No. 15-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.G., by his next friend and mother DEIRDRE GRIMM,

Plaintiff-Appellant

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee

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

AMICUS CURIAE BRIEF OF THE STATES OF SOUTH CAROLINA, WEST VIRGINIA, ARIZONA AND MISSISSIPPI AND THE GOVERNORS OF MAINE AND NORTH CAROLINA IN SUPPORT OF DEFENDANT-APPELLEE

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This brief is filed pursuant to Rule 29(a), FRAP, in support of Appellee Gloucester County School Board and supports affirmance of the District Court decision appealed in this case. The States of South Carolina, West Virginia, Arizona and Mississippi and the Governors of the States of Maine and North Carolina that join in this brief, share an interest in maintaining control of their schools and ensuring that they are not required to follow a United States Department of Education interpretation of its regulation that is contrary to Title IX.

INTRODUCTION AND SUMMARY OF ARGUMENT

As Justice Kennedy has observed, control of our schools is "one of the most traditional areas of state concern . . . ." It is also, he added, "one of the most sensitive areas of human affairs." Federal control of our schools is "contrary to our traditions . . . ." *Davis , as Next Friend of Lashonda D. v. Monroe County Bd. of Ed.*, 526 U.S. 629, 658 (1999). (Kennedy, J., dissenting).

G.G. was born a baby girl. G.G. has two X chromosomes, not an X and a Y chromosome. It is also undisputed that G.G. has the female sexual and reproductive organs, and lacks the male sexual and reproductive organs. In short, there is no disagreement that G.G. is biologically of the female sex.

That simple truth suffices to resolve this case. Title IX of the Education Amendments of 1972 forbids disparate treatment only if it is "on the basis of sex." 20 U.S.C. § 1681(a). The 1975 regulation expressly authorizes "provid[ing] separate toilet, locker room, and shower facilities on the basis of sex." 33 C.F.R. § 106.33. In 1972, 1975, and today, sex is a biological reality, unlike subjective or cultural constructions of gender or gender identity. Moreover, because Congress enacted Title IX under its Spending Clause authority, courts must apply a clear statement requirement; but there is certainly no clear statement that the law extends beyond discrimination based on biological sex. To hold otherwise disregards fundamental principles of federalism.

Under the law, the Gloucester County School Board need only allow G.G. to use the same facilities as other biological girls. It has gone further than the law requires in offering additional options, such as multiple single-stall, unisex restrooms.

The government's belated efforts to invert the meaning of Title IX and its regulation merits no deference. The government wrongly reads "sex" to mean solely gender identity, not sex; whenever an individual reports a gender identity at odds with his or her biological sex, gender trumps sex. Such a reading flatly conflicts with the statute and regulation, has never been enacted as a regulation, and is unworthy of deference. Interpretive guidance can at most put a gloss on a

statute or regulation, not subvert it. At most, gender can combine with differential treatment of the sexes to prove sex discrimination, but gender alone cannot make out a Title IX violation where there is no disparate treatment based on biological sex.

Nor do cases discussing sex stereotypes, such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), aid appellant. If G.G. had been excluded from the girls' bathroom because G.G. looked, acted, or dressed like a boy, G.G. would be treated differently from other girls. There, the violation of the sex stereotype would trigger a sex-discrimination claim. Here, by contrast, G.G. is being excluded from the boys' bathroom not because of any stereotype about how G.G. should look, act, or dress, but simply because G.G. is not of the male sex. Excluding G.G. from the boys' bathroom falls squarely within the regulatory safe harbor for single-sex bathrooms.

Moreover, the government undercuts its entire case by conceding the relevance of historical sex distinctions in bathrooms. It notes "that the mere act of providing separate restroom facilities does not violate Title IX . . . because such segregation does not disadvantage or stigmatize any student but simply comports with a historical practice when using multi-user restroom facilities outside the home." U.S. Br. 22 n.8. But that concession resolves this case. Here, the requirement that girls and boys use the restroom corresponding to each one's

biological sex "does not disadvantage or stigmatize any student," and the relevant "historical practice" requires using the bathroom of G.G.'s biological sex, the female sex.

Appellant's constitutional claims fare no better. Notably, the government declines to support appellant's constitutional claims. The Fourteenth Amendment's Equal Protection Clause forbids sex discrimination that "create[s] or perpetuate[s] the legal, social, and economic inferiority of women," not rules carefully tailored to the "enduring" "[p]hysical differences between men and women." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Single-sex bathrooms in no way "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* They simply reflect urinary, sexual, and similar biological differences between the sexes. As Justice Kennedy wrote for the Court, "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classifications of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real." *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

ARGUMENT

I

TITLE IX APPLIES ONLY TO BIOLOGICAL SEX, NOT TO GENDER IDENTITY AT ODDS WITH ONE'S BIOLOGICAL SEX

What is most noteworthy about both appellant's and the government's briefs is the absence of traditional statutory exegesis, grounded in the text. Dictionary definitions and decisions of this and other circuits contradict appellant's and the government's effort to transform the statute from one addressing biological sex into a gender-identity measure. And the clear-statement canon for interpreting Spending Clause legislation reinforces the narrowness of the statute's scope.

The government's unenacted guidance documents cannot trump the unambiguous term "on the basis of sex" in the statute and regulation. And the government concedes that the long tradition of single-sex restrooms is valid and nondiscriminatory, undermining its entire case. Appellant's and the government's novel position is quite literally unprecedented; no court has struck down single-sex bathrooms, and any such social revolution would have to come from the democratically elected legislature. Title IX forbids disparate treatment of the biological sexes, not subjective or cultural expressions of gender at odds with one's biological sex.

A

The Text of the Statute and Regulation: "Sex" Is a Biological Reality, Not a Subjective or Cultural Construct

Though appellant and the government avoid focusing on the text, traditional statutory construction begins with the words of the statute. The key phrase at issue in Title IX, 20 U.S.C. § 1681(a), and 33 C.F.R. § 106.33 is "on the basis of sex," and the key question is whether "sex" is a biological category or a subjective or cultural one. It is the former, not the latter.

The two leading dictionaries at the time of Title IX's enactment make this clear. The *Oxford English Dictionary* defines "sex" as "The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." 9 OXFORD ENGLISH DICTIONARY 578 (1961). The "organs of sex" are "the reproductive organs in sexed animals or plants." Id. "Sex-cell[s]" are either male (sperm) or female (ova). *Id*. Humans, animals, and plants are all divided into male and female categories based upon their biology (except in the few species that reproduce asexually). *Id*. at 577-78. Thus, sexual intercourse or sexual relations are paradigmatically the coming together of the sexual organs of the male and the female sexes in the natural process of reproduction. The transitive verb "to sex" means "to determine the sex of, by

anatomical examination." *Id*. at 578. Chick sexers, for example, examine newly hatched chicks to differentiate biological males from females, separating future roosters from future hens.

Likewise, Webster's Second defines "sex" in terms of "the distinctive function of the male or female in reproduction." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabridged 1939). The definition goes on to discuss the complementary roles of spermatozoa and ova and the two types of sex chromosomes, XX and XY. Id. And while today people often use the term "gender" loosely to mean "sex," Webster's Second notes that the latter is a biological fact while the former is a linguistic, social, or cultural artifact. "SEX refers to physiological distinctions; GENDER, to distinctions in grammar." Id.

That is precisely how this Court has understood the distinction between the two terms. "[G]ender connotes cultural or attitudinal characteristics distinctive to the sexes, as opposed to their physical characteristics." *Hopkins v. Baltimore Gas & Elec Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996). And the American Psychological Association defines "sex" as "a person's biological status" based on indicators such as "sex chromosomes, gonads, internal reproductive organs, and external genitalia." JA 59.

Applying this straightforward, biological understanding of "sex," the Eighth and Tenth Circuits have rejected Title VII sex-discrimination claims by biological

males with male genitalia who sought to use women's restrooms. *Etsitty v. Utah* Transit Auth., 502 F.3d 1215, 1219, 1221 (10th Cir. 2007); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748-50 (8th Cir. 1982) (per curiam). Other circuits likewise reject applying Title VII to transgendered persons. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085-87 (7th Cir. 1984). As the Seventh Circuit explained, it is not for judges to broaden statutes beyond the plain, traditional definition of "sex": "[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, then new definition must come from Congress." *Ulane*, 742 F.2d at 1087.

B

Because Title IX Is Spending Clause Legislation, Courts Must Apply a Clear-Statement Requirement; But the Law Contains No Clear Statement That It Extends Beyond Biological Sex

If there were any question about the meaning of the word "sex," it would be resolved by the clear-statement requirement for Spending Clause legislation. Congress enacted Title IX pursuant to its power under the Spending Clause. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. supra, at, 640 (1999). As was stated in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), the plain statement rule is "an acknowledgment that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." When Congress wishes to attach strings to federal funding by passing laws under

the Spending Clause, it must give recipients ample notice of the restrictions it is imposing when they choose to accept the funds.

Thus, the Supreme Court applies a clear-statement canon of statutory interpretation to Title IX: "In interpreting language in spending legislation, we thus 'insis[t] that Congress speak with a clear voice.' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" *Davis,* . (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (alterations in *Davis*)).

That clear-statement canon reinforces the plain import of the statutory text, limiting it to biological sex. It also distinguishes Title IX from Title VII, which was enacted pursuant to the Commerce Clause, Equal Protection Clause, and Fifteenth Amendment, not the Spending Clause. Title IX's scope is narrower than that of Title VII, not as broad. Appellant's and the government's repeated citations of Title VII cases are thus inapposite.

C

The Department of Education's 2014-2015 Guidance Contradicts the Statute and Regulation and Merits No Deference

The statute says nothing about gender or gender identity. Nor does 33 C.F.R. § 106.33, which expressly authorizes sex-segregated restrooms and locker rooms.

Appellant and the government instead rely on a 2015 letter to school districts, which in turn rested on a 2014 question-and-answer document, which redefined "on the basis of sex" to include gender identity. Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary of Policy, Office of Civil Rights, U.S. Dep't of Ed. (Jan. 7, 2015); Office of Civil Rights, U.S. Dep't of Ed., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

Neither document went through notice-and-comment rulemaking or was otherwise adopted as a regulation, so there is no argument for Chevron deference. Moreover, the question-and-answer document was labeled a "significant guidance document," meaning that it was "non-binding [in] nature" and should not be "improperly treated as [imposing] legally binding requirements." Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3433, 3435 (Jan. 25, 2007). "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

Nor is there any occasion for *Auer v Robbins*, 519 U.S 452 (1997) deference, which is limited to "an agency's interpretation of its own ambiguous regulation."

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012). "The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Christensen*, 529 U.S. at 588.

Here, the agency has redefined the key statutory term "sex," not just a regulation. The government claims (at 25) that the meaning of "students of one sex" and "students of the other sex" in the regulation is ambiguous and requires interpretation, but there is no ambiguity that leaves room for agency interpretation. Far from putting a gloss on an unclear term, the government has inverted the central meaning of the central term in the statute as well as the regulation. In any event, the clear-statement canon for Spending Clause legislation leaves no room for an agency to read any ambiguities broadly.

Even if the canon alone were not dispositive, a casual glance at the Oxford English Dictionary or Webster's Second would resolve any supposed ambiguity. "Students of one sex" are those of the male sex, who have male reproductive organs, can urinate into urinals, and thus use boys' bathrooms; students of the other sex are those of the female sex, who lack male reproductive organs, must urinate sitting down, and thus use girls' bathrooms. G.G. is treated the same as any other biological female, not differently on the basis of sex.

D

While Gender Characteristics That Correlate with Sex May Give Rise to Sex-Discrimination Claims, Gender Identity at Odds with Biological Sex Cannot Invert the Meaning of the Statutory Term "Sex"

Appellant's and the government's brief core claim seems to be that because gender discrimination is sometimes actionable as sex discrimination, any distinctions that touch on sex amount to actionable gender discrimination regardless of biological sex. Appellant Br. 20-22; U.S. Br. 9-14. Both cite Title VII cases finding actionable discrimination based upon stereotypes about how a member of a particular sex should look, act, or behave. In particular, both rely on *Price Waterhouse*, in which the Supreme Court allowed a Title VII suit to proceed by a woman who was criticized as insufficiently feminine in her "macho" attitude, dress, demeanor, and appearance. Appellant Br. 23-24 (citing *Price Waterhouse*, 490 at 235 (1989) (plurality opinion)); U.S. Br. 8, 10 (same, citing 490 U.S. at 235, 242 (plurality)).

Contrary to these suggestions, *Price Waterhouse* nowhere redefined the biological category of sex. Assume *arguendo* that Title VII case law applies fully to Title IX, even though, as Spending Clause legislation, Title IX must be interpreted more narrowly. Assume arguendo that appellant and the government have not overreached in treating a plurality opinion as if it were the controlling opinion of the Court. And assume arguendo that even though *Price Waterhouse*

was a case about the standard of proof and causation required, the plurality's asides about what constitutes discrimination can be treated as reasoning rather than dictum. Even if one grants these stretches, their conclusion does not follow.

The most that *Price Waterhouse* suggested was that "sex-based considerations" can prove actionable discrimination under Title VII. 490 U.S. at 235 (quoted in U.S. Br. 8). In other words, biological sex can be the bull's-eye of the target, but gender characteristics may correlate with sex, forming concentric circles around the core of biological sex. Women who are treated differently from men because they do not look, act, or behave like women are "supposed to" behave may claim discrimination. These victims of discrimination have been put into social or cultural boxes that men would not have been put into, simply because the women are biologically female. In that case, sex distinctions and gender distinctions go hand in hand, reinforcing each other.

Importantly, all of the judicial decisions addressing transgender plaintiffs cited by appellant and the government fit this model. Appellant Br. 21-25; U.S. Br. 10-14. All of the judicial decisions in which transgender plaintiffs have been allowed to pursue discrimination claims have involved penalizing the plaintiff for failing to look, act, or dress the way "real" men or women are culturally expected to. Most of these cases did not even mention bathroom usage, and none of them turned on

bathroom-related claims.[1] The parallel to these cases would be if G.G. had been forbidden to use the girls' restroom because G.G. looked, dressed, or acted like a

[1] *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (affirming finding of discriminatory firing where transgender plaintiff was told "that a male in women's clothing is 'unnatural'"; restroom use referenced but as a hypothetical, and restrooms were single occupancy); *Barnes v. City of Cincinnati*, 401 F.3d 729, 734-35 (6th Cir. 2005) (finding discriminatory demotion of police officer based on wearing lipstick, makeup, and manicure; no mention of bathroom usage); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (allowing transgender firefighter's discrimination suit to proceed based on "co-workers[] questioning him about his appearance and commenting that his appearance and mannerisms were not 'masculine enough'"; no mention of bathroom usage); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000) (allowing discrimination suit to proceed where loan officer told transgender loan applicant "that she would not provide him with a loan application until he 'went home and changed'" out of "traditionally feminine attire"; no mention of bathroom usage); *Schwenk v. Hartford*, 204 F.3d 1187, 1194 (9th Cir. 2000) (allowing transgender prisoner to pursue claim under Gender Motivated Violence Act based on guard's sexual assault; the word "bathroom" is used once but not in relation to a transgender issue); *United States v. Southeastern Okla. State Univ.*, No. 5:15-CV-324, 2015 WL 4606079, at **1-2** (W.D. Okla. July 10, 2015) (declining to dismiss Title VII employment-discrimination suit based on denying tenure to transgender professor; no mention of bathroom usage); *Rumble v. Fairview Health Services*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at 3-6 (D. Minn. Mar. 16, 2015) (denying motion to dismiss where alleged discrimination consisted of hostile treatment by emergency room obstetrician/gynecologist; no mention of bathroom usage); *Lewis v. High Point Regional Health Sys.*, 79 F. Supp. 3d 588, 589-90 (E.D.N.C. 2015) (denying motion to dismiss where job applicant was "harassed and ridiculed [during a job interview] about her status as a transsexual"; no mention of bathroom usage); *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 782-83 (D. Md. 2014) (denying motion to dismiss

boy. In that case, G.G. would have been pigeonholed based on gender stereotypes about how a "real" girl was supposed to look, dress, or behave. Cf. U.S. Br. 14 ("Treating a student adversely because the sex assigned to him at birth does not match his gender identity is literally discrimination 'on the basis of sex.'").

Here, however, G.G. is treated no differently from any other girl on account of biological sex. G.G. is being excluded from the boys' bathroom not because of any stereotype about how G.G. should look, act, or dress, nor because of G.G.'s gender identity, but simply because G.G. is not of the male sex. Regardless of gender identity, no female may use the boys' restroom. G.G. lacks a male reproductive organ, and boys using urinals are not legally compelled to be in the presence of biological females when the boys must expose their male reproductive organs to urinate. That falls squarely within the regulatory safe harbor for single-sex bathrooms.

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claim that police department declined to hire transgender plaintiff as volunteer patrolman; no mention of bathroom usage); *Muir v. Allied Integration Tech.*, No. DKC 13-0808, 2013 WL 6200178, at *2, *10 (D. Md. Nov. 26, 2013) (denying motions to dismiss and for summary judgment based on plaintiff's termination allegedly for painting fingernails and otherwise looking like a female; no mention of bathroom usage); *Schroer v. Billington*, 577 F. Supp. 2d 293, 295-99 (D.D.C. 2008) (finding discrimination under Title VII based on refusal to hire after applicant disclosed plans to conduct sex-change surgery; no mention of bathroom usage); *see also Hart v. Lew*, 973 F. Supp. 2d 561, 581 (D. Md. 2013) (relying primarily on much more than bathroom usage--primarily disciplinary actions, negative performance reviews, denial of sick leave, and adverse comments, which persisted after sex-change surgery).

At root, appellant's and the government's claim is that gender identity trumps sex, so that a biological girl is entitled to use the boys' restroom. But while gender might broaden or reinforce the statutory term "sex," it cannot invert or contradict it, as the district court correctly held. Dist. Ct. Op. 12-15. Without differential treatment rooted in G.G.'s sex, gender identity alone has no toehold in the language of Title IX, particularly as reinforced by the Title IX clear-statement canon.

When one strips their inapposite case citations away, one sees that appellant's and the government's position is novel, indeed radical. Neither one can muster a single judicial decision forcing schools to admit biological girls to boys' bathrooms, or biological boys to girls' bathrooms. The most they can cite is a single EEOC adjudication earlier this year, which was decided under Title VII and deserves no more deference than the other nonbinding regulatory guidance. U.S. Br. 12. Their position is quite literally unprecedented.

This Court should hesitate long before becoming the first court ever, anywhere in the United States, to force schools to admit adolescent biological females into boys' bathrooms and locker rooms, and adolescent biological males into girls' bathrooms and locker rooms. If such a social revolution is to be wrought, it must come from the democratically elected legislature, not the courts or the executive. As the Seventh Circuit rightly put it, "if the term 'sex' as it is used in Title VII [or,

a fortiori, Title IX] is to mean more than biological male or biological female, then the new definition must come from Congress." *Ulane*, 742 F.2d at 1087.

E

The Government's Concession to Historical Restroom Practice Undercuts Its Entire Case, Recognizing the Reasonable, Nondiscriminatory Practice of Reserving Separate Restrooms for Each Biological Sex

Appellant and the government seek to abrogate the longstanding practice of requiring boys and girls to use the restrooms and locker rooms that correspond to each one's biological sex. They cite no evidence of any exception to this tradition for transgendered teenagers because there is no such evidence.

Yet appellant does not challenge the general reservation of restrooms for the use of males and females respectively. Appellant's Br. 31. And the government's rationale for allowing such restrooms vitiates its entire case:

> G.G. does not challenge the existence of male and female restrooms, Appellant's Br. 31, and for good reason. [The Department of Education] has concluded that the mere act of providing separate restroom facilities for males and females does not violate Title IX (as long as the facilities are comparable), see 34 C.F.R. 106.33, which is reasonable because such segregation does not disadvantage or stigmatize any student but simply comports with a historical practice when using multi-user restroom facilities outside the home.

U.S. Br. 22 n.8 (emphasis added). The government's rationale in this footnote undercuts its and appellant's entire case. Providing single-sex restrooms "does not disadvantage or stigmatize any student, but simply comports with a historical

practice." *Id*. Appellant's subjective self-report of feeling stigmatized, which the district court found appeared to have been drafted by appellant's lawyers, cannot unilaterally invalidate a neutral, traditional restroom policy. Dist. Ct. Op. 21-26. Moreover, the Gloucester County School Board has gone out of its way to accommodate G.G., installing three single-stall unisex restrooms in addition to the restroom in the nurse's office. *Id.* at 19, 25. At least one of these restrooms is near the boys' and girls' bathrooms and so comparably convenient. *Id*. at 19.

Finally, the district court noted the grave logical inconsistency in appellant's argument. Appellant asks this Court to give dispositive weight to appellant's own, basically unsubstantiated feelings and desire to use the boys' restroom. Yet appellant simultaneously disregards the feelings of and invasion of the privacy of the many more boys who would be forced to perform intimate bodily functions in the presence and possibly view of a biological female. Dist. Ct. Opp. 22-26. Indeed, appellant claims that G.G. should not have to use the single-stall restrooms, but then insists that all the boys whose privacy G.G. would invade must use them instead. Appellant's Br. 42. Nothing in Title IX, let alone its single-sex bathroom regulation, compels such a result.

II

THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE DOES NOT FORCE SCHOOLS TO OPEN BOYS' RESTROOMS OR LOCKER ROOMS TO BIOLOGICAL FEMALES

Appellant devotes only four pages to the Equal Protection Clause but does not cite a single judicial decision finding that single-sex restrooms amount to sex discrimination. Br. 38-42. It is noteworthy that the government declines even to argue the Equal Protection Clause issue, recognizing the lack of any basis for doing so.

Requiring each sex to use its own restroom depends not on any inaccurate or degrading stereotypes about women's inferiority, but on the basic biological differences between the sexes, such as boys' exposure of their male reproductive organs to use urinals, out of the presence of females. The Constitution does not require admitting females to boys' rooms.

Appellant's claim of a constitutional violation is exceedingly thin. The Supreme Court authority cited does not support appellant's claim but rather undercuts it.[2] Equal protection forbids relying on "fixed notions concerning the

[2] Indeed, appellant cites some authority that has nothing to do with sex differences but rather *disability* discrimination or racial integration. Appellant's Br. 41 (citing *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-75 (2001) (holding that Eleventh Amendment bars recovering money damages against a state under the Americans with Disabilities Act) and *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (striking down racially

roles and abilities of males and females," such as that men or women "are presumed to suffer from an inherent handicap or to be innately inferior." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). Differences in treatment "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." United States v. Virginia, 518 U.S. at 533 (1996). In short, the Equal Protection Clause forbids discriminating in favor of one sex or against the other based on inaccurate, degrading stereotypes about women's inferiority, abilities, or the like.

These same authorities, however, distinguish legitimate physical classifications from illegitimate stereotypes. Even as it struck down the exclusion of women from the Virginia Military Institute, the Supreme Court preserved room for treating the sexes differently where warranted by biology. It noted that while racial and nationality classifications may not rest on differences among races or nationalities, "[p]hysical differences between men and women, however, are enduring, [and] the two sexes are not fungible." *United States v. Virginia*, 518 U.S. at 533 (internal quotation marks omitted). States may act based on these "inherent differences" so long as they do not "denigrat[e] the members of either

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discriminatory school integration plan)). Justice Kennedy's views on biological differences between the sexes is discussed not in *Garrett* but in *Nguyen*, addressed in the text of this brief.

sex" or "create or perpetuate the legal, social, and economic inferiority of women." Id. at 533-34.

The sexes are genuinely different in their reproductive anatomy and biology. Thus, the Court held in *Nguyen v. INS*, Congress may legitimately enact differential requirements for proof of citizenship depending on whether a child was born of a citizen mother or a citizen father. 533 U.S. at 73. In the former case, parentage is obvious, and the child develops a bond with the citizen mother in utero and at birth; in the latter, parentage may not be obvious and there may be no development of a bond. Id. at 62-69. The differential treatment does not violate equal protection because it "takes into account a biological difference between the parents." Id. at 64. In his opinion for the Court, Justice Kennedy made it abundantly clear that differential treatment of the sexes is legitimate when it is rooted in the biology of reproduction, not stereotypes:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73. The differences in urinary biology, rooted in the reproductive organs specific to each sex, are no less real and no more rooted in stereotype than are those rooted in the birth process. Just as equal protection permits gestation and birth-based classifications, so too it permits single-sex restrooms, which neither stigmatize nor disrespect nor prejudice either sex.

Indeed, this Court distinguished United States v. Virginia from single-sex restrooms on this very ground. "When, however, a gender classification is justified by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). "The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different." Id.

This Court's opinion in *Faulkner* forecloses appellant's argument. Single-sex restrooms are the paradigmatic example, invoked by this Court, of legitimate sex classifications. There is no stigma or stereotype involved, and the mixing of the sexes would tread upon entirely legitimate "privacy concerns" of each sex. Id. Though appellant (at 39) seeks to evade this logic by claiming that the policy excluding G.G. is new, it is as traditional and well-settled as public restrooms

themselves. What is novel is appellant's effort to use gender identity to trump the biological reality of G.G.'s female sex. There is no authority for twisting equal protection to force schools to ignore the biology of urination and the privacy of adolescent boys' reproductive organs.

CONCLUSION

For the foregoing reasons the amici states respectfully submit that the foregoing reasons support affirming the District Court decision.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-2056 **Caption:** G.G. by Grimm v. Gloucester County School Board

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(s) James Emory Smith, Jr.

Attorney for Amicus Curiae State of SC

Dated: November 30, 2015

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: State of South Carolina

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

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