No. 19-1952

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
Newport News Division

BRIEF OF PLAINTIFF-APPELLEE GAVIN GRIMM

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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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gavin Grimm
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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: _____ Date: 9/11/19

Counsel for: Gavin Grimm

CERTIFICATE OF SERVICE

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I certify that on September 11, 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:

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INTRODUCTION

Gavin Grimm ("Gavin") is a twenty-year-old man who is transgender. When Gavin was fifteen, he 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 his treatment for gender dysphoria. With the support of the school principal and superintendent, Gavin used the boys' restrooms at Gloucester High School for approximately seven weeks without incident. But the Gloucester County School Board (the "Board") then overruled its own administrators and enacted a new policy prohibiting boys and girls "with gender identity issues" from using the same common restrooms as other boys and girls. The new policy directed transgender students to an "alternative appropriate private facility" instead.

Throughout the rest of high school, Gavin was forced to use separate restrooms that no other student was required to use. That degrading and stigmatizing policy singled Gavin out as unfit to use the same restrooms as every other student. The Board continued to exclude Gavin even after he began receiving hormone therapy (which altered his bone and muscle structure, deepened his voice, and caused him to grow facial hair), obtained a Virginia state I.D. card listing his sex as male, underwent chest reconstruction surgery, obtained a court order legally changing his sex to male under Virginia law, and received a new Virginia birth certificate reflecting that his sex is male.

Even after graduation, the Board continued discriminating against Gavin by refusing to provide him with a transcript that matches the "male" sex designation on his birth certificate. Based on its own preconceptions and stereotypes about who should be recognized as male under Virginia law, the Board claimed authority to collaterally attack the decisions of the Gloucester County Circuit Court and the procedures of the Virginia Registrar. As a result, whenever Gavin was required to provide a transcript to colleges or potential employers, he had to provide a transcript that identified him as "female."

After four long years of litigation, the parties filed cross-motions for summary judgment, and the Board failed to present *any* evidence explaining how its discriminatory restroom policy furthered its asserted interest in protecting student privacy related to nudity. When asked why toilet stalls and urinal dividers did not fully address any privacy concerns, the Board's 30(b)(6) witness said he was "sure" there are other ways the policy protects student privacy but "I can't think of any other off the top of my head." JA 472. When confronted with the same question at the summary judgment hearing, the Board's counsel conceded that Gavin's use of the restrooms did not implicate any privacy concerns related to nudity. JA 1187.

Based on the undisputed evidence, the district court entered summary judgment, awarded nominal damages, and issued a declaratory judgment that the

Board's restroom policy violated Gavin's rights under the Equal Protection Clause and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et. seq.*

The district court also issued a permanent injunction requiring the Board to provide Gavin with an updated transcript, along with nominal damages and a declaratory judgment that the Board's actions with respect to his transcript constituted an additional violation of Gavin's rights under the Equal Protection Clause and Title IX.

The district court's order should be affirmed in its entirety. Once again, Gavin's case has demonstrated that "some entities will not protect the rights of others unless compelled to do so." *G.G v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 731 (4th Cir. 2017) (Davis, J., concurring, joined by Floyd, J.). Gavin and other transgender students in Gloucester County must, therefore, "look[] to the federal courts to vindicate their claims to human dignity." *Id.* at 730.

STATEMENT OF THE CASE

Gavin's Experience Before Tenth Grade

When Gavin was born, the hospital staff designated him as female, but from a young age, Gavin knew that he was a boy. JA 108. "I always saw myself as a boy," explains Gavin. *Id.* "But I did not have the language at the time to vocalize those feelings." JA 109. Eventually, Gavin learned about the term "transgender" and realized there was a word for the feelings he had felt all his life. JA 110.

Gender identity is the medical term for a person's deeply felt, inherent sense of belonging to a particular gender. JA 174.[1] Most people have a gender identity that matches the sex they were designated at birth. *Id.* But people who are transgender have a gender identity that differs from their birth-assigned sex. JA 175. Boys and girls who are transgender are people who consistently, persistently, and insistently do not identify with the sex assigned to them at birth. *Id.*

By ninth grade, most of Gavin's friends knew about his gender identity, and he lived openly as a boy when socializing away from home and school. JA 110. But with the onset of puberty, Gavin began to suffer debilitating levels of distress from gender dysphoria, a condition in which transgender individuals experience clinically significant distress caused by the incongruence between their gender identity and the sex assigned to them at birth. JA 111, 175. In April of 2014, Gavin

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[1] In support of summary judgment, Gavin submitted the expert report and declaration of Dr. Melinda Penn, a pediatric endocrinologist who specializes in treating transgender youth. JA 172-82. Her testimony is relevant to provide background information about the treatments provided to transgender youth and the effects of those treatments on their physiology and anatomy.

The Board's designated expert did not dispute that Dr. Penn's report is consistent with the recommendations of the American Academy of Pediatrics ("AAP") and the Endocrine Society, or that treatments in accordance with those recommendations are provided to transgender youth throughout the country. JA 350-51. He simply disagreed with those recommendations and accused the AAP of promoting an "ideology of transgenderism." JA 350.

came out to his parents as a boy. JA 111-12. At Gavin's request, he began seeing a psychologist with experience counseling transgender youth, who diagnosed Gavin with gender dysphoria. JA 112, 123. To be diagnosed with gender dysphoria, the incongruence between a person's gender identity and sex assigned at birth must have persisted for at least six months and must be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning. JA 175.

The standard of care for gender dysphoria that is recognized by the American Academy of Pediatrics ("AAP") and every major medical and mental health professional organization in the United States is to eliminate the clinically significant distress by helping boys who are transgender to live as boys and girls who are transgender to live as girls. JA 176. Before puberty, this treatment—often referred to as gender transition—does not involve drugs or surgical intervention and is limited to "social transition," which means allowing transgender children to live and be socially recognized in accordance with their gender identity. *Id*. This includes permitting children to dress, cut or grow their hair, and use names, pronouns, restrooms, and other sex-separated facilities consistent with their gender identity. *Id.*

Under guidelines from the Endocrine Society, transgender adolescents may be eligible for puberty-blocking hormone therapy if a qualified mental health

professional confirms certain diagnostic criteria, including a long-lasting and intense pattern of gender dysphoria that worsened with the onset of puberty. JA 177-78. Transgender adolescents may initially receive treatments to delay puberty and may eventually receive gender-affirming hormone therapy to allow them to go through puberty consistently with their gender identity. JA 178. Under current standards of care, transgender adolescents may receive medically necessary chest reconstructive surgery once they turn sixteen, and genital surgery once they reach the age of majority. JA 179.

With his medical providers' help, Gavin transitioned to living in accordance with his male identity as part of treatment for gender dysphoria. JA 112. Gavin legally changed his name to Gavin and began using male pronouns. JA 113. Gavin also began using the men's restrooms in public venues—including restaurants, libraries, and shopping centers—without encountering any problems. JA 37, 868. His psychologist also referred Gavin to an endocrinologist for hormone therapy. JA 113.

Gavin's mother saw a dramatic change in Gavin. She had "understood for most of Gavin's early life that he struggled with something." JA 129. According to his mother, Gavin "never felt fully comfortable around people, and he had trouble being around big crowds at parties and events. Gavin's demeanor changed noticeably when he transitioned and started to live authentically as a boy. He is

now confident and comfortable with himself. He is not that shy, anxious kid anymore." *Id.*

School Administrators' Response to Gavin's Transition

In August 2014, before beginning his sophomore year, Gavin and his mother met with a school guidance counselor to explain that Gavin is a boy who is transgender and would be attending school as a boy. JA 113. They also gave her a treatment documentation letter from Gavin's psychologist, which stated that Gavin was receiving treatment for gender dysphoria and should be treated as a boy in all respects. JA 123, 130.

The counselor assured Gavin and his mother that teachers and staff would call Gavin by his new legal name and male pronouns. JA 113. With respect to restrooms, Gavin and his mother agreed to a plan where Gavin would use the restroom in the nurse's office or teachers' lounge. JA 113-14, 761.

Once school started, however, Gavin began to feel it was "stigmatizing to use a separate restroom" and felt "anxiety and shame" from traveling to a different restroom from everyone else. JA 113. The restroom in the nurse's office was also located far away, and Gavin was often unable to use the restroom without being late to class. JA 113-14. Gavin recalls one time when he returned to class from making the trip to the nurse's restroom, his teacher "made a big public point about how long I had been gone in a way that I felt was humiliating." JA 114. Other

times, students would say things like, "what took you so long[?]" and make other snide remarks. *Id.*

After a few weeks, Gavin asked for permission to use the boys' restrooms. JA 114, 761. Principal Nate Collins consulted with the director of school counseling, who recommended that Gavin be allowed to use the boys' restrooms and said it would be in Gavin's best interest. JA 369-70, 761.

Principal Collins also spoke with Superintendent Walter Clemons about Gavin's request, who, in turn, consulted with legal counsel at Reed Smith LLP and the Virginia School Board Association. JA 368, 371, 762. Clemons then said he would support whatever decision Collins made. JA 410-11. He believed Collins to be a good principal and trusted him to handle day-to-day concerns at school. JA 409.

After meeting with Gavin and his mother, Principal Collins decided that allowing Gavin to use the same restrooms as other boys would be in his best interest. JA 373. Collins believed in cultivating a welcoming environment for all students because "students learn best when they feel safe and secure and comfortable in their environment." JA 364. He informed Gavin and his mother that Gavin could use the boys' restrooms beginning on October 20, 2014, and he documented the decision in a memo. JA 758.

Collins did not think he was making a commitment that transgender students could also use the same locker rooms as other boys and girls. His decision was "focused on the restroom specifically." JA 374.

The School Board Intervenes

Gavin used the same restrooms as other boys for seven weeks without incident: "Over the course of those seven weeks, I had a single conversation with a student in the restroom," Gavin recalls. "He asked me if I liked his socks, and I said yes." JA 115.

Although Gavin never encountered any problems while using the restroom,[2] some adults in the community contacted Principal Collins, Superintendent Clemons, and members of the Board to demand that the transgender student (who was not publicly identified as Gavin until later) be barred from the boys' restrooms. JA 160-69. One student also spoke to Principal Collins in person. JA 161.

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[2] The Board's inflammatory assertion that Gavin "was involved in an altercation" (Def.'s Br. 9) is not supported by the record. The Board relies on a teacher's email (JA 1211) that is hearsay and cannot be considered on summary judgment. According to the email, Gavin and another student were "yelling" in class, but Gavin testified that he had no intention of physically fighting. JA 873, 1211. Gavin provided undisputed testimony that the yelling began because a school bully was loudly talking about Gavin's genitals in class and calling Gavin "disgusting" and "freaky." JA 871-72.

None of the complaints involved any actual instance in which someone was in the restroom when Gavin was present and felt that their privacy had been violated. JA 160-69

Superintendent Clemons contacted the Board on October 22, 2014, and told them there were two issues he wanted to discuss "in closed session," including "a transgender issue." JA 759. At the closed session, the Board decided not to take any immediate action to overrule Principal Collins. JA 762, 765. But two days before the Board's November 11, 2014 meeting, Board member Carla Hook proposed the following policy:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support and advice 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 767-68.

Hook drafted the policy on her own without consulting any medical professionals. JA 156-57. The policy does not define "biological gender," and the term has no common meaning. There are many biological components of sex, including chromosomal, anatomical, hormonal, and reproductive elements. JA 174-75, 312. These elements do not always align within an individual as typically male or typically female, either because that individual has intersex traits or because that individual has undergone medical care for gender dysphoria. JA 174-75. For these reasons, the Endocrine Society has said "the terms 'biological sex' and 'biological male or female' are imprecise and should be avoided." JA 175.

The Board has never explained how it defines or determines "biological gender." With hormone therapy, transgender students develop physical sex characteristics typical of their gender identity—not the sex designated for them at birth. JA 179. 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.* In addition, transgender children who receive puberty blockers never go through puberty as their birth-assigned sex. *Id.* When they receive hormone therapy, they are exposed to the same levels of testosterone or estrogen as non-transgender boys and girls during puberty. *Id.*

When asked about his understanding of the policy, Superintendent Clemons testified that he thought "biological gender" was determined by a student's "genitalia." JA 416. When asked what the "biological gender" would be for someone who had genital surgery, Clemons said, "I meant male or female organs when I said genitalia." JA 417. When asked what the "biological gender" would be for someone who has an androgen-insensitivity condition where they develop external sex organs that do not typically align with their internal organs and chromosomes, Clemons said, "I really haven't given that thought." *Id.* When asked what restroom a transgender girl would use if—as a result of puberty blockers and hormone therapy—she had typically female breasts and hips, Clemons said, "I don't know the answer to that question." JA 420. And when asked which restroom a transgender girl should use if she had an amended birth certificate with a female gender marker at the time she registered for school, Clemons again said, "I don't know the answer to that question." JA 422.

On the final day of discovery, however, the Board produced a School Board member as a Rule 30(b)(6) witness who asserted for the first time that the Board defines "biological gender" for purposes of its restroom policy as the gender on a student's current birth certificate—not based on an assessment of the student's physiology. JA 463. According to the witness, an eighteen-year-old transgender girl who has not obtained an updated birth certificate would have to use the boys'

restroom even if she has breasts as a result of hormone therapy and a vagina as a result of genital surgery. JA 538. And a transgender boy who *has* obtained an updated birth certificate would be able to use the boys' restroom, regardless of his physiology. JA 517-18.

In its summary judgment briefing, the Board offered yet another explanation for the policy. Contradicting the sworn testimony of the 30(b)(6) witness, the Board asserted that "if a student enrolled in Gloucester High School with a birth certificate designating the student's sex as male, but the School Board later learned through complaints from students that the student was actually physiologically and anatomically female," then "the student would have been required to use the restroom associated with his physiological sex or one of the three single-user restrooms." District Ct. ECF No. 200, at 27. When the district court asked counsel to clarify which physiological characteristics he was referring to, counsel stated that his "understanding of the Board's position" is that "as long as an individual has the primary genitals and sex characteristics of a particular gender, male or female … that is what they are considering." JA 1147.

The Board Passes the Policy

Before Ms. Hook placed her proposal on the agenda, no one ever informed Gavin about the complaints received by the Board. JA 380-81. Gavin and his mother learned about the meeting on social media less than 24 hours beforehand

through a Facebook post urging people to show up to oppose "a girl being in the boys' restroom." JA 115-16, 131.

Gavin and his parents attended the meeting and spoke against the proposed policy: "After having the experience of being treated just like other boys, I could not sit on the sidelines and let [them] take it away from me[,]" explains Gavin. "If I did not speak up, the conversation would have been held without me and with no one to support me. Since it was a conversation about my future, I wanted to be included." JA 116. A link to a video of Gavin's remarks is available at *G.G.*, 853 F.3d at 729 n.1 (Davis, J., concurring).

The School Board deferred voting on the policy until its meeting on December 9, 2014. JA 978 .

Before the next meeting, the Board issued a press release announcing "plans to designate single stall, unisex restrooms … to give all students the option for even greater privacy." JA 770. The press release also announced plans for "adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms." *Id.* Photographs of the new stalls and partitions are available at JA 1009-15.

Despite those additional privacy protections, speakers at the December 9, 2014 Board meeting demanded that Gavin be excluded from the boys' restrooms immediately. Many threatened to vote Board members out of office if they refused

to pass the new policy. JA 141-42. With Gavin in attendance, speakers pointedly referred to him as a "young lady." JA 116, 142. 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. *Id.* The Board meetings made Gavin feel that he had been turned into a public spectacle in front of the entire community. JA 116.

The Board passed the policy by a 6-1 vote. JA 775.

The following day, Principal Collins told Gavin he could no longer use the same restrooms as other boys and would be punished if he did so. JA 116. In a letter to Gavin's parents, Collins wrote that, because of the Board's new policy, "Gavin will no longer be able to use the male restrooms at Gloucester High School effectively immediately." JA 779.[3]

The "Alternative Private Facilities"

There was a period of time after the Board passed its restroom policy before the new single-user restrooms were constructed. JA 117. At one point during that time, Gavin stayed after school for an event. *Id.* When Gavin realized he had to use the restroom and the nurse's room was locked, he broke down sobbing in the

[3] Collins privately wondered "how we would come to know that a student was transgender" and whether this is "an enforceable policy." JA 403-04. He concluded "it would be difficult to enforce." JA 404.

library. *Id.* A librarian saw him and drove him home so he could use the restroom. *Id.*

When the single-user restrooms were installed, they were all located far from Gavin's classes. *Id.* Classrooms at Gloucester High School are located in four different wings of the school: A Hall, B Hall, C Hall, and D Hall. JA 969-70. Every hall has common restrooms for students to use near their classes. JA 969-71. Most of Gavin's classes were in D Hall. JA 761. But there were no single-user restrooms there. JA 970. Two of the single-stall restrooms were converted from old locker rooms for the custodial staff near the cafeteria. *See* JA 384. A third restroom was located in A Hall near the nurse's office. JA 388. Photographs of one of the single-stall restrooms near the cafeteria are reproduced at JA 1016-20.

School administrators initially planned to convert a faculty restroom in C Hall into one of the single-user restrooms, but the faculty complained. JA 780. The teachers explained they could not use a restroom further away because they have only five minutes between classes. One teacher noted that waiting until lunch would require the teachers to avoid using the restroom from 8:00 a.m. to 12:30 p.m., which "is a very long time for anyone to wait." *Id.* In response, the administration abandoned the plan to install a single-stall restroom on C Hall. JA 383.

Although any student was allowed to use the single-user restrooms, no one else was required to do so, and Gavin never saw any other student use them. JA 117. The two restrooms near the lunchroom were visible from where Gavin and his friends ate lunch, but Gavin never saw any student use the single-stall restrooms. *Id.*

Gavin felt that the separate restrooms sent a message that he is not fit to be treated like everyone else. JA 116-17. Gavin explains, "it was humiliating for the School Board to take the position that there was something wrong with me, and that I should not be allowed to be with my peers in common spaces." *Id.* Principal Collins says that he "understood [Gavin's] perception" that the policy sent a message "that Gavin wasn't welcome." JA 405-06.

Impact of the Policy on Gavin

The Board's policy had a devastating impact on Gavin. "He felt so validated when he was allowed to use the boys' bathroom at school, just like a normal boy," explains Gavin's mother. "He had never felt like a normal boy up to that point because he hadn't been validated that way. They gave him that validation, and then they took it away." JA 133.

Gavin did everything he could to avoid using the restroom at school. JA 118. As a result, he was often distracted and uncomfortable in class. *Id.* Gavin's mother remembers that the Grimm family "kept boxes of AZO, an over-the-counter

medication for urinary tract infections, always stocked at home to in order to give him some relief from the pain." JA 133.

When Gavin absolutely had to use the restroom, he used the nurse's office. Every time he had to walk to the other side of school to use the nurse's restroom, Gavin felt like he was taking a "walk of shame" because it was a constant reminder that Gavin had been barred from using the same restrooms as other boys. JA 118. It also physically isolated Gavin from the rest of his peers by requiring him to travel to a separate part of the school if he had to use the restroom between classes. JA 117.

When Gavin attended school football games, there was no restroom that he could use. JA 118. The Gloucester High School building was locked after school, and there are no single-user restroom facilities in the stadium. *Id.* One time, Gavin asked a friend to drive him to Lowe's or Home Depot to use the bathroom. *Id.* Another time, he called his mother to pick him up and take him home early. *Id.* Gavin's mom recalls picking him up and Gavin saying "[my] bladder was about to burst." JA 133.

By the beginning of his junior year, Gavin's distress was so great that he could no longer attend class. One night, Mrs. Grimm "found him sobbing on the bathroom floor, and he begged [her] to take him somewhere because he was

having thoughts of suicide." *Id.* She took him to the hospital at Virginia Commonwealth University, where he stayed for several days on the boys' ward. *Id.*

After leaving the hospital, Gavin completed eleventh grade in an independent study program at the "T.C. Walker" building, which is a separate location where students can complete course credits online. JA 119. All the students in the program used a single-stall restroom near the classroom, so Gavin "was able to use this restroom without being singled out and treated differently from everyone else." *Id.*

The independent study program was not offered at T.C. Walker the following year. *Id.* Gavin returned to Gloucester High School for twelfth grade, but he had earned enough academic credits that he was able to take a reduced course load. *Id.* Gavin continued using the nurse's restroom when he absolutely had to and stayed away from campus as much as possible. *Id.*

The Board Disregards Gavin's Court Order and Birth Certificate

Over the course of tenth, eleventh, and twelfth grade, Gavin continued to medically transition and have his male sex recognized in legal documents:

In December 2014, Gavin began hormone therapy, which has altered his bone and muscle structure, deepened his voice, and caused him to grow facial hair. JA 120.

In June 2015, the Virginia Department of Motor Vehicles issued Gavin a state I.D. card identifying him as male. JA 124.

In June 2016, Gavin underwent chest-reconstruction surgery, in accordance with the medical standards of care for treating gender dysphoria. JA 120.

On September 9, 2016, the Gloucester County Circuit Court issued an order pursuant to Va. Code § 321.269(E), changing Gavin's sex under Virginia law and directing the Virginia Department of Health to issue Gavin a birth certificate listing his sex as male. JA 125. The order states: "The court finds that Gavin Elliot Grimm underwent gender reassignment surgery in June 2016; that the surgery was successful; and that Gavin Elliot Grimm is now functioning fully as a male. Therefore, the court finds that the sex of Gavin Elliot Grimm has been properly changed by a medical procedure and that it is in his best interests to amend his birth certificate." *Id.*

On October 27, 2016, the Virginia Department of Health issued Gavin a birth certificate listing his sex as male. JA 127, 982.

Despite all this, the Board continued to prohibit its administrators from allowing Gavin to use the boys' restrooms. JA 120.

The Board also refused to update the gender marker on Gavin's official school transcript to match the sex designation on his birth certificate. Gavin's mother remembers that "Gavin wanted to have the gender marker on his school

records changed to 'male' before he applied to college," and "[w]hen Gavin was issued an updated birth certificate listing his gender as male, it was a celebration for us because we thought he could finally get his school records changed too." JA 133-34. But when Gavin "went to the guidance office several times to ask when [his] school records would be updated," he "never received an answer." JA 121. "Finally, someone from the guidance office told [Gavin] that they had been instructed to tell [him]: 'We have received your request. Thank you.'" *Id.*

After Gavin's attorneys wrote to counsel for the Board, the Board responded by letter on January 18, 2017. The Board stated that, based on its review of the birth certificate and the relevant law, the Board "declines to change the official school records." JA 992. The Board provided no further explanation of its decision.

Gavin graduated on June 10, 2017. JA 1171. He is now attends Berkeley City College in California and hopes to transfer to a four-year college. *Id.*

The Board's refusal to update Gavin's transcript continued to affect Gavin after graduation because, unlike all his other identification documents, the transcript declares that his sex is "female." JA 128. "Every time I have to provide a copy of my transcript to a new school or employer, I will have to show them a document that negates my male identity and marks me as different from other boys," Gavin explained. "I think it is unfair that a high school that put me through so much is able to wield that much negative influence over my adult life." JA 121.

The Board Publicly Rejects a New Policy

Shortly before the close of discovery, the Board publicly announced that it would be considering a new policy at a public hearing on February 19, 2019. JA 973. The proposed policy "would allow transgender students to use the restroom consistent with the student's asserted gender identity when [certain] criteria have been met." *Id*.

But, once again, a large number of adults opposed allowing transgender boys and girls to use the same restrooms used by other boys and girls. Several speakers explicitly grounded their opposition in their personal disapproval of gender transition. One speaker said, "our sons are being demasculinated by this country. Our daughters are being defeminized. I don't want to see us promote that." JA 143. Another said "when we talk about social transition and gender identity we're talking about issues that we've created. God didn't create those." *Id.*

Two days later, the Board announced it would not act on the proposed policy at its upcoming meeting and would "not set a time frame for when any action will be taken or when any further discussion will be held regarding the resolution." JA 974.

Procedural History

Gavin filed this lawsuit in 2015, alleging that the Board's policy discriminated against him on the basis of sex, in violation of Title IX and the Equal

Protection Clause. JA 5. He also filed a motion for preliminary injunction, and the parties spent the next two years litigating whether that motion should be granted. JA 5-15. After Gavin graduated in June 2017, this Court remanded the case to the district court to determine whether graduation mooted Gavin's claims for prospective relief. JA 15.

On remand, Gavin withdrew his request for a preliminary injunction and filed an amended complaint seeking a permanent injunction, prospective declaratory relief, nominal damages, and retrospective declaratory relief. *Id.* After the Board filed a motion to dismiss, the district court dismissed the claims for prospective relief as moot, with Gavin's consent. JA 30-31. But the district court denied the Board's motion to dismiss the remainder the case as moot because Gavin's claims for nominal damages and retrospective declaratory relief remained live and justiciable. JA 31-34. The district court then denied the Board's motion to dismiss for failure to state a claim, holding that Gavin had stated valid claims under both Title IX and the Equal Protection Clause. JA 35-65.

On February 15, 2019, the district court granted Gavin leave to file a Second Amended Complaint, which alleged that the Board's refusal to update Gavin's transcript constituted an additional violation of Title IX and the Equal Protection Clause. JA 66. The Second Amended Complaint sought nominal damages,

declaratory relief, and a permanent injunction requiring the Board to provide Gavin with a transcript matching his Virginia court order and birth certificate. JA 86-87.

After discovery, the parties filed cross-motions for summary judgment. JA 22. The district court denied the Board's motion for summary judgment and granted Gavin's motion. JA 1165-92.

SUMMARY OF ARGUMENT

Although Gavin graduated in 2017, his claims for nominal damages and retrospective declaratory relief related to the restroom policy continue to present a live case and controversy. Under controlling circuit precedent, "even if a plaintiff's injunctive relief claim has been mooted, the action is not moot if the plaintiff may be 'entitled to at least nominal damages.'" *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009). And even if the panel were free to depart from circuit precedent, Gavin's claims would still not be moot under the standard adopted by *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) (en banc).

The district court properly granted summary judgment on Gavin's equal protection claims. By forcing Gavin to use separate alternative restrooms that no other student was required to use, the Board subjected Gavin to different and unequal treatment. The Board's discrimination against Gavin, as a boy who is transgender, is subject to heightened scrutiny under the Equal Protection Clause

because classifications based on gender and transgender status are both subject to heightened scrutiny. But despite four years of litigation, the Board has failed to present any evidence demonstrating that its policy serves the Board's asserted interest in protecting student privacy related to nudity. Indeed, the Board concedes that those interests are not implicated by Gavin's use of the restrooms. The Board's sweeping policy is so disconnected from the asserted goal of protecting privacy related to nudity that the policy fails even rational basis review.

The district court also properly granted summary judgment on Gavin's Title IX claims. By excluding Gavin from the same restrooms as other boys and forcing him to use separate single-stall restrooms, the Board discriminated against him on the basis of sex. One of Title IX's implementing regulations authorizes schools to "provide separate toilet … facilities on the basis of sex," 34 C.F.R. § 106.33, and no one disputes that the ordinary definition of "sex" in 1972 and today includes physiological and anatomical characteristic. But that does not give the Board license and discriminate against transgender students based on any anatomical or physiological sex characteristics of the school's own choosing. The regulation must still be harmonized with the underlying statute's prohibition on "discrimination." 20 U.S.C. § 1681(a). When a school provides separate restrooms on the basis of sex, it must do so in a manner that does not harm individual students or subject them to different and unequal treatment.

Finally, the district court properly granted summary judgment on Gavin's equal protection and Title IX claims based on the Board's refusal to update his transcript to match the sex designated on his court order and birth certificate. The Board offers no support for its assertion that Gavin's court order and birth certificate were not issued in conformance with Virginia law. The Board also has no authority to collaterally attack the validity of Gavin's order, which was issued by a court of competent jurisdiction and is entitled to full faith and credit under Virginia and federal law.

ARGUMENT

I. Legal Standard.

The district court's grant or denial of summary judgment is reviewed de novo. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). Summary judgment is warranted when "'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Ret. Comm. of DAK Americas LLC v. Brewer*, 867 F.3d 471, 479 (4th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)).

II. Graduation Did Not Moot Gavin's Claims for Nominal Damages.

Gavin's claims for nominal damages and retrospective declaratory relief related to the restroom policy have not been mooted by Gavin's graduation. Under binding circuit precedent, "even if a plaintiff's injunctive relief claim has been

mooted, the action is not moot if the plaintiff may be 'entitled to at least nominal damages.'" *Rendelman*, 569 F.3d at 187 (quoting *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007)).[4]

The Board asks this Court to follow a recent 7-5 decision from the en banc Eleventh Circuit in *Flanigan's*, 868 F.3d at 1263-64, which held that a challenge to a city ordinance was moot despite the plaintiff's request for nominal damages. Def.'s Br. 58. But even if this panel were free to disregard circuit precedent, Gavin's claims would not be moot under the *Flanigan's* standard either.

> "The term 'nominal damages' describes two types of awards: (1) those damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual, present loss of any kind; and (2) the very different allowance made when actual loss or injury is shown, but the plaintiff fails to prove the amount of damages."

Minn. Lawyers Mut. Ins. Co. v. Batzli, 442 F. App'x 40, 51 (4th Cir. 2011) (quoting 22 Am. Jur. 2d Damages § 8 (2003)). The "nominal damages" in *Flanigan's* fell into the first category: The plaintiffs challenged an ordinance that was repealed before it was ever applied to them. *Flanigan's* reasoned that the

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[4] Gavin's graduation also does not moot his request for a retrospective declaratory judgment, which is intertwined with the damages claim. *See Lippoldt v. Cole*, 468 F.3d 1204, 1217 (10th Cir. 2006); *Marks v. City Council of City of Chesapeake, Va.*, 723 F. Supp. 1155, 1160 (E.D. Va. 1988), *aff'd*, 883 F.2d 308 (4th Cir. 1989).

plaintiffs "have already won," and nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." *Flanigan's*, 868 F.3d at 1264.[5]

By contrast, Gavin's claims for nominal damages fall into the second category. The Board enforced its policy against Gavin for three years of high school, and the Board has still not repealed it. The Board inflicted real harm on Gavin, and nominal damages are an appropriate way to redress that harm. In these circumstances, "[a]n award of nominal damages does not mean that there were not actual economic damages, just that the exact amount of damages attributable to the improper conduct was not proven." *Bains LLC v. Arco Prod. Co., Div. of Atl. Richfield Co.*, 405 F.3d 764, 772 (9th Cir. 2005); *accord Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.*, 262 F.3d 260, 266 (4th Cir. 2001) (explaining that where "*some* amount of damage likely is present … a nominal amount of damage is adequate to support liability").

Article III does not foreclose such relief. "A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars

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[5] The result in *Flanigan*'s might be more appropriately characterized as a determination that the plaintiff never established standing to bring a nominal damages claim in the first place. *Cf. Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 571 (4th Cir. 2007).

in compensatory damages." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). Indeed, "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

Under any standard, Gavin's claims for nominal damages present a live case and controversy.

III. The Board's Policy Violated the Equal Protection Clause.

The undisputed evidence at summary judgment established that the Board's restroom policy subjected Gavin, as a boy who is transgender, to different and unequal treatment. In opposing summary judgment, the Board failed to present any evidence showing that the different and unequal treatment actually served the Board's asserted interest in protecting student privacy related to nudity. Based on the undisputed evidence—which the Board does not challenge on appeal—the district court determined that Gavin was entitled to summary judgment on his equal protection claim as a matter of law. The district court's opinion is consistent with decisions from the Seventh Circuit and the overwhelming majority of district courts across the country.[6] The decision should be affirmed.

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[6] *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050-54 (7th Cir. 2017); *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293, 1311-20 (M.D. Fla. 2018), *appeal docketed*, No. 18-13592 (11th

A. The Board's Policy Treated Gavin Differently From Other Students Because He Is a Boy Who Is Transgender.

On its face the Board's policy explicitly targets transgender students for different treatment. The policy begins with the preface, "Whereas the [Board] recognizes that some students question their gender identities." The policy then concludes with the declaration, "therefore," the use of common restrooms "shall be limited to the corresponding biological genders" and students with "gender identity issues" will be provided "an alternative … facility." JA 768. The express purpose of the policy was to stop the students it describes as having "gender identity issues" from using the common restrooms and move them to "an alternative … facility." *Id.*

The Board nevertheless asserts that the policy treats everyone "the same" because every student can use either the restroom associated with their "biological gender" or a single-user restroom. Def.'s Br. 44. But, as the Board's 30(b)(6)

Cir. Aug. 24, 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 717-26 (D. Md. 2018); *Evancho v. Pine Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't. of Educ.*, 208 F. Supp. 3d 850, 856-58 (S.D. Ohio), *stay denied sub nom.*, *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016).

The Board continues to cite *Johnston v. University of Pittsburgh of the Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). But the overwhelming majority of courts over the past four years have rejected *Johnston*'s analysis. *See Adams*, 318 F. Supp. 3d at 1319.

witness conceded, transgender students are the only students for whom there is discrepancy between their gender identity and their so-called "biological gender" as the Board defines it: "I only have a sample size of one, but that's the only time I've been involved with any sort of conflict." JA 458. The change in policy had no effect on other students, all of whom continued to use the same restrooms they used before. The policy's only function was to subject Gavin, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students." *Whitaker*, 858 F.3d at 1049; *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.").

Preventing boys and girls who are transgender from using the same restrooms as other boys and girls does not treat everyone "the same." "Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go." JA 1180; *accord Whitaker*, 858 F.3d at 1051; *Adams*, 318 F. Supp. 3d at 1312; *M.A.B.*, 286 F. Supp. 3d at 723; *Evancho*, 237 F. Supp. 3d. at 285. Indeed, the Board's shifting definition of "biological gender" is gerrymandered to apply only to transgender students. "Many aspects of biology determine a person's sex," and the Board's ad hoc explanations of its

policy fail to explain why it "uses some of these factors to define sex and ignores others." JA 1181. The Board claims that the policy is based on "anatomy" and "physiology," yet struggles to answer how the policy applies to a girl who is transgender and, as a result of hormone therapy, has breasts and hips typical of other teenage girls. And the Board simply disregards the impact of hormone therapy on Gavin's physiology.

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 uses men's restrooms in all public venues. He has undergone hormone therapy and had chest reconstruction surgery. He is recognized as a boy by his family, his medical providers, the Commonwealth of Virginia, and the world at large. But, unlike every other boy at Gloucester High School, Gavin was singled out for different treatment and prohibited from using the restroom that matched his daily life as a boy because he is transgender. *See Adams*, 318 F. Supp. 3d at 1312.

Ignoring these "dispositive realities," *United States v. Virginia*, 518 U.S. 515, 550 (1996), the Board once again asserts that there is no objective way to distinguish between Gavin and a non-transgender girl. Def.'s Br. 40-41. The Board thus continues to "misrepresent[] [Gavin's] claims and dismiss[] his transgender status." *Whitaker*, 858 F.3d at 1050. Gavin did not seek to use the boys' restrooms based on his subjective "internal perceptions" of being a boy (Def.'s Br. 27) or

based on "assertion of transgender status alone" (Def.s' Br. 36). He sought to use the boys' restrooms because he transitioned and was *living* in accordance with his identity. At the time the Board's policy was passed, Gavin had supplied school administrators with a "treatment documentation letter" from his psychologist, he had legally changed his name, and he was preparing to undergo hormone therapy. By the time Gavin graduated, he had undergone hormone therapy and chest reconstruction surgery, and he had received a state I.D. card, court order, and birth certificate stating that he is male. But the Board bent over backwards to ignore these "objective" forms of proof in favor of its own ad hoc definitions of "biological gender."

B. The Board's Differential Treatment of Gavin Was Unequal.

The Board's treatment of Gavin was not merely different, but also unequal. *Cf. Virginia*, 518 U.S. at 554 (citing *Sweatt v. Painter*, 339 U.S. 629 (1950)). The undisputed evidence established that (a) the "alternative" restrooms stigmatized Gavin and (b) the "alternative" restrooms were inadequate and more difficult to access. *Cf. Whitaker*, 858 F.3d at 1050.

First, Gavin and his mother provided detailed and unrebutted testimony about how the Board's policy was humiliating and stigmatizing for Gavin. JA 116-20, 132-33. Gavin has also provided undisputed testimony that the anxiety and humiliation of having to use separate restrooms drove him to restrict his fluid

intake and avoid using the restrooms altogether, which resulted in physical discomfort and pain. JA 118.

Gavin's perceptions of stigma were objectively reasonable from the perspective of someone in Gavin's position under all the circumstances. The reasonableness of Gavin's perceptions was corroborated by Principal Collins, who testified that he believed Gavin felt the policy sent a message "that Gavin wasn't welcome" and that he "understood [Gavin's] perception." JA 405-06. It was corroborated by major medical organizations and professional school administrator associations, who acknowledge that transgender students experience worse outcomes when their identities are not supported in school and feel singled out as different when forced to use separate restrooms from their peers. JA 1178 (summarizing amicus briefs from these organizations). And it was corroborated by our nation's civil rights laws, which recognize 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); *see Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3rd Cir. 2018) (explaining that a policy forcing transgender students to use separate single-user facilities "would very publicly brand all transgender students with a scarlet 'T,' and they should not

have to endure that as the price of attending their public school"), *cert. denied*, 139 S. Ct. 2636 (2019).[7]

Although the Board argued below that Gavin could not prevail without expert testimony, the Board's counsel eventually conceded that Gavin's testimony was sufficient for purposes of nominal damages, and the Board does not raise the issue on appeal. JA 1184. No expert testimony is necessary to establish that "it is humiliating to be segregated from the general population." *G.G.*, 853 F.3d at 730 (Davis, J., concurring).

Second, the single-stall restrooms were also unequal because they were not equally accessible as a practical matter. There were no single-stall restrooms available for Gavin in the football stadium. JA 118. If Gavin had to use the restroom while watching a football game, he had to leave the stadium and be driven home or to a nearby hardware store. *Id.*

Even inside the school building, there were only three single-user restrooms, and they were all clustered together near A Hall. Gavin testified that the single-stall restrooms were too far away for him to use between classes on B Hall, C Hall, and D Hall, and that he would have to miss an inordinate amount of class time to

[7] Indeed, the Board's designated expert witness testified that one of the *benefits* of excluding transgender students from using restrooms that align with their gender identity is that it communicates a message to the student's peers that gender transition is not normal. JA 691. He also believes that allowing Gavin to use the same restrooms as other boys could spread a "social contagion." JA 697.

use them during class. JA 114, 117, 853. That testimony is corroborated by teachers who told school administrators not to convert the faculty restroom on C Hall into a single-user restroom because there was not sufficient time between classes for teachers to walk from C Hall to a different restroom. JA 780.

Although the stigma of having to use separate facilities would alone be enough to establish unequal treatment, the comparative inaccessibility of the single-user restrooms provides an additional reason why Gavin's treatment was both different and unequal.

C. The Board's Policy Is Subject to Heightened Scrutiny as Discrimination Based on Transgender Status.

This Court should join the Ninth Circuit and district courts across the country in recognizing that discrimination based on a person's transgender status is subject to heightened scrutiny. As these courts have explained, discrimination against transgender individuals satisfies all four of the "factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class." *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019). "[T]transgender people as a class have historically been 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*, 237 F. Supp. 3d at 288; *accord* JA 59-60; *M.A.B.*, 286 F. Supp. 3d at 719-22; *Highland*, 208 F. Supp. 3d at 873-74; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015).[8]

D. The Board's Policy Is Subject to Heightened Scrutiny as Discrimination Based on Gender.

By singling out Gavin for different and unequal treatment, the Board discriminated against him based on gender under the Equal Protection Clause. As a boy who is transgender, Gavin did "not conform to some people's idea about who is a boy." *G.G.*, 853 F.3d at 730 (Davis, J., concurring). But generalizations that are accurate for most boys cannot justify discrimination against boys who fall "outside the average description." *Virginia*, 518 U.S. at 550. The Board's policy "is inherently based upon a sex-classification," *Whitaker*, 858 F.3d at 1051, and

[8] The only circuit precedents rejecting heightened scrutiny are *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977), which is no longer good law, and *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995), which noted that "[r]ecent research concluding that sexual identity may be biological suggests reevaluating *Holloway*" but concluded that the plaintiff's "allegations are too conclusory to allow proper analysis of this legal question."

"all gender-based classifications today warrant heightened scrutiny," *Virginia*, 518 U.S. at 555 (internal quotation marks omitted).[9]

There is no exception to heightened scrutiny for gender discrimination based on physiological or biological characteristics. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001) (applying heightened scrutiny and upholding policy because it imposed only a "minimal" burden was not "marked by misconception and prejudice" or "disrespect").

There is also no exception to heightened scrutiny for sex-separated programs and facilities. In arguing for a lower standard of review, the Board relies on dicta from *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993), which discussed sex-separated restrooms as a context in which equal protection might permit "separate but equal" facilities. But, as discussed *supra*, the uncontested facts establish that the "alternative" single-stall restrooms at Gloucester High School were both separate and unequal.[10]

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[9] The Supreme Court will decide in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107, whether discrimination against transgender employees is discrimination because of sex under Title VII of the Civil Rights Act of 1964. But gender discrimination under the Fourteenth Amendment is not constrained by the narrower scope of statutory protections. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).

[10] To the extent that *Faulkner* suggested that sex-separated facilities are subject to a different standard, that suggestion was abrogated by *Virginia*, which explicitly

E. The Board's Discrimination Against Gavin Fails Heightened Scrutiny.

To survive heightened scrutiny, the Board must show its policy serves an important governmental interest and "that the discriminatory means employed" "are substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017). "Moreover, the classification must substantially serve an important governmental interest *today*, for in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged." *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)) (cleaned up). "The burden of justification is demanding and it rests entirely on the [government]." *Virginia*, 518 U.S. at 533.

The Board failed to present *any* evidence to carry its demanding burden. The Board's 30(b)(6) witness testified that the policy is based solely on a privacy interest in preventing exposure to nudity around students with different physiological sex characteristics. JA 464, 479.[11] But the undisputed evidence

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rejected the "substantively comparable" standard employed in the *VMI* and *Faulkner* cases. *Virginia*, 518 U.S. at 529.

[11] The Board's 30(b)(6) witness did not assert that "a secondary governmental interest was student safety." Def.'s Br. 12. When asked whether the policy was also justified by student safety, the witness said "each individual board member

showed that the Board did not receive any complaints about nudity—from students or parents—related to any actual encounter with Gavin in the restroom. As this Court previously recognized, concerns about exposure to nudity do not apply to Gavin's "use—or for that matter any individual's appropriate use—of a restroom." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 n.10 (4th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1239 (2017). Excluding Gavin from using the restroom "ignores the practical reality of how [Gavin], as a transgender boy, uses the bathroom: by entering a stall and closing the door." *Whitaker*, 858 F.3d at 1052; *accord Adams*, 318 F. Supp. 3d at 1314; *Evancho*, 237 F. Supp. 3d at 289-90.

After years of litigation, the Board failed to present any evidence or explanation for how privacy interests related to nudity were not fully addressed by the expanded stalls and urinal dividers in the restrooms and the availability of single-stall restrooms for anyone who wants greater privacy. The only three contexts involving nudity identified by the Board's 30(b)(6) witness were when students use a toilet, use a urinal, or open their pants to tuck in their shirts. JA 470. When asked why the expanded stalls and urinal dividers did not fully address those situations, the witness stated he was "sure" there are other ways the policy protects

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may feel differently about. But from a policy perspective, it was focused on privacy." JA 464-65

student privacy related to nudity but "I can't think of any other off the top of my head." JA 472. When confronted with the same question by the district court, the Board's counsel *conceded* that that there is no privacy concern related to nudity when a transgender student walks into a stall and shuts the door. JA 1187.[12]

Although the Board attempts to draw support from *Virginia*, 518 U.S. at 550 n.19 (*see* Def.'s Br. 33), the case only undermines its argument. The parties in *Virginia* agreed that including women in the Virginia Military Institute would require adjustments such as "locked doors and coverings on windows." *Id.* at 588. The Court nevertheless concluded that these minor changes to provide "privacy from the other sex" would not disrupt the essential nature of the program and could not justify excluding women from admission. *Id.* at 550 n.19. The teaching of the case is that asserted "privacy" interests cannot justify overbroad exclusions or unequal treatment. *See id.* at 555 n.20.

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[12] This as-applied challenge is limited to restrooms, not locker rooms. Indeed, when Gavin's attorneys attempted to ask the 30(b)(6) witness about how the Board's policy protected privacy in locker rooms, the Board's counsel declared the questions to be irrelevant and instructed the witness not to answer. JA 481-83.

Even in the context of locker rooms, however, courts have found that transgender students already share the same locker rooms as other boys and girls without any actual exposure to nudity taking place. There are many non-discriminatory ways to enhance privacy for all students without banishing transgender students from the facilities. *See Boyertown*, 897 F.3d at 531 (privacy stalls and single-user facilities available for any student); *M.A.B.*, 286 F. Supp. 3d at 724 (single-user restrooms and locker room stalls).

Moreover, even if there were an actual risk of exposure to nudity, placing a boy who is transgender in the girls' restroom (or placing a girl who is transgender in the boys' restroom) would still mean that students would be in the presence of students with "anatomical and physiological differences." Def.'s Br. 53. For example, the Board's 30(b)(6) witness testified that under the Board's policy a eighteen-year-old transgender girl who has not obtained an updated birth certificate would have to use the boys' restroom even if she has developed breasts as a result of hormone therapy and a vagina as a result of genital surgery. JA 539. Placing her in the boys' restroom would place her in the presence of individuals with "anatomical and physiological differences." Def.'s Br. 53. *Cf. United States v. Biocic*, 928 F.2d 112, 115 (4th Cir. 1991) (discussing breasts as an "anatomical difference[] between male and female").

Protecting privacy related to nudity is an important governmental interest, but the Board did not even attempt to show "that the discriminatory means employed" "are substantially related to the achievement of those objectives." *Morales-Santana*, 137 S. Ct. at 1690.

F. The Board's Discrimination Against Gavin Fails Rational Basis Review.

The Board's policy fails even rational basis review. It is a sweeping, categorical exclusion that applies to all restrooms, in all circumstances, regardless

of whether a transgender student's use of the restroom bears any actual relationship to the Board's stated interests. Based on this categorical exclusion, the Board excluded Gavin from the same restrooms as his peers even after he obtained a court order and birth certificate recognizing him as male, and even though the Board concedes that Gavin's use of the restroom did not actually implicate the Board's stated interests in preventing exposure to nudity. "The breadth of the [policy] is so far removed from [the] particular justifications" advanced by the Board, that it is "impossible to credit them." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

Instead, the evidence leads to the inescapable conclusion that the Board has chosen to defer to constituents who disapprove of Gavin using the boys' restroom. Under any standard of scrutiny, deferring to generalized fear, discomfort, and moral disapproval is a not legitimate governmental interest that can justify discriminatory treatment. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). "If adopting and implementing a school policy or practice based on [the] individual determinations or preferences of parents—no matter how sincerely held—runs counter to the legal obligations of the [School] District, then the District's and the Board's legal obligations must prevail." *Evancho*, 237 F. Supp. 3d at 292; *accord Adams*, 318 F. Supp. 3d at 1320. "An individual can invoke a right to constitutional protection when he or she is harmed, even if the

broader public disagrees and even if the legislature refuses to act." *Obergefell*, 135 S. Ct. at 2605.

The Board argues that non-transgender students would experience discrimination if they have to use separate single-stall facilities to protect their "adolescent modesty, personal sensitivities, or religious scruples" about using the same restroom as a transgender student. Def.'s Br. 40. But "[n]othing in the record suggests that cisgender students who voluntarily elect to use single-user facilities to avoid transgender students face the same extraordinary consequences as transgender students would if they were forced to use them." *Boyertown*, 897 F.3d at 530; *accord M.A.B.*, 286 F. Supp. 3d at 724-25; *Evancho*, 237 F. Supp. 3d at 293. The Board's 30(b)(6) witness testified that the separate single-stall restrooms provided an acceptable, non-stigmatizing alternative for boys who are uncomfortable sharing the boys' restroom with a transgender girl who had a male sex assigned at birth. JA 487. The Board provides no explanation for why the same restrooms are insufficient for boys who are uncomfortable sharing a restroom with a transgender boy like Gavin.

Difference can be discomfiting, but there are ways to respond to that discomfort without discrimination. Students are free to use one of the single-stall restrooms if they are uncomfortable with the presence of anyone else in the common restroom. But the "sincere, personal opposition" of some people cannot

justify a policy that "demeans or stigmatizes those whose own liberty is then denied." *Obergefell*, 135 S. Ct. at 2602. 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*, 760 F.3d at 384.

IV. The Board's Policy Violated Title IX.

The district court also correctly held that the Board's policy discriminated against Gavin on the basis of sex, in violation of Title IX. That holding is consistent with rulings from the Seventh Circuit and the overwhelming majority of district courts.[13] This Court should affirm.

As the district court recognized, discriminating against someone because they are transgender inherently constitutes sex discrimination under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth," *Whitaker*, 858 F.3d at 1048, and "transitioning status constitutes an inherently gender non-conforming trait," *EEOC v. R.G. & G.R.*

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[13] *See Whitaker*, 858 F.3d at 1050-54; *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018), *appeal docketed*, 18-35708 (9th Cir. Aug. 23, 2018); *Adams*, 318 F. Supp. 3d at 1320-25; *M.A.B.*, 286 F. Supp. 3d at 712-17.

Harris Funeral Homes, Inc., 884 F.3d 560, 577 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

Prohibiting Gavin from using the same restrooms as other boys was an "overt, physical deprivation of access to school resources," which is "[t]he most obvious example" of a Title IX violation. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *see G.G.*, 822 F.3d at 718 n.4. The undisputed facts in the summary judgment record—which the Board does not challenge on appeal—demonstrated that this exclusion caused Gavin harm. JA 1184.

The Board nevertheless argues that its facially discriminatory policy is immunized from review under Title IX because one of the 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. As this Court previously explained, "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 based on the premise that separate restrooms differentiate on the basis of sex without harming individuals or treating them unequally. *Cf. Faulkner*, 10 F.3d at 232.

The restroom regulation does not—and cannot—create an exception to the statute's ban on "discrimination." Section 1681(a) categorically provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" at school. 20 U.S.C. § 1681(a). "[T]he term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006). When Congress intended to completely lift the statute's prohibition on "discrimination" it did so explicitly by stating that that the prohibition on discrimination "shall not apply." 20 U.S.C. § 1681(a)(2)-(9). Unlike those statutory exemptions, the restroom regulation authorizes schools to "provide separate toilet facilities … on the basis of sex," while leaving the statutory prohibition on "discrimination" undisturbed.[14] When a school provides restrooms on the basis of sex, it must do so in a manner that does not subject individual students to unequal treatment that causes harm.

Instead of harmonizing the regulation with the statutory text, the Board asserts that the "plain meaning" of the regulation allows schools to stigmatize and discriminate against transgender students by subjecting them to different and

[14] Similarly, the statutory provision authorizing schools to "maintain[] separate living facilities for the different sexes," 20 U.S.C. § 1686, does not declare that the prohibition on discrimination "shall not apply."

unequal treatment, as long as the discrimination is based on anatomical or physiological sex characteristics of the school's own choosing. Def.'s Br. 23-24. The Board asserts that its interpretation is compelled by the plain meaning of the word "sex," which at a minimum includes physiological and anatomical characteristics. *Id.*

No one disputes that the ordinary definition of "sex" in 1972 and today includes physiological and anatomical characteristics. "Sex" typically refers to men and women in general and includes *both* physiological characteristics and behavioral ones. *See G.G.*, 822 F.3d at 722; *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016). But the Board fails to recognize that "a given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different ways of implementation." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 562 (2007). Thus, "[t]he plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole." *G.G.*, 822 F.3d at 720.

The relevant term in this regulation is not the word "sex" in the abstract; it is the phrase "provide separate toilet … facilities on the basis of sex." In the vast majority of cases, that phrase is not complicated to understand and apply. But it does not follow that there was a similarly plain "ordinary, contemporary, common

meaning" (Def.'s Br. 25) in 1972 for how to "provide separate toilet … facilities on the basis of sex" when a student is transgender. "[T]erms that seem plain and easy to apply to some situations can become ambiguous in other situations." *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 639 (7th Cir. 2014) (en banc).

It is impossible to identify the "ordinary, contemporary, common meaning" in 1972 for how to "provide separate toilet … facilities on the basis of sex" to a transgender student because transgender individuals inherently fail to conform the "ordinary" or "common" expectation that a person's sex-based characteristics will all align in the same direction. It is hardly self-evident that an ordinary speaker of the English language in 1972 or today would expect that a boy who is transgender and who has typically male bone and muscle structure, a typically male chest, and typically male facial hair, would use the girls' restroom. Nor is it self-evident that an ordinary speaker of the English language would think that if a boy who is transgender uses the boys' restroom, then the restrooms are no longer provided "on the basis of sex." After all, when Gavin used women's restrooms before transitioning, people perceived him as a boy who was using the wrong restroom. JA 110. Since he transitioned, Gavin has used men's restrooms in public venues without disruption. JA 115.

Indeed, the Board's argument that the regulation has an "ordinary, contemporary, common meaning" in the context of transgender students is

undermined by its own struggle to provide a consistent explanation of what that plain meaning is. The Board's own 30(b)(6) witness testified that the Board's policy is based on students' birth certificates, not their past or present physiology. JA 463. And counsel's assertion that a student with a male birth certificate would be excluded from the boys' restroom if the Board "learned through complaints from students that the student was actually physiologically and anatomically female" indicates that the policy turns, not on physiology, but on other students' *knowledge* that someone is transgender. District Ct. ECF No. 200, at 27.

For all these reasons, there is no inherent conflict between providing restrooms "on the basis of sex" and allowing transgender boys and girls to use the same restrooms as non-transgender boys and girls. The regulation can, therefore, be read consistently with the statute's prohibition on subjecting students to "discrimination." Otherwise, the regulation would have to be declared invalid as applied to Gavin. *See Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994) ("Regulations cannot trump the plain language of statutes, and we will not read the two to conflict where such a reading is unnecessary.").

The Board also invokes *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). Def.'s Br. 42. But *Pennhurst* does not impose a "'super-clear statement' rule," and does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a statute. *W.V. Dep't of*

Health & Human Resources v. Sebelius, 649 F.3d 217, 223, 224 (4th Cir. 2011) (quoting *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985)).

"The *Pennhurst* notice problem does not arise in a [Title IX] case … in which intentional discrimination is alleged." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005) (alterations incorporated). "Title IX funding recipients 'have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979,' when the Supreme Court decided *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979), and 'have been put on notice by the fact that cases since *Cannon* have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination.'" JA 54 (quoting *Jackson*, 544 U.S. at 183) (cleaned up). "[A] State that accepts funds under [a statute with an implied cause of action] does so with the knowledge that the rules for … liability will be subject to judicial determination." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 285 (2d Cir. 2003).

V. The Board's Refusal to Update Gavin's Transcript Violates Title IX and the Equal Protection Clause.

The Board also violated the Equal Protection Clause and Title IX by refusing to update Gavin's transcript and school records in accordance with his court order and birth certificate recognizing him as male. Unlike every other student with a male birth certificate, Gavin was forced to provide prospective

schools and employers with a transcript stating that his sex was "female," which "negates [his] male identity and marks [him] as different from other boys." JA 121. *Cf. 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"). The Board singled out Gavin for this different treatment because Gavin is transgender and does not conform to the Board's stereotypes and overbroad generalizations about gender and physiology.

The Board has no legal basis for asserting that Gavin's court order and birth certificate were not issued in conformance with Virginia law. The Board argues that the Circuit Court for Gloucester County was wrong to issue an order legally declaring Gavin's sex to be male because the Board thinks that Gavin's chest-reconstruction surgery does not legally qualify as a "surgical gender reassignment procedure." Def.'s Br. 56. But the Board offers no legal or factual support for that assertion. To the contrary, the DMS-V specifically includes "mastectomy" as an example of "gender reassignment surgery." JA 1117.[15]

[15] The Board's 30(b)(6) witness specifically disavowed any claim that Gavin's chest-reconstruction surgery was legally insufficient as "not within our purview as a school board to determine." JA 515.

Even assuming for the sake of argument that the Circuit Court for Gloucester County erred, "[a] challenge to an order based on a trial court's misapplication of a statute generally raises a question of court error, not a question of the court's jurisdiction" and, therefore, is "not subject to collateral attack." *Hicks v. Mellis*, 275 Va. 213, 220 (2008). Gavin's order was issued by a court of competent jurisdiction and is entitled to full faith and credit in this Court under Virginia law and 28 U.S.C. § 1738.

The Board's attempt to collaterally attack Gavin's birth certificate is similarly baseless. The Board falsely asserts that "[t]he certificate that Grimm or his mother presented to Gloucester High School was marked 'void.'" Def.'s Br. 55. It was not. JA 134. The *photocopy* of the birth certificate transmitted from Gloucester High School to the Board and its attorney was marked void because birth certificates are printed on security paper. JA 127.

The Board also argues that Gavin's birth certificate was not marked as "amended" and did not contain other notations the Board contends that amended birth certificates should have. Def.'s Br. 55-56. But as noted at the bottom of every birth certificate issued to the public, the document is just an "abstract of the official record filed with the Virginia Department of Health." JA 127.

The Virginia Registrar has submitted a declaration confirming that Gavin's birth certificate is authentic. JA 982. The Board disagrees with the Registrar's

interpretation of Virginia law regarding what information should be included on birth certificates issued to the public. But the Board does not explain how that disagreement has any relevance for which restroom Gavin uses at school or what sex designation is on his transcript. The Board merely offers post hoc *excuses* for its decision to disregard Gavin's birth certificate, not a logical *reason* for doing so.

Finally, the Board argues that Gavin was required to "exhaust" his Title IX and equal protection claims by requesting a FERPA hearing. Def.'s Br. 56. No such requirement exists. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) (Title IX); *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982) (42 U.S.C. § 1983).[16]

The Board erroneously cites to *Johnston* as dismissing an equal protection claim "for not updating school records because the plaintiff did not comply with school policy in requesting a change." Def.'s Br. 58. There was no claim in *Johnston* based on failure to update student records. The case simply noted that the transgender plaintiff's school records had not been updated because the school required "a court order or a new birth certificate reflecting Plaintiff's current

[16]The district court rejected the Board's argument that FERPA provides the exclusive remedy for claims related to school records. JA 66-69. The Board does not raise that argument on appeal.

gender." *Johnston*, 97 F. Supp. 3d at 663. Gavin provided those documents to the Board, but the Board refuses to accept them.

VI. The Board Is Not Entitled to Summary Judgment.

Because the Board's policy is discriminatory on its face, the district court properly granted summary judgment for Gavin without making factual findings about the Board's true motives in enacting and perpetuating its discriminatory policy. But if Gavin's motion for summary judgment is denied, the Board's motion must be denied too. A reasonable factfinder could conclude that the Board's arguments are not just meritless, but also pretexts to justify a course of conduct against Gavin rooted in animus or moral disapproval. *Cf. EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001) (explaining that a pattern of shifting explanations is "in and of itself, probative of pretext"); *A Helping Hand, LLC v. Baltimore Cty., MD*, 515 F.3d 356, 366 (4th Cir. 2008) ("[C]ommunity views may be attributed to government bodies when the government acts in response to these views.").

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee respectfully requests oral argument pursuant to Local Rule 34(a).

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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Dated: November 18, 2019

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I hereby certify that on this 18th day of November, 2019, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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