a t-shirt and gym shorts without fully undressing. *See* Amicus Brief of Transgender Students & Allies, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 836840, at *14, *24 ("Student Amicus), https://goo.gl/w6RGWZ. They often do not shower; indeed, there are no functional showers in the locker rooms at Gloucester High School. *See* Dec. 9 Minutes at 2:12:37.

In any event, schools across the country already include transgender students in locker rooms while accommodating the privacy of all students in a non-stigmatizing manner with privacy curtains and private changing areas. *See Students & Parents for Privacy*, 2016 WL 6134121, at *29 (privacy accommodations prevented any risk of "involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth"); State Amicus at 24-27, https://goo.gl/QU7KhE; Student Amicus, 2017 WL 836840, at *9-24. Transgender students have their own sense of modesty and often go to great lengths to prevent exposure of any anatomical differences between themselves and other students. *See* Administrator Amicus, 2017 WL 930055 at *13-14. Experience has shown that there are many ways to address privacy concerns in an even-handed manner without a "blanket ban that forecloses any form of accommodation for transgender students other than separate facilities." *Carcaño*, 203 F. Supp. 3d at 638.

high schools, colleges, or universities will often use restrooms in which no one else knows them, much less their transgender status. A boy who is transgender will be far more disruptive to expectations of privacy if he is forced to use the girls' restrooms than if he uses the same restrooms as other boys.

Difference can be discomfiting, but there are ways to respond to that discomfort without discrimination. Gloucester High School has installed additional privacy protections and provides a private restroom for anyone uncomfortable using the same restroom as Gavin (or any other student). But Title IX does not permit them to exclude transgender students from common restrooms based on "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *cf. Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 282 n.9 (1987) (recounting how students with disabilities were excluded from school because their appearance allegedly "produced a nauseating effect" on classmates); *see also* Amicus Brief of NAACP LDF, *et al.*, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 956145, https://goo.gl/MLjLxC.[33]

[33] As the Court noted in its prior opinion, the same privacy arguments advanced in this case would seem to apply to lesbian and gay students. *G.G.*, 822 F.3d at 723 n.11. Indeed, discomfort with gay people using locker rooms and invidious myths about predation have often been invoked as a justification for discriminating against gay people. *See* NAACP LDF Amicus, 2017 WL 956145, at *20-22.

III. The Motion for Preliminary Injunction Should Be Granted.

To obtain a preliminary injunction, "[p]laintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014).

In its prior decision, this Court vacated the district court's denial of a preliminary injunction because the district court applied an incorrect evidentiary standard. *G.G.*, 822 F.3d at 724-27. The Board did not challenge that portion of the Court's decision in its petition for a writ of certiorari, and this Court should adhere to the same position when it issues a new opinion.

This time, however, the court should reverse the preliminary injunction decision outright instead of vacating and remanding. *See id.* at 729 (Davis, J., concurring). Gavin is likely to succeed on the merits of his Title IX claim and his Equal Protection claim. That likelihood of success necessarily satisfies the remaining preliminary injunction requirements as a matter of law.

A. Gavin Has Established a Likelihood of Success on His Title IX Claim.

For the same reasons that Gavin has stated a claim under Title IX, he is likely to succeed on the merits of his Title IX claim for purpose of a preliminary injunction. Indeed, although the Board's policy violated Title IX even before

Gavin obtained a court order and amended birth certificate stating that he is male (*see supra* n.30 and accompanying text), Gavin's prospects for prospective injunctive relief are overwhelming now that he has received those documents. The Board's continued exclusion of Gavin is now even more extreme than the policies at issue in *Johnston*, 97 F. Supp. 3d at 663, and *Carcaño*, 203 F. Supp. 3d at 627 n.13.

B. Gavin Has Established a Likelihood of Success on His Equal Protection Claim.

Although the district court did not address Gavin's likelihood of success on his equal protection claim, Gavin is likely to prevail on the merits of that claim too. *See Evancho*, 2017 WL 770619, at *13; *Highland*, 208 F. Supp. 3d at 873-74; *Whitaker*, 2016 WL 5239829, at *6.[34]

For the same reasons that the Board's policy discriminates based on sex under Title IX, it also constitutes gender discrimination under the Equal Protection Clause and triggers heightened scrutiny. *Glenn*, 663 F.3d at 1318-19; *Smith*, 378 F.3d at 577. In addition, courts have increasingly recognized that discrimination based on transgender status is a quasi-suspect classification that requires heightened scrutiny because "transgender people as a class have historically been

[34] Moreover, even if the Board's policy were authorized under Title IX, Gavin would still prevail on the equal protection claim *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).

subject to discrimination or differentiation;" "they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society"; "as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group"; and "as a class, they are a minority with relatively little political power." *Evancho*, 2017 WL 770619, at *13; *accord Highland*, 208 F. Supp. 3d at 873-74; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015); *see also G.G.*, 853 F.3d at 730 (Davis, J., concurring) (recognizing that transgender individuals are "a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected").

The Board's policy cannot survive heightened scrutiny. As discussed above, the Board has other non-discriminatory options for protecting the privacy of all students equally without excluding transgender students. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) ("Providing for needy spouses is surely an important governmental objective" but "the question remains whether the discriminatory means employed … itself substantially serves the statutory end.").

Instead of being tailored to address privacy interests related to nudity, the policy rests on generalized fears and discomfort that are not a legitimate basis for imposing unequal or stigmatizing treatment under any standard of scrutiny. *See Evancho*, 2017 WL 770619, at *16 n.42; *Highland*, 208 F. Supp. 3d at 877.

Impermissible discrimination often stems from an almost "instinctive mechanism to guard against people who appear to be different in some respects from ourselves" or who "might at first seem unsettling." *Garrett*, 531 U.S. at 374-75 (Kennedy, J., concurring). Excluding transgender people from using the same restrooms as everyone else prevents them "from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014).

C. Gavin Has Satisfied the Remaining Preliminary Injunction Factors.

Because Gavin is likely to succeed on the merits, he has also established irreparable harm. "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted); *accord Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) ("The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right."). The violation of Gavin's rights under Title IX also constitutes irreparable harm that cannot be compensated by monetary damages. *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771, 777 (S.D.W.V. 2012) (collecting cases).

The balance of hardships also weighs strongly in favor of a preliminary injunction. As this Court previously concluded, the Board has failed to identify any

harm that would result from Gavin's use of the boys' restroom. *See G.G.*, 822 F.3d at 723 n.11.

Finally, an injunction in favor of Gavin is in the public interest. It is always in the public interest to "uphold[] constitutional rights." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (internal quotation marks omitted). Similarly, "the overriding public interest l[ies] in the firm enforcement of Title IX." *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993).

Because Gavin is likely to success on the merits of his claims and entitled to a preliminary injunction as a matter of law, the Court should reverse and direct the district court to enter a preliminary injunction on remand without further delay.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully requests oral argument pursuant to Local Rule 34(a).

CONCLUSION

For the foregoing reasons, the dismissal of Plaintiff's Title IX claim and the denial of Plaintiff's motion for preliminary injunction should be reversed.

Respectfully submitted,

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Dated: May 8, 2017

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 12,864 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 the 8th day of May, 2017, I filed a I filed the foregoing brief as well as the Joint Appendix filed herewith 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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