

No. 20-1163

IN THE
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

—v.—

GAVIN GRIMM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a school board policy prohibiting a transgender boy from using the same multi-user school restrooms as other boys violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment, when the evidence shows that the policy subjects that student to separate and unequal treatment.

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INTRODUCTION

When the events giving rise to this case unfolded, Gavin Grimm was a transgender teenage boy at Gloucester High School. He lived as a boy and was treated as male in all aspects of his daily life. He changed his legal name to Gavin. He updated the gender marker on his I.D. card from the Virginia Department of Motor Vehicles to reflect that he is male. He received testosterone hormone therapy. He underwent chest reconstruction surgery. And he ultimately received a Virginia court order and birth certificate further recognizing him as male.

Outside of school, Gavin used the men's restrooms at all public venues. After meeting with school administrators and receiving their permission, Gavin did the same at Gloucester High School. He used the boys' restrooms without incident until the Gloucester County School Board (the "Board") overruled its own administrators and passed a new policy barring Gavin from the boys' restroom because he is transgender. The Board's new policy prohibited any student "with gender identity issues" from using any restrooms consistent with their gender identity under any circumstances. Pet. App. 33a. The policy directed Gavin to an "alternative" single-user facility instead. *Id.*

Title IX regulations permit separate restrooms for boys and girls, but the Board's new policy was different. By treating Gavin differently from other boys and forcing him to use separate single-stall facilities because he is transgender, the Board's policy singled out Gavin and stigmatized him as unfit to use the same restrooms as his peers. To avoid the daily

humiliation of the policy, Gavin avoided using *any* restroom, leading to unbearable stress, painful urinary-tract infections, and ultimately Gavin’s hospitalization for suicidal thoughts.

After reviewing a comprehensive summary-judgment record detailing the harm the Board’s policy inflicted on Gavin, the district court held—and the Fourth Circuit agreed—that the Board’s policy subjected Gavin to discriminatory treatment in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and the Equal Protection Clause. Pet. App. 12a-118a. The Seventh and Eleventh Circuits have reached the same conclusion in cases involving similar exclusions. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020), *petition for reh’g en banc filed*, Aug. 28, 2020. No circuit has ruled to the contrary.

The Board now petitions for a writ of certiorari but fails to offer a compelling reason for this Court’s review. There is no circuit split for this Court to address, and the courts below resolved the legal questions correctly. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

This case comes to the Court following a grant of summary judgment. The facts as set forth below are undisputed.¹

¹ Throughout its petition, the Board makes unsupported assertions about its own motives and about how its restroom policy operated in practice. But the Board fails to identify any

A. Gavin's Transition.

From a young age, Gavin knew he was a boy but lacked the vocabulary to explain it. App., *infra*, 1a-3a. Gavin eventually learned the term “transgender” and realized that there was a word for the way he had felt all his life. *Id.* at 3a.²

Gender identity is the medical term for a person's deeply felt, inherent sense of belonging to a particular gender. Pet. App. 21a. 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-designated sex. *Id.* at 21a-22a. Boys and girls who are transgender are people who consistently, persistently, and insistentlly have an identity that differs from the sex assigned to them at birth. *Id.*

By ninth grade, most of Gavin's friends knew he was a boy, and Gavin lived openly as a boy when socializing away from home and school. App., *infra*, 4a. But with the onset of puberty, Gavin began to suffer debilitating levels of distress. *Id.* at 4a-5a. In April 2014, Gavin came out to his parents as a boy. *Id.* at 5a-6a, 19a. At Gavin's request, he began seeing a psychologist with experience treating transgender youth. *Id.* at 6a, 19a. She diagnosed Gavin with

testimony or other “particular parts of materials in the record” supporting those representations. Fed. R. Civ. P. 56(c)(1)(A).

² The Board refers to Gavin and other transgender students as having a “self-determined” gender identity. Pet. 20. As discussed below, Gavin's identity as a boy is reflected in his medical records, his state I.D. card, his amended birth certificate, and a court order changing Gavin's designated sex under Virginia law. Pet. App. 37a.

gender dysphoria, a diagnostic term for individuals with a gender identity that differs from their sex assigned at birth who experience clinically significant distress as a result of the incongruence. Pet. App. 30a-31a.

The standard of care for treating gender dysphoria recognized by the American Academy of Pediatrics and every major medical and mental health professional organization in the United States is to reduce the clinically significant distress by affirming boys who are transgender as boys and girls who are transgender as girls. Pet. App. 24a-26a. Under current standards of care, transgender adolescents may receive puberty-blocking medication and 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. C.A. App. 177-78. Transgender teenagers may receive medically necessary chest reconstructive surgery, typically after they turn sixteen, and genital surgery once they reach the age of majority. *Id.* at 179.

With his medical providers' help, Gavin lived in accordance with his male identity as part of his treatment for gender dysphoria. App., *infra*, 6a. He changed his legal name to Gavin and began using male pronouns. *Id.* He used the men's restrooms in public venues without encountering any problems. *Id.* at 6a, 9a. His psychologist also referred Gavin to an endocrinologist for hormone therapy. Pet. App. 31a.

According to his mother, Gavin's demeanor changed noticeably when he transitioned and started to live authentically as a boy. App., *infra*, 18a. Once affirmed as a boy, Gavin became more comfortable

with himself and was no longer the “shy and anxious kid” that he had been before being treated for gender dysphoria. *Id.*

B. School Administrators Respond 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 would be attending school as a boy. Pet. App. 31a. They also gave the guidance counselor 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. *Id.*

The counselor assured Gavin that his teachers and school staff would call him Gavin and address him with male pronouns. App., *infra*, 7a. Gavin agreed that he would use the restroom in the nurse’s office for the time being. *Id.*³

Once school started, however, Gavin began to feel it was “stigmatizing to use a separate restroom” and felt “anxiety and shame” from having to travel to a different restroom from everyone else. App., *infra*, 7a-8a. The restroom in the nurse’s office was also far from his classes, and Gavin was often unable to use that restroom without being late. *Id.* On one occasion Gavin’s teacher “made a big public point” about how

³ The Board falsely asserts that Gavin’s mother suggested that Gavin use a single-user restroom in the nurse’s office. Pet. 6. The Board’s only citation for that assertion is an erroneous statement from Judge Niemeyer’s dissent from an earlier stage of this case. Pet. App. 209a. The summary judgment record does not provide any support for that assertion.

long it took him to use the restroom, humiliating Gavin in front of his peers. *Id.* at 8a. Other times, students would make snide remarks. *Id.*

After a few weeks, Gavin asked permission to use the boys' restrooms. App., *infra*, 8a. 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 to do so. C.A. App. 369-70, 761.

Collins also spoke about Gavin's request with Superintendent Walter Clemons, who said he would support whatever decision Collins made. C.A. App. 410-11. Clemons believed Collins to be a good principal and trusted Collins to handle day-to-day concerns at school. *Id.* at 409.

After meeting with Gavin, Principal Collins decided that allowing Gavin to use the same restrooms as other boys would be in his best interest. C.A. App. 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." *Id.* at 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. *Id.* at 758.

Collins did not address whether transgender students could also use the locker rooms associated with their gender identity. His decision was "focused on the restroom specifically." C.A. App. 374.

C. The School Board Meetings.

Gavin used the boys' restrooms for seven weeks without incident. Over that period of time, Gavin had only one conversation in the restroom with another

student. The student asked Gavin if he liked the boy's socks. (Gavin said he did.) App., *infra*, 35a.

Although Gavin never encountered any problems while using the restroom, some adults in the community contacted Principal Collins, Superintendent Clemons, and members of the Board to demand that "the transgender student" be barred from the boys' restrooms. Pet. App. 123a. None of the complaints cited any instance in which someone was in the restroom when Gavin was present and felt that their privacy had been violated. C.A. App. 160-69, 456. Only one student personally complained to Principal Collins. That student never used the restroom at the same time as Gavin, and he spoke with Principal Collins before the restroom privacy improvements discussed below. Pet. App. 32a.⁴

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

Whereas the [Gloucester County Public Schools ("GCPS")] recognizes that some students question their gender identities, and

⁴ The Board failed to introduce evidence that it received complaints from any other student at the time. *See* C.A. App. 160-69 (Board's response to interrogatory identifying all complaints it received).

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.

Pet. App. 32a-33a. Hook drafted the policy on her own without consulting any medical professionals or other experts. *Id.* at 82a.

No one informed Gavin about the complaints received by the Board. App., *infra*, 9a-10a. Gavin and his mother learned about the meeting less than 24 hours beforehand through a Facebook post urging people to show up to oppose allowing “a girl to use the boys’ restrooms.” *Id.* at 10a, 20a. Gavin and his parents decided to attend the meeting and speak against the proposed policy because Gavin did not want to “sit on the sidelines” while other people had “a conversation about [his] future.” *Id.* at 10a. Gavin told the Board: “All I want to do is be a normal child and use the restroom in peace.” School Board Meeting

(Dec. 9, 2014), at 25:47.⁵ “I did not ask to be this way, and it’s one of the most difficult things anyone can face.” *Id.* at 26:18. “I am just a human. I am just a boy.” *Id.* at 27:13.

The Board deferred voting on the policy until its meeting on December 9, 2014. Pet. App. 34a. 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.” C.A. App. 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 C.A. App. 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. Pet. App. 34a. 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. *See* School Board Meeting (Dec. 9, 2014), at 1:22:15.⁶ “Put him in a separate bathroom if that’s what it’s going to take,” said another. *Id.* at 58:56.

The Board meetings made Gavin feel that he had been turned into a “public spectacle” in front of

⁵ *Available* at http://gloucester.granicus.com/player/clip/1065?view_id=10.

⁶ *Available* at http://gloucester.granicus.com/player/clip/1090?view_id=10.

the entire community. App., *infra*, 10a. Gavin's mother remembers the school board meeting as "a horror show." *Id.* at 21a. She still recalls "how appalled [she] felt for Gavin and how scared it made [her] that he wouldn't be able to struggle and live through all of this." *Id.*

The Board passed the policy by a 6-1 vote. Pet. App. 35a. The following day, Principal Collins told Gavin he could no longer use the boys' restrooms and would be punished if he did so. *Id.*

D. The "Alternative" Facilities.

At one point after the Board adopted its policy but before it had created new single-stall restrooms, Gavin stayed after school for an extracurricular event. Pet. App. 35a. When Gavin realized he had to use the restroom and the nurse's restroom was locked, he broke down sobbing in the library. *Id.* at 35a-36a. A librarian saw Gavin and drove him home so he could use the restroom. *Id.* at 36a.

When the single-user restrooms were installed, they were all far from Gavin's classes. Pet. App. 36a. Classrooms at Gloucester High School are located in four different wings of the school: A Hall, B Hall, C Hall, and D Hall. C.A. App. 969-70. Every hall has a common boys' restroom and a common girls' restroom for students to use near their classes. *Id.* at 969-71. But there were no single-user restrooms in D Hall, where Gavin attended most of his classes. *Id.* at 761, 970. One single-user restroom was in A Hall near the nurse's office. *Id.* at 388. The other two single-stall restrooms were located near the cafeteria and were converted from old locker rooms for the custodial staff. *Id.* at 384. Photographs of one of the single-stall

restrooms near the cafeteria are reproduced at C.A. App. 1016-20.

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. Pet. App. 36a. Gavin felt that the separate restrooms sent a message that he was not fit to be treated like everyone else. App., *infra*, 11a-12a. “[I]t was humiliating” to be told by his school board “that there was something wrong with [him], and that [he] should not be allowed to be with [his] peers in common spaces.” *Id.* at 11a. Principal Collins “understood [Gavin’s] perception” that the policy sent a message “that Gavin wasn’t welcome.” C.A. App. 174-75.

E. The Impact of the Policy on Gavin.

The Board’s policy had a devastating impact on Gavin. App., *infra*, 12a-14a. He did everything he could to avoid using the restroom at school. *Id.* at 12a-13a. As a result, he developed painful urinary tract infections and was often distracted and uncomfortable in class. *Id.* at 12a. 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.” *Id.* at 23a.

When Gavin absolutely had to use the restroom, he used the nurse’s office. App., *infra*, 12a. 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.” *Id.* It was a constant reminder that he had been barred from using the same restrooms as other boys solely because he is transgender. *Id.* 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. *Id.* at 12a-13a.

When Gavin attended school football games, there was no restroom that he could use. App., *infra*, 12a-13a. 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 restroom. *Id.* at 13a. Another time, Gavin called his mother to take him home early. *Id.* Gavin's mother recalls Gavin saying his "bladder was about to burst." *Id.* at 23a.

By the beginning of his junior year, Gavin's distress was so great that he could no longer attend class. App., *infra*, 13a. One night, Gavin's mother "found him sobbing on the bathroom floor, and he begged [her] to take him somewhere because he was having thoughts of suicide." *Id.* at 22a-23a. She took him to the hospital at Virginia Commonwealth University, where he stayed for several days on the boys' ward. *Id.* at 23a.

After leaving the hospital, Gavin completed eleventh grade in an independent study program at an off-site location where students can complete course credits online. App., *infra*, 13a-14a. 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.* at 14a.

The independent study program was not offered at the off-site location the following year. App., *infra*, 14a. 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.* He stayed away from campus as much as possible, and he continued using the nurse's restroom when he was on campus. *Id.*

F. 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 update his legal documents to reflect that he is male:

- In December 2014, he began hormone therapy, which altered his bone and muscle structure, deepened his voice, and caused him to grow facial hair. Pet. App. 35a.
- In June 2015, the Virginia Department of Motor Vehicles issued him a state I.D. card identifying him as male. *Id.* at 37a.
- In June 2016, he underwent chest-reconstruction surgery in accordance with the medical standards of care for treating gender dysphoria. *Id.*
- On September 9, 2016, the Gloucester County Circuit Court issued an order pursuant to Va. Code § 32.1-269(E), changing Gavin's sex under Virginia law and directing the Virginia Department of Health to issue a birth certificate listing his sex as male. *Id.*
- On October 27, 2016, the Virginia Department of Health issued Gavin a birth certificate listing his sex as male. *Id.*

The Board nonetheless continued to prohibit its administrators from allowing Gavin to use the boys' restrooms. *Id.* at 88a.

Gavin graduated on June 10, 2017, but the Board refused to update the gender marker on Gavin's official school transcript to match his birth certificate. Pet. App. 38a. Unlike all his other identification documents, Gavin's transcript classified his sex as "female." *Id.* Whenever Gavin had to present his transcript to a prospective educational institution or employer, the transcript undermined his male identity, marked him as different from other boys, and outed him as being transgender. *Id.* at 78a-79a.

G. The Board's Shifting Definitions of "Biological Gender."

The Board's policy provides that the use of male and female restrooms "shall be limited to the corresponding biological genders." Pet. App. 33a. But the term "biological gender" or "biological sex" has no consistent legal, scientific, or common meaning. There are many biological components of sex, which do not always align in any given individual as typically male or typically female. *Id.* at 140a; C.A. App. 174-75.⁷

When a transgender student receives hormone therapy, their most prominent and visible sex characteristics will align with their gender identity—not the sex assigned to them at birth. C.A. App. 179-80. Hormone therapy affects bone and muscle

⁷ Approximately 2% of all children born worldwide have intersex traits with variations in sex organs, chromosomes, and hormones that do not fit within binary anatomical gender classifications. Pet. App. 88a.

structure, and produces secondary sex characteristics such as facial and body hair in boys and breasts in girls. *Id.* at 179. And transgender children who receive puberty blockers never go through puberty as their birth-assigned sex. *Id.* In addition, students who are 16 or older may also undergo chest reconstructive surgery, which creates a typically male chest for transgender boys, and at age 18, students may undergo genital surgery. *Id.*

Throughout this litigation, the Board’s attempt to define what it means by “biological gender” has been a moving target. Superintendent Clemons testified that he thought “biological gender” was determined by a student’s “genitalia.” C.A. App. 416. When asked what the “biological gender” would be if someone had genital surgery, Clemons said, “I meant male or female organs when I said genitalia.” *Id.* at 417. 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.” *Id.* at 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.” *Id.* at 422.

On the final day of discovery, the Board produced a School Board member as a Federal Rule of Civil Procedure 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. C.A. App. 463.

According to the witness, an 18-year-old transgender girl who has not obtained an updated birth certificate would have to use the boys' restroom even if she has breasts and a vagina as a result of hormone therapy and surgery. *Id.* at 538. And a transgender boy who *has* obtained an updated birth certificate would be able to use the boys' restroom, regardless of his physiology. *Id.* at 517-18.

In its summary-judgment briefing, the Board contradicted the sworn testimony of the 30(b)(6) witness and 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." C.A. App. 1147.

H. The Board's Justification for Its Policy.

During discovery, the Board's 30(b)(6) witness testified that the Board's policy was justified by a governmental interest in protecting student privacy from students of the "opposite physiological sex." C.A. App. 472. The witness specifically testified that those privacy interests related exclusively to "either being seen naked or seeing someone else naked." *Id.* at 469.

But when asked why the new expanded stalls and urinal dividers in the Gloucester High School restrooms did not fully address those privacy concerns, the witness responded that he “[was] sure” the policy also protected privacy interests in other ways, but that he “[couldn’t] think of any other off the top of [his] head.” C.A. App. 471-72.

The Board’s 30(b)(6) witness was also unable to explain how assigning students to restrooms based on their sex assigned at birth would protect the privacy of a boy who is uncomfortable sharing the restroom with a girl who is transgender and has a typically female appearance. The witness testified that boys who are uncomfortable sharing the restroom with a girl who is transgender could use one of the new single-stall facilities instead. C.A. App. 487. But the witness provided no explanation for why the same single-stall restrooms were insufficient for boys who are uncomfortable sharing a restroom with a transgender boy like Gavin.⁸

I. Procedural History.

Gavin filed this lawsuit in 2015, alleging that the Board’s policy discriminated against him on the basis of sex and transgender status, in violation of

⁸ Although the question presented in the Board’s petition is limited to restrooms, *see* Pet. i, which are the only facilities Gavin sought to use, the petition repeatedly alludes to students’ use of “locker rooms and shower facilities,” Pet. 1. But when Gavin’s attorneys attempted to ask the Board’s 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 because “this case is not about locker rooms” and instructed the witness not to answer. C.A. App. 481-83.

Title IX and the Equal Protection Clause. Pet. App. 38a-39a. The parties spent the next two years litigating whether Gavin's motion for a preliminary injunction should be granted based on guidance documents issued by the Department of Education. *Id.* at 39a-40a. This Court granted certiorari to review that question, but the Court vacated and remanded the case to the Fourth Circuit when the incoming Trump administration withdrew the guidance documents at issue. *Id.* Gavin graduated high school a few months later. *Id.*

On remand, Gavin withdrew his request for a preliminary injunction and filed an amended complaint. Pet. App. 40a. 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 for nominal damages and retrospective declaratory relief. *Id.* at 40a-41a.

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. C.A. App. 66-67. The Second Amended Complaint sought nominal damages, declaratory relief, and a permanent injunction requiring the Board to provide Gavin a transcript with the gender marker matching his Virginia court order and birth certificate. *Id.* at 86-87.

After discovery, the parties filed cross-motions for summary judgment. Pet. App. 41a. The district court denied the Board's motion for summary judgment and granted Gavin's motion. *Id.* at 41a-43a.

On appeal, the Fourth Circuit affirmed the district court’s decision in its entirety. Pet. App. 12a-118a.⁹ With respect to Gavin’s Title IX claim, the court noted that the Board’s policy classified Gavin “on the basis of sex” even if that term were narrowly construed as referring only to a person’s sex assigned at birth. *Id.* at 72a. The Fourth Circuit also noted that Gavin had suffered a legally cognizable harm, both because the restrooms were inconveniently located and because “[t]he stigma of being forced to use a separate restroom . . . invites more scrutiny and attention from other students, very publicly branding all transgender students with a scarlet ‘T.’” *Id.* at 74a-75a (cleaned up).

The Fourth Circuit then turned “to the heart of the Title IX question in this case: whether the policy unlawfully discriminated against Grimm.” Pet. App. 75a. Guided by *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), the Fourth Circuit recognized that the term “discrimination” typically “mean[s] treating [an] individual worse than others who are similarly situated.” Pet. App. 75a (citing *Bostock*, 140 S. Ct. at 1740). Gavin was treated worse than similarly situated students because, unlike all other students at Gloucester High School, Gavin “could not use the restroom corresponding with his gender” and had to use alternative single-stall facilities. *Id.* at 75a-76a. The Fourth Circuit explained that Title IX’s implementing regulations allow schools to provide “separate toilet . . . facilities on the basis of sex” but do not authorize schools to do so in a manner that

⁹ The Board does not seek review of the Fourth Circuit’s decision with respect to the gender marker on Gavin’s transcript. Pet. i.

subjects students to separate and unequal treatment. *Id.* at 76a.

With respect to Gavin’s equal protection claim, the Fourth Circuit explained that the Board’s restroom policy must be reviewed under heightened scrutiny, both because the policy rests on sex-based classifications and because classifications based on transgender status are at least quasi-suspect. Pet. App. 51a. Applying heightened scrutiny, the Fourth Circuit held that the Board failed to show that Gavin’s exclusion from the same restrooms as other boys was substantially related to the Board’s asserted interest in protecting students from exposure to nudity. *Id.* at 65a-69a. The court noted that the Board’s own 30(b)(6) witness failed to identify any potential exposure to nudity that was not addressed by the additional privacy protections and stall dividers installed by the Board. *Id.* at 66a. The court further noted that “[t]he insubstantiality of the Board’s fears has been borne out in school districts across the country, including other school districts in Virginia.” *Id.*

Judge Wynn concurred and wrote separately to “emphasize several particularly troublesome aspects of the Board’s policy.” Pet. App. 81a. First, despite the Board’s invocation of “biology,” Judge Wynn explained that “the Board’s policy provides no consistent basis for assigning transgender students—who often possess a mix of male and female physical characteristics—to a particular bathroom.” *Id.* at 82a. And the Board’s reliance on a student’s birth certificate at the time of enrollment “fails to treat *even transgender* students alike” because two transgender students with identical physiologies would be treated differently if one of them had obtained an amended

birth certificate before enrolling in Gloucester County schools. *Id.* at 84a.

Judge Wynn also noted that, for purposes of using a restroom, a transgender student's outward physical appearance and secondary-sex characteristics are more relevant than the student's unseen genitals. "Unlike his clothed genitals, Grimm's male characteristics—no breasts, masculine features and voice timbre, facial hair, and a male haircut—would have been readily apparent to any person using the . . . restroom. Put simply, Grimm's entire outward physical appearance was male." Pet. App. 87a. Placing Gavin in the girls' restroom (or a girl who is transgender in the boys' restroom) would therefore "produce[] the very privacy harms [the Board] purportedly seeks to avoid." *Id.* at 85a.

Judge Wynn also rebutted the Board's assertion that its policy treats transgender students the same as other students. He explained that "despite the Board's contention that there is no problem because Grimm could have used the girls' bathrooms or the single-stall bathrooms, we must take a careful and practical look at the options he realistically faced." Pet. App. 89a. And the reality was that Gavin "could no more easily use the girls' restrooms than a cisgender boy." *Id.* at 90a (emphasis omitted). Instead of providing "separate but equal accommodations in schools on a male/female basis," the Board's policy "ensures that transgender students may use neither male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned-at-birth." *Id.* at 91a.

Judge Niemeyer dissented. Pet. App. 97a-118a. Although the Board's 30(b)(6) witness testified that

the only privacy interest at issue in the case was exposure to nudity, Judge Niemeyer argued *sua sponte* that the relevant “privacy interests are broader than the *risks of actual* bodily exposure. They include the intrusion created by [the] *mere presence*” of a transgender student in the restroom “when we ‘shit, shower, shave, shampoo, and shine.’” *Id.* at 111a (emphasis omitted).

The Fourth Circuit denied the Board’s petition for rehearing en banc on September 22, 2020. Pet. App. 1a-11a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS.

In seeking this Court’s review, the Board does not identify any lower-court conflict for this Court to resolve. The Fourth, Seventh, and Eleventh Circuits have all held that school districts violated Title IX and the Equal Protection Clause by prohibiting boys who are transgender from using the same restrooms as other boys and forcing them to use separate and unequal single-user restrooms. *See* Pet. App. 12a-118a (decision below); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020), *pet’n for rehearing en banc filed*, Aug. 28, 2020.¹⁰

¹⁰ To the extent that Petitioner speculates that the Eleventh Circuit could grant rehearing en banc in *Adams*, this Court may choose to defer action on the Board’s petition for a writ of certiorari until the petition for rehearing en banc in *Adams* is resolved.

A motions panel of the Sixth Circuit reached the same conclusion in a case involving an elementary school girl who is transgender, and who had to be escorted to separate locked facilities whenever she had to use the restroom. *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) (denying stay pending appeal).

In addition, the Third and Ninth Circuits have rejected claims by plaintiffs who sought to exclude transgender students from common school restrooms in the name of protecting the privacy of students who are not transgender. See *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019); *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020). In all of these cases, no student—whether transgender or not—was exposed to nudity in the restrooms.

In light of the lower courts’ unanimity, it is unsurprising that the Board does not attempt to argue that this Court’s intervention is necessary to resolve a split in the lower courts. What School Board dismisses as a “handful” of lower-court decisions, Pet. 23, is in fact a broad and unanimous consensus.¹¹

¹¹ The reasons the Court granted certiorari in this case five years ago are now wholly absent. At that time, the Court was confronted with a split in authority as to whether deference should be given to the Department of Education’s guidance documents under *Auer v. Robbins*, 519 U.S. 452 (1997). Compare *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), with *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). Today, there is no agency interpretation to defer to, and there is uniformity in the circuits as to the application of Title IX.

II. THE DECISION BELOW IS CORRECT.

The courts of appeals' unanimous answer to the question presented is also the correct answer. Where, as here, the evidence shows that an explicitly sex-based restroom policy is used to “exclude[]” a transgender student “from participation in,” to “den[y]” him “the benefits of,” or to “subject[]” him “to discrimination under” an educational program receiving federal financial assistance, Title IX, 20 U.S.C. § 1681(a), and the Equal Protection Clause provide a remedy.

A. Under Title IX, Sex-Specific Restroom Policies May Not Be Applied in Ways that Discriminate Against Transgender Students.

1. *Title IX prohibits discrimination based on transgender status.*

Title IX “prohibits a funding recipient from subjecting any person to ‘discrimination’ ‘on the basis of sex.’” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a)). The term “discrimination” typically “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). And “[t]he statute’s other prohibitions” further “help to give content to ‘discrimination’ in this context.” *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). “Students are not only protected from discrimination, but also specifically shielded from being ‘excluded from participation in’ or ‘denied the benefits of’ any ‘education program or activity

receiving [f]ederal financial assistance.” *Id.* at 650. (quoting 20 U.S.C. § 1681(a)).

Discriminating against a student for being transgender is discrimination “on the basis of sex” under Title IX. In *Bostock* this Court held that discrimination against a person because they are transgender is discrimination “because of . . . sex” under Title VII of the Civil Rights Act of 1964, even assuming “sex” refers exclusively to a person’s sex assigned at birth. When an employer discriminates against a person because they are transgender, the Court explained, the employer “necessarily and intentionally discriminates against that individual in part because of sex.” *Bostock*, 140 S. Ct. at 1744.¹²

The same reasoning applies to Title IX. Both statutes focus on discriminatory treatment of individuals, not groups: Title VII protects “[a]ny individual,” 42 U.S.C. § 2000e–2(a)(1); Title IX protects any “person,” 20 U.S.C. § 1681(a). And both statutes require no more than “but for” causation: Title VII prohibits discrimination “because of” sex, 42 U.S.C. § 2000e–2(a)(1); Title IX prohibits discrimination “on the basis of” sex, 20 U.S.C. § 1681(a). Both terms entail no more than a “but for” causation standard. *See Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1013 (2020). Thus, as with Title VII, to discriminate against a student because he is transgender is to discriminate

¹² As in *Bostock*, this Court need not resolve whether the term “sex” in 1972 “captur[ed] more than anatomy and reach[ed] at least some norms concerning gender identity and sexual orientation” because the outcome would be the same under any definition of the term. 140 S. Ct. at 1739.

based on sex. “And that is all Title [IX] has ever demanded to establish liability.” *Bostock*, 140 S. Ct. at 1744.

2. *Schools may not discriminate in the provision of sex-separated restrooms.*

There is no statutory “donut hole” to Title IX that allows schools to use sex-based restroom policies to injure particular students or to deny them equal educational opportunity. *Bostock*, 140 S. Ct. at 1747. Although the statute’s prohibition on discrimination is subject to a list of “specific, narrow exceptions,” Pet. 21 (quoting *Jackson*, 544 U.S. at 175), the exceptions do not include restrooms. The exceptions to Title IX’s prohibition on discrimination are all listed in 20 U.S.C. § 1681(a)(2)-(9), which enumerates specific contexts in which section 1681(a)’s prohibition on discrimination “shall not apply.”

There is no similar exception to discrimination for restrooms. An implementing regulation authorizes schools to “provide separate toilet . . . facilities on the basis of sex,” if the separate facilities are “comparable.” 34 C.F.R. § 106.33. But the regulation does not exempt restrooms from section 1681(a)’s prohibition on discrimination and does not allow schools to “injure protected individuals” on the basis of sex whenever restrooms are at issue. *Burlington*, 548 U.S. at 59.

There is also no authorization to discriminate in the statutory provision regarding dormitory “living facilities,” which—despite the Board’s assertion to the contrary, Pet. 4—has nothing to do with school restrooms. Restrooms in public school building are

classic public accommodations, not living facilities.¹³ And even if they were treated as such, the provision simply authorizes schools to “maintain[] separate living facilities for the different sexes,” 20 U.S.C. § 1686, while leaving the prohibition on “discrimination” undisturbed.

3. *The Board’s restroom policy subjected Gavin to discrimination.*

The undisputed evidence establishes that, by treating Gavin differently from other boys because he is transgender, the Board subjected Gavin to discrimination. Whether differential treatment amounts to discrimination must be judged from “the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” *Burlington*, 548 U.S. at 71 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)). That “inquiry requires careful consideration of the social context in which particular behavior

¹³ The Board’s assertion that “the Department of Education has long interpreted ‘living facilities’ to include ‘toilet, locker room, and shower facilities,” Pet. 4, lacks any foundation in the administrative record. When Title IX’s implementing regulations were first published in the Federal Register, the final rule indicated the source of statutory authority for each regulatory provision. The only regulation implementing the statutory provision for living facilities was the provision on “Housing,” now codified at 34 C.F.R. § 106.32. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24127, 24141 (June 4, 1975). The regulation for separate toilet facilities now codified at 34 C.F.R. § 106.33 did not reference the statutory provision regarding living facilities or otherwise claim to implement it. *See id.*

occurs and is experienced by its target.” *Oncale*, 523 U.S. at 81.

Despite the Board’s assertion that its “biological gender” policy treats all students equally, the sole function of the policy is to segregate transgender students from their peers. As Judge Wynn explained, the use of such terms “to classify students has the effect of shunting individuals like Grimm—who *may not* use the boys’ bathrooms because of their ‘biological gender,’ and who *cannot* use the girls’ bathrooms because of their gender identity—to a third category of bathroom altogether.” Pet. App. 81a. Indeed, the text of the Board’s policy makes clear that its purpose was to move students with “gender identity issues” to “alternative” facilities. *Id.* at 56a.

The consequences for Gavin were devastating. “In an experience all too common for transgender individuals (particularly children), early in his junior year at Gloucester High, Grimm was hospitalized for suicidal thoughts resulting from being in an environment of ‘unbearable’ stress where ‘every single day, five days a week’ he felt ‘unsafe, anxious, and disrespected.’” Pet. App. 92a. When transgender students are excluded from using the same restrooms as other students based on their sex assigned at birth and are effectively required to deny their gender identity, they suffer real injuries that significantly impair their ability to access the educational benefits that Congress sought to protect. *See Adams*, 968 F.3d at 1307; *Whitaker*, 858 F.3d at 1041; *Dodds*, 845 F.3d at 221-22.

In this case, the separate restrooms for students “with gender identity issues” were not

“equal” in any sense. The “alternative” restrooms were single-stall facilities, not common restrooms shared with others. They were far from Gavin’s classes. And they were completely absent from the football stadium. *See App, infra*, 11a-13a.

The Board argues that this discriminatory treatment was justified because Gavin was not “similarly situated” to other boys. Pet. 19. But the question is whether Gavin was similarly situated to non-transgender boys in all *relevant* respects. *Cf. City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Whatever relevance a transgender person’s chromosomes or unseen genitals may have in other contexts, those differences between Gavin and non-transgender boys are not relevant to which common restroom they use. Gavin’s “entire outward physical appearance was male,” and “he could no more easily use the girls’ restrooms than a cisgender boy.” Pet. App. 87a, 90a (emphasis omitted).

On these facts, the evidence unequivocally established that excluding Gavin from the same restrooms as other boys because he is transgender was a “distinction[] or difference[] in treatment that injure[d] [a] protected individual[],” on the basis of his sex. *Burlington*, 548 U.S. at 59. Unlike all other students, Gavin alone was prohibited from using the multi-user restrooms and relegated to “alternative” facilities because he is transgender. That separate and unequal treatment “excluded” Gavin “from participation in,” “denied” Gavin “the benefits of,” and “subjected” Gavin “to discrimination under” an educational program receiving federal financial assistance, in violation of the plain text of Title IX, 20 U.S.C. § 1681(a).

B. Subjecting Transgender Students to Separate and Unequal Treatment in the Use of Restrooms Violates the Equal Protection Clause.

The court of appeals also correctly concluded that the Board’s treatment of Gavin violated equal protection. “[A]ll gender-based classifications today warrant heightened scrutiny.” *United States v. Virginia*, 518 U.S. 515, 555 (1996) (cleaned up). As with Title IX, “equal accommodations in schools on a male/female basis . . . says nothing about what happened in this case: separation of transgender students from their cisgender counterparts through a policy that ensures that transgender students may use neither male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned-at-birth.” Pet. App. 91a. To justify its relegation of Gavin to separate and unequal restrooms, the Board must carry its “demanding” burden under heightened scrutiny. *Virginia*, 518 U.S. at 533.

The Board failed to carry that burden. The Board argued below that its policy advances an important governmental interest in protecting students from unwanted exposure to nudity among people with different physiological sex characteristics. But the Board presented no evidence whatsoever that its exclusion of Gavin from the boys’ restrooms was substantially related to that interest. “[A]s a matter of common sense, any individual’s appropriate use of a public bathroom does not involve exposure to nudity—an observation that is particularly true given the privacy enhancements installed in the bathrooms at Gloucester High.” Pet. App. 86a. When asked why the

expanded stalls and urinal dividers did not fully address the Board's privacy concerns, the Board's 30(b)(6) witness responded that he "[was] sure" the policy also protected privacy interests in other ways, but that he "[couldn't] think of any other off the top of [his] head." C.A. App. 472. Such concededly unsubstantiated speculation does not satisfy heightened scrutiny.

The Board analogizes the exclusion of transgender students from restrooms at Gloucester High School to the privacy alterations installed at the Virginia Military Institute after the admission of women. *See* Pet. 30 (citing *Virginia*, 518 U.S. at 550 n.19). But that analogy misses the *Virginia* Court's point, which was that privacy concerns do not justify overbroad exclusions when they can be addressed more narrowly. *See Virginia*, 518 U.S. at 555 n.20. The proper analogy to the privacy alterations installed at VMI are the privacy alterations that have already been installed at Gloucester High School: urinal stall dividers, privacy strips in stalls, and single-user facilities for all students to use if they wish for even greater privacy. Those privacy alterations have eliminated any hypothetical risk of exposure to nudity without harming, excluding, or stigmatizing anyone. *Virginia* neither authorizes nor permits schools to use overbroad assertions of "privacy" to deprive students of equal educational benefits.

Judge Niemeyer defended the Board's overbroad policy by arguing *sua sponte* that the Board has an important governmental interest in protecting non-transgender students from the "*mere presence*" of transgender students in common restrooms. Pet. App. 111a. According to the dissent, "we want to be alone—

to have our privacy—when we ‘shit, shower, shave, shampoo, and shine.’” *Id.* But a judge’s after-the-fact personal speculations do not satisfy the Board’s burden. And the dissent’s argument plainly proves too much. It would justify excluding any minority group if the majority in any particular community wishes to avoid sharing restrooms with them. *Cf. Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home.”).

To be sure, difference can be discomfoting. The government is free to respond to that discomfort, so long as it does so without discrimination. *Cf. Cleburne*, 473 U.S. at 448. Any student who “want[s] to be alone,” Pet. App. 111a, when using the restroom at Gloucester High School is free to use one of the single-stall facilities if they are uncomfortable with the presence of a transgender student, or anyone else. But “[t]here is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the . . . commingling of students and the refusal of individuals to commingle where the state presents no such bar.” *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950). Excluding transgender students from common spaces based on the alleged discomfort of others “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.” *Boyertown*, 897 F.3d at 530.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Date: May 25, 2021

APPENDIX

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division**

GAVIN GRIMM,
Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant

Civil Case No. 4:15-cv-54

DECLARATION OF GAVIN GRIMM

1. I am the plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.
2. My name is Gavin Elliot Grimm.
3. I was born in Gloucester County on May 4, 1999, and lived in Gloucester County all my life until January 2018.
4. I currently reside in Berkeley, California where I attend school at Berkeley City College and engage in community activism work.
5. I was a student at Gloucester High School and graduated on June 5, 2017.

My Early Childhood Before Transition

6. I have always known that I am a boy. I always saw myself as a boy, identified with male cartoons, and related to male characters. During imaginary play as a young child, I always cast myself in a male role with a traditionally male or gender-

neutral name.

7. Around the time that I reached school age, I first started to understand that others perceived me as a girl. I also began to recognize that society perceives large differences between men and women, including different expectations about their social roles. In part, this realization developed as I expressed interest in activities that were not available to me because I was seen by others as a girl. At that point, I had an understanding that the female physical and social role I was assigned were inaccurate. But I did not have the language at the time to vocalize those feelings.

8. Starting in elementary school, I was bullied throughout my entire school career, in part because I did not conform to traditionally feminine gender expectations. Peers threw things at me, called me horrible names, refused to sit near me, and excluded me from activities. I was called names frequently, at least once or twice a day. Students would call me “faggot,” “dyke,” “homo,” “weirdo,” and make references to my weight.

9. I recall one instance when students were asked to line up boy, girl, boy, girl. I remember the person assigning students placed me in one of the “boy” positions. This was a moment of great joy for me.

10. Throughout my childhood I would request boys’ clothing, but was told it was not appropriate for me. As I grew older, I would fight with my mom to let me shop in the boys’ aisle. I remember a particularly distressing experience when my sister got married and my mother insisted I wear a dress. That was a painful, drawn-out process. For every store we went to, I would walk in, take one look, and say I hated

them all. I really fought hard not to wear a dress and eventually, after a lot of tears, I wore one that was very plain and black, like a square with straps. I was incredibly distressed, and the first thing I greeted my relatives with was “please don’t call me pretty,” because I did not want to be perceived as feminine in any way.

11. At around age 12, I was able to exercise more control over my clothing and hairstyle. I cut my hair short in a style traditionally associated with boys, and wore clothing exclusively from the boys’ section of stores.

12. When I was 13, I also began using a compression garment, often referred to as a chest binder, to flatten my breasts. I never left the house without wearing the compression garment.

13. Everyone who knew me still assumed that I was a girl because I had not at that time discovered the word transgender and how that related to who I was. But, outwardly, I presented very masculine, and that was not something that was unnoticed by peers and friends. When I went in women’s restrooms, I was chased out or yelled at by girls or women saying “you are not supposed to be in here,” or telling me that I was in the wrong place and needed to leave.

My Gender Transition and Coming Out

14. Around the same time, I first learned about the term “transgender” from the internet, and realized that there was a word for the feelings I had felt all my life. I had not known about gender transition before, and I was ecstatic to discover it was something a person could do.

15. I had very few friends when I was younger,

but as I acknowledged my male gender identity to myself and began to feel more comfortable with who I am, I began to form a group of close friends. One time in ninth grade, before I had revealed to any of my friends that I was transgender. I remember a friend saw another student and remarked, “that looks like the male version of Gavin.” My other friend said in response, “Gavin is the male version of Gavin.” (This was before I changed my name, so they actually used said my old name instead of “Gavin” when they talked.) I was elated that one of my closest friends perceived me as male, even before I had revealed my gender identity to them.

16. During ninth grade, I gradually began disclosing to friends that I was a boy. Since the reactions of my friends were generally positive and supportive, I disclosed my gender identity to more friends. By the end of ninth grade, most of my friends were aware of my gender identity, and I lived openly as a boy when socializing with friends away from home and school.

17. But I was still afraid to reveal to my family or teachers that I was transgender. My home and community environment was very conservative and also religious. The teachings of the churches in our community were that being gay or transgender was wrong and evil.

18. This made my ninth grade year very difficult for me. Continuing to be seen by others as a girl was incredibly distressing to me. When I would raise my hand to answer a question in class, teachers would say “yes, ma’am.” Teachers continued to refer to me by a female name. Using the girls’ restrooms was also a constant source of anxiety, so I began

avoiding the restrooms at school.

19. The cumulative stress of being constantly misgendered caused depression and anxiety so severe that I could not attend school during the spring semester of my freshman year. My ability to function at school became so diminished that it was not possible for me to continue going to school. My social anxiety related to being gendered incorrectly was so bad that I was afraid to go outside, where I might encounter other people. I was miserable, and as a result, could not focus academically. Instead, I took classes through a home-bound program that follows the public high school curriculum through online classes.

20. In April 2014 I finally came out to my mother as a boy. I had previously downloaded a PDF on a reading tablet with information about what it means to be transgender, but I had been too nervous to show it to her. That day, we were in the kitchen talking about something else, and she said the word “transgender.” I did not think she was aware of that word. When she said the word “transgender,” I ran off to find the tablet—but I couldn’t find it. So I came back and told her that I am transgender, and a boy.

21. My mom told me she loved me and would support me, but she told me not to tell the rest of my family yet. She also helped pick a new name for me: Gavin.

22. We ended up telling the rest of my family a few weeks later at a party for my fifteenth birthday. The morning of the party I was overwhelmed by grief and anxiety. I had locked myself in my bedroom, deeply traumatized by the thought of experiencing another birthday as a “birthday girl.” My father

knocked, and he asked me what the problem was. I told him, “Mom said I wasn’t allowed to tell you.” So he asked my mom, and she told him I was a boy. My mom then called the rest of my relatives who were on the way to the party to tell them that I was a boy. She wiped off my old name from the birthday cake, and wrote “Gavin” in its place.

23. My mother made clear to my dad and my brother that she expected them to respect that I am a boy and to use my correct name and pronouns. That was not a point of negotiation in our household. It took a few months for my father and brother to get used to it. But they eventually shifted from tacitly accepting my identity to fully supporting me. My father and brother would comfortably say to other people “he’s my son,” or “he’s my brother.”

24. At my request, I began therapy with a psychologist who had experience with working with transgender patients. The psychologist diagnosed me with gender dysphoria. The psychologist recommended that I immediately begin living as a boy in all respects. That included using a male name and pronouns and using boys’ restrooms. The psychologist gave me a “treatment documentation letter” to confirm I was receiving treatment for gender dysphoria and that, as part of that treatment, I should be treated as a boy. A copy of that treatment documentation letter is attached as Exhibit A. In addition, the psychologist recommended that I see an endocrinologist to begin hormone treatment for gender dysphoria.

25. In July 2014, I petitioned the Circuit Court of Gloucester County to change my legal name to Gavin Elliot Grimm, and the court granted the

petition.

Starting Tenth Grade as a Boy

26. Before the beginning of tenth grade, my mother and I met with Gloucester High School guidance counselor Tiffany Durr to explain that I was a boy and needed to socially transition at school as part of my medical treatment. Ms. Durr expressed support for me and a willingness to ensure a welcoming environment for me at school.

27. Ms. Durr and I agreed that I would send an email to teachers explaining that I was to be addressed using the name Gavin and to be referred to with male pronouns. This was to avoid the potential of misgendering (a practice of unintentionally or maliciously misidentifying my gender) or deadnaming (a practice of using a transgender person's birth name, instead of their chosen name).

28. I did not personally experience malicious misgendering from staff, but there were small groups of students who would make a point to greet me by my dead name, and deliberately identify me as a girl. I recall one instance where my name, "Gavin," was called for attendance, and a classmate started laughing. I heard him tell everyone, "that's a chick, that's a chick," and repeatedly tried to call my attention by yelling my old name. But after I complained to the teacher, she made sure that the student did not harass me in class again.

29. I initially agreed to use a separate restroom in the nurse's office, but once I began school, I soon found it stigmatizing to use a separate restroom. I began to feel anxiety and shame surrounding my travel to the nurse's office. The location of the nurse's

office made it difficult for me to use the restroom between classes, as it was located in a different part of the building and was very inconvenient to reach from my classrooms. I recall my frustration with missing instructional time in class.

30. I was also embarrassed by how long it would take for me to get to and return from the nurse's office. On at least one occasion a teacher commented on my lengthy disappearance when I reentered the classroom. The teacher made a big public point about how long I had been gone in a way that I felt was humiliating. Other times, students would say, "what took you so long," and other snide remarks.

31. I was allowed to use a faculty restroom that was closer to my classes, but I was even more embarrassed to use the faculty restroom than the restroom in the nurse's office. I was worried that another student would see me go into a faculty restroom, which would have been even more uncommon than my going to the nurse's office.

32. After a few weeks, I asked Ms. Durr and Principal Nate Collins to be allowed to use the boys' restrooms. I expressed to Mr. Collins that it was stigmatizing and embarrassing to have to travel to a separate restroom, and that it was also detrimental to my instructional time to have to travel so far to use the restroom. I said that it identified me as different and as a target for harassment.

33. I did not need to use the locker rooms because I had elected to continue completing my physical education classes through an online program.

34. I also informed Mr. Collins that I was expecting to begin hormone therapy. My family and I had met with a pediatric endocrinologist at Virginia

Commonwealth University to begin hormone therapy treatment. But my initial blood tests revealed that my body was already producing an unusually high amount of testosterone. Before I could begin hormone therapy I had to wait several weeks while the doctors made sure that I did not have an endocrine disorder that was incompatible with hormone therapy.

35. Mr. Collins told me he would check with others. A few weeks later, Mr. Collins met with me again and said that I could use the same restrooms as other boys.

36. I started using the restrooms on October 20, 2014. For approximately the next seven weeks, I used the boys' restrooms at school. During the time I used the boys' restrooms, I never encountered any problems from other students. Over the course of those seven weeks, I had a single conversation with a student in the restroom. He asked me if I liked his socks, and I said yes.

37. At the time I was granted permission to use the boys' restroom at school, I had already been using the boys' restroom in public places in Gloucester and outside of Gloucester, so this was very natural to me.

38. After being respected as a boy and allowed to use the same restrooms as other boys, I was excited about the prospect of living out the rest of my school year as just another student. The seven weeks when I had been respected and treated like other boys were the most comfortable I ever felt at school.

The School Board's New Policy

39. On November 10, 2014, my mother and I learned that the School Board would be discussing my use of the boys' restrooms at its meeting on November

11, 2014. No one from the Gloucester High School administration or the School Board informed us of this discussion. We learned about it through a Facebook post encouraging people to attend and speak out against me using the boys' restrooms, with many vile comments about a girl being in the boys' restroom. My mom and I were frustrated, and we felt it was wrong that we were not given advanced notice that the question of my bathroom use was going to be debated at a public school board meeting.

40. My parents and I attended the meeting to speak against the policy. After having the experience of being treated just like other boys, I could not sit on the sidelines and let the School Board take it away from me. 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.

41. I also attended the School Board's meeting on December 9, 2014.

42. Members of the public who spoke at the meetings made openly hostile comments about me, calling me "a freak," "a dog," and all sorts of hateful horrible language. Many of these individuals went to great lengths to refer to me with female pronouns or honorifics such as young lady, little miss, ma'am, or missus.

43. As a result of the school board meetings and the new transgender restroom policy, I felt like I had been stripped of my privacy and dignity. Having the entire community discuss my genitals and my medical condition in a public setting has made me feel like a public spectacle. Everyone could now identify me as "the transgender student who wants to use the boys'

restroom,” which made me incredibly anxious and fearful.

44. The day after the school board meeting, Mr. Collins told me that I would no longer be allowed to use the boys’ restrooms and that there would be disciplinary consequences if I tried to do so.

45. After having had the opportunity to live consistent with my gender identity, I was devastated when it was taken away from me. 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.

46. Although the Board had announced that it would construct three new single-user restrooms, those restrooms were not completed until about a week after the policy went into effect. At one point during that week, I stayed after school for an event and realized that the nurse’s office was locked and it would be several hours before my parents could pick me up. I was very distraught—totally devastated—that I had nowhere to use the restroom in my own school, so I broke down and went sobbing to the library to ask for help. One of the librarians drove me home so that I could use the restroom.

47. After the three single-stall restrooms were constructed at Gloucester High School, I looked inside the restrooms once or twice just to see what they looked like, but I never used them. The single-stall restrooms made me feel even more stigmatized and isolated than using the nurse’s office because everyone knew that they were installed for me in particular, so that other boys would not have to share the same restroom as me.

48. Although the school said that all students

could use the single-stall restrooms, I was the only student mandated to use them. I never saw any other student use the single-stall restrooms either. Two of the restrooms were near the lunchroom, and when my friends and I sat down for lunch we could see the restrooms, but I never saw any student use them.

49. Unlike some of the boys' restrooms, none of the new single stall restrooms were located near my classes. Only one of the single-stall restrooms is located anywhere near the restrooms used by other students. Because all three facilities are clustered near each other, they were not much closer or more convenient than the nurse's restroom.

50. Instead of using the separate restrooms, I tried to avoid using the restrooms entirely while at school. When that was not possible, I used the nurse's restroom. Every time I had to walk to the nurse's room, I felt like I was doing a walk of shame. I was embarrassed that everyone who saw me enter the nurse's office knew exactly why I was there: because I am transgender, and I was prohibited from using the same restrooms as other boys.

51. I tried to limit the amount of liquids I drank and tried to "hold it" when I needed to urinate during the school day. Avoiding the restroom was distracting when I was trying to focus in class. And, as a result of trying to avoid using the restroom, I repeatedly developed painful urinary tract infections. The only time I developed these infections was during the schoolyear when I had to avoid using the restroom; I did not develop infections during summer vacations, and now that I have graduated from Gloucester High School, that problem has disappeared.

52. The restroom policy also interfered with my

involvement in school events and activities, making me feel even more targeted and isolated. There was no restroom I could use when attending football games because there were no single-user facilities by the athletic field and school buildings were locked after-hours, so I tried very hard to plan ahead so that I would not have to use the restroom during the game. But there were a few occasions when I needed to use the restroom, and I had to leave the game early. One time, a friend had to drive me down the road to use a restroom at a nearby Lowe's or Home Depot. Another time, my mother just came and took me home.

53. Shortly after the policy went into effect, I met with Ms. Durr and told her that I felt humiliated and distressed by the Board's policy. But I knew that she could not do anything to change it. After that, I realized that talking to school counselors and administrators was pointless because the Board had already decided that it didn't care about my wellbeing. Counselors and administrators could not give me permission to use the boys' restroom, and I did not have faith in the school system to protect me.

54. By the time I started eleventh grade, the stress was unbearable. I was in an environment every single day, five days a week, where I felt unsafe, anxious, and disrespected. I told my mom that I was having suicidal thoughts, and I was hospitalized briefly at Virginia Commonwealth University (VCU) Medical Center Critical Care Hospital for mental health treatment for suicidality, depression, and anxiety.

55. Instead of returning to Gloucester High School to resume classes, I completed the rest of eleventh grade in an independent study program at

the “T.C. Walker” building, which is a separate location where students could complete course credits through an online computer program. At the “T.C. Walker” building, all the students in the independent study program used a single-stall restroom that was near the classroom. I was able to use this restroom without being singled out and treated differently from everyone else.

56. When I was in twelfth grade, the independent study program was no longer offered at “T.C. Walker.” I returned to Gloucester High School, but I had stored up enough credit from online courses that I had a reduced course load. For all of twelfth grade, I continued to use the nurse’s restroom when I absolutely had to, and I stayed away from campus as much as possible.

57. I graduated Gloucester High School on June 5, 2017.

58. Living through this experience has made me stronger than I ever thought I could be, but I am still deeply hurt and upset about what the School Board put me through for all those years. At the beginning of tenth grade, I finally had a chance to have a normal high school experience just like any other boy. The School Board took that away from me, and I will never get it back.

Additional Medical and Legal Steps in My Gender Transition

59. During tenth, eleventh, and twelfth grade, I also continued to take medical and legal steps as part of my gender transition.

60. In December 2014, shortly after the Board’s policy went into effect, I began hormone therapy,

which has deepened my voice, increased my growth of facial hair, and given me a more masculine appearance.

61. In June 2015—at the end of tenth grade—the Virginia Department of Motor Vehicles issued a state I.D. card for me identifying me as male with an “M” gender marker. A copy of the DMV letter confirming my gender marker change is identified as Exhibit B.

62. In June 2016—at the end of eleventh grade—I underwent chest-reconstruction surgery, as part of my treatment for gender dysphoria.

63. On September 9, 2016—at the beginning of twelfth grade—the Gloucester County Circuit Court issued an order declaring that my sex is male and directed the Virginia Department of Health to issue me a birth certificate listing my sex as male. A copy of that court order is attached as Exhibit C.

64. On October 27, 2016, the Virginia Department of Health issued a birth certificate listing my sex as male. A copy of that birth certificate is attached as Exhibit D.

65. Despite all of this, I was still not allowed to use the same restrooms as other boys at Gloucester High School.

66. After I received my updated birth certificate, my mother and I provided the school with a copy and asked them to update my school records to match the gender marker on my birth certificate. I was planning to apply to colleges, and I wanted my school transcript to be updated so that it identified me as “male” instead of “female.”

67. I went to the guidance office several times to

ask when my school records would be updated, but I never received an answer. Finally, someone from the guidance office told me that they had been instructed to tell me: “We have received your request. Thank you.”

68. As a result of Gloucester County Public Schools’ refusal to update my school records, my official school transcript still identifies my sex as “female” even though all of my other identification documents identify me as male. A copy of my transcript is attached as Exhibit E.

69. I am currently attending community college at Berkley City College, but I plan to eventually transfer to a four-year school. 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. I am still tethered to high school by this document, and 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.

70. I was shocked and angry when I learned the School Board recently testified that their policy turned on students’ current birth certificate. If the Board really is interpreting its policy this way, then it makes what they did to me even worse. Under what they now say the policy means, I should have been allowed to use the same restrooms as other boys starting in late October 2016 when I provided them with my new birth certificate. I could have had a normal high school experience for most of my senior year. I jumped through hoop after hoop, and I did everything I was supposed to do even under the Board’s discriminatory policy. If the Board really thought something was

wrong with my documents, why didn't they just tell me what the problem was so I could address it? It feels like they were playing games with my life, and I do not understand how a group of adults could treat a high school student that way.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 3/19/19

/s/ Gavin Grimm

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division**

GAVIN GRIMM,
Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant.

Civil No. 4:15-cv-00054

DECLARATION OF DEIRDRE GRIMM

1. I am the mother of Plaintiff Gavin Grimm in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. My name is Deirdre Anne Grimm.

3. I live in Gloucester County, Virginia.

4. I have been a Licensed Practical Nurse (“LPN”) for 30 years. I currently work for the American Addiction Treatment Center and Sentara Wound Care Center.

5. I understood for most of Gavin’s early life that he struggled with something, but he wasn’t able to put a name to it until later.

6. As a child Gavin was anxious. He 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.

7. In April 2014, Gavin came out to me as transgender. I inadvertently opened the door by telling him about a conversation that I had recently had with another adult about their transgender child. Gavin seized the moment, and said he had to tell me something. He was very nervous when he came out to me as transgender.

8. Gavin's coming out did not change a thing about my love and support. I told him it didn't change anything about how I felt about him. But I know it was a big deal for him because he wasn't sure what to expect.

9. I was committed to supporting Gavin from day one. The first thing I did was spend three days and nights reading about transgender children and how I could support Gavin. My husband took a longer time to deal with it and really understand what Gavin was going through. He tried very hard to show support from the beginning, and his support for Gavin really transformed over several months.

10. At Gavin's request, I took him to see a psychologist who specialized in treating transgender youth. She diagnosed him with gender dysphoria and gave us a treatment documentation letter advising that he should be treated as a boy in all respects.

11. Before Gavin began tenth grade in the fall of 2014, Gavin and I met with the school guidance counselor, Ms. Tiffany Durr, about Gavin's transition. I presented her with Gavin's legal name change order and his treatment documentation letter. Ms. Durr was very supportive of Gavin and was fully "on board" with using Gavin's correct name and pronouns.

12. Gavin used the nurse's bathroom for some time that fall, but he expressed concerns to me. Gavin

said that it took him a long time to walk across the school to the nurse's bathroom from his classes in D-hall. He also said he felt singled out and embarrassed, and that other students made comments pointing out that he was using a separate restroom, saying things like "what took you so long?" Gavin and I met with Ms. Durr and Principal Nate Collins and discussed Gavin's concerns. Mr. Collins was very open to allowing Gavin to use the boys' restroom. We all had a very reassuring conversation about Gavin's safety, and I felt fully supported by Mr. Collins.

13. Gavin, Mr. Collins, and I all set a date on which Gavin would begin using the boys' restrooms at school. Gavin began using the boys' restrooms in October 2014.

14. On November 10, 2014, a friend of mine sent me a Facebook message, in which someone was urging people to go the Gloucester County School Board meeting the following evening, on November 11th. The message said that the School Board would be discussing and voting on Gavin using the boys' restrooms.

15. I don't remember if the message named Gavin, but I remember it was clear they were talking about my child and whether he should be allowed in the boys' restroom. The post was clearly rallying people to go to the meeting and oppose a transgender student using the restrooms. Some of the comments were really terrible.

16. No one on the School Board ever contacted me or Gavin about the meeting. The first time I became aware of any problem was from the Facebook message I received.

17. After seeing the Facebook post, I started making a booklet of educational materials on what it means to be transgender. I included medical literature, information on suicide rates for transgender children, and information pulled from transgender equality websites. I made one booklet for every School Board member and took those booklets to the meeting and gave them to the members.

18. When Gavin and I spoke about it, we never considered not going to the School Board meeting. They were going to be talking about Gavin, my child, and I had no doubt that I had to be there. Gavin was also set on going. He has always been the kind of kid who will fight for himself if people are going to be making decisions about his life.

19. Prior to the meeting I knew nothing about the School Board's proposal. All I knew was that they were discussing my son and whether or not he should be allowed to use the boys' restroom. I was not aware of any plans to restrict boys' and girls' restrooms by "biological sex," or to create a third restroom option for "unisex" usage.

20. I didn't really know what to expect at the School Board meeting, but I really didn't expect it to be as brutal as it was. Gavin and I sat and listened to adult members of our community stand up and insult Gavin. I remember them calling my child an "it" and a "freak," and I remember thinking I worked in this community for 17 years as a nurse. I have been at many of these people's houses taking care of their moms and dads. I loved my community, and I remember thinking, how could people be calling my kid these names?

21. I remember one adult after another getting up there and talking about things that I don't even think were appropriate for them to be talking about. These people were talking about his private body parts. I just remember how appalled I felt for Gavin and how scared it made me that he wouldn't be able to struggle and live through all of this. Based on what I had read about transgender youth and the suicide risks, I was already scared for Gavin's life. Then we went to this horror show of a school board meeting, and it just made me even more fearful of the impact on him of his community not accepting him.

22. When the School Board said it would be installing separate single-stall restrooms Gavin and I talked about the new restrooms, and he was very upset about it. He didn't want to use them because he is not "unisex;" he is a boy. I remember him saying they may as well put a flashing light that says "Gavin" above the new restrooms, because everyone knew they were created for him, and only he was forced to use them.

23. The School Board voted on December 9, 2014, to issue a policy preventing Gavin from using the boys' restrooms. Gavin was seriously distressed by this policy. He felt so validated when he was allowed to use the boys' bathroom at school, just like a normal boy. 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.

24. From that point, high school was especially difficult for Gavin. One night at the beginning of his year in eleventh grade, I found him sobbing on the bathroom floor, and he begged me to take him somewhere because he was having thoughts of

suicide. So I took him to Virginia Commonwealth University Medical Center to get him help. They put him on the boys' ward, which was very validating to him. He was treated like any other boy.

25. One time, Gavin called me and asked me to pick him up from a football game because there was no bathroom for him to use after school. There was no single-user restroom at the football field, and he wasn't allowed to use the men's room. Gavin told me he felt like his bladder was about to burst. It was like a gut punch to me, as a mom. If you don't have an issue accessing bathrooms, you don't think about how hard it is for somebody who does. But Gavin lived that reality every day in high school.

26. Gavin had frequent urinary tract infections during his high school years. He would hold his urine during the day and have to use the restroom as soon as he got home. We kept boxes of AZO, an over-the-counter medication for urinary tract infections, always stocked at home in order to give him some relief from the pain.

27. Not only has the School Board ruined my son's high school years, but now they're affecting his college years too. Gavin wanted to have the gender marker on his school records changed to "male" before he applied to college. When 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. I personally walked an official copy of that document into the Gloucester High School guidance department and handed it to the office secretary. They gave me the impression it would be no problem for them to update Gavin's records, but when Gavin started requesting

his transcript to apply to colleges, he realized they had refused to list his gender as male.

28. When I learned the Board is now saying Gavin could have used the boys' restroom his senior year if they thought he had presented a valid birth certificate, I was furious. In all these years, no one from the High School or the School Board ever said a word to me or Gavin indicating there was any problem with his birth certificate. For them to come back and say that now feels like a slap in the face. It makes me so upset that they have treated my kid this way.

29. Gavin is a strong kid, but this whole experience has taken a big toll on him and on our entire family. As a parent, you want to protect your child and keep him from harm. It broke my heart to watch him suffer and not be able to do anything to stop it. And he was being hurt by his own School Board, which should have been protecting him.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 3/21/19

/s/ Deirdre Grimm