No. 16-273

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,

Respondent.

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

BRIEF OF *AMICI CURIAE* WOMEN'S LIBERATION FRONT AND FAMILY POLICY ALLIANCE IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici are the Women's Liberation Front ("WoLF"), an organization of radical feminists dedicated to the liberation of women by ending male violence, regaining reproductive sovereignty, and preserving women-only spaces, and the Family Policy Alliance ("FPA"), a Christian organization dedicated to helping pro-family Americans unleash their citizenship for a nation where God is honored, religious freedom flourishes, families thrive, and life is cherished.

Pro-family Christians and radical feminists may not agree about much, but they agree that redefining "sex" to mean "gender identity" is a truly fundamental shift in American law and society. It also strips women of their privacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women's very existence. It not only revokes the very rights and protections Congress enacted specifically to secure *women's* access to education, but does so in order to extend Title IX to cover men *claiming* to be women.

Less than one month after the decision below, the federal government issued "guidance" expanding the

[1] No counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than FPA and WoLF, has made a monetary contribution intended to fund its preparation or submission, and counsel of record for all parties have consented to its filing.

reach of the "sex" means "gender identity" doctrine from just restrooms to *all* previously sex-segregated facilities, including locker rooms, showers, and dormitories.[2] Not surprisingly, the government cited the Fourth Circuit's decision as support for taking this interpretation to its logical conclusion. App. 129a, n. 5.

Three harmful consequences follow from redefining "sex" in Title IX to mean "gender identity".[3] First, women will lose their physical privacy and face an increased risk of sexual assault. This redefinition allows *any* man to justify his presence in *any* women-only space simply by uttering the magic words, "I identify as a woman", subject only to the condition that male students "notif[y] the school administration that the student will assert a gender identity that differs from previous representations or records." App. 130a. But male faculty, administrators, other employees, *and any other men who walk onto the campus* of a Title IX institution do not have to notify anyone about anything; they can just show up in any women's restroom, locker room, shower, or dormitory whenever they want.

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[2] U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter on Transgender Students*, May 13, 2016 ("May 13 Guidance"), App. 126a-142a. On August 21, 2016, the U.S. District Court for the Northern District of Texas preliminarily enjoined enforcement of the May 13 Guidance. *Texas v. United States*, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), on appeal, *Texas v. United States*, No. 16-11534 (5th Cir.).

[3] *Amici* use "sex" throughout to mean exactly what Congress meant in 1972: The binary biological classification of human beings as either female ("women") or male ("men").

But because men have been forcing themselves on women for thousands of years with virtual impunity, a new pretext for stripping women of their privacy and making them more vulnerable to everything from groping to rape may actually be the least remarkable of these consequences.

More pernicious is the loss of one of the primary means by which women are trying to overcome the centuries – millennia – of being denied education: Scholarships. If any man becomes eligible for the millions of dollars in female-only scholarships at Title IX institutions merely by "identifying" as a woman, then many will do just that. For women, this means the loss of an indispensable tool in their struggle to achieve equality in education.

The third and most serious consequence of legally redefining "woman" as anyone who claims to be one, is that "woman" – as humankind has *always* recognized "woman" – will cease to exist. Women's immutable existence will be legally altered to include any man who wishes to be deemed a woman, for whatever reason, at whatever time and for however long it suits him.

Even at times and in places where women are the property of men (as many still are around the globe) and have few rights beyond those granted by their owners they, like all women, still possess their own experience and legal status derived from their biological reality. But if "sex" means nothing more than self-determined "gender identity", even those women will continue to share a status no longer

available to "the people formerly known as women" in the United States. If, as a matter of law, anyone can be a woman, then no one is a woman.

WoLF

WoLF's interest in this case stems from its own challenge to the May 13 Guidance that expanded the application of the "sex" means "gender identity" doctrine to all sex-segregated facilities at Title IX schools. (*Women's Liberation Front v. U.S. Department of Justice et al.*, No. 1:16-cv-00915 (D.N.M. August 11, 2016.) WoLF's district court complaint alleges that the Guidance is a legislative rule adopted without the required notice and comment rulemaking, that it conflicts with the plain language of Title IX, and that it violates Constitutional rights to privacy.[4]

Family Policy Alliance

FPA's interest in this case is tied directly to its advocacy for policies that protect the privacy and safety of women and children in vulnerable spaces such as showers and locker rooms. Together with its state allies, FPA launched the "Ask Me First" campaign (www.askmefirstplease.com) to empower women and children to advocate for their privacy and safety rights before government officials who might not otherwise consider those most affected by redefining Title IX. As a Christian organization, FPA

[4] *WoLF v. United States* has been stayed pending a decision in this case.

believes that all human beings are created in the image of God and that both sexes uniquely reveal part of His nature. Because of this, FPA opposes policies that would endanger or eliminate either sex.

STATEMENT

If accepted, the redefinition of "sex" mandated by the Fourth Circuit will have at least three very serious consequences for women.

A. Privacy and Sexual Violence

Redefining "sex" to mean "gender identity" means that the hundreds of colleges and universities that have women-only dormitories must now allow any man who "identifies" as a woman to live in them: According to DOJ and DOE, "a school must allow transgender students access to housing consistent with their gender identity." App. 137a.

Thus women who believed that they would have the personal privacy of living only with other women will be surprised to discover that men will be their roommates and will be joining them in the showers. And those women will only discover this *after* they move in, not before, because even if the school is aware that a student is a man identifying as a woman, *the school must keep such notification confidential*. Schools may disclose "directory information" such as "a student's name, address, telephone number, date and place of birth", etc., but "[s]chool officials may not designate students' sex, including transgender status, as directory information because doing so could be

harmful or an invasion of privacy." App. 140a. It is truly mind-boggling that informing women as to which men might have the "right" to share a bedroom with them is an "invasion of privacy", but it is *not* an invasion of privacy to invite those men into women's bedrooms in the first place.

Colleges have already begun implementing this portion of May 13 Guidance. For example, Florida Gulf Coast University announced that, as a result of the Guidance, it will open its women-only dorms to any man who "identifies" as female.[5] This includes the Women in Science, Technology, Engineering and Mathematics Living and Learning Community (WiSTEM), designed to support "first-year college women pursuing challenging degrees in STEM disciplines".[6]

Schools have long provided women-only dormitories and related facilities for female students. For example, Cornell College in Mount Vernon, Iowa, has a proud history of serving women, being the first college west of the Mississippi to grant women the same rights and privileges as men, and the first, in 1858, to award a degree to a woman. At Cornell College, Bowman-Carter Hall has traditionally been a residence hall for women only.[7] But if "sex" is redefined to mean "gender identity", then any man

[5]www.nbc-2.com/story/33480768/fgcu-opens-all-housing-to-transgender-students.
[6]www.fgcu.edu/Housing/prospective/WiStem.html.
[7]www.cornellcollege.edu/residence-life/housing/halls/bowman-carter/index.shtml.

will be legally entitled to live in Bowman-Carter Hall so long as he "identifies" as a woman.

The same is true at another Cornell – Cornell University – where Balch Hall has long been a women-only residence.[8] But that will end if "sex" is redefined to mean "gender identity", and the women of Balch Hall will be joined by any man – or group of men – who utters the magic words.

Privacy is one thing; violence is another. The violence DOE and DOJ have done to the statute is reflected in the violence that will result from their actions. Without a second thought – and without any public notice or opportunity to comment – the federal government has mandated that almost every school in the U.S. must now allow men to invade women's privacy and threaten their physical safety in the places heretofore reserved exclusively for them. That *any* man can justify his presence in *any* women's restroom, locker room, or shower by saying, "I identify as a woman" will not escape the notice of those who already harass, assault, and rape tens of thousands of women every day.

The first report of the White House Task Force to Protect Students from Sexual Assault begins with the sentence, "One in five women is sexually assaulted in college."[9] More recent data has shown that the problem is even worse than that – *more than 10% of*

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[8] living.sas.cornell.edu/live/wheretolive/residencehalls/Balch-Hall.cfm.

[9] *Not Alone*, April 2014, p. 2 (available at www.justice.gov/ovw/page/file/905942/download).

college women experienced sexual assault in a single academic year, with almost half of those women reporting *more than one such assault during that time*.[10] Moreover, a majority of those assaults were committed by "students, professors, or other employees of the school"; in other words, the very people that the federal government is now emboldening in those activities. *Id.,* p. 104.

It is surreal that the Departments of Education and Justice, both of which profess concern about the safety of women in schools and on campus, would facilitate sexual predation in those very places. Allowing any man to claim he has a right guaranteed by federal law to be where he should not be seriously undermines the laws designed to protect women in these places.

For example, in Maryland it is a crime "to conduct visual surveillance of . . . an individual in a private place without the consent of that individual". Md. Code Ann., Crim. Law § 3-902(c)(1); the statute defines "private place" as "a room in which a person can reasonably be expected to fully or partially disrobe and has a reasonable expectation of privacy" (*id.*, § 3-902(a)(5)(i)), such as dressing rooms, restrooms (*id.*, § 3-902(a)(5)(ii)), and any such room in a "school or other educational institution". *Id.*, § 3-902(a)(5)(i)(6).

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[10] U.S. Department of Justice, Bureau of Justice Statistics, *Campus Climate Survey Validation Study Final Technical Report*, January 2016, p. 85 (available at www.bjs.gov/content/pub/pdf/ccsvsftr.pdf).

Given that any man can assert that he has a legal right to be in the women's locker room because he "identifies as female", it is impossible to see how either this or similar laws in 26 other states could ever be enforced.[11]

Giving predators the convenient pretext of a right to be precisely where women are at their most vulnerable also renders similar statutes in other states simply inapplicable to these types of crimes: In many states, the relevant statute criminalizes only covert or "surreptitious" observation.[12] For example, District of Columbia law provides that it is "unlawful for any person to occupy a hidden observation post or to install or maintain a peephole, mirror, or any electronic device for the purpose of secretly or

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[11] See Alaska Stat. § 11.61.123; Ariz. Rev. Stat. § 13-1424; Ark. Code Ann. § 5-16-102; Cal. Penal Code § 647; Colo. Rev. Stat. § 18-3-404; Ind. Code Ann. § 35-45-4-5; Iowa Code § 709.21; Kan. Stat. Ann. § 21-4001; Ky. Rev. Stat. Ann. § 531.090; Me. Rev. Stat. Ann. tit. 17-A, § 511; Md. Code Ann., Crim. Law § 3-902; Minn. Stat. § 609.746; Mo. Rev. Stat. § 565.253; Neb. Rev. Stat. Ann. § 28-311.08; N.H. Rev. Stat. Ann. § 644:9; N.J. Stat. Ann. § 2C:14-9; N.M. Stat. Ann. § 30-9-20; Okla. Stat. Ann. tit. 21, § 1171; Or. Rev. Stat. § 163.700; 18 Pa. Cons. Stat. Ann. § 7507.1; S.C. Code Ann. § 16-17-470; Tenn. Code Ann. § 39-13-607; Tex. Penal Code Ann. § 42.01; Utah Code Ann. § 76-9-702.7; Vt. Stat. Ann. tit. 13, § 2605; Wash. Rev. Code Ann. § 9A.44.115; Wis. Stat. Ann. § 942.08. Other states either criminalize only filming in such places (Conn. Gen. Stat. § 53a-189a; Idaho Code Ann. § 18-6609; 720 Ill. Comp. Stat. Ann. 5/26-4; Mass. Ann. Laws ch. 272, § 104; N.Y. Penal Law § 250.45), and one state limits its voyeurism statutes to private residences (La. Rev. Stat. Ann. § 14:283.1).

[12] Presumably those states never considered that such predators would be open about their activities.

surreptitiously observing" in a bathroom, locker room, etc. D.C. Code Ann. § 22-3531(b). Similarly, in Virginia, "It shall be unlawful for any person to use a peephole or other aperture to secretly or furtively peep, spy or attempt to peep or spy into a restroom, dressing room, locker room, [etc.]." Va. Code Ann. § 18.2-130(B).[13]

But it is *not* illegal for a man to walk into a women's locker room in the District of Columbia or Virginia and openly ogle the women there, because there is nothing "secret or surreptitious about" that action – just the opposite. Redefining "sex" to mean "gender identity" *effectively decriminalizes this predatory sexual activity* and gives a get-out-of-jail free card to any predator who smiles and says, "But I identify as a woman".

[13] This same condition of the secret or hidden observer applies to voyeurism statutes in at least 15 other states. *See* Del. Code Ann. tit. 11, § 820 ("peer or peep into a window or door"); Fla. Stat. Ann. § 810.14 ("secretly observes"); Ga. Code Ann. § 16-11-61 ("peeping Tom"); Haw. Rev. Stat. Ann. § 711-1111 ("peers or peeps"); Mich. Comp. Laws Serv. § 750.167 ("window peeper"); Miss. Code Ann. § 97-29-61 ("pries or peeps through a window"); Mont. Code Ann. §45-5-223 ("surreptitious"); Nev. Rev. Stat. Ann. § 200.603 ("surreptitiously conceal . . . and peer, peep or spy"); N.C. Gen. Stat. § 14-202 ("peep secretly"); N.D. Cent. Code § 12.1-20-12.2 ("surreptitiously"); Ohio Rev. Code Ann. § 2907.08 ("surreptitiously"); R.I. Gen. Laws § 11-45-1 ("window, or any other opening"); S.D. Codified Laws § 22-21-1 ("peek"); Wyo. Stat. § 6-4-304 ("looking in a clandestine, surreptitious, prying or secretive nature").

B. Preferences Addressing Historical and Systemic Discrimination

After centuries of second-class treatment in all matters educational, the very preferences used to remedy that history and encourage women's education – most importantly, scholarships for women – will now be reduced by the demands of any men who "identify" as women. Every women's scholarship at Title IX schools that have been created by the school itself, or by the federal or state government *must*, as a matter of federal law, now be open to any such men.[14]

Virtually all schools have such endowed scholarships. Princeton, for example, has the Peter A. Cahn Memorial Scholarship, the first scholarship for female students at Princeton, and the Gary T. Capen Family Scholarship for International Women. For graduate students, Cornell University's School of Veterinary Medicine has the Sheila D. Grummick Scholarship for female students, and the Richard M. Sweezey Memorial Scholarship, whose awards are made to students "with financial need and preferably to a minority female student from the Bronx to help pay for supplies and books."[15]

Given the struggles women have gone through to become lawyers (*see, e.g.*, Ruth Bader Ginsburg, *The*

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[14] Whether scholarships funded by a third party (*e.g.*, Alpha Epsilon Phi, a women's legal sorority, sponsors the Ruth Bader Ginsburg Scholarship for female law students) would be required to abide by this policy if used at a school subject to Title IX is an open question.

[15] https://www2.vet.cornell.edu/education/doctor-veterinary-medicine/financial-aid/policies-funding-sources/scholarships/scholarship-list.

Progression of Women in the Law, 28 Val. U. L. Rev. 1161 (1994)), it is not surprising that law schools also have established such scholarships. Yale Law School, for example, has the Joan Keyes Scott Memorial scholarship for women students, the Lillian Goldman Perpetual Scholarship Fund, "for students in financial need who have a demonstrated interest in women's rights, with a preference for women students", and the Elizabeth Warke Brem Memorial Fund, "for scholarships at Yale Law School with a preference for Hispanic women students".[16]

Nor are such scholarships confined to private institutions. At the University of Iowa, for example, undergraduate women are supported by, *inter alia*, the Madeline P. Peterson Scholarship, "awarded to an entering first-year woman student of American Indian descent", and the Cathy Hinton Scholarship, "awarded to a female engineering student who is an Iowa resident".[17] For graduate students, the University of Virginia has the Class of 1975 Marianne Quattrocchi Memorial Scholarship, whose purpose is "to attract female candidates to Darden [School of Business] who otherwise might not attend."[18] The list goes on and on.

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[16] http://bulletin.printer.yale.edu/htmlfiles/law/alumni-and-endowment-funds.html.

[17] https://diversity.uiowa.edu/awards/madeline-p-peterson-scholarship-american-indian-women; https://uiowa.academicworks.com/opportunities/83404.

[18] http://www.darden.virginia.edu/mba/financial-aid/scholarships/affinity/.

Even the federal government offers such scholarships, *e.g.,* the National Oceanic and Atmospheric Administration's Dr. Nancy Foster Scholarship Program, which "provides support for master's and doctoral studies in oceanography, marine biology, maritime archaeology and all other science, engineering, social science and resource management disciplines involving ocean and coastal areas particularly by women and members of minority groups."[19]

Twenty years ago, this Court eloquently described how women's physiology was used as an excuse to deny them education:

> Dr. Edward H. Clarke of Harvard Medical School, whose influential book, Sex in Education, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, Sex in Education 38-39, 62-63 (1873); *id., at 127* ("identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over"); see also H. Maudsley, Sex in Mind and in Education 17 (1874) ("It is not that girls have not ambition,

[19] http://fosterscholars.noaa.gov/aboutscholarship.html.

> nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex."); C. Meigs, Females and Their Diseases 350 (1848) (after five or six weeks of "mental and educational discipline," a healthy woman would "lose . . . the habit of menstruation" and suffer numerous ills as a result of depriving her body for the sake of her mind).

United States v. Virginia, 518 U.S. 515, 536 n.9 (1996). It is ironic that while women's bodies were once used as an excuse to deny them education, now women's educational opportunities will be curtailed by saying that there is actually no such thing as a "female" body: Women, after all, are simply anyone who "identifies" as such.

Congress enacted Title IX to ensure women's equal access to educational opportunity; it is difficult to imagine a more damaging interpretation than reading it to allow men to help themselves to one of the primary means of assuring that access.

C. Other Remedial Statutes

If "sex" is ambiguous in Title IX, then there is no logical reason why "sex" or "female" or "woman" or "girl" is any less ambiguous when used in any other

law designed to remedy centuries of discrimination against women.

Nearly thirty years ago, Congress enacted the Women's Business Ownership Act of 1988 to "remove, insofar as possible, the discriminatory barriers that are encountered by women in accessing capital and other factors of production" (Pub. L. 100-533, § 101), and creating the National Women's Business Council, of which at least four members would be "women". *Id.*, § 403(b)(2)(A)(ii). In 1992, noting that "women face significant barriers to their full and effective participation in apprenticeable occupations and nontraditional occupations", Congress enacted the Women in Apprenticeship and Nontraditional Occupations Act (Public Law 102-530, § 1(a); codified at 29 U.S.C. § 2501(a)), in order to "expand the employment and self-sufficiency options of women" in these areas via grants, technical assistance and studies. *Id.*, §1(b); codified at 29 U.S.C. § 2501(b). In 2000, Congress amended the Small Business Act to create the Procurement Program for Women-Owned Small Business Concerns (Pub. L. 106-554, § 811; codified at 15 U.S.C. § 637(m)) in order to create preferences for women-owned (and "economically disadvantaged" women-owned) small businesses in federal contracting. In 2014, Congress again amended the Small Business Act (Pub. L. 113-291, § 825; codified at 15 U.S.C. § 637(m)) to include authority to award sole-source contracts under this program. Neither in 1988, nor 1992, nor 2000, nor 2014, nor in any other remedial statute did Congress define "woman", so presumably these programs will

soon become equally available to any man who "identifies" as one.

Just as with Title IX scholarships, allowing men to take advantage of remedial programs and benefits Congress intended for women works to perpetuate the very problems these programs were intended to fix.

While *amici* are concerned that men will say that they are women for the purpose of helping themselves to benefits Congress intended for actual women, redefining "sex" to mean "gender identity" in Title IX would also affect all other federal statutes which explicitly incorporate Title IX's definition of "sex discrimination". For example, the federal government spends billions of dollars a year for "youth workforce investment activities", "adult employment and training activities", and "dislocated worker employment and training activities". 29 U.S.C. § 3181. All of these programs are subject to Title IX's nondiscrimination provisions. 29 U.S.C. § 3248(a)(1)-(2). The same is also true for Public Health Service block grants to states for general purposes (42 U.S.C. § 300w-7(a)), for mental health and substance abuse (42 U.S.C. § 300x-57(a)), for maternal and child health (42 U.S.C. § 708(a)), and a myriad of other federal programs.[20]

[20] This redefinition will also wreak havoc with many federal statistics. If a man who "identifies" as a woman is mugged, was the crime committed against a man or a woman? If a man who "identifies" as a woman is diagnosed with cancer, will the government require that this be recorded as part of female morbidity statistics?

Finally, *amici* also note that men might take advantage of the "sex" means "gender identity" definition to avoid particular obligations imposed on them, *e.g.*, selective service: "[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States . . . to present himself for and submit to registration[.]" 50 U.S.C. § 3802(a). In the event of war, no doubt demographers will be astonished by the sudden surge in the female population.

D. Erasing Women

It was not that long ago that this Court noted approvingly that married women had a limited independent legal existence apart from their husbands:

> The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband.

Mackenzie v. Hare, 239 U.S. 299, 311 (1915). Women may have escaped the bonds of such doctrines and achieved their independent legal existence, but that

status is now threatened by redefining "sex" to mean "gender identity".

Worse than enabling men to help themselves to women's bodies and women's remedial or protective programs, that redefinition poses a truly existential threat: An administrative *ukase* decreeing that there really is no such thing as a woman. When the law requires that any man who wishes (for whatever reason) to be treated as a woman *is* a woman, then "woman" (and "female") lose all meaning. With the stroke of a pen, women's existence – shaped since time immemorial by their unique and immutable biology – has been eliminated by Orwellian fiat. Women, as they have been known forever, will simply be no more.

SUMMARY OF ARGUMENT

Amici make three arguments in support of Petitioner.

First, in addition to the dictionary definitions of "sex" from when Title IX was enacted described by Petitioner (Pet. Br. 27-32), there are numerous contemporary examples of Congress, the courts and the Executive Branch all using the word "sex" to mean the physiological differences between men and women. Moreover, notwithstanding the recent efforts of the Departments of Justice and Education, all three branches have continued to do so. In fact, the Department of Justice itself has a long and well-documented history (in decisions of the Equal Employment Opportunity Commission) of arguing that the federal civil rights laws did not apply to "gender identity" discrimination by the federal

government, including *in DOJ's own employment practices*.

Second, in his concurrence below, Judge Davis erroneously cites cases in which the federal courts have extended statutory or Constitutional provisions to include "gender identity" discrimination as support for why the Respondent had "demonstrated a likelihood of success on the merits of his Title IX claim." App. 35a. Those cases provide no basis for so interpreting Title IX, because extending such protection under those laws did not necessarily infringe upon rights granted to anyone else. In contrast, extending Title IX to include "gender identity" would necessarily revoke the very rights Congress granted women in that statute.

Third, the Fourth Circuit accorded *Auer* deference to a DOE interpretation which, in turn, relied on a single previous DOE interpretation applicable only to single-sex classes, not restrooms or any other single-sex facility. However, DOE's earlier regulatory actions show that even applying the "sex" means "gender identity" doctrine to single-sex classes violated the agency's own regulations and, *a fortiori*, provides no support for extending that doctrine to restrooms or any other single-sex facility.

ARGUMENT

I. ALL THREE BRANCHES OF THE FEDERAL GOVERNMENT HAVE CONSISTENTLY USED THE WORD "SEX" TO MEAN THE PHYSIOLOGICAL DIFFERENCES BETWEEN WOMEN AND MEN.

In addition to the contemporary dictionary definitions of "sex" that focus without exception on the physiological differences between men and women (Pet. Br. 27-32), other indications from that time demonstrate what Congress meant by "sex". In 1975, Congress ordered the military to open the service academies to women. In doing so, Congress was very clear about the differences between men and women:

> [T]he Secretary of the military department concerned shall take such action as may be necessary and appropriate to insure that . . . (2) the academic and other relevant standards required for appointment, admission, training, graduation, and commissioning of female individuals shall be the same as those required for male individuals, *except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals.*

Pub. L. 94–106, § 803(a); codified at 10 U.S.C. § 4342 note (emphasis added). If "male" and "female" were simply a matter of self-identification, it would have made no sense for Congress to refer to the

"physiological differences" between them. Similarly, Petitioner gives several examples of Congress using "gender identity", *and* either "sex" or "gender", in the same statutory provisions (Pet. Br. 33-34); presumably, Congress would not use both if it intended them to mean the same thing.

Not only did Congress use "sex" to mean the binary physiological division of humans into women and men, the other branches of the federal government also regarded "sex" as physiologically determined.

Less than a year after Congress enacted Title IX, this Court noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[.]" *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In fact, throughout all of this Court's sex discrimination jurisprudence, not once has it even hinted that "sex" meant anything other than "an immutable characteristic determined solely by an accident of birth". *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 212 (1976)(Stevens, J., concurring)(sex "is an accident of birth"); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 727 (1978)(Burger, C.J., dissenting)("categorizing people on the basis of sex, the one acknowledged immutable difference between men and women"). And, most recently, this Court noted that, for two people of the same sex, "their immutable nature dictates that same-sex marriage is their only real path to this profound commitment." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594 (2015).

Similarly, while DOJ and DOE insist that "sex" means "gender identity", that does not seem to be the opinion of the Chief Executive, who has consistently used *both* "sex" *and* "gender identity" in the same sentence. In 2010, President Obama asked the Secretary of the Department of Health and Human Services to begin a rulemaking concerning rights of hospital patients, in which:

> [i]t should be made clear that designated visitors . . . should enjoy visitation privileges that are no more restrictive than those that immediate family members enjoy. You should also provide that participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, *sex,* sexual orientation*, gender identity*, or disability.

Presidential Memorandum of April 15, 2010, 75 F.R. 20511 (emphasis added).

In 2011, pursuant to his authority under 8 U.S.C. § 1182(f) to suspend entry of certain aliens into the United States, the President did just that as to:

> any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; *sex;* disability; membership in an indigenous group; language; religion; political opinion;

> national origin; ethnicity; membership in a particular social group; birth; or sexual orientation *or gender identity*, or who attempted or conspired to do so.

Presidential Proclamation No. 8697, 76 F.R. 49277 (emphasis added).

In 2012, the President formed the "Working Group on the Intersection of HIV/AIDS, Violence Against Women and Girls, and Gender-related Health Disparities", and ordered it to, *inter alia*, "provide information on . . . (iv) research and data collection needs regarding HIV/AIDS, violence against women and girls, and gender-related health disparities to help develop more comprehensive data and targeted research (*disaggregated by sex, gender, and gender identity*, where practicable)". Presidential Memorandum of March 30, 2012, 77 F.R. 20277 (emphasis added).

If, as Respondent insists, "sex" is identical to "gender identity", then there was no reason for the President to keep using both terms in his official Proclamations and Memoranda. The only reason for the President to have used both "sex" and "gender identity" is that they mean different things.

On July 21, 2014, the President issued Executive Order 13672, which amended two previous Executive Orders from 1965 and 1969. The President amended four separate provisions of Executive Order 11246 (September 24, 1965), concerning discrimination by government contractors and subcontractors, adding

"gender identity" to the prohibited categories of discrimination, each of which already included "sex".

The President also amended Executive Order 11478 (August 8, 1969), concerning discrimination in federal employment, by adding "gender identity" to the prohibited categories of discrimination that included "race, color, religion, sex, national origin, handicap, or age discrimination". Thus President Obama also did not believe that the word "sex" (and when used in the specific context of prohibited discrimination) meant "gender identity" when it was used by President Johnson in 1965 or by President Nixon in 1969.

Even other parts of the Justice Department believe that "sex" is not the same as "gender identity". For more than 30 years, the Board of Immigration Appeals has consistently described "sex" as an "immutable characteristic", beginning with the seminal case of *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985):

> [W]e interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.

The *Acosta* doctrine of "immutable characteristics" has been cited in dozens of cases reviewing BIA decisions (most recently in *Garay Reyes v. Lynch*, 842 F.3d 1125, 2016 U.S. App. LEXIS 21408, p. 9 (9th Cir. 2016)), and BIA's position that "sex" is an "immutable characteristic" has apparently never been questioned.[21]

Nor is the Bureau of Immigration Appeals the only part of the Justice Department that disagrees with the position DOJ advanced below. For decades, DOJ insisted that discrimination by the federal government against transgendered individuals was *not* discrimination on the basis of sex. As recently as 2011, the Department of Justice maintained, *as to its own employment practices,* that claims of discrimination on the basis of "gender identity" were simply not cognizable under the prohibition of discrimination on the basis of "sex".

DOJ's position was rejected only in *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012), which expressly stated that it was overruling a long line of cases affirming the government's view that discrimination on the basis of "gender identity" did not fall within the meaning of discrimination on the basis of sex. *Id.* at 25, n.16, citing, *inter alia*, *Kowalczyk v. Department of Veterans Affairs*, Appeal No. 01942053, p. 4 (EEOC December 27, 1994)("The

[21] At other times, BIA refers to "sex" simply as an "innate" characteristic, *e.g.,* "innate characteristics such as sex or family relationship". *Matter of C-A-,* 23 I. & N. Dec. 951, 959 (BIA 2006).

Commission finds that the agency correctly concluded that appellant's allegation of discrimination based on her acquired sex (transsexualism) is not a basis protected under Title VII and therefore, the final agency decision properly dismissed this basis") and *Cassoni v. United States Postal Service*, Appeal No. 01840104, p. 4 (EEOC September 28, 1984) (rejecting Title VII claim of "gender identity" sex discrimination because: "Absent evidence of Congressional intent to the contrary, and in light of the aforementioned case law, this Commission finds that the phrase 'discrimination because of sex' must be interpreted in accordance with its plain meaning").

In fact, it was not until 2014 that Attorney General Holder announced that he had "determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity". In that same document he candidly admitted "that Congress may not have had such claims in mind when it enacted Title VII" in 1964. *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, December 15, 2014, p. 2 (available at https://www.justice.gov/file/188671/download).

In sum, there is no credible basis for concluding that the word "sex" meant anything but the physiological differences between men and women when Congress enacted Title IX in 1972 or when the Department of Health, Education and Welfare ("HEW") issued the Title IX regulations in 1975.

II. EXTENDING OTHER LAWS TO REMEDY "GENDER IDENTITY" DISCRIMINATION PROVIDES NO BASIS FOR DOING SO UNDER TITLE IX.

Judge Davis' concurring opinion below cited four decisions in which other statutes or Constitutional protections had been applied to "gender identity" discrimination to support his conclusion that Respondent would "succeed on the merits of his Title IX claim." App. 35a. But a critical difference between Title IX and the statutes and Constitutional provisions at issue in those cases makes them inapposite: Unlike the harms that would flow from expanding Title IX, extending protection on the basis of "gender identity" to those plaintiffs did not violate anyone else's rights under those laws.

Restoring a transgender plaintiff's position with the Georgia General Assembly's Office of Legislative Counsel because of an Equal Protection Clause violation (*Glenn v. Brumby,* 663 F.3d 1312, 1316-19 (11th Cir. 2011)) did not infringe the Equal Protection rights of anyone else. Holding that being terminated by the Fire Department on the basis of transgender identity was cognizable under Title VII (*Smith v. City of Salem,* 378 F.3d 566, 573-75 (6th Cir. 2004)) would not violate anyone else's Title VII rights. Deciding that refusal to give a cross-dressing man a loan application was discrimination "on the basis of sex" under the Equal Credit Opportunity Act ("ECOA") (*Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000)) did not violate anyone else's ECOA rights. And applying the Gender Motivated Violence

Act ("GMVA") to an attempted rape of a transgender prisoner by a prison guard (*Schwenk v. Hartford,* 204 F.3d 1187, 1201-02 (9th Cir. 2000)) did not infringe anyone else's rights under the GMVA.

But Title IX is different. Congress enacted Title IX as a remedial statute for the benefit of women, and granting Title IX rights to men who claim they are women *necessarily violates* the rights Congress gave women in this law. In contrast, in each of the cited cases, recognizing rights and providing remedies under the various statutory and Constitutional provisions did not infringe on any rights Congress or the Founders extended to anyone else.

III. THE FERG-CADIMA LETTER IS NOT ENTITLED TO *AUER* DEFERENCE BECAUSE IT RELIED ON A PREVIOUS AGENCY INTERPRETATION THAT VIOLATED THE AGENCY'S OWN REGULATIONS.

The Fourth Circuit's decision rested entirely on the deference it gave DOE's interpretation of "sex" (the "Ferg-Cadima Letter") under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). As Petitioner notes (Pet. Br. 14), the *only* citation in the Ferg-Cadima Letter regarding DOE's position on restroom access is to an earlier DOE document entitled, "*Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*" (available at http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf)(the "Classroom Q&A").

As its title suggests, the Classroom Q&A is limited to consideration of single-sex classrooms, and contains no discussion whatsoever of restrooms (or locker rooms, dormitories, or showers).

Not only was the Ferg-Cadima letter unjustified bootstrapping, but digging a little deeper it becomes clear that the Classroom Q&A itself is flatly inconsistent with the regulation it purports to interpret. Although DOE's regulations explicitly allow for certain types of sex-segregated classes, including "[c]lasses or portions of classes in elementary and secondary schools that deal primarily with human sexuality" (34 C.F.R. § 106.34(a)(3)), the Classroom Q&A states that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of . . . single-sex classes." Classroom Q&A p. 25. The Classroom Q&A fails to cite *any* source or authority whatsoever for this policy statement, and the regulation's actual history shows that the policy contradicts it.

There was no provision concerning single-sex classes in HEW's proposed Title IX regulations. 39 F. R. 22228 (June 20, 1974). However, three weeks later HEW published a supplemental notice from Secretary Weinberger that is worth quoting at length:

> Immediately after the text of the proposed regulation was made public on June 18, 1974, the Department received numerous inquiries as to whether § 86.-34(a) permitted elementary and secondary schools to present

> separately to boys and girls brief presentations in the area of sex education. Although the language of the proposed regulation precludes such separation, I had not intended it to do so in the area of sex education. . . . In view of personal and parental attitudes concerning the subject, and because rights of privacy on these matters, desired by both students and their parents may well be invaded by requiring mixed classes on sex education, school administrators, for reasons not applicable to other subjects, might properly decide that some of or all of such sessions be conducted separately for boys and girls. . . . I hereby give notice that I propose to insert in the final regulation, when published, a proviso at the end of the present text of proposed § 86.34 to read as follows . . . .

39 F. R. 25667 (July 12, 1974). The Classroom Q&A ignores Secretary Weinberger's remarkable personal acknowledgment of the "numerous inquiries" made about separate sex-education classes, and his statements that privacy rights that "may well be invaded" by not allowing such sex-segregated classes for "boys and girls".

Following publication of HEW's final regulations, Congress held six days of hearings on them; according to the chair of the relevant committee, their purpose was to review the regulations "solely to see if they are consistent with the law and with the intent of the Congress in enacting the law. . . . solely to see if the

regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood." *Sex Discrimination Regulations. Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, Ninety-Fourth Congress, First Session* (available at http://eric.ed.gov/?id=ED118012), p. 1.

Not surprisingly, Secretary Weinberger's testimony touched on the issue of sex-segregated classes: "[C]lasses in health education, if offered, may not be conducted separately on the basis of sex, but the final regulation allows separate sessions for boys and girls at the elementary and secondary levels during times when the materials and discussion deal exclusivly [*sic*] with human sexuality". *Id.* p. 439. In order to show public support for the regulations, Secretary Weinberger placed into the record numerous editorials expressing approval; these too, addressed the issue of single-sex classes, *e.g.*, "One particularly controversial point, the implication that since all classes must be open to both sexes this meant sex education, too, was quickly clarified by HEW as a mistake; in the latest version, sex-education classes are exempted." *Louisville Courier-Journal*, *id.* p. 458.

An agency's interpretation of even its own regulations does not get deference if an "alternative reading is compelled by the regulation's plain language *or by other indications of the Secretary's intent at the time of the regulation's promulgation*." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)(emphasis added). Secretary Weinberger's personal supplemental notice

concerning single-sex classes and his Congressional testimony show that neither he nor Congress (nor the public) thought that there was any ambiguity in the single-sex class regulation or, indeed, with the word "sex".

DOE's most recent regulatory action concerning single-sex classes further undermines the Classroom Q&A. In 2006, DOE amended its Title IX regulations "to clarify and modify" requirements for "single-sex schools, classes and extracurricular activities", but despite changing the very regulation concerning sexual education classes (34 C.F.R. § 106.34(a)(3)), DOE did not say a word about "gender" or "gender identity". 71 F. R. 62530 n.6 (October 25, 2006).

DOE introduced its redefinition of "sex" to mean "gender identity" in addressing single-sex classes in the Classroom Q&A; the Ferg-Cadima Letter then bootstrapped off that to extend the doctrine to restrooms, and then when the decision below deferred to the Ferg-Cadima Letter, DOE issued the May 13 Guidance extending the "sex" means "gender identity" doctrine to showers, locker rooms, dormitories, and beyond. It bears repeating that DOE and DOJ justify creating this revolutionary social policy without a single public notice or opportunity for comment, on the grounds that they were doing nothing more than "clarifying" the meaning of the word "sex".

CONCLUSION

For the reasons stated herein, the Court should reverse the decision below and vacate the preliminary injunction.

Respectfully submitted,

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