18-13592-EE

IN THE

United States Court of Appeals

for the Eleventh Circuit

DREW ADAMS,
Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
District Court Case No. 3:17-cv-00739-TJC-JBT

EN BANC BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF FLORIDA IN SUPPORT OF PLAINTIFF AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1 through 26.1-3, the undersigned certifies that they believe that the Certificates of Interested Persons set forth in the Petition for Panel Rehearing and Rehearing En Banc of Appellant The School Board of St. Johns County, Florida (Aug. 4, 2021) and the En Banc Brief of Amici Curiae Medical and Mental Health Professionals Supporting Defendant-Appellant School Board of St. Johns County, Florida (Nov. 8, 2021) are complete, subject to the following amendments:

Added:

ACLU of Florida – Amicus Curiae

American Civil Liberties Union – Amicus Curiae

Block, Joshua A. – Counsel for Amici Curiae

Tilley, Daniel B. – Counsel for Amici Curiae

The undersigned will enter this information in the Court's web-based CIP contemporaneously with filing this Certificate of Interested Persons.

/s/ Joshua A. Block
Joshua A. Block

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF AMICI CURIAE

Amici Curiae American Civil Liberties Union and ACLU of Florida are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

All parties have consented to the filing of this brief.

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over two million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is one of the ACLU's statewide affiliates. Together, *Amici* advocate on behalf of the equal rights of lesbian, gay, bisexual, and transgender people.

As organizations that have litigated landmark cases regarding the rights of transgender people, including *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Parents for Privacy v. Barr,* 949 F.3d 1210 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020); and *Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018), *cert denied*, 139 S. Ct. 2636 (2019), the *Amici* have a strong interest in the application of proper standards when evaluating such claims.[1]

ARGUMENT

Amici submit this brief to respond in greater detail to the arguments made by the dissent from the June 14, 2021 panel opinion (the "dissent"), which contends

[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

there is no meaningful difference between the constitutional and statutory claims raised by Andrew[2] and the claims that could be raised by a cisgender girl who is prevented from using the boys' restrooms.

As discussed below, although the dissent accuses the panel majority of "clos[ing] its eyes to . . . biological reality" (Dissent 48), the dissent ignores the reality that, as a result of gender affirming hormone therapy and surgery, Andrew has "anatomical and physiological" sex characteristics (Def.'s En Banc Br. 8) that are consistent with his male identity—and different from the "anatomical and physiological" characteristics of cisgender girls. Focusing on only one side of the equation, the dissent argues that *excluding* Andrew from the boys' restroom protects an interest in student privacy from "biological differences between the sexes" (Dissent 54), but the dissent never addresses how those interests are advanced by *including* Andrew in the girls' restroom.

That omission is understandable because even Defendant (the "District") admitted in court that placing Andrew in the girls' restroom—or placing a transgender girl with developed breasts in the boys' restroom—would undermine its asserted interests. In response to questioning from the court, the District's witness testified that the District "wants" transgender students in Andrew's position to use the single-stall restrooms and that those restrooms are "the solution for St. Johns

[2] *Amici* understand that the Plaintiff has changed his legal name to "Andrew."

County" to ensure the "safety and comfort of every child." Doc. 161 at Tr. 219. Because the District's preexisting policies did not contemplate the existence of transgender students like Andrew, the District decided to "come up with a policy" designed to move him to a separate, single-stall facility. *Id.* at Tr. 151.

With an accurate understanding of these facts, it is plain that "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." *Grimm*, 972 F.3d at 625 (Wynn, J., concurring). Whatever else a school may do to accommodate sex-specific privacy interests, neither Title IX nor the Equal Protection Clause allows schools to stigmatize and harm transgender students by forcing them into a third set of single-user restrooms, away from the rest of their peers. In arguing to the contrary, the dissent misapplies heightened scrutiny and invents a new "safe harbor" from Title IX's prohibition on discrimination that Congress declined to provide.

I. The Dissent Ignores Critical Facts that Narrow the Scope of This As-Applied Challenge.

The district court in this case limited its reasoning and judgment to Andrew—and only to Andrew—while expressly declining to consider whether other transgender students would be similarly entitled to relief. Doc. 192 at 66-67. Andrew is a transgender teenage boy who has had gender affirming hormone therapy and

chest reconstruction surgery, and who received an updated Florida driver's license and birth certificate reflecting that he is male. Doc. 192 at 11-12; Doc. 147. Those facts dramatically narrow the scope of this appeal and put the lie to the dissent's all-or-nothing choice between assigning restrooms based on "biological sex" or "gender identity."

Ignoring these critical facts, the dissent argues there is no principled basis to distinguish between a transgender boy like Andrew and any other person whose birth-assigned sex was female. According to the dissent, a student's sex "does not come with an expiration date, and it does not require periodic updates to confirm its continuing accuracy." Dissent 43. Accusing the panel majority of "clos[ing] its eyes to . . . biological reality," the dissent argues that "[b]ecause a student's sex does not change over time, the schools have no need to accept updates" in the form of amended birth certificates. *Id.* at 48.

But the reality is that "anatomical and physiological" sex-based characteristics of transgender students *do* change over time. Def.'s En Banc Br. 8. As a result of puberty blockers, gender affirming hormone therapy, and surgery, transgender teenagers "often possess a mix of [typically] male and female physical characteristics." *Grimm*, 972 F.3d at 621 (Wynn, J., concurring). Teenage boys who are transgender can "alter the appearance of the genitals, suppress menstruation, and produce secondary sex characteristics such as increased muscle mass, increased

body hair on the face, chest, and abdomen, and a deepening of the voice." Doc. 192 at 9. Similarly, puberty blockers and gender affirming hormone therapy for transgender teenage girls alters the appearance of genitals, and causes them to develop breasts typical of non-transgender girls. Doc. 151-4 at 20-21.

To be sure, a person's sex assigned at birth and genetic makeup do not change over time. But a person's genetics or anatomy as a baby do not have any "obvious relevance" to "bathroom privacy." Def.'s En Banc Br. 17. To the contrary, Andrew used men's restrooms in all public venues outside of school without causing any disruption whatsoever. Doc. 192 at 36, 39.

The dissent's failure to acknowledge these facts pervades its analysis. The dissent argues that *excluding* Andrew from the boys' restroom protects an interest in student privacy from "biological differences between the sexes" (Dissent 54), but the dissent never addresses how those interests are advanced by *including* Andrew in the girls' restroom. *See Grimm*, 972 F.3d at 623 (Wynn, J., concurring) ("Even if were we to accept the Board's contention that the alleged infringements on student bodily privacy were in fact present, then the policy would, on balance, harm student privacy interests more than it helped them."); *cf. United States v. Biocic*, 928 F.2d 112, 115 (4th Cir. 1991) (discussing breasts as an "anatomical difference[] between male and female"). Indeed, under the dissent's all-or-nothing approach, a public

university could require a transgender man to use the women's restroom—and a transgender woman to use the men's restroom—even after receiving genital surgery.

Recognizing these biological facts does not require anyone to believe that "'sex' means the same thing as 'gender identity.'" Dissent 48. Even accepting all the dissent's arguments that people have "sex-specific" privacy interests (Dissent 70) based on "the anatomical and physiological differences between boys and girls" (Def.'s En Banc Br. 8), those arguments do not provide even a rational basis for a policy placing Andrew in the girls' restroom—much less an "exceedingly persuasive" one. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

II. The Dissent Examines the Wrong Policy.

The dissent contends that the District has a single restroom policy that applies equally to all students. But, in practice, the District has two separate restroom policies: one for non-transgender students and another for students who are transgender. Although the District provides common sex-separated restrooms for boys and girls, it enforces a policy designed to ensure that boys and girls who are transgender cannot use either of them.

A. The School District Created a New Policy Designed to Guarantee that Transgender Students Use Single-Stall Restrooms.

For "as long as anybody can remember," the District had a restroom policy that "boys go to the boys' designated restrooms, and the girls go to the girls' designated bathrooms." Doc. 161 at Tr. 227. The policy did not purport to

distinguish between a student's sex assigned at birth, genetics, hormones, external anatomy, internal anatomy, or gender identity. The District did not think about how its policy would apply to transgender students until 2013, when it "focused more specifically on LGBTQ issues" for the first time. *Id.* at Tr. 150-51. Sallyanne Smith, the director of student services, testified that "the more questions that were coming in, the more I realized we needed to come up with some policy because we didn't have any." *Id.* at Tr. 151. "We all sat around the table and I explained this was an issue that we needed to start looking into and to come up with a policy for that." *Id.*

The resulting policy for transgender students was published in September 2015 as part of an "LGBTQ best practices policy," *id.* at Tr. 245; Doc. 152-6, which was "a supplement to the unwritten policy" specifically for transgender students, Doc. 161 at Tr. 73. The drafters of the new policy considered whether transgender students should be allowed to use restrooms consistent with their gender identity and made a conscious decision to exclude them. *See id.* at Tr. 215-16. The "best practices" policy states that no law requires schools to "allow a transgender student access to the restroom corresponding to their consistently asserted transgender identity." Doc. 152-6 at 1. Instead, the policy declared that "[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." *Id.*

The dissent insists that the 2015 transgender policy merely provides an "option of using gender-neutral bathrooms" and "is an *accommodation* for transgender students, not a special *burden*." Dissent 62. But Ms. Smith admitted in court that the District "wants" transgender students to use the single-stall restrooms. Doc. 161 at Tr. 218-19. In response to questions about which restroom a transgender teenage girl should use if, as a result of puberty blockers and hormone therapy, she has typically feminine bone and muscle structure and developed breasts, Smith testified that "I would recommend to the child that they use the neutral one because I think they are safer there," and it would "be comfortable and safe with all the parties involved." *Id.* at Tr. 209. In follow-up questioning, the district court asked: "Does the policy come down to in the case of a transgender student that the district wants you to use a gender-neutral bathroom?" *Id.* at Tr. 218. Ms. Smith responded: "I think for the safety and comfort of every child, that would be the solution for St. Johns County." *Id.* at Tr. 219.

Andrew posed a new problem for the District, and "the solution for St. Johns County" was to develop a policy that ensured he would have no realistic choice other than to use a single-stall restroom. If Andrew actually exercised his alleged choice to use a restroom based on his sex assigned at birth, it would *undermine* the policy's asserted goals of separating restrooms based on "anatomical and physiological

differences between the sexes." Def.'s En Banc Br. 11. By design, the policy can achieve that goal only if transgender students use the single-user restrooms instead.[3]

B. The Dissent Uses the Wrong Denominator to Describe How the Policy Operates.

Because it examines the wrong policy, the dissent uses the wrong denominator to describe how the policy operates. The dissent argues that because only 0.04% of students in the District are transgender, the District's policy of assigning students to restrooms based on "biological sex" (or, in reality, the sex designated in school records at the time of enrollment) works 99.96% of the time. Dissent 45. Any discrimination against transgender students, the dissent argues, is merely a "disparate impact" from the underlying decision to have sex-separated restrooms. *Id.* at 64.

But, as discussed above, before it decided to "come up with a policy" for transgender students, the District had no reason to distinguish between sex and "biological sex" or between original birth certificates and amended birth certificates. Doc. 161. at Tr. 151. As another District witness conceded, "until [Andrew] Adams" there was never "any sort of need to clarify the policy, to make a choice." Doc. 162 at Tr. 45-46. *Any* policy would be accurate for 99.6% of students no matter what

[3] Of course, none of this is to suggest that using the girls' restrooms would have been an acceptable non-discriminatory option for Andrew. *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285 (W.D. Pa. 2017).

sex-based criteria the District used. The only function of specifying that students will use restrooms based on sex assigned at birth or original birth certificates is to subject Andrew, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students." *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1049 (7th Cir. 2017); *cf. City of Los Angeles. v. Patel*, 576 U.S. 409, 418 (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.") (internal quotation marks omitted).[4]

Moreover, the fact that the policy harms transgender students without harming non-transgender students does not convert that harm into "disparate impact." Dissent 64. Like the language of Title VII, "[t]he neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). When Andrew is excluded from the common restrooms because he is transgender (i.e., because he has a male gender identity and was assigned a female sex at birth), he suffers an individual injury because of his sex.

[4] The District was also well aware that its decision "to clarify the policy, to make a choice" (Doc. 162 at Tr. 46), would affect transgender students—and only transgender students. That is why it changed language of the draft policy from "consistently asserted gender identity" to "consistently asserted *transgender* identity" and changed "Students will be given access to a gender-neutral restroom" to "*Transgender* students will be given access to a gender-neutral restroom." Doc. 152-20 at 2 (emphases added) (reflecting these changes).

The fact that the policy does not similarly harm *all* boys or *all* people assigned a female sex does not nullify his individual right. *See Bostock*, 140 S. Ct. at 1743 ("[A] rule that appears evenhanded at the group level can prove discriminatory at the level of individual."); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 n.3 (7th Cir. 2017) (en banc) ("A failure to discriminate against all women [or all men] does not mean that an employer has not discriminated against one woman [or one man] on the basis of sex."); *Virginia*, 518 U.S. at 555 ("Valuable as [the Virginia Women's Leadership Institute] may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade.").

The dissent attempts to whitewash the District's discrimination against Andrew with a strained analogy to *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). According to the dissent, "a 'lack of identity' exists between the policy and transgender status" because the policy "creates two groups—students who can use the boys' bathroom and students who can use the girls' bathroom" and "[b]oth groups contain transgender students and non-transgender students." Dissent 63. But *every* form of discrimination based on sexual orientation or transgender status could be re-written that way. Laws banning same-sex couples from marrying created two groups—people prohibited from marrying men and people prohibited from marrying

women—and both groups contained both gay people and heterosexual people. Like the dissent here, the defenders of those marriage bans argued that they did not facially discriminate based on sexual orientation and instead imposed merely a disparate impact. *See, e.g.*, Pet'r Br. at 53, *DeBoer v. Snyder,* 2015 WL 1384104 (U.S. 2015) (citing *Bray*, 506 U.S. at 271). The Supreme Court nevertheless recognized such laws "are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right." *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015). The exclusion also "impos[es]" a "disability on gays and lesbians [that] serves to disrespect and subordinate them." *Id.*

The same is true here. Just as laws prohibiting (a) men from marrying men and (b) women from marrying women discriminated against *both* groups based on sexual orientation, the District's policy prohibiting (a) boys who are transgender from using the boys' restrooms and (b) girls who are transgender from using the girls' restroom discriminates against *both* groups based on their transgender status. And, as in *Obergefell*, the District's provision of restrooms is "in essence unequal" because it completely excludes transgender students from using the same common restrooms as their peers and "impos[es]" a "disability on" transgender students that "serves to disrespect and subordinate them." *Id.* "Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where [non-

transgender] students are permitted to go." *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 457 (E.D. Va. 2019), *aff'd*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

C. The Dissent Applies the Wrong Standard for Identifying Discriminatory Intent.

Because the District's policy facially discriminates against Andrew based on his sex, there is no need to establish that the policy was passed or enforced because of, not in spite of, the harm to transgender students. But, even if such a showing were necessary, the dissent is wrong to suggest that the only relevant intent is the intent of whatever school official originally established sex-separated restrooms. *See* Dissent 64. A discriminatory purpose exists when a governmental actor "selected *or reaffirmed* a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added); *see also Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) ("[W]hen a plan is reenacted . . . the state of mind of the reenacting body must also be considered.").

In any event, the fact that the District did not originally "have transgender students in mind" (Dissent 64) is no defense to a policy that facially discriminates based on sex. The Supreme Court has made clear that, when sex discrimination is at issue, "new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged." *Sessions v. Morales-Santana*, 137 S.

Ct. 1678, 1690 (2017) (quoting *Obergefell*, 576 U.S. at 673 (alterations incorporated)).

III. The Equal Protection Clause Does Not Permit Separate and Unequal Restrooms.

The dissent faults Andrew and the original panel opinion for "failing to address head-on the lawfulness of sex-separated bathrooms in schools." Dissent 40. But "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." *Grimm*, 972 F.3d at 625 (Wynn, J., concurring).

The dissent argues that sex-separated restrooms have been upheld under heightened scrutiny as advancing a privacy interest in "using the bathroom away from the opposite sex." Dissent 55. But the dissent's cases do no such thing, even in dicta. Rather, in the context of discussing race discrimination or striking down exclusions of women from educational programs, some courts have pointed to sex-separated restrooms as a different context in which it may be possible to provide non-stigmatizing "separate but equal" facilities. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993); *see also Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("Just as the law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race

providers."). The dissent does not identify any case suggesting that a governmental interest in privacy could justify providing *unequal* restrooms that stigmatize or harm the individuals who use them.[5]

The dissent argues there is no constitutional difference between Andrew's experience and the experience of a cisgender girl who cannot use the boys' restrooms. But as the dissent acknowledges elsewhere, "context matters." Dissent 39. The dissent quotes Justice Marshall for the proposition that "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). But a men's restroom sign also looks very different from a sign that says "biological men only." The

[5] Although the dissent attempts to draw support from the reference to "privacy" in *Virginia* (Dissent 57), the case only undermines its argument. To justify its exclusion of women, VMI argued that the school's unique adversarial education method and lack of privacy could not be "tolerated in a sexually heterogeneous environment" because it "would destroy ... any sense of decency that still permeates the relationship between the sexes." *Virginia*, 518 U.S. at 528. The parties in Virginia agreed that including women in the Virginia Military Institute would require minor adjustments such as "locked doors and coverings on windows." *Id.* at 588 (Scalia, J., dissenting). The Court nevertheless concluded that these minor changes 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 (warning that concern about undermining "decency" between the sexes has been an "ancient and familiar fear" used to justify discrimination and exclusion). So-called "[i]nherent differences" may not be used "for denigration" or to create or perpetuate "legal, social, or economic inferiority." *Id.* at 533-34.

discriminatory nature of such policy must be assessed objectively from the perspective of a reasonable person in the plaintiff's position under all the circumstances, paying "careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *accord Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). That requires the court to evaluate the harm from the perspective of a boy who is transgender, not from the perspective of a cisgender girl. *See* Transcript of Oral Argument at 15, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 1731 (2020) (No. 17-1623) (Gorsuch, J.) ("[T]here are male and female bathrooms, there are dress codes that are otherwise innocuous, right, most -- most people would find them innocuous. But the affected communities will not. And they will find harm.").

Andrew provided powerful—and unrebutted—testimony about how his separation from other students carried a powerful stigma and constant humiliation. Appellee's Panel Br. 13-16. And the evidence from expert witnesses confirmed that Andrew's feelings of stigma were objectively reasonable from the standpoint of a reasonable person in his position. Indeed, our country's civil rights laws have long recognized the "daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969). Such state-sanctioned sex discrimination communicates a

stigmatizing "message," not only to the individual, but to "all those who may later learn of the discriminatory act." *J.E.B.*, 511 U.S. at 142.[6] Forcing transgender students to use separate single-user facilities "very publicly brand[s] 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.[7]

IV. The Dissent Misapplies Heightened Scrutiny.

In arguing that the District's policy nevertheless satisfies heightened scrutiny, the dissent applies a diluted form of scrutiny that violates the Supreme Court's instructions at every turn.

A. Heightened Scrutiny Does Not Allow Sex Separation to Be an End Unto Itself.

As thoroughly explained in Plaintiff's brief, the District's policy for transgender students is not substantially related to the government's interest in protecting students from unwanted exposure to nudity. Although witnesses for the

[6] The School District's refusal to respect Andrew's updated birth certificate sends a similar message, "tell[ing]" Andrew "and all the world, that [his] otherwise valid [birth certificate is] unworthy of [the School District's] recognition." *United States v. Windsor*, 570 U.S. 744, 772 (2013).

[7] During oral argument this court asked whether the harm to Andrew differs from the harm experienced by a cisgender girl who wants to use the boys' restrooms because the lines for girls' restrooms are too long. *See* Recording of Oral Argument at 17:50. The lack of sufficient facilities for girls would certainly be a form of harm, but the remedy for that harm would be to provide additional facilities, not to provide access to the boys' restrooms.

District speculated that someone might change their shirt outside a restroom stall, there is no evidence that this has actually occurred, much less that the restroom is a place where "bodily exposure . . . is most likely to occur." Dissent 59.

Because of the tenuous connection between restrooms and nudity, the dissent's primary argument is that the District's policy is substantially related to an important governmental interest in protecting students from the mere presence of a transgender student in the restroom. According to the dissent, "[t]he policy is a mirror image of its objective—it protects students from using the bathroom with the opposite sex by separating bathrooms on the basis of sex. The policy 'is not a means to some greater end, but an end in itself.'" Dissent 58 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (plurality)).

The Supreme Court in *Virginia* squarely rejected precisely this type of "notably circular argument." 518 U.S. at 545. In that case, VMI argued, and the Fourth Circuit agreed, that "[s]ingle-sex education at VMI serves an 'important governmental objective,'" and that "the exclusion of women is not only 'substantially related,' it is essential to that objective." *Id.* The Supreme Court rejected this argument for merging together ends and means and effectively "bypass[ing] any equal protection scrutiny" at all. *Id.* at 529. Sex-based classifications can be a *means* for advancing an important governmental interest, but they cannot be an *end* unto themselves.

Avoiding the mere presence of a transgender person in the multi-stall restroom cannot justify unequal and discriminatory treatment. "[N]o court has ever" recognized "such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex." *Boyertown*, 897 F.3d at 531. Courts have also unanimously rejected claims that the presence of a transgender person in a multi-user restroom creates a hostile environment for non-transgender people. *See Parents for Priv.,* 949 F.3d at 1229; *Boyertown*, 897 F.3d at 536; *Cruzan v. Special Sch. Dist., # 1*, 294 F.3d 981, 984 (8th Cir. 2002) (per curiam).

The only cases mustered by the dissent in support of a constitutional privacy interest for restrooms are cases involving compelled drug tests or cases in which a person is forced to perform excretory functions while being viewed by others. *See* Dissent 57 (citing *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982), and *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 626 (1989)). Those cases have no application here because the multi-user restrooms at Andrew's high school all have separate stalls that close and lock. *See* Doc. 151-17 at 12. Defendant also admitted it could install additional urinal dividers and disclaimed any interest in avoiding the cost of doing so. Doc. 162 at Tr. 32; Doc. 161 at Tr. 67-68.

If a student is uncomfortable using the same multi-user restroom as a transgender student like Andrew, the District can respond to that discomfort in a

non-discriminatory and non-stigmatizing manner. Indeed, the District has several single-user restrooms that any student can choose to use if they want greater privacy from transgender students or from anyone else in a common restroom. But the "sincere, personal opposition" of some people to using restrooms with transgender students cannot justify a policy that "demeans or stigmatizes those whose own liberty is then denied." *Obergefell*, 576 U.S. at 672.

B. A "Substantial Relationship" Under Heightened Scrutiny Is Not Determined By the Percentage of People Harmed By a Classification.

The dissent argues that because only 0.04% of students in the District are transgender, the District's policy of assigning students to restrooms based on "biological sex" (or, in reality, the sex designated in school records at the time of enrollment) works 99.96% of the time. Dissent 45. But the Supreme Court has never upheld facially discriminatory policies based on their accuracy in describing the status quo for a majority of individuals. Equating a "substantial relationship" with such measurements would eviscerate heightened scrutiny because a "[c]haracteristic of sex-based classifications," is that they "may hold true for many, even most, individuals." *Miller v. Albright*, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting); *see Morales-Santana*, 137 S. Ct. at 1693 (reaffirming that generalizations cannot justify differential treatment even if they are "descriptive . . . of the way many people still order their lives").

For example, in *Virginia* the State argued it was constitutional to exclude women from VMI because most women would not want to be educated in VMI's "adversarial method," and that educational experiences must be designed "around the rule," and not "around the exception." 518 U.S. at 541. The Supreme Court emphatically rejected that argument, explaining that "estimates of what is appropriate for *most women*[] no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550.

By contrast, the dissent's diluted version of heightened scrutiny is based almost exclusively on *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), without sufficient attention to the rest of the Supreme Court's reasoning. In *Nguyen*, the Court upheld a statute that requires unwed U.S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U.S. citizenship to those children. As the Supreme Court subsequently emphasized, however, the Court's reasoning in *Nguyen* depended on the fact that the father's burden of acknowledging parenthood was "minimal" and easily met without "inordinate and unnecessary hurdles." *Nguyen*, 533 U.S. at 70; *see Morales-Santana*, 137 S. Ct. at 1694 (emphasizing these features of the Court's analysis).

Nguyen may be relevant when evaluating a policy that created procedural or administrative requirements for transgender students to satisfy before using

restrooms consistent with their gender identity, but it provides no support for the District's sweeping, categorical ban.

C. Heightened Scrutiny Does Not Provide Deference to School Administrators.

Finally, the dissent supplements its heightened scrutiny analysis with a call for deference to school officials. But *Virginia* emphatically rejected such deference in the educational context, declaring that "[t]he Fourth Circuit plainly erred in exposing Virginia's. . . plan to a deferential analysis." 518 U.S. at 555. Heightened scrutiny is "demanding," not deferential. *Id.* at 533.

V. The Dissent Misconstrues 34 C.F.R. § 106.33 as a "Safe Harbor" From Title IX's Prohibition on Discrimination.

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). An "overt, physical deprivation of access to school resources" is "[t]he most obvious example" of a Title IX violation. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

There is no exception to Title IX that allows schools to use sex-based restroom policies to injure particular students or to deny them equal educational opportunity.

The statute's prohibition on "discrimination" in section 1681(a) is limited by subsections (2)-(9), which enumerate specific contexts in which 1681(a)'s prohibition on "discrimination" "shall not apply." But that list of "specific, narrow exceptions," *Jackson*, 544 U.S. at 175, does not include restrooms. And when "Congress has explicitly enumerated a discrete exception to a general rule," courts may "not imply additional exceptions absent a clear direction to the contrary." *United States v. Alabama*, 778 F.3d 926, 934 (11th Cir. 2015).

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 create a "safe harbor" (Dissent 72) exempting restrooms from section 1681(a)'s prohibition on discrimination. Nor could it. Agencies do not have the power to authorize something that the plain text of the statute prohibits. *See Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251, 271 (4th Cir. 2021) (explaining that because plain text of Title IX encompasses dress codes, agency could not exempt dress codes from statute's reach), *reh'g en banc granted on other grounds*, 2021 WL 4892153 (4th Cir. Oct. 19, 2021); *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008) (explaining that a regulation cannot authorize what the statute prohibits); *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.").[8]

For these reasons, 34 C.F.R. § 106.33 is not—and cannot be—a "safe harbor" that allows schools to engage in practices that "would otherwise constitute discrimination" under 20 U.S.C. § 1681(a). Dissent 72. Rather, Title IX and 34 C.F.R. § 106.33 allow schools to provide separate restrooms on the basis of sex, but not to do so in a manner that violates the underlying statute's prohibition on discrimination. The definition of "sex" in the regulation is ultimately irrelevant to this appeal because no matter what definition the regulation uses, the District cannot

[8] There is also no authorization for restroom discrimination in the statutory provision regarding dormitory "living facilities," 20 U.S.C. § 1686. Judge Niemeyer's assertion in *Grimm* that 34 C.F.R. § 106.33 implements 20 U.S.C. § 1686 lacks any foundation in the administrative record. *See* 972 F.3d at 632 (Niemeyer, J., dissenting) When Title IX's implementing regulations were first published, the final rule indicated the source of authority for each regulatory provision. The only regulation implementing the statutory provision for living facilities was the regulation 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*. And even if it had, the statute simply authorizes schools to "maintain[] separate living facilities for the different sexes," 20 U.S.C. § 1686, while leaving the prohibition on "discrimination" undisturbed.

use restrooms as a means of engaging in discrimination. *See Grimm*, 972 F. 3d at 618.[9]

As explained in connection with Andrew's equal protection claim, discrimination is exactly "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." *Grimm*, 972 F.3d at 625 (Wynn, J., concurring). And, as also explained in connection with the equal protection claim, this disparate treatment unquestionably constitutes discrimination from the perspective of a reasonable person in the plaintiff's condition under all the circumstances.

[9] Although ultimately irrelevant, the dissent's assertions about the meaning of "sex" in 34 C.F.R. § 106.33 are also wrong. *Bostock* specifically reserved the question whether the statutory term "sex" bears "a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity." 140 S. Ct. at 1739; *see Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (collecting definitions). But even assuming that the term "sex" was limited to biological and physiological characteristics, that limitation would still not dictate how to "provide separate toilet … facilities on the basis of sex," 34 C.F.R. § 106.33, to a student who, as a result of gender affirming hormone therapy and surgery, "possess a mix of [typically] male and female physical characteristics," *Grimm*, 972 F.3d at 621 (Wynn, J., concurring). 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—or that if he used the boys' restrooms then the restrooms would no longer be provided "on the basis of sex."

Moreover, any ambiguity in the restroom regulation cannot shield otherwise unlawful discrimination through *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). *See Grimm*, 972 F.3d at 619 n.18. The necessary clarity under *Pennhurst* comes from the unambiguous statutory text, which broadly prohibits "discrimination" against any "person" "on the basis of sex." 20 U.S.C. § 1681(a). As with Title VII, that statutory text "has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them." *Bostock*, 140 S. Ct. at 1753. But in each of these cases, the Supreme Court held that the unambiguous statutory text provided the request notice under *Pennhurst*. *See Jackson*, 544 U.S. 167 (reversing this Court's conclusion that Title IX did not prohibit retaliation); *Davis*, 526 U.S. 629 (reversing this Court's conclusion that Title IX did not cover deliberate indifference to sexual harassment by another student); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992) (reversing this Court's conclusion that Title IX did not cover sexual harassment). Because the text of the statute controls over the recipient's subjective expectations, "*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Jackson*, 544 U.S. at 183 (internal quotation marks omitted).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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This brief complies with the word limitation of Fed. R. App. P. 29(a)(5) because it contains 6490 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that a copy of the foregoing was filed electronically with the Court's CM/ECF system on November 19, 2021. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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