RECORD NO. 19-1952

In The
United States Court of Appeals
For The Fourth Circuit

GAVIN GRIMM,

Plaintiff – Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1952 Caption: Gavin Grimm v. Gloucester County School Board

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Gloucester County School Board
(name of party/amicus)

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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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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/ David P. Corrigan Date: 09/12/2019

Counsel for: Appellant

CERTIFICATE OF SERVICE

****

I certify that on September 12, 2019 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/ David P. Corrigan (signature) September 12, 2019 (date)

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question).

This is an appeal from a final judgment. This Court has jurisdiction under 28 U.S.C. § 1291. The District Court entered a final judgment on August 9, 2019. JA 1165-1193. Defendant-Appellant Gloucester County School Board ("School Board") filed a timely notice of appeal on August 30, 2019 (No. 19-1952). JA 1194.

STATEMENT OF ISSUES

1. Whether the District Court erred in denying the School Board summary judgment and granting the Plaintiff summary judgment on Plaintiff's Title IX claims.

2. Whether the District Court erred in denying the School Board summary judgment and granting the Plaintiff summary judgment on Plaintiff's Equal Protection claims.

STATEMENT OF THE CASE

1. Background

Grimm is a former student at Gloucester High School in Gloucester County, Virginia. Grimm was born a biological female, but now identifies as a male. JA 108. Grimm enrolled in high school as a girl and started ninth grade as a girl. JA 985-990.

At the beginning of Grimm's sophomore year in August 2014, Grimm and his mother met with the school principal and guidance counselor and explained that Grimm was transgender and wanted to attend school as boy. JA 113.

Grimm and his mother provided the principal and guidance counselor a letter from Grimm's psychologist, stating Grimm was receiving treatment for gender dysphoria and should be treated as a boy in all respects, including when using the restroom. JA 112, 123.

Grimm initially used the restroom in the nurse's office, but began using the boys' restroom on October 20, 2014. JA 78, 97, 817, 879-880. Grimm also was granted permission to complete his physical education requirements through a home-bound program, and, as a result, never needed to use the locker rooms at the school. JA 876-877. Within two days, parents of students learned a transgender boy was using the boys' restrooms and complained on behalf of their children. JA 378.

Additionally, a student complained about the lack of privacy in the bathroom. JA 378, 762-767.

The Board considered the issue and, after two public meetings held on November 11 and December 9, 2014, adopted the following resolution:

> Whereas the GCPS [Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

JA 775, 978.

The Board also installed three single-stall unisex bathrooms in the high school, which were available on December 15, and open to all students who, for whatever reason, desired greater privacy. JA 486-87, 983. Grimm refused to use the unisex restrooms, claiming they made him feel stigmatized and isolated. JA 132.

In June 2016, before Grimm's senior year of high school, Grimm underwent chest-reconstruction (double mastectomy) surgery. JA 120. This procedure does not create any biological changes in the transgender individual. Instead, surgical gender reassignment procedures cannot be completed until the transgender

individual is at least 18 years of age. JA 309, 331, 1099-1100. In November 2016, Grimm provided a new Virginia birth certificate listing Grimm's sex as male. JA 120, 127.

Grimm filed suit asserting violations of the Equal Protection Clause of Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972. In the Second Amended Complaint, Grimm claimed that the School Board's policy violated his rights on the day the policy was first issued and throughout the remainder of his time as a student at Gloucester High School; that the School Board's refusal to update Gavin's official school transcript to match the "male" designation on his updated birth certificate violated his rights; and that he was entitled to nominal damages and injunctive relief. JA 70-87.

The School Board contends that its restroom policy and decision not to update Grimm's official school transcript does not discriminate on the basis of sex and complies with Title IX and the Equal Protection Clause.

2. Procedural History

Grimm filed his original Complaint on June 11, 2015. In a Memorandum Opinion dated September 17, 2015, the Honorable Robert G. Doumar ("Judge Doumar") denied Grimm's motion for a preliminary injunction and granted the School Board's motion to dismiss Grimm's Title IX claim, holding that the School

Board's restroom policy did not violate Title IX. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 738 (E.D. Va. 2015).

Grimm appealed to this Court. On appeal, the appropriate level of deference ("*Auer* deference") to be afforded a letter issued by the Department of Education, through the Office of Civil Rights ("OCR letter"), became the focus. This Court reversed, concluding that the OCR letter merited *Auer* deference. (ECF Doc. 62). The United States Supreme Court granted a stay of this Court's mandate and then granted the School Board a writ of certiorari. After the federal Departments of Education and Justice rescinded the OCR letter, the Supreme Court vacated this Court's decision and remanded. Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017).

This Court dismissed the appeal on Grimm's motion, and Grimm filed an Amended Complaint with the District Court. (ECF Doc. 113, 114; Appeal 15:2056 ECF Doc. 252). The School Board filed an Amended Motion to Dismiss Grimm's Amended Complaint, which Judge Allen denied on May 22, 2018. (ECF Doc. 148).

On June 1, 2018, the School Board filed a Consent Motion to Certify an Interlocutory Appeal to the United States Fourth Circuit Court of Appeals. (ECF Docs. 149 and 150). On June 5, 2018, Judge Allen issued an order granting the Consent Motion to Certify and amending the May 22 Order as follows: "pursuant to 28 U.S.C. § 1292(b), the Court finds that the Order involves a controlling question

of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation." (ECF Doc. 153). On June 14, 2018, the School Board filed an Unopposed Petition for Permission to Appeal Pursuant To 28 U.S.C. § 1292(b). (Appeal: 18-252; ECF Doc. 2). This Court entered an Order on July 11, 2018, denying the petition for permission to appeal. (Appeal: 18-252; ECF Doc. 11).

On February 15, 2019, Grimm filed a Second Amended Complaint. (ECF Doc. 177). On March 26, 2019, the School Board filed a Motion for Summary Judgment and Brief in Support and Grimm filed a Motion for Summary Judgment and Brief in Support. (ECF Doc. 191 and 196; ECF Doc. 184 and 185).

On August 9, 2019, the District Court entered an opinion and order denying the School Board's Motion for Summary Judgment and granting Grimm's Motion for Summary Judgment. (ECF Doc. 229). On this same date, the District Court entered judgment in favor of Grimm and against the School Board. (ECF Doc. 230). The School Board timely filed this appeal on August 30, 2019. (ECF Doc. 235).

STATEMENT OF MATERIAL FACTS

1. Grimm was born a female with female genitalia and fully functioning female reproductive organs. Grimm was issued a birth certificate that stated Grimm's sex as female. JA 892; JA 893; JA 897-98; JA 1070[1].

2. Grimm enrolled in the Gloucester County School system as a girl and started ninth grade as a girl. JA 983-93; JA 1196-1205.

3. At the beginning of Grimm's sophomore year in August 2014, Grimm and Grimm's mother met with the school principal and guidance counselor and explained Grimm was transgender and transitioning from female to male. JA 366; JA 814; JA 815-16.

4. School officials agreed to refer to Grimm using Grimm's new name and by using male pronouns. See Original Complaint, ¶ 28 (ECF Doc. 8); JA 532-53; JA 36; JA 366.

5. Grimm initially used the restroom in the nurse's office. JA 818; JA 827.

6. On October 20, 2014, Grimm began using the boys' restroom with the principal's support. JA 376; JA 994-1006. Grimm also was granted permission to

[1] Plaintiff identified Dr. Melinda Penn, a Pediatric Endocrinologist, as an expert witness.

complete his physical education requirements through a home-bound program, and, as a result, never needed to use the locker rooms at the school. JA 876-77.

7. Within two days, parents of students learned a transgender boy was using the boys' restrooms and complained. JA 378. Additionally, a student complained about the lack of privacy in the bathroom. JA 378; JA 994-1006. Grimm was also involved in an altercation with a fellow student concerning Grimm's use of the male restroom. JA 870-73; JA 1211.

The School Board received 39 emails and several oral communications, mostly from parents of students in Gloucester County, opposing a transgender student using the restroom that was inconsistent with the student's biological sex and expressing concerns about student privacy. JA 994-1006.

For example, one parent wrote:

> "I respectfully ask that you act to protect the rights and privacy of students who are not transgender … I have a son who attends … School, and cannot imagine how he would feel if a transgender student began to utilize the boys restroom … All students, not just one, should have their privacy upheld … Please act on behalf of the entire student population, not just one student. This is not a discrimination issue, it is a privacy issue." JA 1210.

Another concerned family of Gloucester students wrote,

> "[t]he decision regarding any transgender student using the restroom they assign to themselves should be considered based on the needs and privacy of ALL STUDENTS in the school ... Our boys … are mortified by the idea that any female, including their mother or sister, would be in a bathroom with them while they are using it. Our daughter is concerned that a decision to allow [transgender boys] into the men's

> restrooms will lead to a male student assigning himself as a female and being allowed in the women's restrooms … Surely there is a place somewhere in the school that can be remodeled to include two to three stalls and designated as a unisex bathroom and used by anyone who feels the need." JA 1214-15.

The School Board was advised on the afternoon of December 9, 2014, by another citizen that the ACLU website noted with approval that "some school administrations offer [transgender] students the use of the employee single stall restroom." JA 1212-13.

8. A School Board member proposed the following policy for public debate at a November 11, 2014, School Board meeting:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

JA 1209; JA 978.

A public discussion ensued with students and parents of students expressing their opposition and privacy concerns.[2]

9. Grimm voluntarily addressed the School Board in a public meeting, on November 11, 2014. JA 883. The School Board did not identify Grimm as the transgender student. JA 885-86. By a vote of 4-3, the School Board deferred a vote on the resolution until its meeting on December 9, 2014. JA 975-981.

10. Before the December 9, 2014 meeting, the School Board issued a press release announcing "plans to designate single stall, unisex restrooms … to give all students the option for even greater privacy." At the meeting, parents and students again expressed their privacy concerns regarding the use of restrooms and locker rooms.[3] The School Board passed the resolution by a 6-1 vote. JA 772-778.

11. The School Board installed three single-stall unisex restrooms that were available for use beginning December 15, 2014. JA 1206-08, JA 1217. Any student was allowed to use the single-stall restrooms. The unisex restrooms are not just for transgender students. JA 486-87; JA 491, JA 983-93. Grimm was permitted to use the single user restrooms at the high school. JA 486-87; JA 491; JA 983-93.

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[2] The complete November 14, 2014 public discussion can be found at: http://gloucester.granicus.com/MediaPlayer.php?view_id=10&clip_id=1065.
[3] The complete December 9, 2014 public discussion can be found at: http://gloucester.granicus.com/MediaPlayer.php?view_id=10&clip_id=1090

12. The School Board enacted the restroom and locker room policy to protect the privacy interests of all students in the school system. JA 464. The policy is focused to ensure student's privacy interests of not having to share a restroom with someone from an opposite physiological sex, including not being exposed to or having to be in a state of undress before another student of the opposite physiological sex. JA 467; JA 469. A secondary governmental interest was student safety. JA 464-65.

13. Pursuant to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V"), the term "sex" refers to the biological indicators of male and female such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal or external genitalia. JA 1076; JA 1116.

14. Transgender individuals remain biologically men or biologically women. JA 341-360; JA 1074.

15. In June 2016, before Grimm's senior year, Grimm underwent chest-reconstruction (double mastectomy) surgery. JA 932. This procedure does not create any biological changes in the transgender individual. Instead, it is only a physical change. JA 1100. Surgical gender reassignment procedures cannot be completed until the transgender individual is at least 18 years of age. JA 650; JA 1100. To that extent, Grimm remained biologically and anatomically female. JA1100; JA 1101-02; JA 898.

16. In November 2016, Grimm provided a different Virginia birth certificate listing Grimm's sex as male. JA 438-39. The birth certificate was not issued in conformity with Virginia law based upon the School Board's understanding of the Code of Virginia and applicable administrative regulations. The School Board declined to revise Grimm's official school transcript, because Grimm remained biologically female, the information that Grimm provided was at odds with the process and procedures outlined by Virginia law and the Virginia Administrative Code to amend a birth certificate, and the birth certificate provided was stamped void and not "amended." JA 606-07; JA 1216. The School Board has a governmental interest in ensuring student's educational records are maintained in accordance with applicable federal and state laws. JA 617-18; JA 619.

17. The School Board informed Grimm he had a right to a hearing related to the School Board's decision not to amend Grimm's official transcript and educational records pursuant to School Board policy JO and Family Educational Rights and Privacy Act. Grimm did not request a hearing, either while he was a student or after his graduation. ECF Doc. 171-1; JA 983-93.

18. On June 10, 2017, Grimm graduated from Gloucester High School in Gloucester County, Virginia. JA 793.

SUMMARY OF ARGUMENT

In the long history of this litigation, the fundamental question remains the same: Is the Gloucester County School Board's ("School Board") restroom and locker room policy lawful? The answer is, and always has been, yes.

From the outset, the School Board's goal has been to accommodate Grimm while simultaneously balancing the legitimate interests of all of its students, from kindergarten through twelfth grade. The School Board's policy treats all students the same. All students may use both the restroom and locker room facilities that correspond with their biological sex or one of three single-stall restrooms available for any student. The School Board's policy complies with Title IX and fulfills the requirements of the Equal Protection Clause. Simply put, the School Board's policy does not discriminate. The same is true with respect to Grimm's official school transcript.

The question of whether Title IX and the Equal Protection Clause prohibit discrimination on the basis of gender identity – as opposed to biological sex – is the controlling question of law in this case. See ECF Doc. 153 at 2. ("First, the Court concludes that the May 22, 2018 Order involves a controlling question of law—specifically, the question of whether Title IX and the Equal Protection Clause prohibit discrimination on the basis of gender identity.").

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. Under the Equal Protection clause, discrimination on the basis of sex is likewise prohibited. Thus, the proper interpretation of "on the basis of sex" under Title IX, § 106.33 and the Constitution is at the heart of this dispute.

Nevertheless, on May 22, 2018, the Honorable Arenda W. Allen ("Judge Allen") entered an Order holding that the prohibition of discrimination "on the basis of sex" includes gender identity. The District Court held claims of discrimination on the basis of transgender status are *per se* actionable under a gender stereotyping theory, and applied this law on summary judgment. ECF No. 148 at 20. Grimm v. Gloucester Cty. Sch. Bd., No. 4:15CV54, 2019 WL 3774118, at *8–9 (E.D. Va. Aug. 9, 2019).

In ruling against the School Board and in favor of Grimm at the summary judgment stage, the District Court concluded "the Board has discriminated against Gavin Grimm on the basis of his transgender status in violation of Title IX" and the Equal Protection Clause. JA 1183; (Grimm v. Gloucester Cty. Sch. Bd., No. 4:15CV54, 2019 WL 3774118, at *10 (E.D. Va. Aug. 9, 2019)). The District Court also declared that the School Board's refusal to update Grimm's official school

transcript "to conform to the 'male' designation" on his amended birth certificate violated the Fourteenth Amendment and Title IX.

In doing so, the District Court declared the School Board's "policy violated Mr. Grimm's rights under the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972, on the day the policy was first issued and throughout the remainder of his time as a student at Gloucester High School." JA 1192. This means a physiological female student who identifies as a male must be allowed to use the boys' restroom, and a physiological male student who identifies as a female must be allowed to use the girls' restroom. It also means that the policy of the School Board - which separates restrooms by physiological sex, while also providing unisex restrooms for all students - is *prohibited* by Title IX and the Equal Protection Clause.

The District Court's interpretation of Title IX and the Equal Protection Clause is wrong and foreclosed by the text, structure, and history of Title IX and its implementing regulations, and is inconsistent with the Supreme Court's precedent and application of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Discrimination "on the basis of sex" does not include transgender status or gender identity, and implementing policies based on biological sex is not sex stereotyping under Price Waterhouse.

STANDARD OF REVIEW

The District Court granted Grimm's motion for summary judgment and denied the School Board's motion for summary judgment. This Court has frequently held it "reviews a district court's grant of summary judgment *de novo*, applying the same legal standards as the district court." See, e.g., Martin v. Lloyd, 700 F.3d 132, 135 (4th Cir. 2012); see also, Libertarian Party of Va. v. Judd, 718 F.3d 308, 312-13 (4th Cir. 2013) ("We review de novo the district court's disposition of the cross-motions for summary judgment, evaluating them seriatim…).

ARGUMENT

I. The District Court Erred in Denying the School Board Summary Judgment and Granting Grimm Summary Judgment When The District Court Re-Defined The Term "Sex" To Include Transgender Status.

In granting Grimm summary judgment, the District Court "conclude[d] that the Board discriminated against Gavin Grimm on the basis of his transgender status in violation of Title IX." [ECF No. 229 at 19]. The District Court relied on its previous Order, which held "that claims of discrimination on the basis of transgender status are *per se* actionable under a gender stereotyping theory." [ECF Nos. 229 at 25; 148 at 20].

The District Court also held that transgender individuals are subject to heightened scrutiny under the Equal Protection Clause "for at least two reasons." [ECF Doc. 229 at 8]. "First, transgender individuals constitute at least a quasi-suspect class." Id. "Second, discrimination based on sex stereotypes constitutes sex-based classification of a type subject to intermediate scrutiny." Id.

The only way Grimm can prevail on either of his claims is if the term "sex" is redefined to include "transgender." The District Court erroneously made that determination by relying on the sex-stereotyping analysis set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Price Waterhouse did not create an independent claim of sex stereotyping, and nothing in Price Waterhouse suggests that sex itself is a stereotype.

The School Board's policy with respect to restrooms and official school transcripts treats all students equally on the basis of physiological and anatomical characteristics, and there is no basis in the law for concluding transgender status falls into the sex stereotyping rubric of Price Waterhouse.

II. The District Court Erred in Denying the School Board Summary Judgment and Granting Grimm Summary Judgment on Grimm's Title IX Claim.

A. The School Board's Policy is valid under Title IX and its regulations.

The District Court erred in denying the School Board's motion for summary judgment, because Grimm's Title IX claim is barred by the plain language of Title IX and its implementing regulation, 34 C.F.R. § 106.33. Throughout this litigation, Grimm has argued that "sex" is determined according to "gender identity," meaning "a person's deeply felt, inherent sense of one's gender." ECF Doc. 177, ¶ 20. The text, history, and structure of Title IX, and the plain language of its implementing regulation, foreclose that view. Although this Court originally accepted an *agency interpretation* adopting Grimm's position, relying on the doctrine of Auer v. Robbins, 519 U.S. 452 (1997), even then the Court acknowledged that such an interpretation is "not the intuitive one." G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 722 (4th Cir.), vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017). See also id., 822 F.3d at 720 (holding that "the Board's reading—

determining maleness or femaleness with reference exclusively to genitalia—" is one of multiple "plausible reading[s]" of 34 C.F.R. § 106.33.")

The District Court declined to interpret the statutory term "sex" as referring "to the 'then-universal understanding of "sex" as a binary term encompassing the physiological distinctions between men and women,' as understood during the passage of Title IX and the promulgation of § 106.33," on the ground that "this fails to address the question of how § 106.33 is to be interpreted regarding transgender students or other individuals with physiological characteristics associated with both sexes" (ECF Doc. 148, p. 16.) However, the better interpretation—which is reflected in the School Board's policy—is that schools may rely on the anatomical and physiological differences between males and females when separating boys and girls on the basis of sex in restrooms and similar facilities.

1. Title IX prohibits sex discrimination as a means of ending educational discrimination against women.

Title IX was designed principally to end discrimination against women in university admissions and appointments. See 117 Cong. Rec. 39250, 39253, 39258; 118 Cong. Rec. 5104–06. Title IX's architects viewed such discrimination as rooted in pernicious stereotypes about women. 118 Cong. Rec. 5804.Title IX's ban on sex discrimination emerged from Congress's multifaceted efforts in the early 1970's to address discrimination against women. See generally Paul C. Sweeney, *Abuse*,

Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment, 66 UMKC L. Rev. 41, 50–54 (1997).

> At the same time, Title IX preserved settled expectations of privacy between males and females by permitting "separate living facilities for the different sexes," 20 U.S.C. § 1686, and "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33 ("section 106.33"). Such exceptions were "designed," as Senator Bayh explained, "to allow discrimination only in instances where personal privacy must be preserved." 121 Cong. Rec. 16060.

2. Title IX allows certain facilities and programs to be separated by sex.

Congress understood not all distinctions between men and women are based on stereotypes. Foremost are distinctions needed to preserve privacy. As ERA proponents had grasped, "disrobing in front of the other sex is usually associated with sexual relationships," Barbara A. Brown, Thomas I. Emerson, Gail Falk, Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 901 (1971), and thus implicated the recently-recognized right to privacy. See id. at 900–01 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)). That privacy right, the proponents believed, "would permit the separation of the sexes" in intimate facilities such as "public restrooms[.]" Id.

Both the Senate and the House grasped this commonsense principle. For instance, Senator Bayh noted that sex separation would be justified where "absolutely necessary to the success of the program" such as "in classes for pregnant girls," and "in sports facilities or other instances where personal privacy must be

preserved." 118 Cong. Rec. 5807. Representative Thompson—"disturbed" by suggestions that banning sex discrimination would prohibit all sex-separated facilities—proposed an amendment stating that "nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex." 117 Cong. Rec. 39260. The language was introduced that day and adopted by the House without debate. 117 Cong. Rec. 39263. Although Bayh's version lacked a similar proviso, the conference committee included Thompson's language without further discussion. H.R. Conf. Rep. No. 92-1085 at 222.

Subsequently, the Department of Health, Education, and Welfare ("HEW") proposed a Title IX regulation providing that sex separation would be permitted for "toilet, locker room and shower facilities." 39 Fed. Reg. 22228, 22230 (June 20, 1974). The final regulations retained HEW's clarification. 40 Fed. Reg. 24128, 24141 (June 4, 1975); 34 C.F.R. § 106.33 ("section 106.33").[4] HEW's regulations continued to use the statutory term "sex," without elaboration.

When Congress considered the HEW regulation, Senator Bayh again linked the issue to privacy. He introduced into the record a scholarly article explaining that

[4] HEW's regulations were recodified in their present form after the reorganization that created the Department of Education in 1980. See 45 Fed. Reg. 30802, 30960 (May 9, 1980). Additionally, because multiple agencies issue Title IX regulations, the section 106.33 exception appears verbatim in 25 other regulations. See, e.g., 7 C.F.R. § 15a.33 (Agriculture); 24 C.F.R. § 3.410 (Housing & Urban Development); 29 C.F.R. § 36.410 (Labor); 38 C.F.R. § 23.410 (Veterans Affairs); 40 C.F.R. § 5.410 (EPA).

Title IX "was designed to allow discrimination only in instances where personal privacy must be preserved. For example, the privacy exception lies behind the exemption from the Act of campus living facilities. The proposed regulations preserve this exception, as well as permit 'separate toilet, locker room, and shower facilities on the basis of sex.'" 121 Cong. Rec. 16060.

B. The text and history of Title IX and Section 106.33 refute the notion that the statutory term "sex" must be equated with "gender identity."

The most straightforward way to resolve the Title IX claim is the one previously taken by Judge Doumar. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 738 (E.D. Va. 2015). As Judge Doumar correctly explained, Title IX regulations "specifically allow[ ] schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable." Id. at 745. It is beyond dispute that in the 1970s—when Congress enacted Title IX and HEW adopted section 106.33—the term "sex" at least *included* the anatomical and physiological distinctions between men and women.[5] It follows that when schools establish separate restrooms, locker rooms, and showers for boys and girls, Title IX and section 106.33 affirmatively permit them to rely on anatomical and

[5] Indeed, as discussed below, all relevant indicia of meaning show that the understanding of "sex" shared by Title IX's architects was determined *wholly* by those physiological distinctions. The same is true, in common parlance, up to the present day. See Memorandum Opinion, Sept. 17, 2015, ECF Doc. 57, at p. 12 ("under any fair reading, 'sex' in [s]ection 106.33 clearly includes biological sex").

physiological sex to distinguish those facilities, regardless of whether the term "sex" could also theoretically include some notion of "gender identity." ECF Doc. 57 at p. 12 (concluding that, because the School Board's policy is permitted by the regulation, "the Court need not decide whether 'sex' in … [s]ection 106.33 also includes 'gender identity'"). As a straightforward matter of interpretation, nothing more was necessary to grant the School Board summary judgment on Grimm's Title IX restroom claim. ECF Doc. 57 at pp. 12-13.

Grimm's position depends on a reading of Title IX that is incompatible with the plain meaning of the term "sex": namely, that for Title IX purposes one's internal sense of gender identity is *determinative* of one's sex. Grimm's position means that physiology is not only irrelevant but *invalid* under Title IX as a basis for separating boys and girls in restrooms. Grimm's interpretation forbids something the statute and regulation affirmatively permit: use of the anatomical and physiological distinctions between males and females to separate boys and girls in restrooms, locker rooms, and showers. Grimm's view is incorrect as a matter of law.

Indeed, Grimm's own expert agrees there is a biological, anatomical and physiological component to determining the sex of an individual. JA 1068-72. Thus, under these circumstances, a policy of providing segregated same sex restrooms and single-stall unisex restrooms for any student to use does not violate Title IX and is indeed permissible under section 106.33.

1. The term "sex" at a minimum *includes* anatomical and physiological distinctions.

The Supreme Court has long held, "[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" as of "the era of [the statute's] enactment." Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (quotes omitted). The Supreme Court recently reaffirmed this guiding principle. New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019). "After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." Ibid. (citation omitted). Courts should not rewrite a statute "under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1725 (2017) (citation omitted).

All available evidence confirms the term "sex" deployed in Title IX and section 106.33 referred solely to the anatomical and physiological differences between men and women. The use of that term thus provides no support for the radical notion espoused by Grimm that one's "sex" for Title IX purposes should be determined, not by anatomical and physiological characteristics, but instead by an individual's internal "gender identity."

This conclusion plainly follows from the linguistic evidence considered by *both* the majority and dissenting opinions in this Court's previous decision on this matter. Those opinions cited nine dictionaries between them, covering a period from before the enactment of Title IX to the present. Every single one referred to *anatomical and physiological* characteristics as a criterion for distinguishing men from women. G.G., 822 F.3d at 721–22; 736–37. Thus, all of those Title IX-era definitions explicitly referred to physiological characteristics as a central determinant of one's "sex." None even hinted that "sex" even includes—much less *turns on*—one's internal gender identity.

The same is true of the DSM-V, which defines "sex" as the biological indicators of male and female such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal or external genitalia. JA 1116.

No putative ambiguities in a few dictionary definitions can overcome the weight of linguistic evidence that physiology is at least a critical factor in the term "sex" as deployed in Title IX. See, e.g., MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 226–28 (1994) (rejecting reliance on outlier dictionary definitions "whose suggested meaning contradicts virtually all others"). Furthermore, even the allegedly ambiguous definitions of sex still referred overwhelmingly to "anatomical and physiological differences" between the sexes, as well as characteristics that "subserve[ ] biparental reproduction." See

G.G., 822 F.3d at 721 (quoting *American College Dictionary* (1970) and *Webster's Third New International Dictionary* (1971)). And *none* referred to "gender identity," or anything like it, as a constitutive part of one's sex—much less the sole, determinative factor.

Consequently, there is not a linguistic basis to contend that the term "sex" in Title IX could ever have been understood to refer to gender identity *at all*, and certainly not to the *exclusion* of objective physiological characteristics distinguishing men from women. See e.g., R.G. & G.R. Harris Funeral Homes, Inc., v. Aimee Stephens, No. 18-107 (U.S.), Brief for Respondent, at 24 n.10 (acknowledging that phrase "sex assigned at birth" is the same as definition of "sex" based on physiological and anatomical features of male and female infants.); See also JA 548; JA 341-60; JA 1070-71.

The prohibition against "sex" discrimination enacted by Congress in 1972 is not so elastic that, today, someone born anatomically and physiologically female could be considered a male for purposes of Title IX based on that person's internal perceptions. That re-imagination of the term "sex" does not merely broaden the "comparable evils" at which the framers of Title IX were aiming, rather, it entirely subverts the basis of Title IX's anti-discrimination provision. Cf. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998).

Instead of joining Grimm in rewriting Title IX, this Court should simply adopt the intuitive interpretation that the School Board is permitted by Title IX to separate the sexes in restrooms and locker rooms and designate official school records based on the anatomical and physiological distinctions between males and females, as school districts around the nation have been doing in reliance on Title IX for the past five decades. That straightforward conclusion is enough to resolve Grimm's claim, and the School Board should have been granted summary judgment.

2. Congress understood Title IX to permit classifications based on physiology.

Furthermore, to the extent the Court wishes to refer to Title IX's legislative history, that history, as set out above, confirms that "sex" was understood by the framers of Title IX and its regulations to encompass the anatomical and physiological differences between men and women. See, e.g., St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 612–13 (1987) (confirming textual meaning through legislative history).

Other indicators of congressional purpose likewise show that gender identity is outside the scope of Title IX. For example, the subsequently enacted Violence Against Women Act ("VAWA")—a Spending Clause statute, like Title IX—prohibits funded programs or activities from discriminating based on either "sex" or "gender identity." 42 U.S.C. § 13925(b)(13)(A). "Sex" and "gender identity" must have meant distinct things to the Congress that enacted VAWA—otherwise

including gender identity with sex would create surplusage. See, e.g., National Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 501 (1998) (rejecting agency interpretation under Chevron for this reason). Other statutes enacted after Title IX relate to discriminatory acts based on "gender" and "gender identity," confirming that when it legislates, Congress distinguishes outward manifestations of sexual identity—akin to sex—from inward, perceived ones. See 18 U.S.C. § 249 (federal hate crimes); 42 U.S.C. § 3716(a)(1)(C) (Attorney General authority to assist with State and local investigations and prosecutions); 20 U.S.C. § 1092(f)(1)(F)(ii) (crime reporting by universities); 42 U.S.C. § 294e-1(b)(2) (federal mental health grants). Yet Congress has never supplemented Title IX with an additional gender identity-based standard.

In other contexts, Congress has repeatedly declined to enact statutes forbidding gender identity discrimination in education. The Student Non-Discrimination Act, introduced in 2010, 2011, 2013, and 2015 in both the Senate and the House,[6] would condition school funding on prohibiting gender identity discrimination. Another measure, the "Equality Act," would amend the Civil Rights

[6] H.R. 4530 (111th Cong. 2010); S. 3390 (111th Cong. 2010); H.R. 998 (112th Cong. 2011); S. 555 (112th Cong. 2011); H.R. 1652 (113th Cong. 2013); S. 1088 (113th Cong. 2013); H.R. 846 (114th Cong. 2015); S. 439 (114th Cong. 2015).

(footnote continued)

Act of 1964 to prohibit gender identity discrimination in various contexts, including employment and education.[7] Neither bill has ever left committee.

Congress's failure to act to protect transgender status as a protected classification—and its use of "sex" and "gender identity" as independent concepts in other federal statutes—is significant. While in some cases the Supreme Court has not placed great weight on post-enactment legislative activity, here, Congress's legislative inaction on bills directly relevant to the issues in this case is "significant." E.g., Bob Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983) (it was "significant" that Congress declined to enact "no fewer than 13 bills" during a 12-year period while Congress "enacted numerous other amendments" to the statute); Flood v. Kuhn, 407 U.S. 258, 281–84 (1972) (Congress "clearly evinced a desire" to maintain the status quo by rejecting "numerous and persistent" legislative proposals).

In the face of Congress's failure to add the concept of gender identity to Title IX—indeed, its repeated decision *not* to do so—Grimm's position amounts to asking this Court to "update" the law by judicial amendment. Yet, the only plausible explanation for the absence of the term "gender identity" from Title IX is that Title IX has *never* included it, and still does not. If Congress wishes to incorporate that

[7] S. 1858 (114th Cong. 2015); H.R. 3185 (114th Cong. 2015).

distinct concept into Title IX, it knows how to do so. This Court should decline Grimm's invitation to do the work of Congress.

3. The implementing regulations confirm this interpretation.

In its Order entered May 22, 2018 (ECF Doc. 148), the District Court declined to interpret the statutory term "sex" as referring "to the 'then-universal understanding of "sex" as a binary term encompassing the physiological distinctions between men and women,' as understood during the passage of Title IX and the promulgation of § 106.33," because it did not address how "§ 106.33 is to be interpreted regarding transgender students or other individuals with physiological characteristics associated with both sexes." Id. at page 16.[8] Examination of the Department of Education's Title IX regulations demonstrates that the Department, however, has always employed a "binary" interpretation. Thus, 34 C.F.R. § 106.21 provides that a recipient of federal financial assistance "may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of *both sexes* …." (Emphasis added.) Section 106.60 contains identical language with respect to applicants for employment.

34 C.F.R. § 106.17 provides similarly that to be approved by the Secretary a "transition plan" must, *inter alia*, "(2) State whether the educational institution or

[8] Grimm does not have characteristics associated with both sexes and that scenario is not at issue in this case.

administratively separate unit admits students of *both sexes*, as regular students and, if so, when it began to do so." (Emphasis added.) (A "transition plan" is "a plan … under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of *both sexes* without discrimination." 34 C.F.R. § 106.2 (emphasis added).) "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of *both sexes*"; and in determining whether equal opportunities are available, the Department "will consider, among other factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of *both sexes*." 34 C.F.R. § 106.41 (emphases added).

The Department's regulations consistently employ an unambiguously "binary" understanding of the statutory term "sex"—consistently with the then-universal understanding during the passage of Title IX and the promulgation of § 106.33. Respectfully, the District Court substituted an interpretation of term sex which is at odds with that of the Congress that enacted Title IX and the implementing regulations.

4. Supreme Court and Fourth Circuit precedents strongly support the School Board's interpretation of Title IX.

Supreme Court and Fourth Circuit sex discrimination precedents also offer compelling support for reading the term "sex" in Title IX as referring to the

anatomical and physiological differences between men and women. When determining the nature of prohibitions on sex discrimination, the Supreme Court and this Court have focused on anatomical and physiological differences, especially in contexts involving the lawful separation of males and females for privacy purposes. That emphasis underscores the correctness of interpreting Title IX to rely on physiology, thereby permitting the School Board's restroom and locker room policy and official transcript policy.

For instance, in United States v. Virginia, 518 U.S. 515, 540–46 (1996), the Supreme Court held that the Equal Protection Clause required the Virginia Military Institute to admit women. Yet, even as it rejected stereotypes based on "inherent differences" between the sexes, the Court nonetheless emphasized that "[p]hysical differences between men and women are enduring" and explained that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." Id. at 533, 550 n.19. Thus, the Court's analysis of its "privacy" concerns was grounded in objective, "physical differences" between the sexes, and not in subjective factors like gender identity.

More pointedly, in Tuan Anh Nguyen v. INS, 533 U.S. 53, 59–60 (2001), the Supreme Court upheld against equal protection challenge a federal immigration standard that made it easier to establish citizenship if a person had an unwed citizen

mother, as opposed to an unwed citizen father. The easier standard for persons with citizen mothers was explicitly justified on *biological* grounds—namely that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." Id. at 63. The Court rejected the argument that this distinction "embodies a gender-based stereotype," explaining "[t]here is nothing irrational or improper in the recognition that at the moment of birth … the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father." Id. at 68. The Court added these observations that apply with equal force here:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. … The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73. Here again, the Court's analysis of these issues was driven by objective, physiological differences between the sexes.

The physiological conception of sex underlying the Virginia and Tuan Anh Nguyen decisions has been deployed recently by this Court. In Bauer v. Lynch, 812 F.3d 340 (4th Cir. 2016), cert. denied, 137 S. Ct. 372 (Oct. 31, 2016), this Court rejected the argument that differing FBI fitness standards for men and women—

based on their "innate physiological differences"—constituted impermissible sex discrimination under Title VII. Id. at 343. Relying on Virginia, Bauer held that the different standards were justified because "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs," and, despite Virginia's rejection of sex stereotypes, "some differences between the sexes [are] real, not perceived[.]" Id. at 350. Indeed, Bauer's reasoning had been foreshadowed by this Court's earlier decision in Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993). In that case, the Court noted that sex separation in intimate facilities is justified by "acknowledged differences" between the sexes. Id. at 233. And the Court observed that "[t]he point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." Id. at 232.

Those decisions strongly support interpreting Title IX and its regulations to allow the separation of men and women on the basis of anatomical and physiological differences, precisely as the School Board's policy does in multiple-stall restrooms and locker rooms and in ensuring accurate official school records. As Justice Kennedy wrote for the Court in Nguyen, "[t]o fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." 533 U.S. at 73. Justice Stevens captured this point in City of Los Angeles, Department of Water & Power v. Manhart, when he wrote

for the Court that "[t]here are both real and fictional differences between women and men." 435 U.S. 702, 707 (1978).

Anatomical and physiological differences between men and women are real ones, especially where they are relied on to safeguard reasonable privacy expectations that have long been part of the fabric of public life. And it is difficult to imagine a more appropriate setting for safeguarding privacy than school restrooms. Indeed, the undisputed facts here establish those anatomical and physiological differences exist in this case, despite Grimm's gender identity assertions and Grimm's chest reconstructive surgery before Grimm's senior year of high school. Yet, the District Court's judgment provides that the School Board's policy violated Grimm's rights on the day it was enacted, which effectively means that the Court determined that the assertion of transgender status alone, without regard to the anatomical differences between boys and girls, is protected under Title IX and the Equal Protection Clause.

5. Price Waterhouse does not support Grimm's claims.

Furthermore, the District Court misinterpreted Price Waterhouse and expanded the concept of "sex stereotyping" to encompass transgender status as *per se* sex discrimination. JA 1172 ("discrimination on the basis of transgender status constitutes gender stereotyping.") This application of Price Waterhouse is not justified.

Price Waterhouse did not create an independent claim of sex stereotyping, and this Court should not create one now. Instead, the Price Waterhouse plurality only held that sex stereotyping can be "*evidence*" of sex discrimination. 490 U.S. at 251; id. at 258–61 (White, J., concurring); *id.* at 261–79 (O'Connor, J., concurring); Id. at 294 (Kennedy, J., dissenting, "Title VII creates no independent cause of action for sex stereotyping.") Accordingly, under Price Waterhouse, a plaintiff still must prove one sex is treated worse than the other sex.

Thus, the District Court was mistaken to hold that because of Grimm's transgender status alone, he was discriminated against based on sex stereotypes. Instead, the relevant analysis is whether, the School Board discriminated against Grimm based on stereotypes about his biological sex, female, not transgender status. The clear answer is no. The School Board implemented a restroom policy, and maintains official school records, based on the physiological and anatomical differences between boys and girls, not any stereotypes associated with their biological sex.

Price Waterhouse does not suggest that sex itself is a stereotype. Indeed, other than transgender status, Grimm has not identified what specific stereotype supports his claim. Instead, in Price Waterhouse, the employer discriminated against women who showed aggressiveness, but not against men who showed the same trait. Thus,

the reliance on this stereotype disfavored the female plaintiff, which created the sex specific stereotype actionable under Title VII.

Here, however, the School Board's policy treats transgender status the same and is not sex-specific. The policy applies equally to boys and girls, whether transgender or not. That is, all students can use the restroom associated with their biological sex or one of three unisex restrooms. Moreover, official school transcript records are maintained based on a student's biological sex. The School Board does not rely on specific sex related stereotypes, and it makes no sense to say that distinguishing boys from girls on the basis of *physiological or anatomical characteristics* amounts to prohibited sex "stereotyping."

Furthermore, the School Board's policy distinguishes boys and girls based on physical sex characteristics alone, *not* based on any of the characteristics typically associated with sex stereotyping—such as whether a woman is perceived to be sufficiently "feminine" in the way she dresses or acts. Cf., e.g., Price Waterhouse, 490 U.S. at 235. Indeed, the School Board's standard rejects classifying students based on whether they meet *any* stereotypical notion of maleness or femaleness. Far from violating Price Waterhouse, the School Board's policy is the *opposite* of the kind of sex stereotyping prohibited by that decision. See, e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (concluding that Price Waterhouse does not require "employers to allow biological males to use women's restrooms,"

because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes").

The District Court erred in holding that the School Board violated Title IX because of Grimm's transgender status. In fact, the Supreme Court has already said that sex is *not* a stereotype and the "physical differences between men and women" relating to reproduction—the very features that determine sex—are not "gender-based stereotype[s]." Nguyen, 533 U.S. at 68.

C. Equating "sex" with gender identity undermines Title IX's structure.

The District Court's decision and interpretation of Title IX—requiring access to sex-separated facilities based on gender identity alone—undermines Title IX's structure, obstructs its purposes, and leads to obvious and intractable problems of administration. "It is implausible that Congress meant [Title IX] to operate in this manner." King v. Burwell, 135 S. Ct. 2480, 2494 (2015).

1. The District Court's interpretation of Title IX would itself lead to discrimination.

The District Court's opinion leads to discrimination in different forms. Most obviously, persons whose gender identities align with their physiological sex would have access only to one facility, but transgender individuals such as Grimm could elect to use *either* the facilities designated for people of their sex *or* the opposite sex's facilities, resulting in different degrees of access depending on whether a

person's gender identity diverges from physiology. That is "sex" discrimination under Grimm's own argument.

Grimm also implies that while Grimm's discomfort in the girls' restroom requires relief under Title IX, another boy's discomfort with Grimm's presence in the boys' restroom is legally meaningless. Providing Grimm a choice between the girls' room and an alternative unisex restroom open to all students is, in Grimm's view, an affront to Grimm's dignity. Yet, forcing the same choice on Grimm's male classmates—notwithstanding their own adolescent modesty, personal sensitivities, or religious scruples—is simply the price to be paid. The same logic would apply to the feelings of boys sharing locker rooms and showers with a transgender individual like Grimm and to 14-year old girls sharing facilities with 18-year old physiological males. Title IX does create so one-sided a regime.

Grimm's solutions to any of these problems are of no help. For example, some of Grimm's prior briefs imply that a transgender individual's access to the other physiological sex's facilities turns on gender presentation (*i.e.*, whether someone appears to be relatively more masculine or feminine) and the sincerity of an individual's feelings of discomfort on being required to use a facility consistent with anatomical and physiological sex.

Those standards suggest that schools must evaluate access to restrooms based on the subjective sincerity of a student's desire to adopt an "identity" at odds with

his or her anatomy and physiology and how consistently or comprehensively the student "presents" his or her preferred gender identity. Even putting aside the manifest difficulty of discerning adolescent motivations, administrators would have to evaluate students' access to facilities based on relative masculine or feminine traits. But that is classic sex-stereotyping, see Price Waterhouse, 490 U.S. at 250–51, which schools would undertake at their peril.

These and other serious practical problems counsel against this attempt to transform the statutory prohibition on sex discrimination into the distinctly different prohibition on gender identity discrimination, as Grimm's Title IX claim demands.

2. Grimm's interpretation frustrates Title IX's purposes.

Like any statute, Title IX should be interpreted so that its "manifest purpose is furthered, not hindered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). And here, one of Title IX's purposes was to maintain schools' ability to separate male and female students in some circumstances, especially when personal privacy is implicated. But this purpose is incompatible with an approach that understands "sex," not by the anatomical and physiological distinctions between males and females, but instead by "gender identity"—"a person's deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female." ECF Doc. 177 ¶20. If access to sex-separated facilities turns on gender identity, then the sex separation contemplated by Title IX and its

regulations would cease to exist. Under that regime, a school board might *wish*, as a matter of legislative policy, to keep boys and girls in separate locker rooms; but in practice any given restroom or locker room would be open to members of both sexes. An interpretation of the term "sex" that frustrates the purposes of Title IX should be rejected. See G.G., 822 F.3d at 738 (Niemeyer, J. dissenting).

D. If "sex" were equated with "gender identity," Title IX and its regulations would be invalid for lack of clear notice.

Finally, even if Title IX and its regulations were ambiguous as applied to transgender individuals, then under Grimm's interpretation, Title IX violates the Spending Clause for failure to afford funding recipients clear notice of the conditions of funding. This Court should interpret Title IX in a way that does not render it potentially unconstitutional.

Title IX was enacted under the Spending Clause, and the threat of withdrawing federal funding is the main enforcement mechanism. See 20 U.S.C. § 1682. Moreover, "[l]egislation enacted pursuant to the spending power is much in the nature of a contract, and therefore, to be bound by federally imposed conditions, recipients of federal funds must accept them voluntarily and knowingly." Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (quotes and alteration omitted) (quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). For that reason, "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out unambiguously," for

"States cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain." Id. (quotes and citation omitted).

Given the limits on Congress's spending power, Grimm's position must be rejected under the rule of constitutional avoidance. See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

III. The District Court Erred In Denying The School Board's Motion For Summary Judgment And Granting Grimm's Motion For Summary Judgment On The Equal Protection Claim.

A. The School Board has not violated the Equal Protection Clause.

The Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The equal protection requirement "does not take from the States all power of classification," Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 271 (1979), but "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

Thus, "[t]he [Equal Protection] Clause requires that similarly-situated individuals be treated alike." Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). To make out a claim under the Equal Protection Clause, Grimm had to

demonstrate that he has been treated differently from others similarly situated and that the unequal treatment was the result of intentional discrimination. Morrison v. Garraghty, 239 F.3d 648, 652 (4th Cir. 2001); Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002). Grimm failed to meet his burden.

B. Grimm cannot prevail, because all students are treated the same by the School Board.

The School Board's restroom policy and maintenance of official school transcript records do not discriminate against any class of students. They treat all students and situations the same. To protect the safety and respect the privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding physiology of the students. The School Board also provides three single-stall restrooms for any student to use regardless of his or her physiology. The School Board maintains official school transcript records based on the student's biological sex.

Under the School Board's restroom policy, Grimm was treated like every other student in the Gloucester Schools. Every student can use a restroom associated with their physiology, whether they are boys or girls. If students choose not to use the restroom associated with their physiology, they can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

Grimm was permitted, but chose not to use either the single-stall restroom or the girls' restroom. JA 870; JA 901. Similarly, Grimm was treated like every other student with respect to his official school transcript record, which denotes the biological sex of the student. Grimm, therefore, cannot demonstrate that he was treated differently from others similarly situated or that he was subject to intentional discrimination in violation of the Equal Protection Clause. See Workman v. Mingo County Bd. of Educ., 419 F. App'x 348, 354 (4th Cir. 2011) (no evidence of unequal treatment in application of state mandatory vaccination laws before admission to school); Hanton v. Gilbert, 36 F.3d 4, 8 (4th Cir. 1994) (no evidence that similarly situated males were afforded different treatment).

1. Grimm does not compare similarly situated individuals.

The District Court ignored this sensible application of the School Board's policy. In doing so, the District Court held that transgender individuals constitute a quasi-suspect class and that the School Board relied on sex stereotypes for purposes of the Equal Protection analysis. This holding ignores the fundamental purpose of the Equal Protection Clause – that similarly situated individuals be treated alike. Here, Grimm is not comparing a male with a similarly situated female, nor is Grimm arguing that the School Board treated males differently than females or vice versa. Instead, Grimm's underlying assertion is that the School Board is treating a biological girl who want to use the boys' restroom or have her transcript changed

because of her gender identity, differently from both boys and girls who want to use the restroom that conforms to the biological sex or have a transcript that conforms to their biological sex. This is not a proper comparison to establish discrimination on the basis of sex and does not implicate the Equal Protection Clause. Instead, it relies solely on transgender status.

Grimm's sex at birth defines the equal protection question. Johnston v. Univ. of Pittsburgh of Com. Sys. Of Higher Educ., 97 F. Supp. 3d 657, 671 ("While Plaintiff alleges that he is a 'male,' ... Plaintiff was assigned the sex of "female" at birth ... Thus, while Plaintiff might identify his ***gender*** as male, his ***birth sex*** is female. It is this fact … that is fatal to Plaintiff's sex discrimination claim. Regardless of how gender and gender identity are defined, the law recognizes certain distinctions between male and female on the basis of birth sex."). Grimm's birth sex is female. Grimm's choice of gender identity did not cause biological changes in his body, and Grimm remains biologically female. JA 341-60; JA 1073-74. While, Grimm had chest reconstruction surgery in June of 2016, this procedure did not create any biological changes in Grimm, but instead, only a physical change. JA 1100. While Grimm had a new birth certificate issued during his senior year in high school, Grimm still was anatomically and physiologically female. As such, Grimm's attempt to insert "gender identity" as a component of "sex" fails to state an Equal Protection Clause claim as a matter of law.

2. The District Court improperly determined the School Board relied on sex-stereotypes in holding the School Board violated Equal Protection Clause.

The District Court misinterpreted Price Waterhouse in its application of the Equal Protection analysis for the same reasons it did so under the Title IX analysis. The School Board's restroom policy and maintenance official school transcript records based on the student's biological sex does not rely on "sex stereotyping", and the District Court erred in holding the School Board violated the Equal Protection Clause on this basis. For purposes of brevity and judicial economy, the School Board adopts the arguments set out in Section II. B. 5 of this brief.

C. Transgender persons are not a suspect class entitled to heightened scrutiny.

Neither the United States Supreme Court nor this Court has recognized transgender status as a suspect classification under the Equal Protection Clause. Other courts have rejected the notion that transgender status is a suspect classification. See, e.g., Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that transsexuals are not a protected class under Title VII); Druley v. Patton, 601 F. App'x 632, 635 (10th Cir. 2015) (declining to recognize transgender as a suspect class); Brown v. Zavaras, 63 F.3d 967, 970-71 (10th Cir. 1995) (declining to recognize transsexuality as a protected class); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) ("transsexuality itself [is] a characteristic that, in and of itself, nearly all federal courts have said is unprotected

by Title VII"); Johnston, 97 F. Supp. 3d 657, (holding that transgender status is not a suspect classification); Jamison v. Davue, No. CIV S-11-2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012) ("Plaintiff is cautioned, however, that transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review.")[9]

Further, unlike laws that differentiate between fathers and mothers, widows and widowers, unwed fathers and unwed mothers, see Sessions v. Morales-Santana, 137 S. Ct. 1678, 1688-89 (2017), separating boys and girls into different bathrooms based on their physiology is not sex-based discrimination that is prohibited by the Equal Protection Clause. This Court should not recognize transgender as a new suspect classification. Indeed, the Supreme Court has admonished lower courts not to create new suspect classifications. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985). Accordingly, Grimm's equal protection claim should be reviewed under the rational basis standard. For the reasons discussed below,

[13] See also Doe v. Alexander, 510 F. Supp. 900, 904 (D. Minn. 1981); Braninburg v. Coalinga State Hosp., No. 1:08-CV-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012); Kaeo-Tomaselli v. Butts, No. CIV. 11-00670 LEK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013); Lopez v. City of New York, No. 05 CIV. 10321(NRB), 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009); Starr v. Bova, No. 1:15 CV 126, 2015 WL 4138761, at *2 (N.D. Ohio July 8, 2015); Murillo v. Parkinson, No. CV 11-10131-JGB VBK, 2015 WL 3791450, at *12 (C.D. Cal. June 17, 2015); Stevens v. Williams, No. 05-CV-1790-ST, 2008 WL 916991, at *13 (D. Or. Mar. 27, 2008); Rush v. Johnson, 565 F. Supp. 856, 868 (N.D. Ga. 1983).

however, that claim fails even if it is reviewed under the more demanding standards applicable to suspect classifications.

D. The School Board's Policy is presumptively constitutional under rational basis review, and passes constitutional muster even under intermediate scrutiny.

Requiring students to use facilities that correspond to their birth sex to provide privacy to all students has been recognized as a rational basis by multiple courts. See Johnston, 97 F. Supp. 3d at 669-70 (citing Etsitty, 502 F.3d at 1224; Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975)). Indeed, the Supreme Court also has recognized (1) that there are inherent "[p]hysical differences between men and women" that are "enduring" and render "the two sexes … not fungible" and (2) that each sex must be afforded privacy from the other sex. United States v. Virginia, 518 U.S. 515, 533, 550 n. 19 (1996).[10]

This Court likewise has held that individuals have a right to bodily privacy. See Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) ("Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating."). In particular, this Court has acknowledged "society's undisputed

[10] In a 1975 *Washington Post* editorial, then Columbia Law School Professor Ruth Bader Ginsburg wrote that "[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy." Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21 (emphasis added).

approval of separate public rest rooms for men and women based on privacy concerns." Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993).

This is not a revolutionary proposition. Other courts have recognized the basic need for bodily privacy. See, e.g., Doe v. Luzerne Cty., 660 F.3d 169, 177 (3d Cir. 2011) (an individual has "a constitutionally protected privacy interest in his or her partially clothed body," and this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 498 (6th Cir. 2008) ("the constitutional right to privacy … includes the right to shield one's body from exposure to viewing by the opposite sex"); Sepulveda v. Ramirez, 967 F.2d 1413, 1415-16 (9th Cir. 1992) ("[t]he right to bodily privacy is fundamental," and "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample).

Protecting bodily privacy is of particular concern when it comes to students. Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies"). Indeed, the School Board has a responsibility to ensure students' privacy, which is especially acute when children are still developing, both emotionally and physically. See, e.g., Burns v. Gagnon, 283 Va. 657, 671, 727 S.E.2d 634, 643 (2012); Davis v. Monroe County School Board of Education, 526 U.S. 629, 646-47 (1999). That is exactly

the aim of the School Board's restroom policy in this case. Andersen, 22:1-11; 25:15-17; 25:19-26:12; 27:22-28:5. See, e.g. Johnston, 97 F. Supp. 3d 657, 671-72 (holding that transgender status is not a suspect classification and that providing separate restroom and locker room facilities for college students based on their biological sex did not violate the Equal Protection Clause); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Etsitty v. Utah Transit Auth., 502 F.3d at 1221-22; Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982).

Furthermore, the School Board's policy is not just rationally related, but substantially related, to the important governmental interest of protecting the privacy of all of its students. Intermediate scrutiny requires the government to demonstrate that a challenged policy serves "important governmental objectives" and that the purportedly discriminatory means employed are "substantially related" to the achievement of those objectives. Virginia, 518 U.S. at 533. The government is not, however, required to show that the policy is the "least intrusive means of achieving the relevant government objective." See United States v. Staten, 666 F.3d 154, 159-60 (4th Cir. 2011) (citations and internal quotation marks omitted). "In other words, the fit needs to be reasonable; a perfect fit is not required." Id. at 162.

The School Board has a responsibility to its students—ages 6 to 18—to ensure their privacy while engaging in personal bathroom functions. This is particularly

true in an environment where children are still developing, both emotionally and physically. See, e.g., Burns, 283 Va. at 671, 727 S.E.2d at 643 (school administrators have a responsibility "to supervise and ensure that students could have an education in an atmosphere conducive to learning, free of disruption, and threat to person."); Va. Code § 22.1-254 (compulsory attendance). This legitimate privacy interest of students and parents was expressed in the many emails and communications the Board received when the issue came to light, including during the public School Board hearings on November 11, 2014 and December 9, 2014 where privacy was the emphasis. The School Board policy was enacted to protect that right. Johnston, 97 F. Supp. 3d at 668 (finding "controlling the unique contours under which this case arises," namely a public school which is "tasked with providing safe and appropriate facilities for all of its students.")

Furthermore, the School Board's interest in protecting students' privacy rights based on their physiology has been recognized by the Department of Education. The regulations implementing Title IX specifically allow schools to provide "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. The suggestion that the School Board does not have a substantial interest in providing separate restroom and locker room facilities based on physiology is unfounded.

Grimm's gender identification as a male does not alter the anatomical and physiological differences between Grimm and other male students, nor does it erase the anatomical and physiological differences between a male student who identifies as a female and other female students. And even Grimm must concede that student privacy is a legitimate interest for the School Board to consider.

Accordingly, there is not only a rational basis, but a substantial basis for the School Board's policy requiring students either to use the restroom and locker room associated with their physiology or to use a single-stall restroom of their choice. Johnston, 97 F. Supp. 3d at 671-72; United States v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991) (recognizing anatomical differences between men and women for purposes of equal protection analysis.); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980) ("[i]t does not require a constitutional scholar" to conclude that a strip search invades a student's privacy rights). As recently as January 2016, the Fourth Circuit cited Virginia approvingly while concluding that physiological differences justified treating men and women differently in some contexts. See Bauer v. Lynch, 812 F.3d 340, 350 (4th Cir. 2016). Grimm is unable to demonstrate an Equal Protection violation.

IV. Issuance of a new birth certificate does not compel revision of Grimm's school records.

A. The School Board is under no obligation to conform Grimm's school records to a new birth certificate that was not issued consistently with Virginia law.

The District Court denied the School Board summary judgment, holding that the School Board violated Grimm's rights under Title IX and the Equal Protection Clause by not updating his official school transcript to match the "male" designation on his updated birth certificate. In addition to the arguments set out above, Grimm's new birth certificate and its issuance do not comply with Virginia law and are ineffective and void. Accordingly, the School Board did not violate Title IX and the Equal Protection clause for these reasons as well.

Va. Code § 32.1-269 governs amendments of vital records, including "change of sex." It provides, in part, that "[a] vital record registered under this chapter, with the exception of a death certificate, may be amended only in accordance with this section and such regulations as may be adopted by the [State Board of Health] to protect the integrity and accuracy of such vital records." (Subsection A.) Subsection B provides (with an exception that applies only to children born out of wedlock) that "a vital record that is amended under this section **shall be marked 'amended'** and the date of amendment and a summary description of the evidence submitted in support of the amendment shall be endorsed on or made a part of the vital record." See also id., Subsection E: "Upon receipt of a certified copy of an order of a court

of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure and upon request of such person, the State Registrar shall **amend** such person's certificate of birth to show the change of sex …." (Emphasis added.)

12 VAC 5-550-460 (Methods of correcting or altering certificates) also applies to amendments of birth certificates. It provides in part that **"corrections or alterations shall be made by drawing a single line through the incorrect item, if listed, and by inserting the correct or missing data immediately above it or to the side of it**, or by completing the blank item, as the case may be." (Emphasis added.) And similarly to Subsection B of Va. Code § 32.1-269, it provides that "there shall be inserted on the certificate a statement identifying the affidavit and documentary evidence used as proof of the correct facts and the date the correction was made."

Grimm's new birth certificate is deficient in four respects: (1) it is not marked "amended"; (2) it indicates a "date issued" but does not indicate in any way that that is a date of an amendment; (3) it provides no description of evidence submitted in support of the amendment; and (4) the "correction" or "alteration" is not indicated by a line drawn through the "incorrect item." See JA 1218.[11]

[11] The certificate that Grimm or his mother presented to Gloucester High School was marked "void." JA 1219.

No person reviewing that certificate would perceive the slightest indication that it is an amended, altered, or "corrected" certificate, which is contrary to the manifest legislative policy as well as the letter of the law. The certificate, therefore, was not issued in compliance with Virginia law, which controls.

Moreover, the underlying basis for the amended birth certificate does not comply with Virginia law. An amended birth certificate can be sought when an individual's sex has been changed by "surgical gender reassignment procedure.". Yet, the evidence is undisputed that Grimm only had chest reconstructive surgery, not a "surgical gender reassignment procedure." Indeed, surgical gender reassignment surgery could not be performed until Grimm was at least 18 years old, and Grimm still had female genitalia and reproductive organs in place. JA 1100-02.

As such, under either circumstance, the School Board has no duty to "update" Grimm's transcript "to match the 'male' designation on his updated birth certificate," as demanded by his Second Amended Complaint.

B. Grimm's school records claim should be rejected for failure to exhaust available administrative remedies.

The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, provides a framework by which a student may request an amendment to his education records. Under 34 C.F.R. § 99.20(a), "[i]f a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she

may ask the educational agency or institution to amend the record." Id. Then, "[t]he educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request." 34 C.F.R. § 99.20(b). "If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21." 34 C.F.R. § 99.20(c). Finally, "[i]f, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both." 34 C.F.R. § 99.21(b)(1)(ii)(2). A federal court may review a refusal to amend education records pursuant to § 99.21. See Lewin v. Medical College of Hampton Roads, 931 F. Supp. 443, 444 (E.D. Va. 1996), aff'd, 1997 WL 436168 (4th Cir. 1997).[12]

Here, the School Board met FERPA's requirements by informing Grimm of his right to a hearing on the issue. JA 992-993. Grimm has not requested a hearing

[12] Lewin holds that FERPA does not "permit disappointed students to federalize disputes over the academic accuracy of their professors' grading methods and substantive test answers." 931 F. Supp. at 445, citing Tarka v. Cunningham, 917 F.2d 890, 892 (5th Cir. 1990). No similar issues are presented here.

(or otherwise sought relief under that Act). His school records claim therefore must be dismissed for failure to exhaust an available administrative remedy. See e.g., Johnston, 97 F. Supp. 3d at 671–72 (dismissing Equal Protection claim for not updating school records because the plaintiff did not comply with school policy in requesting the change); See e.g., Cavalier Telephone v. Virginia Elec. and Power, 303 F.3d 316 (4th Cir. 2002).

V. Grimm's claims against the School Board are moot.

Grimm's claims against the School Board are moot. By pursuing a claim only for nominal damages and a retroactive declaration that his rights were violated, Grimm's purpose for continuing this litigation is to obtain a judicial stamp of approval, which does not present a justiciable controversy. The Eleventh Circuit thoroughly analyzed this issue and held that a claim for nominal damages only does not save the claim from mootness when the accompanying claims for declaratory and injunctive relief are moot. Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia, 868 F.3d 1248, 1263 (11th Cir. 2017). The cases in this Circuit have not undertaken a similarly thorough analysis, and the Fourth Circuit should now follow Flanigan's.

CONCLUSION

For the foregoing reasons, the School Board respectfully requests that this Court reverse the District Court's Order denying the School Board's motion for summary judgment and granting Grimm's motion for summary judgment and enter judgment in favor of the School Board.

GLOUCESTER COUNTY SCHOOL BOARD

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Dated: October 22, 2019

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I hereby certify that on this 22nd day of October, 2019, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users:

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