# GENDER IDENTITY AND THE LAW
# 2021 AUTHORS' UPDATE
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This update is free of charge in courses requiring the associated textbook.

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## CHAPTER 3 ANTI-"CROSS-DRESSING" LAWS

**Insert the following before final paragraph on p.97:**

On February 3, 2021, New York Governor Andrew Cuomo signed Senate Bill 1351, thereby repealing New York State's loitering for purposes of prostitution law or "walking while trans ban." The legislation repealed New York Penal Law section 250.37, which explicitly prohibited "loitering for the purpose of engaging in a prostitution offense," and amended section 240.37, which deals with affirmative defenses for prostitution. The bill received overwhelming support; the senate approved it 44 to 16, and the assembly passed the repeal by vote of 105 to 44. More than 90 New York organizations, as well as others including the Human Rights Campaign,had spoken out against the statute. The repeal was also supported by many district attorneys, including Nassau County DA Madeline Singas and Brooklyn DA Eric Gonzalez, whose office stopped prosecuting violations of the law even prior to its repeal. Despite its record of opposing criminal justice reform, the District Attorneys Association of the State of New York supported the legislation, saying that the loitering law had led to "harassment and unjust arrests." Senate Bill 1351 was not derailed by Republicans' efforts calling it "Spitzer's Law" after the disgraced former governor and arguing that it showed the Democratic majority intended to legalize prostitution. These developments and background thereto are covered in Sammy Gibbons, *New York Legislature Repeals "Walking While Trans" Loitering Law*, THE JOURNAL NEWS (Jan. 29, 2021), at https://www.lohud.com/story/news/2021/01/29/new-york-expected-repeal-walking-while-trans-loitering-law/4311171001/ (last visited July 22, 2021); Bill Mahoney, *Legislature Votes to Repeal Law Against Loitering for Purpose of Prostitution*, Politico (Feb. 4, 2021), at https://www.politico.com/news/2021/02/04/legislature-votes-to-repeal-law-against-loitering-for- purpose-of-prostitution-465849 (last visited July 22, 2021); and NYCLU/ACLU of New York, *Legislative Memo: Loitering Repeal* (n.d.), at https://www.nyclu.org/en/legislation/legislative- memo-loitering-repeal (last visited July 22, 2021).

## CHAPTER 4 YOUTH IN OUT-OF-HOME CARE

**In the first line on p.109:**

Replace the citation to CAL. WELF. & INST. CODE § 160013 with CAL. WELF. & INST. CODE §16013.

# CHAPTER 5 EMPLOYEE RIGHTS UNDER CIVIL RIGHTS LAWS AND THE CONSTITUTION

**Insert at the end of p.313:**

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## Note on *Bostock*'s First Year

Lower courts have made significant rulings relying on *Bostock* in the year since the Supreme Court decided that landmark case. In addition to cases under Title VII, they have considered *Bostock* in cases involving equal protection, school athletics, housing, healthcare, and the interpretation of state statutes.

*Title VII*

In the Title VII arena, courts have used *Bostock* to understand but-for causation, the *McDonnell Douglas* burden shifting doctrine, and discrimination in spousal benefits. In *Peterson v. West TN Expediting, Inc.*, No. 20-5845, ___ Fed. Appx. ___, 2021 WL 1625226, at *2 (6th Cir. Apr. 27, 2021), the Sixth Circuit Court of Appeals cited *Bostock* in holding that a defendant's merely having non-discriminatory reasons for an adverse employment action was irrelevant where the plaintiff claimed that another, unlawful factor motivated the action, using the more expansive understanding of but-for causation set out in *Bostock*.

The Fifth Circuit Court of Appeals, by contrast, in *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595 (5th Cir. 2021), rejected the argument that *Bostock* created a more expansive understanding of causation than had previously prevailed; *Bostock* "did not alter the meaning ofdiscrimination itself." And so the court did not think that *Bostock* provided the plaintiff there grounds to reopen an adverse judgment under Federal Rule of Civil Procedure 59(e). *Olivarez* held that plaintiffs must identify facts making their claims of but-for discrimination plausible at the motion to dismiss stage. It also suggested in *dicta* that a plaintiff must prove the existence ofa more favorably treated comparator at summary judgment, a result that seems in tension with *Bostock's* formulation of but-for causation.

In *Corley v. Mercedes-Benz U.S. International, Inc.*, No. 7:19-CV-01400-LSC, 2021 WL 2042945, at *7 (N.D. Ala. May 21, 2021), a federal district court held that *Bostock's* discussion of but-for causation did not make the *McDonnell Douglas* burden-shifting framework inapplicable. The court said that *McDonnell Douglas* is merely an evidentiary framework to help court decide whether there is a triable issue of fact, noting several cases in which the Eleventh Circuit applied *McDonnell Douglas* post-*Bostock.*

In *Pidgeon v. Turner*, ___ S.W.3d ___, No. 14-19-00214-CV, 2021 WL 1686746, at *14 (Tex. App. Apr. 29, 2021), a Texas appellate court held that *Bostock* meant that denial of employment benefits to same-sex spouses would likely violate Title VII. (This and related litigation dated back to 2013, before the Supreme Court's marriage equality ruling in *Obergefell v. Hodges*, 576 U.S. 644 (2015), when then Houston mayor Annise Parker directed that city employees validly married in another state to a person of the same sex be afforded the same benefits provided to employees with a married different-sex spouse.)

*Equal Protection*

The Eleventh Circuit Court of Appeals cited *Bostock* in holding that the Equal Protection Clause protected a transgender student from a bathroom policy that prevented him from using the boys'

bathroom at a county high school. *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, No. 18-13592, ___F.4th_____, 2021 WL 2944396 (11th Cir. July 14, 2021). A federal district court in Indiana held that a county prisoner was protected from disparate treatment based on sexual orientation, citing *Bostock*. *Alsanders v. Martain*, No. 3:20-CV-858-RLM-MGG, 2021WL 2453945, at *1 (N.D. Ind. June 16, 2021). In *Monegain v. Department of Motor Vehicles*, 491 F. Supp. 3d 117, 141-42 (E.D. Va. 2020), a federal district court in Virginia cited *Bostock* in holding that a dress code policy applicable to a transgender state employee, preventing her from dressing in clothing appropriate to her gender, stated a claim under the Equal Protection Clause. A California state appeals court cited *Bostock* in rejecting the claim that a law making it unlawfulfor a long-term care facility to assign rooms based on transgender status except at the transgender resident's request violated cisgender residents' equal protection rights. *Taking Offense v. State*, No. C088485, ___ Cal. Rptr. 3d ___, 2021 WL 3013112, at *10 (Cal. Ct. App. July 16, 2021).

*School Athletics*

A federal district court in West Virginia cited *Bostock* in ruling that a state statute prohibiting transgender students from participating in gender-appropriate sports teams violated Title IX. The Court held that "[h]er sex 'remains a but-for cause' of her exclusion under the law." *B.P.J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, ___ F. Supp. 3d. ___, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021). A federal district court in Connecticut, in rejecting a challenge to the transgender-inclusive participation policy of the Connecticut Interscholastic Athletic Conference, the governing body for interscholastic athletics in Connecticut, which permits high school students to participate in sex-segregated sports consistent with their gender identity, noted that *Bostock* could affect the interpretation of Title IX, though it did not decide the issue. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *10 (D. Conn. Apr. 25, 2021).

*Housing*

In *School of the Ozarks, Inc. v. Biden*, No. 6:21-03089-CV-RK, 2021 WL 2301938 (W.D. Mo. June 4, 2021), the plaintiff challenged a memorandum issued by the federal Department of Housing and Urban Development that was based on *Bostock* and entitled "Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act." The plaintiff school asked the court to enjoin enforcement against private religious schools that have student housing policies based on biological sex or that prohibit same sex relationships. The court denied the injunction on the grounds that there was no injury-in-fact because, although the memorandum referenced *Bostock*, it did not specify how HUD will determine Fair Housing Act (FHA) liability based on *Bostock* in any specific factual setting or address potential exemptions. *Id*. at *3. In *Scutt v. Maui Family Life Center*, No. CV 20-00375 JAO-KJM, 2021 WL 1794597,at *5 (D. Haw. May 5, 2021), the court cited *Bostock* as potentially relevant to a conclusion thatthe FHA's prohibition on sex discrimination encompasses discrimination against transgender/LGBTQIA+ individuals, but did not make a decision on that issue because theplaintiff was alleging race discrimination.

*Health Care*

In *C.P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-CV- 06145-RJB, 2021 WL 1758896, at *4 (W.D. Wash. May 4, 2021), a federal district court concluded that a prohibition in Section 1557 of the Affordable Care Act of discrimination based on sex in health care forbade anti-transgender discrimination. The court reasoned that it would be logically inconsistent with *Bostock* to find that Section 1557 permits discrimination for being transgender. Similarly, in *Walker v. Azar*, No. 20CV2834FBSMG, 2020WL 4749859 (E.D.N.Y. Aug. 17, 2020), the court

decided that administrative rules proposed by the Trump administration providing that gender identity discrimination was not forbidden by thesex ban among the anti-discrimination provisions of the Affordable Care Act (Section 1557) were contrary to *Bostock*, and the court enjoined their enforcement.

*Religious Exemptions*

In *Religious Sisters of Mercy v. Azar*, ___ F. Supp. 3d ___, No. 3:16-CV-00386, 2021 WL 191009, at *22 (D.N.D. Jan. 19, 2021), *judgment entered sub nom. Religious Sisters of Mercy v. Cochran*, No. 3:16-CV-00386, 2021 WL 1574628 (D.N.D. Feb. 19, 2021), a federal district court ruled that, in light of *Bostock*, Section 1557 of the ACA arguably forbids refusals to perform or provide insurance coverage for gender transition procedures. This, the court thought, could "result in the Catholic Plaintiffs losing millions of dollars in federal healthcare funding and incurring civil and criminal liability." *Id.* The court went on to rule that such an interpretation of Section 1557 would violate the Religious Freedom Restoration Act of 1993 (RFRA). Having reasoned that the threat of monetary liability imposed a substantial burden on the Catholic plaintiffs (who/which asserted a religious belief against performing or covering gender transition procedures), and expressed skepticism about whether Section 1557 would serve a compelling governmental interest, the court held this interpretation to violate RFRA for failure to satisfy the statute's requirement that the government use least restrictive means when it is going to burden religion substantially:

> If the aim is to expand financial support, then "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing" gender- transition procedures for those "unable to obtain them under their health-insurance policies due to their employers' religious objections." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728(2014). Other options include providing "subsidies, reimbursements, tax credits, or tax deductions to employees" or paying for services "at community health centers, public clinics, and hospitals with income-based support." *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 945 (8th Cir. 2015). ACA exchanges offer yet another viable alternative, whereby "the government could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage at all." *Id.*; *see also* 81 Fed. Reg. at 31,428 (noting that nondiscrimination requirements apply to plans offered through ACA exchanges). And if broadening access to gender-transition procedures themselves is the goal, then "[t]he government could ... assist transgender individuals in finding and paying for transition procedures available from the growing number of healthcare providers who offer and specialize in those services." *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016); *see also* Doc. No. 120-3 (listing clinics that specialize in healthcare for transgender individuals).

*Id.* at *23.

*State Statutory Interpretation*

A number of state courts have long held that their non-discrimination laws follow the interpretations of Title VII by federal courts. In the past, this often meant that the state law did not cover sexual orientation or gender identity. Post-*Bostock*, however, it generally means the opposite. For example, in construing the Florida Civil Rights Act's ban on sex discrimination toreach sexual orientation discrimination in *Nafziger v. Gospel Crusade, Inc.*, No. 8:19-CV-2511-T-35TGW, 2020 WL 10404420, at *5 (M.D. Fla. July 13, 2020), a federal court relied on *Bostock* and its interpretation of Title VII's sex discrimination ban. In contrast, *Boshaw v. Midland Brewing Co*., No. 19-CV-13656,

2021 WL 1192916, at *6-7 (E.D. Mich. Mar. 30, 2021), a different federal court refused to hold that Michigan's statute prohibiting sex discrimination covered sexual orientation discrimination despite the fact that the state courts had explicitly stated that federal cases were considered persuasive precedent. The *Boshaw* court justified this refusal because the state supreme court had not yet spoken on its view of the meaning of *Bostock*.

* * *

As seen here, most courts have construed *Bostock* in ways that provide greater protections against sexual orientation and gender identity discrimination. Not all courts, however, have interpreted *Bostock* in this way. The long-term effects of *Bostock* on discrimination cases remain to be seen.

## CHAPTER 6 MILITARY SERVICE

**Insert the following at end of p.382**:

**The Repeal of Trump's Trans Ban**

On January 20, 2021, Joseph R. Biden, Jr. was inaugurated as the forty-sixth President ofthe United States. On January 25, he issued the following executive order to repeal Donald J. Trump's ban on transgender military service and direct the armed forces back to the path of inclusion that had been set under the Obama administration. It recounts the Obama administration's study process and the evidence of consistency of transgender persons' military service with military needs, reasserts U.S. policy that otherwise fit transgender people may serve openly and without discrimination, makes clear that Trump's prior memoranda on the subject are revoked by this executive order, directs the Secretaries of Defense and of Homeland Security to develop regulations to implement this policy, forbids excluding people from service on the basis of gender identity or "under circumstances relating to gender identity," directs that it shall be construed and implemented consistently with applicable law (thereby affirming that Biden was exercising his Commander-in-Chief power consistently with his constitutional duty to take care that the laws are faithfully executed), and specifies that the order does not create enforceable rights.

### Executive Order 14004 of January 25, 2021
### Enabling All Qualified Americans To Serve Their Country in Uniform

86:17 Fed. Reg. 7471-7474 (Jan. 28, 2021)

By the authority vested in me as President by the Constitution and the laws of the UnitedStates of America, it is hereby ordered as follows:

**Section 1.** *Policy*. All Americans who are qualified to serve in the Armed Forces of the United States ("Armed Forces") should be able to serve. The All-Volunteer Force thrives when it is composed of diverse Americans who can meet the rigorous standards for military service, and aninclusive military strengthens our national security.

It is my conviction as Commander in Chief of the Armed Forces that gender identity should not be a bar to military service. Moreover, there is substantial evidence that allowing transgender individuals to serve in the military does not have any meaningful negative impact onthe Armed Forces. To that end, in 2016, a meticulous, comprehensive study requested by the Department of Defense found that enabling transgender individuals to serve openly in the UnitedStates military would have only a minimal impact on military readiness and healthcare costs. The study also concluded that open transgender service has had no significant impact on operational effectiveness or unit cohesion in foreign militaries.

On the basis of this information, the Secretary of Defense concluded in 2016 that permitting transgender individuals to serve openly in the military was consistent with military readiness and with strength through diversity, such that transgender service members who couldmeet the required standards and procedures should be permitted to serve openly. The Secretary of Defense also concluded that it was appropriate to create a process that would enable service members to take steps to transition gender while serving.

The previous administration chose to alter that policy to bar transgender persons, in almost all circumstances, from joining the Armed Forces and from being able to take steps to transition gender while serving. Rather than relying on the comprehensive study by a nonpartisan federally funded research center, the previous administration relied on a review that resulted in a policy that set unnecessary barriers to military service. It is my judgment that the Secretary of Defense's 2016 conclusions remain valid, as further demonstrated by the fact that, in 2018, the then-serving Chief of Staff of the Army, Chief of Naval Operations, Commandant of the Marine Corps, and Chief of Staff of the Air Force all testified publicly to the Congress that they were notaware of any issues of unit cohesion, disciplinary problems, or issues of morale resulting from open transgender service. A group of former United States Surgeons General, who collectively served under Democratic and Republican Presidents, echoed this point, stating in 2018 that "transgender troops are as medically fit as their non-transgender peers and that there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from military service or to limit their access to medically necessary care."

Therefore, it shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination.

**Sec. 2**. *Revocation*. The Presidential Memorandum of March 23, 2018 (Military Service by Transgender Individuals), is hereby revoked, and the Presidential Memorandum of August 25,2017 (Military Service by Transgender Individuals), remains revoked.

**Sec. 3**. *Agency Roles and Responsibilities*. In furtherance of the policy described in section 1 ofthis order, I hereby direct the following:

(a) The Secretary of Defense, and Secretary of Homeland Security with respect to theCoast Guard, shall, after consultation with the Joint Chiefs of Staff about how best to implement this policy and consistent with applicable law, take all necessary steps to ensure that all directives, orders, regulations, and policies of their respective departmentsare consistent with this order. These steps shall include establishing a process by which transgender service members may transition gender while serving, along with any furthersteps that the Secretary of Defense and Secretary of Homeland Security deem appropriateto advance the policy described in section 1 of this order.

(b) The Secretary of Defense shall:

(i) immediately prohibit involuntary separations, discharges, and denials of reenlistment or continuation of service on the basis of gender identity or under circumstances relating to their gender identity;

(ii) identify and examine the records of service members who have been involuntarily separated, discharged, or denied reenlistment or continuation ofservice on the basis of gender identity or under circumstances relating to their gender identity;

(iii) issue guidance to the Secretaries of each military department regarding the correction of the military records of individuals described in subsection (b)(ii) of this section as necessary to remove an injustice, pursuant to section 1552(a) of title 10, United States Code, to the extent permitted by law; and

(iv) direct the Secretaries of each military department to provide supplemental guidance, subject to the approval of the Secretary, to the boards for the correction

of military records, instructing such boards on how to review applications for the correction of records of individuals described in subsection (b)(ii) of this section. Where appropriate, the department concerned shall offer such individuals an opportunity to rejoin the military should they wish to do so and meet the current entry standards.

(c) The Secretary of Homeland Security with respect to the Coast Guard shall:

(i) immediately prohibit involuntary separations, discharges, and denials of reenlistment or continuation of service, on the basis of gender identity or under circumstances relating to their gender identity;

(ii) identify and examine the records of service members who have been involuntarily separated, discharged, or denied reenlistment or continuation of service, on the basis of gender identity or under circumstances relating to their gender identity;

(iii) issue guidance regarding the correction of the military records of individuals described in subsection (c)(ii) of this section as necessary to removean injustice, pursuant to section 1552(a) of title 10, United States Code, to the extent permitted by law; and

(iv) provide supplemental guidance to the Board for Correction of Military Records of the Coast Guard, instructing the Board on how to review applicationsfor the correction of records of individuals described in subsection (c)(ii) of this section. Where appropriate, the Secretary of Homeland Security shall offer such individuals an opportunity to rejoin the Coast Guard should they wish to do so and meet the current entry standards.

(d) The Secretary of Defense and the Secretary of Homeland Security shall report to me within 60 days of the date of this order on their progress in implementing the directives in this order and the policy described in section 1 of this order.

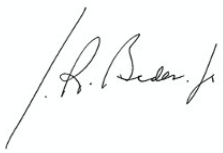
**Sec. 4**. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or thehead thereof; or

(ii) the functions of the Director of the Office of Management and Budgetrelating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantiveor procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 25, 2021.

Just over three months later, the Department of Defense's new Instruction 1300.28 In- Service Transition for Transgender Servicemembers (Mar. 31, 2021), canceling and reissuing theTrump Defense Department's DoD Instruction 1300.28 "Military Service by Transgender Persons and Persons with Gender Dysphoria" (September 4, 2020), became effective April 30, 2021. This new DoD Instruction 1300.28 may be found at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130028p.pdf (last visited June 20, 2021). A companion instruction, DoD Instruction 6130.03 Medical Standards for Military Service: Appointment, Enlistment, or Induction, Vol. 1 (Mar. 31, 2021) was issued thesame day; it reinstates the Obama era requirement that a person who has undergone hormone therapy for gender transition must be "stable on such hormones for 18 months or no longer requires such hormones" and may be found at https://www.esd.whs.mil/ Portals/54/Documents/DD/issuances/dodi/613003v1p.pdf (last visited June 20, 2021).

Note that Trump's ban was effectuated by presidential and essentially administrative action; Biden's repeal of the ban was accomplished the same way. Nothing currently would prohibit a new President from seeking to reinstate a ban on military service by transgender people through similar action, though of course such an attempt would certainly be challenged incourt as Trump's ban was—though Trump's appointments to the Supreme Court have shifted it even further to the right. Bills in previous Congresses have sought to prohibit such discriminatory exclusion of people for being transgender. *See, e.g.*, H.R. 1032/S. 373, A bill to provide for the retention and service of transgender individuals in the Armed Forces (introduced Feb. 7, 2019).

# CHAPTER 7 PUBLIC ACCOMMODATIONS AND HOUSING

## In the first paragraph on p.417:

Change “an incarcerated transgender woman’s pro se complaint” to “the pro se complaint of a professed intersex woman (who had had ‘corrective surgery’)”

# CHAPTER 8 PARENTING

**At pp.441-442:**
Replace "Robert Sterling Simmons" with "Sterling Robert Simmons" and replace occurrences of "Robert" with "Sterling"

**Insert the following at end of p.485:**

Conflicts can and have arisen between parents of children whom only one parent regards as transgender or supports the child in their expression of a gender identity different from the sex assigned the child at birth. Consider, for example, the parental conflict in *Williams v. Frymire*, 377 S.W.3d 579 (Ky. App. 2012), *infra*. Before presenting the edited opinion, which sides with a father who did not believe his child to be transgender, this Update excerpts the appellate brief for the mother, who believed the child to be a transgender boy, a diagnosis with which the father disagreed and which led him to seek physical custody, which the trial court grants and the appellate court affirms.

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Appellant's Brief
**Linda Williams, Appellant, v. David Frymire, Appellee**
No. 2011-CA-001568
2011 WL 10989784 (Ky.App. Dec. 1, 2011) (Appellate Brief)
Appeal from Calloway Circuit Court

Action No. 10-CI-00444



[The preceding table of contents retains the original brief's page numbering to provide a sense ofthe modest length of the mother's appellate brief in this case.—Eds.]

## INTRODUCTION

This is an appeal of an Order entered on August 10, 2011, in which the Trial Court'sdecision was entered without jurisdiction. Moreover, the decision to modify custody was arbitrary, contrary

to Kentucky Law and an abuse of discretion.

....

**STATEMENT OF THE FACTS**

Appellant, Linda Williams (hereinafter "Appellant" or "Linda") ... and Appellee, David Frymire ... were married and divorced to one another two times. The first marriage ended by dissolution of marriage in 1996. The Parties remarried March 9, 2000. The couple had one child, Jessica Frymire (born XX/XX/2005) ... during their second marriage. Linda and David divorced for the second time in Fayette Family Court on January 29, 2007. David failed to attend the final hearing held by the Fayette Family Court. Linda was awarded sole custody of Jessica.

After their separation, David showed little concern for Linda or Jessica's well-being. Linda and Jessica stayed with family friends, Mr. and Mrs. Tracey, from three to six months. Specifically, Linda testified that David went five and a half to six months without speaking to Linda or seeing the baby. She then moved to an apartment in Versailles, Kentucky. In 2007, [Linda] moved to Bellville, Illinois to live with her parents for two years. She then moved to St. Charles, Missouri …. David eventually moved from Fayette County to Murray, Kentucky. Jessica resided with Linda outside of Kentucky for over three years, with limited contact with David. According to Linda, she spoke with David maybe once every two months.

At some point after the separation, David eventually began visiting with Jessica and had scheduled visitation at least the last full weekend each month and limited time over the holidays. These were the only contacts maintained in Kentucky. This limited visitation was David's choosing as he explained to Linda that this is "what he could do" according to his work schedule. Even after finally setting up visitations with the child, David has been late to pick up the child in the past, and has also missed very important events of the child's young life, including the child's baptism and a church performance. On both occasions, he was invited and choose not to attend.

The case was transferred from Fayette Circuit Court on October 29, 2007 to Woodford County Circuit Court and ultimately to Calloway County Family Court on August 26, 2010, by the County Attorneys for child support purposes only.

In May 2010, Linda took Jessica to see Ms. Trina Jansen, a Licensed Professional Counselor and Art Therapist, in St. Louis, Missouri and Illinois, over concerns with Jessica's aggressive and angry behaviors. Linda had shared her concerns with David; however, he was notinterested in the situation. Linda was concerned for Jessica because the child would go into rages if Linda tried to dress her as a girl, as the child wanted to be a boy.

Ms. Jansen researched the issue and diagnosed the child with Gender Identity Disorder. She had continued to provide therapy for the child since from the initial interview through the trial date. She further confirmed that Jessica adamantly claims that she is a boy and wants to be aboy and when treated as a boy her anxiety diminishes.

On June 7, 2010, Linda took Jessica to Dr. Patricia Berne, a Licensed Psychologist in St. Louis, Missouri. Dr. Berne received a [Ph.D.] in Psychology from St. Louis University and her Masters in Psychology from Washington University, in St. Louis. Dr. Berne testified she had been working with gender variant clients since 1981. At the time of trial, approximately ten percent of her patients were gender variant individuals.

Linda kept David advised of the situation as it was developing. David admitted under cross examination that Linda invited him to speak with the counselor, Ms. Trina Jansen as well as Dr. Berne. Linda testified that she not only invited David to come to Missouri to speak with the doctor but also offered to pay his expenses to do so. Once again, David declined.

In January 2011, David filed a petition in Calloway County, Kentucky in the Dependency, Neglect and Abuse Division of Calloway County Family Court, requesting emergency custody of Jessica. Emergency custody was granted but the case was dismissed at theTemporary Removal Hearing as David had also filed a motion to modify custody in the divorce action. The Family Court issued orders on January 7, 2011 prohibiting Linda from administering any hormone suppression medication or allowing any non-emergency surgery to Jessica unless agreed by David. (There is [*sic*] no allegations that Linda violated any parts of these Orders). The Family Court also appointed a Guardian ad Litem for Jessica, to represent the Child's interests, and appointed Dr. Sarah Shelton to perform a custody evaluation. The Court left Jessica in Linda's primary care.

Linda challenged Kentucky's jurisdiction and the venue of the case as her and the childhad been residing outside of Kentucky for over three (3) years. This issue was briefed by the Parties. The Family Court found that it retained jurisdiction and venue.

The trial in this matter was held on August 3 and 4, 2011. At this time each Party called witnesses to testify on their behalf. Each party was provided an opportunity to submit documenting evidence. The child's Guardian Ad Litem was present and participated during theTrial.

Dr. Berne, the expert that treated Jessica for Gender Identity Disorder stated that she did not believe that Linda was in any way enforcing a male gender orientation on Jessica. Rather she believed that

Linda was actually affirming the child's gender choices, which is the recommendedtreatment for a child with Gender Identity Disorder of Jessica's age group. Dr. Berne concluded, from her treatment of Jessica, that Jessica had a rare condition known as Gender Identity Disorder.

Dr. Berne testified on the standard practices of diagnosis and treatment of individuals with Gender Identity Disorder or other gender variant issues. Based on her expansive knowledge of the subject, Dr. Berne testified as to the initial diagnosis and treatment of these individuals while explaining that the process of diagnosis and treatment of individuals with Gender Identity Disorder is different between children, adolescents and adults. Specifically, Dr. Berne testified that in diagnosing children, multiple indicators are used including an I.Q. test, some self reporting, a projection test and information from family members.

In its decision being challenged in this Appeal, the Family Court cited two factors that weighed in its decision to discredit Dr. Berne's diagnosis. First, the Family Court found issue that Dr. Berne relied solely on the history provided by Linda and saw no importance in seeking independent collateral sources such as the father and the grandparents. The Family Court reachedthis conclusion despite sworn testimony from Dr. Berne that in diagnosing Gender Identity Disorder in children, very little information from families is necessary to complete a diagnosis because a child, in terms of child development, begins to identify with an innate gender at or around age three. Dr. Berne testified that diagnosis is different than treatment in that additional information from family members would be beneficial during the treatment phase, but that very little from these collateral resources is necessary during the diagnosis phase. At this age, Dr.

Berne testified that the statements from the child, such as "feel like a boy, sees a girl in the mirror and will grow up to be a man" and "In Kentucky, sometimes I wear a dress for dad. I don't like it. It makes me angry to have to dress like a girl.", all helped Dr. Berne to reach herdiagnosis that Jessica had the disorder.

The second factor the Family Court relied on to discredit Dr. Berne's testimony was her use of the projective test which was the prompting of the child to draw a house, a person and a tree, and the amount of weight that Dr. Berne placed on this tool in forming her diagnosis. Once again, in

reaching this conclusion, the Court refused to take into consideration testimony from Dr. Berne, an expert in the field of transgender issues, which explains the importance and significance of said test. Specifically, Dr. Berne testified that the projective test of having the child to [*sic*] illustrate a house, a person and a tree, is a very well established and documented diagnostic test which is commonly used for assessing many different issues in both children and adults. Furthermore, Dr. Berne testified that this type of methodology helps to uncover multiple aspects in learning about a person, how they see themselves, and how the see themselves in their world. In choosing not to credit this methodology, the Family Court failed to consider the actualdrawing and Dr. Berne's observations. Specifically, in discussing with the child the drawing, theChild's statement that "this is me" (pointing to a picture of a smaller male), "and I will grow up to be a man" (pointing to the picture of the larger male). Dr. Berne affirmed that Linda had no accessibility to influence the drawing of the child in any way. Dr. Berne testified that the treatment for gender variant issues is the process of affirmation and continued therapy for anxiety and depression. Dr. Berne testified that when there is not enough response to a child diagnosed with this condition for what they are expressing and feeling, there is a significant risk of depression and greater mental health difficulties in children with gender variant disorders. Further, she believed that Linda was following appropriate steps according to the child's diagnosis and the recommendations associated with such. Finally, Dr. Berne testified that a referral was made to seek further consultation and a second opinion at Linda's request to ensurethat she was following the appropriate steps in treating Jessica. Dr. Berne warned that if the current course of treatment for the Child, the affirmation process, were to cease, there would benegative repercussions for the child as she has an innate sense of gender. If forced to comply with one gender or the other, there is increased hostility, depression and anger.

Linda also called Dr. Dean Rosen to testify. Dr. Rosen is a clinical psychologist in St. Louis, Missouri. He has been licensed in St. Louis, Missouri since 1979, and has been treating gender identity patients since 1979. He testified that he treats patients with transgender, gay and lesbian issues, with sexual abuse history, and he conducts psychological evaluations for family court.

Dr. Rosen testified that prior to trial he had the opportunity to review all reports regarding Jessica's diagnosis. He concurred with Dr. Berne and Ms. Jansen's diagnosis of Jessica having Gender Identity Disorder and he disagreed with Dr. Shelton's report to the contrary. He further concluded that Linda had been following the recommendations for Jessica's treatment, as advised by Jessica's treatment providers and that this treatment was appropriate for Jessica. He also testified that it actually harms the child to be with David if he is not affirming the child with a male identity and he should meet with the treatment providers and learn more about the disorder. He testified that he did not believe that Linda had done anything to unduly influence the treatment and recommendations of the other providers nor did he think Linda was overly invested in Jessica being a boy.

At the end of Dr. Rosen's testimony, the Family Court Judge himself began his own cross examination of Dr. Rosen. An awkward back and forth between the Judge and Dr. Rosen ensued where the Judge cross examined Dr. Rosen on what the Judge clearly perceived as inconsistency in Dr. Berne's testimony and Dr. Rosen's criticisms of Dr. Shelton's report. It was clear in this phase of the trial that the Family Court Judge himself was coming to the defense of Dr. Shelton'sreport.

Dr. Dale Owens was employed by David to conduct an independent evaluation on the diagnosis and an independent assessment of the records. As expected, he testified that he disagreed with Ms. Jansen's, Dr. Berne's and Dr. Rosen's diagnosis of Gender Identity Disorder,citing that he believed that specific guidelines on how to diagnose gender identity disorder were not followed. However, he acknowledged that there is a high risk of harmful behaviors, self harm,substance abuse

and suicidal behaviors among transgender youth. In his testimony, he specifically stated his opinion to Linda, "Our profession failed you," and he had compassion for her for that failing. He further acknowledged that Linda relied on these professionals' advice. It is important to note that Dr. Owens testified that prior to between 1998 and 2008, he was only licensed to work as a licensed psychology associate under the direction of a licensed psychologist until he completed his doctoral work in 2008.

A custody evaluator, Dr. Sarah Shelton, testified. Dr. Shelton did not substantiate the Gender Identity Disorder in Jessica after her evaluation. She testified that she believed Linda haddefinitely been influenced by the professional assistance she sought in Missouri. She further admitted that Linda is generally following the advice of the recommendations of Jessica'smedical providers.

Interestingly, Dr. Shelton on cross examination confirmed her report filed with the Family Court stated that she did not believe that Linda poses any deliberate threat or risk to Jessica's social, emotional, physical or mental well-being. Although her written report indicated that she recommended Linda continue to provide primary residential care for Jessica. However,at time of trial she believed that David's request for primary residence had more [*sic*] due to Linda continuing to seek assistance for Jessica, by seeing another expert, for a second opinion, while Dr. Shelton was completing her evaluation. Dr. Shelton conceded that her complete evaluation would not have been available for Dr. Rosen to review as she had not concluded her evaluation at that time. Finally, Dr. Shelton testified that because Linda had been Jessica's primary care giver for the past six years (her entire life), that factor should be weighted heavily in Linda's favor when determining Jessica's best interests. Dr. Shelton also acknowledged she was not an expert in Gender Identity Disorder.

At the conclusion of testimony, the Guardian Ad Litem who was appointed by the Family Court to represent Jessica's best interests, provided her recommendations. She believed that Linda had been the primary care-giver for Jessica most of the child's life. She did not believe that it was unreasonable for Linda to follow the Dr. Berne's, Ms. Jansen's and Dr. Rosen's recommendations in this case as each were sure of themselves regarding treatment. She further believed that Linda did seek out other professionals in dealing with this issue. Finally, and most importantly, the Guardian ad Litem stated that is was her opinion that it would be traumatic for Jessica to be removed from the primary custody of her mother.

At the end of the trial, the Judge asked Linda about the differences of the testimony between the experts. Linda acknowledged to the Court that it was concerning to her and that itwas difficult to know who to trust or what to do concerning Jessica's care.

The Family Court Judge further stated and acknowledged to Linda that the child was having behavior issues and the psychological profession let her down. He further stated that he placed a great deal of weight on Dr. Shelton and he was not impressed by the rest of the expertsas he believed they appeared to have an agenda. The Judge admitted that he did not know if the child has Gender Identity Disorder, but could not rely on the evidence submitted to make that diagnosis. The Judge was clear that he did not want Jessica starting school as a boy.

After trial in this matter, on August 10, 2011, the Family Court issued a written Order granting David's motion to modify custody from sole custody in favor of Linda to Joint custody. The Court further designated David as Jessica's residential parent.

## ARGUMENT

### I. The Trial Court acted outside of its jurisdiction entering an Order with modified custody of a non-Kentuckian child despite Kentucky being an inconvenient forum as defined by KRS 403.834.

.... In this case, the Calloway Circuit Family Court entered an order which modified the

judgement of sole custody entered by Fayette Family Court despite the fact that the sole custodian and the minor child had no significant contacts with the Commonwealth of Kentucky for more than three (3) years. The custodian moved with the minor child from Kentucky in 2007. Following the move, there was little contact with the state. The child and the Appellant (the sole custodian) resided in Illinois and, ultimately, in metropolitan St. Louis, Missouri. In spite of the facts, the Trial Court ruled it had jurisdiction and was the appropriate forum as defined by statute.

....

Additionally, pursuant to the Statute, the Court is required to find that there is substantial evidence in the state concerting the child's care, protection, training, and personal relationships. In this case, there was no evidence regarding these factors in Kentucky. The child had been living outside of Kentucky for the majority of the child's life. Any evidence regarding the child'scase is years old and precedes the original Custody Order. If not for the custody litigation itself, there would be no proof whatsoever in the Commonwealth.

In the instant case, there was never any consideration of the statutory factors by the Trial Court....

**II. The Trial Court's Order was entered against the weight of the evidence and despite the Appellant's following medical advice.**

[The] modification of the primary residence as ordered by the Family Court is clearly contrary to the child's welfare. The modification was contrary to the testimony of every treatment professional. The Guardian Ad Litem recommended to the contrary and noted that such a change would be "traumatic" for the child. Contrary to the overwhelming evidence, the Trial Court modified the custodial arrangements from sole custody to joint custody and switchedthe parenting schedule in favor of a largely absentee out of state father.

A review of the diagnosis made by the child's treatment team is essential in this case. The diagnosis is often misunderstood and the specter of bias looms over the case.[13] Gender Identity Disorder is a clinical term which is applied to a collection of symptoms. Its existence is not disputed in the medical community. An individual's gender identity develops in early childhood and is usually firmly established by early childhood. Contemporary medical knowledge indicates that gender identity cannot be changed and that attempts to change a person's gender identity arefutile and unethical.

The medical diagnosis applied to transgender people is Gender Identity Disorder ....

[elaboration omitted]

The treatment of Gender Identity Disorder is guided by the Standards of Care set forth bythe World Professional Association for Transgender Health ("WPATH" .....). These guidelines are widely respected and reflect the professional consensus about the psychological, psychiatric, hormonal, and surgical management of Gender Identity Disorder.

Given the diagnosis and treatment recommendations coupled with the Trial Court's decision to modify, Linda was trapped in a moral dilemma with respect to the child. Failure to follow the treatment recommendations might result in allegations of medical neglect. There aremany instances of children being removed and/or placed in foster care when parents act againstmedical advice. In this instance, Linda sought the advice of competent and experienced providers. There were no

[13] **Error! Main Document Only.**It is difficult to imagine a Family Court Judge coming to a conclusion of modification if the child were being treated for epilepsy, leukemia or any more common disorder.

allegations that any provider was incompetent or suggested anything other than the experts[’] mainstream treatment. Further, it is undisputed that Linda followed there[*sic*] recommendations. In fact, she invited David to become a part of the process.

In the end, both Linda and the child were punished by the Trial Court for following the advice of pediatricians and psychologists. There is *no reported* case in Kentucky in which a trialcourt modifies custody based on a parent’s following the advice of a competent medical doctor. In the event that the Court of Appeals affirms the decision of the Trial Court, all parents will be placed in the same precarious position. Parents should have a “safe harbor” from family court litigation and judicial punishment when they rely upon such professional advice. To rule otherwise places all children at medical risk.

....

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***Reading Guide for* Williams v. Frymire**

1. This case involves a custody dispute between parents who disagreed over whether their young child was a transgender boy, as the mother Linda Williams (who had custody) believed, or a cisgender girl, as the (noncustodial) father David Frymire believed. The Kentucky courts largely accept the father’s view of the circumstances leading up to the trial judge’s order in the case. For a contrasting framing, see Appellant’s Brief, *Linda Williams, Appellant, v. DavidFrymire, Appellee*, No. 2011-CA-001568, 2011 WL 10989784 (Ky. App. Dec. 1, 2011), *supra*.

2. What standard of review does the Court of Appeals of Kentucky apply in reviewing the Family Court’s conclusion that it had jurisdiction over the case? What substantive standard does the Court of Appeals apply? What does it reason about alleged connections between the parties and Kentucky? What does it reason about evidence in Kentucky? What standard of review does the court apply in assessing the family court’s ruling that it was not an inconvenient forum? For what reason does the court affirm the family court on this point?

3. What standards of review does the Court of Appeals use to assess the different aspectsof the family court’s decision to make the father the residential parent (i.e., to make him the parent with primary physical custody of the child)? To what factors in the record does the Court of Appeals point to support its conclusion about the family court’s decision?

**Linda Williams v. David Frymire**
377 S.W.3d 579 (Ky. App. 2012)

Before CAPERTON, LAMBERT, and NICKELL, Judges.

**LAMBERT, Judge:**

Linda Williams has appealed from the judgment of the Calloway Family Court modifying custody of her minor daughter, Jessica Frymire, from sole to joint and naming Linda’s former husband and Jessica’s father, David Frymire, as the primary residential parent. Linda contends that the court did not have jurisdiction to consider David’s motion to modify, and if the forumwas appropriate, abused its discretion in modifying the primary residential parent. Based upon our review of the record, including the modification hearing, we disagree with Linda’s arguments and therefore affirm.

Linda Williams and David Frymire were married twice; first from 1992 to 1996, and they

married for a second time on March 9, 2000. One child, Jessica, was born of the second marriageon September 29, 2005. Linda and David separated in March 2006, and Linda filed a petition to dissolve the marriage the same month. At that time, the couple lived in Lexington and the petition was filed in Fayette County. When David failed to appear at the final hearing regarding custody of Jessica, the Fayette Family Court awarded sole custody to Linda and ordered David to pay child support in the amount of $500.00 per month. The final decree was entered in January 2007.

Following the breakup of their marriage, Linda moved to Woodford County with Jessica and David moved to Calloway County. Linda, through the Fayette County Attorney's Office, moved to transfer the matter to Woodford County, where she and Jessica lived. This was grantedin November 2007. In July 2010, Linda, through the Woodford County Attorney's Office, moved to change the venue again, this time to Calloway County. By this time, Linda and Jessicahad moved out-of-state and were living in St. Charles, Missouri, while David remained in Calloway County. This motion was granted in August 2010.

On January 3, 2011, David filed a motion in the Calloway Family Court requesting modification of custody or timesharing, for modification of child support, and for restricted visitation. At this time, Jessica was five years old. The basis for David's motion was Linda's e- mail communication sent on November 29, 2010, in which she announced that Jessica was transgender and would from then on be considered a boy, wear boy clothing, and be called Bridge. Linda also stated that she would begin transitioning Jessica's gender from girl to boy andhad discussed the matter with Jessica's school. Furthermore, Linda would not listen to any challenge regarding this decision, but referred any dissention [*sic*] to her father. In the motion, David also notified the court of Linda's past behavior regarding Jessica's health, when she raised what were later determined to be unfounded concerns about her vision, hearing, and speech, and her suspicion that Jessica might have Asperger's Syndrome. By separate motion, David requested the appointment of a child psychologist and a custodial evaluation, which the family court granted.

In response, Linda contested the family court's jurisdiction to hear the case because she and Jessica had moved out of the state in 2007 and no longer had any significant connection to Kentucky. She also argued that Kentucky was an inconvenient forum to hear the case. In support, Linda cited to Kentucky Revised Statutes (KRS) 403.824 and 403.834(2).

The court denied Linda's request for a hearing and considered the jurisdictional issue on the basis of the parties' briefs. By order entered March 10, 2011, the family court concluded that Kentucky retained exclusive and continuing jurisdiction of the matter pursuant to KRS 403.824 in that David was a resident of Kentucky. The court also determined that Kentucky was not an inconvenient forum to address custody modification. Linda moved to alter, amend, or vacate the court's order, stating that the court had failed to address the specific factors listed in KRS 403.834 related to the inconvenient forum issue. The court amended its order to reflect that it hadconsidered the factors set forth in KRS 403.834(2), but otherwise did not alter its ruling.

The family court held a modification hearing on August 3 and 4, 2011. At the beginning of the hearing, the parties stipulated to joint custody and standard visitation, with each party requesting to be the residential parent, although the court later indicated that it would award whatever type of custody that would be in Jessica's best interest. The parties also provided ajoint exhibit including a tabbed and indexed set of medical records that would be introducedduring the trial. The witnesses testified as follows:

At the time of the hearing, David was forty-four years old. Following their separation, he testified that Linda and Jessica moved to Versailles and stayed with former neighbors. Later, she and

Jessica moved to Illinois and then to St. Charles, Missouri. He visited one time per month with Jessica, generally in Murray, [Kentucky, where he lived,] but Jessica was also able to visit with his sister and his parents (her aunt and grandparents). During their time together, he and Jessica went to the park, played with animals, played baseball, and enjoyed nature. He kept her for five weeks during the summer of 2011, and he stated that she was comfortable and well-settled in his care. David did not encounter any problems with Jessica related to tantrums or depression. He did note that when she arrived, Linda had only packed boy clothes for Jessica to wear.

Regarding the onset of Linda's belief that Jessica is transgender, David recalled a telephone conversation with Linda in May 2010 after Linda had watched a television special on the topic. David assumed this belief would eventually "run its course" like other concerns she had raised in the past related to Jessica's hearing, vision, and speech, and her suspicion of Asperger's Syndrome. David testified that Linda has bipolar disorder, and stated that he believed the medications she took to treat this illness had affected her ability to drive and make decisions.

On cross-examination, David testified about his visitation following their separation and divorce, which he described as increasing over time, and he stated that he never talked to any of the therapists involved. He also admitted that Linda had signed a release permitting him to seek medical assistance for Jessica, if needed. In addition, David stated that he was open to permitting Jessica to wear gender-neutral clothing. The court questioned David regarding his failure to appear at the final custody hearing and whether he had concerns about Linda's ability to care for their daughter. He claimed confusion about the court date, but asked his attorney at the time to represent his interests at the hearing. David testified that he believed Jessica was safe during the time following the separation and divorce.

Betsy Porter, David's sister and Jessica's aunt, testified that she has seen David and Jessica interact, and that Jessica is comfortable, secure, and well cared for while with David. Ms. Porter testified that she had taken care of Jessica at various times during her life, including keeping her for a week when Jessica was two or three weeks old to help Linda cope. She also testified that she had kept Jessica for a week during the summer of 2010. For this visit, Linda hadonly packed boy clothes. Ms. Porter took Jessica shopping for comfortable girl clothes, including white denim capri pants and a purple shirt, which Jessica wore during the visit. She also testified that Jessica played like a girl, but that she was not a "girly" girl as she did not like frills or ruffles. Ms. Porter expressed concern if Jessica were to be left with Linda; she worried that Jessica would be subjected to ridicule, bullied, and not have a place socially. On the other hand, she believed that Jessica would be better off with David because of the change in environment and normalcy he would provide. On cross-examination and questioning by the court, Ms. Porter testified that Jessica acted like a dog during her visit the previous summer. She also testified about their trips to Toys-R-Us, when Jessica directed her to the Olivia playhouse, but not the boys' aisle....

Phyllis, Frymire, David's mother, …. and her husband live in Madisonville, Kentucky, and she testified about David's affectionate relationship with Jessica. She described Jessica as a happy girl, and she never saw Jessica in any tantrums or rages. Mrs. Frymire recalled taking Jessica to get a bicycle, when Jessica chose a pink and purple model. She also recalled being disturbed by Linda's e-mail. Finally, she testified that Jessica needs a different environment, andthat David was a natural caregiver.

Richard Frymire, David's father, ... described Jessica as an active and smart child. He testified that David and Jessica doted on each other, and that Jessica enjoys being a part of the extended Frymire family. Mr. Frymire did not see any tantrums or anxiety on Jessica's part, and did not believe

there was a gender issue. Rather, he believed that Jessica did not like frilly clothes.

Donna Beamer, David's girlfriend of three years, also testified regarding the relationship between David and Jessica. She stated that they adored each other. She further testified that she never saw any behavior indicating that Jessica wanted to be a boy.

Dr. Sarah Shelton, a clinical psychologist appointed by the court to perform a forensic custodial evaluation of the parents and child, testified next. The reports of her evaluations were also included as exhibits. The reports reflect that Dr. Shelton examined the available medical records, letters from providers, and court records, and that she interviewed many providers, family members, and others.

Regarding David, Dr. Shelton concluded that he did not have any major mental health diagnosis, other than a pre-existing diagnosis of Attention Deficit Hyperactivity Disorder. She did note his distress about Jessica's well-being and future, but his distress was at an appropriate level. Dr. Shelton deemed him psychologically fit for parenting, stating that his relationship with his daughter was healthy and positive. Regarding Linda, Dr. Shelton noted her pre-existing diagnoses of anorexia nervosa, bulimia nervosa, and bipolar disorder, which Linda reported were under control. Dr. Shelton noted that Linda "seems very invested in Jessica being identified as a boy and treated as a boy by everyone in the child's life, including Mr. Frymire and Jessica's school." Dr. Shelton believed that Linda was "over-responding to the issues she perceives are occurring with Jessica and gender." In conjunction with this, she recognized Linda's history of over-attending to other cues she perceived regarding Jessica's health over her lifetime. Furthermore, Dr. Shelton noted that while Linda did not meet the criteria for Munchausen Syndrome by Proxy, she did share striking similarities with that diagnosis. Finally, regarding Jessica, Dr. Shelton described her as "a bright, imaginative, happy, and well-adjusted child with a delightful personality." Dr. Shelton did not find any support for the diagnosis of gender identity disorder. Rather, Dr. Shelton believed that Jessica's behaviors were common for her developmental age. Dr. Shelton concluded that both parents should have equal input into Jessica's physical and mental health care as well as more frequent contact with her father. Jessicashould also be treated with gender neutrality.

During her testimony at the hearing, Dr. Shelton recommended a change in custody, despite the trauma such a change would cause for Jessica. Dr. Shelton stated that it would be less traumatic for her than continuing on the same path. In addition, Dr. Shelton believed Jessica needed a new, neutral therapist.

David's final witness was Dr. Dale Owens, a child clinical psychologist. Dr. Owensperformed an independent evaluation of Jessica's medical records at the request of David's attorney.… Dr. Owens believed that the medical profession let Jessica down. Regarding art therapist Trina Jansen, Dr. Owens noted that she did not have any expertise in the area of gender identity disorder. Regarding psychologist Dr. Patricia Berne, Dr. Owens noted concerns about her diagnosis based upon the complexity of the disorder and Jessica's young age. Dr. Owens stated that Dr. Berne's interview with Jessica was not diagnostic, but rather was an individual therapy session. Furthermore, Dr. Owens stated that the diagnosis of gender identity disorder cannot be made without several items being accomplished, including a psychological evaluationand interview. Regarding Dr. Robin Parks, Dr. Owens noted that she performed a psychological diagnostic interview and did not agree with the diagnosis of gender identity disorder. Rather, she diagnosed a mood disorder and anxiety. Dr. Rosen, he noted, did not make any effort to contact anyone outside of the mother, but used her as the primary source of information. In Dr. Owens' opinion, only Dr. Shelton's reports were objective and thorough.

Once David rested his case, Linda called several witness to testify. First to testify was Steven Tracy, a former neighbor. Linda and Jessica lived with Mr. Tracy and his wife following her separation from David. He admitted to being a little concerned about Linda's ability to care for Jessica. He also testified that after Linda and Jessica moved out of state, Jessica would stay with him and his wife for visits.

Jessica's treating psychologist, Dr. Patricia Berne, testified by telephone. Dr. Berne first saw Jessica on June 7, 2010, and saw her four more times between January and July of [2011]. Dr. Berne testified that at the first appointment, she used the projective test of drawing a house, a person, and a tree, as well as self-reporting to diagnose gender identity disorder. In conjunction with this test, Dr. Berne used information she obtained from Linda. From Jessica, Dr. Berne learned that she liked wearing Power Rangers clothing and that she was angry she could not be "Bridge" all of the time. Dr. Berne stated that Jessica spoke through an animal during the first visit. Regarding Linda's role, Dr. Berne recommended that she should affirm Jessica's gender choice and allow her to "be" without any pushing. She also recommended that Jessica start school as a boy. Following the first visit, Dr. Berne sent a letter dated November 28, 2010, to Jessica's school stating her professional opinion that Jessica had gender identity disorder. On cross-examination, Dr. Berne admitted that gender identity disorders are very rare, stating that only one in 30,000 cases will a female identify as a male. She also admitted that she did not perform any psychological testing or complete a child behavioral checklist. She felt confident in diagnosing gender identity disorder after one visit because gender is innate, in her opinion.

The next individual to testify—at the request of the family court—was Dr. Robin Park, a psychologist. Dr. Park first saw Jessica on November 23, 2010, for complaints of anxiety and depression. Linda shared with Dr. Park that Jessica wanted to wear boy clothes and threw fits if she had to wear girl clothes. Dr. Park diagnosed mood and anxiety disorders, and prescribed Prozac. Dr. Park met with Linda on January 3, 2011, due to Dr. Park's concern of possible sexual abuse. She referred Linda to make an appointment with Holly Carson to evaluate possible abuse. Linda then began canceling all appointments with Dr. Park. When Linda did not return her calls and told her staff that she would not be returning to the office, Dr. Park made a hotline call to report suspected sexual abuse and neglect. Dr. Park also indicated a concern about Munchausen Syndrome by Proxy based upon Linda's over-dramatic reasons given for canceling appointments.

Linda's next witness was Trina Jansen, Jessica's art therapist. Ms. Jansen is a licensed counselor. She first saw Jessica on May 5, 2010, when she presented with anger and gender identity issues, stating that she wanted to be a boy. Jessica appeared at the office in boy clothes and with a boy haircut. Jessica also impersonated a dog during the session. Ms. Jansen diagnosed Jessica with gender identity disorder after the first visit. Because she admittedly had no experience with this disorder, Ms. Jansen referred Linda to Dr. Berne. Ms. Jansen saw Jessica again in July and August. In November, Ms. Jansen sent a letter to Jessica's school district regarding her diagnosis of gender identity disorder, that Linda was planning to have Jessica start kindergarten as a boy, and her recommendation that the school begin making arrangements to accommodate Jessica. Ms. Jansen saw her two more times, in January and May 2011, and her recommendation was to continue to affirm Jessica's gender identity as a boy. During cross- examination, Ms. Jansen admitted that she had never taken any classes regarding gender identity disorder and had no experience with this disorder before diagnosing Jessica. Following the first visit, Ms. Jansen familiarized herself with the disorder through internet research and reading books. She felt this made her qualified to make the diagnosis and write an opinion letter.

Linda testified next. She began her testimony with information related to Jessica's birth and David's failure to help either in the hospital or when they were released. She reported being a nervous mother, was unsure of how to care for the baby, and suffered from post-partum depression. Linda stated that David had a drug and alcohol problem. He came home drunk one night, yelled at the baby as she was crying, and pushed the crib she was in. Linda got the baby and left to stay at the Tracys' house, with whom she had been neighbors in Versailles. She and Jessica stayed with the Tracys for six and one-half months until they got an apartment where they lived for a year. David moved to Murray in March 2006 and did not see his daughter duringthis time, despite the Tracys welcoming visitation. Linda filed for dissolution, and she was awarded sole custody of Jessica when David failed to appear at the final hearing. After Linda was laid off from her job ..., she and Jessica moved back to Illinois to live with her parents in September 2007. They later moved to St. Charles, Missouri, where they still live.

Linda took Jessica to see Ms. Jansen at her parents' urging when she could not get her towear girl clothes. She stated that the only way to get Jessica to go out in public was to let her wear boy clothes. Ms. Jansen then referred her to Dr. Berne. Dr. Berne recommended that Lindawatch a special on the transgender issue, but Linda stated she never watched it. Linda was also referred to pediatric endocrinologist Dr. David Dempsher regarding hormone therapies. She also went to Dr. Park, but the thought of giving Jessica Prozac was scary to her. Linda sought out the opinion of Dr. Rosen when she read Dr. Shelton's report that she did not believe Jessica had gender identity disorder and that the disorder is very rare. Linda also sought support from the Transgendered Youth and Family Advocacy Group.

Throughout her testimony, Linda recounted the difficulties she experienced wrapping herhead around the diagnosis of gender identity disorder, thinking that Jessica was just going through a tomboy phase, but was concerned about the high suicide rate that had been reported. She stated that she was doing the best she could for her child by following the recommendationsof the medical providers. She was also not opposed to starting over with new providers to determine if Jessica did in fact have gender identity disorder. She was also adamant that she wanted Jessica to have a relationship with David.

Licensed clinical psychologist Dr. Dean Rosen testified by telephone. He began working with transgendered individuals in 1979, and Linda asked him for a second opinion and whether her actions were appropriate. Dr. Rosen saw Jessica on May 23, 2011, and provided a psychological report detailing the visit, his review of other medical records, and his findings. Dr. Rosen concurred in the finding of gender identity disorder, noting that the medical records show repeated statements from Jessica that she is a boy and wants to be called Bridge. On cross-examination, Dr. Rosen admitted that he did not contact David or any of his family members forinput, but that he found Linda's history to be credible. He thought that Dr. Berne had a sufficientability to make the diagnosis of gender identity disorder, and he discounted Dr. Park because of her Christian beliefs. Regarding the diagnosis of gender identity disorder, Dr. Rosen stated that the projective drawing test of the house, tree, and person is not used for diagnostic purposes, butrather to create rapport.

Linda's father, Clay Williams, testified next. He stated that David never visited with Jessica when she and Linda lived with him and his wife in Illinois. He reported that Jessica did not want to talk to her father on the telephone when he would call, but stated this was typical ofher with everyone. Mr. Williams noted that Linda was following the providers' recommendations.

David then called Rhonda Diaz on rebuttal. Ms. Diaz works at the childcare center in Calloway County that Jessica attended for a few weeks of that summer. She observed Jessica's

mannerisms and how she acted with the other children, and reported nothing out of the ordinary.Ms. Diaz stated that Jessica was well-adjusted and played with both boy and girl toys. She did not note any gender issues, but remembered her being pleasant and funny.

[The] court permitted the parties to make closing statements. David requested sole custody, with visitation for Linda, citing his concern that Linda was going from provider to provider. Linda stated that she was following what the providers had been telling her to do. She requested joint custody, with her being named the primary residential custodian. The GAL also recommended joint custody with Linda remaining as the primary residential custodian. In her opinion, it would be detrimental for Jessica to change her primary custodian. The court indicated that it placed much weight in Dr. Shelton's report, but was not impressed by the rest of the providers' testimonies, noting conflicting information and the existence of an agenda.

On August 10, 2011, the family court issued its lengthy findings of fact, conclusion, and judgment. The court determined that it was in Jessica's best interest to modify the current custody arrangement from sole to joint custody and designated David as the residential parent with visitation to Linda pursuant to Schedule A (the Close Proximity schedule). The court found that Linda's assertions regarding Jessica's depression and behavior was not supported by the testimony of David's family or her recent daycare provider. The court gave no weight to Ms. Jansen's diagnosis of gender identity disorder based upon her lack of training or experience, but placed a great deal of weight upon Dr. Shelton's reports and conclusions, noting that she considered independent collateral sources rather than solely relying on Linda's history. The court also relied upon the testimony of Dr. Owen[s]. Regarding Linda, the court specifically stated:

> The Court is not convinced by Linda's statements that she is agreeable to do anything the Court would conclude is in the child's best interest or that she was emotionally distraught over the diagnosis of gender identity disorder or that she was completely innocent in her acceptance of the mental health professionals' diagnosis. Her actions and conduct contradict her assertions. She had dressed Jessica as a male and cut her hair as a male even prior to taking the child to see the first professional. She contacted a pediatric endocrinologist even though she was advised the child was too young to consider such treatment. She works in the mental health field and should not have been so willing to accept such a diagnosis of such a rare disorder without first questioning the professionals' methodology. When Dr. Park failed to quickly support a diagnosis of gender identity disorder, she refused to continue to work with her and even reported her to the board of ethics and insurance board. Her actions in continuing to dress Jessica in boys' underwear and continuing to seek the services of Dr. Berne, Dr. Rosen, and Dr. Dempsher after Dr. Shelton filed her evaluation clearly do not reflect the actions of a mother distraught over her child being diagnosed with gender identity disorder. It appears odd that a mother distraught over her daughter being diagnosed with gender identity disorder would summarily dismiss the evaluations of Dr. Park and Dr. Shelton.

The court went on to find no evidence to conclude that Linda suffered from Munchausen Syndrome by Proxy, or that David ever had an alcohol or drug abuse problem. Finally, the court concluded that girls can prefer male sports, toys, and clothes without being pathologized as something requiring intervention, such as changing her gender for school, sending her to a separate bathroom, or changing her name to a Power Ranger character. However, the court did not dismiss the possibility that Jessica might or will have gender identity disorder, but noted thatthe disorder is extremely rare and that perhaps Jessica just does not like the color pink and prefers boy activities, toys, and clothes.

Regarding child support, the court ordered Linda to payDavid $660.66 per month effective the date of entry of the order....

On appeal, Linda ..... contends that the family court improperly exercised jurisdiction in this case when it modified custody of a non-resident child and contends Kentucky was an inconvenient forum. Second, if this Court disagrees with her on the jurisdictional issue, Linda argues that the modification order was against the weight of the evidence presented....

The first issue we shall address is whether the family court properly exercised jurisdictionin this case. In a pretrial order, the family court ruled that it retained exclusive and continuing jurisdiction over the case because David had continued to live in Kentucky and provided a significant connection to the Commonwealth. It also found that Kentucky was not an inconvenient forum to address the issues of custody and visitation modification. "Whether a trial court acts within its jurisdiction is a question of law; therefore, our review is *de novo*." *Biggs v. Biggs,* 301 S.W.3d 32 (Ky. App. 2009), citing *Grange Mut. Ins. Co. v. Trude,* 151 S.W.3d 803 (Ky. 2004).

In KRS 403.824, the General Assembly addressed the concept of continuing jurisdictionin child custody matters:

> (1) Except as otherwise provided in KRS 403.828, a court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing jurisdiction over the determination until:
>
> > (a) A court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
> > (b) A court of this state or a court of another state determines that the child, the child's parents, and any other person acting as a parent do not presently reside in this state.
>
> ....

Linda argues that no significant connections exist between Jessica and Kentucky and that there is no longer any substantial evidence in Kentucky regarding Jessica's care, protection, training, or personal relationships. In conjunction with this argument, Linda asserts that the Calloway Family Court cannot have continuing jurisdiction over the case because it did not decide the original custody issue; rather, the original custody decree was issued by the Fayette Family Court, where the dissolution action was filed. This argument is not well-taken. The Courtin *Biggs* made it clear that "the *state* making an initial custody determination retains jurisdiction unless" the factors set forth in KRS 403.824(1) related to lack of significant contacts are met. *Biggs* (emphasis added).

Our review of the record confirms that both Jessica and David maintained significant connections with Kentucky.... While Jessica no longer lives in Kentucky, ... she maintains a significant connection with Kentucky through visits with her father and her father's family members. In addition, Jessica continues to visit with the Tracys in Versailles. Furthermore, there is substantial evidence in Kentucky related to Jessica's care, protection, training, and personal relationships, specifically through David's family and her daycare provider while she was with David. Accordingly, we hold that Kentucky retained exclusive, continuing jurisdiction over this case...

We now turn our attention to KRS 403.834, which provides that a court may decline to exercise its jurisdiction if it is an inconvenient forum:

> ....
> (2) Before determining whether it is an inconvenient forum, a court of this state shall consider

> whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors....

The family court indicated that it considered all of the necessary factors set forth in KRS 403.834(2) in determining that it was not an inconvenient forum, and we agree with this conclusion. In support of her argument that Missouri is a better forum to hear this case, Linda states that Jessica's medical providers are located in Missouri, not Kentucky. On the other hand, David points out that no lay witnesses were located in Missouri; rather, those witnesses were in Kentucky or Illinois (Linda's parents live in Illinois). All of these witnesses, including Jessica's daycare provider, were able to testify live in the courtroom, and the family court permitted telephonic testimony for the medical providers located in Missouri. Based upon the factors set forth in KRS 403.834(2), we hold that the family court did not abuse its discretion in retaining jurisdiction over this case.

[We] shall now consider Linda's second argument ..... [The] family court's decision to name [David] as the residential parent did not constitute an abuse of discretion based on the evidence presented.

.... "The party seeking modification of custody or visitation/timesharing is the party who has the burden of bringing the motion before the court" and "the change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court."KRS 403.320(3) provides for the modification of custody "upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child."

KRS 403.340(3) sets forth several factors for a court to consider in determining whether to modify a prior custody decree..... KRS 403.270(2), in turn provides a list of all relevant factors a court must consider in order to decide what is in the best interests of the child:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to hiscustody;
> (b) The wishes of the child as to his custodian;
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (d) The child's adjustment to his home, school, and community;
> (e) The mental and physical health of all individuals involved;
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
> (g) The extent to which the child has been cared for, nurtured, and supported by any defacto custodian;
> (h) The intent of the parent or parents in placing the child with a de facto custodian; and
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS403.720 and whether the child was placed with a de facto custodian to allow the parentnow seeking custody to seek employment, work, or attend school.

Regarding the best interests standard, "any factual findings are reviewed under the clearlyerroneous standard; any decisions based upon said facts are reviewed under an abuse of discretion standard."

The crux of Linda's argument is that she is being penalized for following the medical advice given to her by Jessica's providers related to her diagnosis of gender identity disorder. We must agree with Dr. Owens' statement that the medical profession certainly let Jessica down. While we

make no judgment about the diagnosis of gender identity disorder or whether Jessica has this disorder, the medical witnesses Linda presented at the hearing did nothing to establish that Jessica was properly diagnosed or that Linda was receiving or following competent medical advice. Ms. Jansen was wholly unsuited and unqualified to make this rare diagnosis, and Dr. Berne made the diagnosis after a brief first session relying on a test that is not used to diagnose gender identity disorder. Furthermore, Dr. Rosen continued to support Dr. Berne's diagnosis and treatment even after discounting the test that she used. The only objective medical witnesses presented were Dr. Shelton, who was appointed by the court, and Dr. Owens. They both discounted the opinions of Jessica's providers and instead used a wide range of reports and interviews to reach their own conclusions that Jessica should not have been diagnosed with gender identity disorder.

The family court very cogently expressed its reasoning for not believing that Linda was completely innocent in her acceptance of the medical providers' advice, or that she would be agreeable to what the court might direct her to do with regard to Jessica's best interests. In fact, the record reflects that Linda tended to reject any challenge to the diagnosis of gender identity disorder, dismissing the medical opinions of both Dr. Park and Dr. Shelton. The record also reflects Linda's history of seeking out diagnoses for Jessica from before she was even a year old. The court's findings related both to Linda's behavior, including her actions in dressing Jessica in boy clothing and giving her a boy haircut prior to visiting the first provider to diagnose her, as well as to Jessica's preferences, provide sufficient support for the decision that it would be in Jessica's best interest to name David as the residential parent, despite the trauma the change in custody would cause. We perceive no abuse of discretion in this decision.

For the foregoing reasons, the judgment of the Calloway Family Court modifying custody is affirmed.

ALL CONCUR.

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**Discussion**

1. As summarized by the Court of Appeals, the family court judge "placed much weight" on the report of Dr. Shelton (the "clinical psychologist appointed by the court to perform a forensic custodial evaluation of the parents and child"), "but was not impressed by the rest of the providers' testimonies, noting conflicting information and the existence of an agenda." The family court judge "also relied upon the testimony of Dr. Owen[s]," the "child clinical psychologist who performed an independent evaluation of Jessica's medical records at the request of" the father's attorney. "Providers" presumably refers to the medical professionals who provided and recommended treatment for the child, that is, art therapist Trina Jansen and psychologist Dr. Patricia Berne; it is less clear whether it also includes Dr. Parks—who conducted a diagnostic interview with the child, did not believe a gender identity disorder diagnosis warranted, and testified at the family court's request (and whom the Court of Appeals's opinion suggests Dr. Owens apparently dismissed along with Jansen's, Berne's, and Dr. Rosen's)—and/or Dr. Rosen, whom the mother had review the report of Dr. Shelton.

On what might the Court of Appeals have based its characterization of Dr. Owens andDr. Shelton as "the only objective medical witnesses presented"? After all, Dr. Shelton was appointed by the court, but Dr. Owens was hired by the father's attorney.

2. What might one think the family court judge meant by accusing certain medical

providers—including Dr. Berne and Dr. Rosen, the only ones whom either party's appellate briefs (or the court's opinion) identified as having expertise in dealing with transgender clients and their psychological issues—as having "an agenda"? Does this justify the trial court in havingenjoined the mother from providing hormonal transition therapies to the child, which she had investigated as a possible course of action, even though the child was years from puberty, before which doctors would not administer puberty blockers to the child?

Why might the family court judge have stated (and the Court of Appeals noted this statement) that the mother did not appear to be "emotionally distraught over the diagnosis of gender identity disorder"? Should a parent be "distraught" over such a diagnosis (rather than, say, resolved to eliminate the suffering of their child that it connotes by providing appropriate treatment)?

3. Like every profession, psychology and psychiatry are not infallible. How should courts approach and resolve disputes between parents about whether their minor children are in fact transgender?

### *Reading Guide for* A.B. v. C.D.

1. In this parenting dispute, the father C.D. refused to accept his transgender son A.B. as a boy and sought to block A.B. from receiving "cross-sex hormones" (testosterone); the mother E.F. was supportive of A.B.'s gender identity and transition. The lower courts rejected the father's efforts, ruling that A.B. was a mature minor legally able to consent to treatment and issuing a protective order against C.D. On the father's appeal, how does the Court of Appeal ruleon C.D.'s motion to introduce new evidence and why?

2. What essentially procedural concern does the Court of Appeal have about the lower court's family violence order? What kind of findings under the Family Law Act does the Court of Appeal hold improper?

3. What does the Court of Appeal hold about a narrower "conduct order" limiting what the father C.D. might do or say regarding A.B.? What role do "Charter values" (values embodied in the Canadian Charter of Rights and Freedoms, somewhat akin to the U.S. Constitution's Bill of Rights) play in the court's analysis? What does the Court of Appeal "urge[]" C.D. to do?

### A.B. v. C.D.

Court of Appeal for British Columbia
2020 BCCA 11 (Jan. 10, 2020)

**Reasons for Judgment of the HONOURABLE CHIEF JUSTICE BAUMAN and the HONOURABLE MADAM JUSTICE FISHER:**

#### I. OVERVIEW

[1] AB is a transgender teenager: assigned female at birth, he feels and perceives himselfto be male. While still a minor, he wished to pursue hormone therapy, a medical procedure that would align his body more closely with how he perceives his gender (the treatment).

[2] His father, CD, strongly opposed AB receiving this treatment, while his mother EF was supportive.

[3] A medical team assessed AB as sufficiently mature to make the treatment decision on his own, and CD pursued litigation. AB and CD both commenced proceedings in the Supreme Court of British Columbia in February 2019 concerning CD's efforts to prevent the treatment and AB's ability

to consent on his own behalf. The three orders under appeal stem from this litigation.

[4] First, a February 2019 order declared AB validly able to consent to treatment, and that referring to AB as a girl or attempting to convince him to halt treatment would be considered family violence under the Family Law Act, S.B.C. 2011, ch. 25 [FLA]. Second, an April 2019 protection order restricted CD's ability to speak with others, including media outlets and AB, about AB's decision to receive hormone therapy. Third, a July 2019 order dismissed the action initiated by CD as vexatious and an abuse of process.

[5] CD appeals all three orders. He argues that they violate his [Canadian] Charter [of Rights and Freedoms]-protected freedoms of belief and expression and what he terms "parental rights," were procedurally unfair, and do not reflect AB's best interests.

[6] AB maintains that these orders were fairly decided, are Charter-compliant, and reflect his best interests as well as the statutory right of mature minors to make their own medical decisions under § 17 of the Infants Act, R.S.B.C. 1996, hc. 223. He is supported by EF and the other respondents.

[7] Following the hearing of this appeal, this court observed there was no reason to interfere with the finding that AB's consent was valid. The treatment, which AB began followingthe February order, was thus permitted to continue.

[8] In these reasons, we explain that decision. We further explain why, in our view, certain aspects of the first two orders were issued in a procedurally irregular fashion and cannot stand. We would allow the appeals of these orders in part and substitute procedurally appropriateorders. We would dismiss the appeal of the July order dismissing CD's action.

## II. BACKGROUND

### A. AB's medical assessment and treatment recommendation

[9] AB's parents, CD and EF, have been separated for several years. They share parenting time and responsibilities over AB under the terms of a separation agreement.

[10] At the time this appeal was heard, AB was nearing his 15th birthday.

[11] AB has identified as male since he was 11 years old. At 12, he began to socially transition, enrolling in school under a chosen male name and using male pronouns with his teachers and peers.

[12] Around 13 years of age, after two years of consistently identifying as male, AB's persistent discomfort with his body led him to want to take steps to appear more masculine. With the support of his mother, AB went to see a registered psychologist, Dr. IJ, for a number of sessions.

[13] Following these sessions, Dr. IJ finalized an assessment and treatment plan for AB. The plan concluded that AB met the diagnostic criteria for gender dysphoria. As described in theconsent form signed by AB, gender dysphoria is a recognized medical condition where a person experiences significant distress because the gender identity they experience differs from their genetic or biological gender, and how others perceive them.

[14] Dr. IJ found that AB would be a good candidate for hormone treatment, and referred him to the BC Children's Hospital (BCCH) for further assessment.

[15] In August 2018, AB met with pediatric endocrinologist Dr. GH at the Gender Clinicat BCCH. Dr. GH conducted a further assessment of AB and again determined that masculinizing hormone treatment was both reasonable in the circumstances and in AB's best interests.

[16] He explained the nature, consequences, and foreseeable risks and benefits of the treatment to AB, presenting a detailed consent form that laid out these risks. AB decided to proceed with the treatment, and signed the form. AB's mother, who supported him throughoutthis process,

also signed the form.

[17] Upon learning AB's father was not aware he was pursuing this treatment, Dr. GH postponed its start in order to present information to AB's father, CD.

[18] CD emailed the clinic a few days later expressing his opposition to the proposed treatment.

[19] From August to December 2018, a social worker at the clinic made "numerous attempts" to set up a meeting between Dr. GH and CD to discuss the proposed treatment. CD didnot attend at the clinic and did not engage with the medical team.

[20] On 1 December 2018, Dr. GH and social worker UV sent a letter to CD. The letter addressed CD's disagreement with the treatment and explained that, under § 17 of the Infants Act, minors are permitted to consent to their own medical treatment.

[21] The letter explained that the consent of a parent is not required to administer healthcare to a minor where the health care provider is satisfied the minor understands a treatment's nature and consequences, and has concluded the health care is in the minor's best interests. It informed CD that the BCCH medical team had assessed AB and found him capable, meaning CD's consent was not required for AB to proceed with treatment.

[22] After litigation commenced, Dr. GH took further steps to ensure his capacity assessment of AB was correct. He asked for an opinion from the Provincial Health Services Authority (PHSA) Ethics Service, which examined his finding of capacity and agreed that AB demonstrated capacity to understand the treatment.

[23] The ethics opinion suggested that, while not necessary, Dr. GH may wish to have an additional capacity assessment done by a provider outside the current care team in order to assuage CD's concerns and improve family dynamics.

[24] Dr. GH referred AB to Dr. MN, a psychiatrist at BCCH in the BC Mental Health Centre, who assessed AB and found that he demonstrated a detailed understanding of the risks and benefits of the treatment. Dr. MN further assessed AB's mental status, finding he displayed reasonable judgment and insight.

## B. Procedural history

### 1. Provincial Court proceedings

[25] This matter first came before a court on 12 December 2018. CD filed an applicationin the Provincial Court of British Columbia asking that AB be prevented from seeking treatmentfor gender dysphoria without CD's consent.

[26] The hearing proceeded without notice to AB on 14 January 2019. The court ordered that AB be prevented from pursuing treatment until 28 January 2019.

[27] On 28 January 2019, the order was extended to prevent treatment from commencing until CD had filed proceedings in Supreme Court.

### 2. Supreme Court proceedings

[28] In early February 2019, both AB and CD initiated proceedings in Supreme Court.

[29] AB filed a notice of family claim on 7 February 2019, following CD's successful Provincial Court application to temporarily bar his treatment. It named CD and EF as respondents. The following day, 8 February 2019, AB filed a notice of application requesting declarations under the FLA, including that he was entitled to make his own medical decisions under § 17 of the Infants Act and that treatment for gender dysphoria was in his best interests. AB also obtained an order that the application be heard on short notice and an order for a publication ban on the proceedings.

[30] On 13 February 2019, CD filed a response to AB's application, which opposed his

requests and asked for an interlocutory injunction preventing AB from obtaining the treatment.

[31] The same day, CD filed a petition in Supreme Court seeking a similar injunction against AB and nine additional parties: PHSA, EF, Dr. GH, Dr. IJ, the Ministry of Education, the Delta School District, elementary and high school counselors and officials who had dealt with AB, and barbara findlay, Q.C., lawyer to AB.

[32] CD then brought an application that asked, among other things, that the named parties be restrained from providing any advice or counsel in relation to the treatment, that they pass on any information they have about AB to CD, and that an interlocutory injunction be granted barring treatment until extensive evidence was heard on the merits of the treatment recommended for AB.

[33] CD also applied for an order that his application be heard on short notice, together with AB's.

**27 February 2019: AB's application granted, CD's application dismissed**

[34] On 19 and 20 February 2019, Justice Bowden considered both applications in a summary trial, along with a third application by AB for a publication ban in the proceeding initiated by CD. While the proceedings initiated by AB were anonymized, those initiated by CD named the parties on the public record.

....

[36] On 27 February 2019, Bowden J. issued reasons for judgment. He concluded, inter alia, that AB's consent was valid under § 17 of the Infants Act and that CD lacked the legal basis for an interlocutory injunction.

[37] CD's application was dismissed. Bowden J. concluded that the law on a mature minor's right to consent to treatment was well-settled. He accepted the evidence of Dr. GH that delaying the treatment further was not a neutral option for AB, as he was experiencing "ongoing and unnecessary suffering" due to his dysphoria. He noted EF's concern that her child might attempt suicide again, having done so in the past, if this suffering were prolonged.

[38] Bowden J. issued the following orders (collectively, the Bowden Order):

1. It is declared under § 37 of the Family Law Act that it is in the best interests of AB that:
    i. he receive the medical treatment for gender dysphoria recommended by the Gender Clinic at BCCH;
    ii. he be acknowledged and referred to as male, both generally and with respect to any matters arising in these proceedings, now or in the future and any references to him in relation to this proceeding, now or in the future, employ only male pronouns;
    iii. he be identified, both generally and in these proceedings by the name he has currently chosen, notwithstanding that his birth certificate presently identifies him under a different name.
2. It is declared under the Family Law Act that:
    i. AB is exclusively entitled to consent to medical treatment for gender dysphoriaand to take any necessary legal proceedings in relation to such medical treatment;
    ii. Pursuant to para. 201(2)(b), AB is permitted to bring this application under the Family Law Act and to bring or defend any further or future proceedings concerning his gender identity;
    iii. Attempting to persuade AB to abandon treatment for gender dysphoria; addressing AB by his birth name; referring to AB as a girl or with female pronouns whether to him directly or to third parties; shall be considered to befamily violence under § 38 of the Family Law Act.

3. AB is permitted to apply to change his legal name from that on his birth certificateto his chosen name and the consent of his mother or father for such change is not required.
4. AB is permitted to apply to change his gender pursuant to § 27 of the Vital Statistics Act, without the consent of his father or mother.
5. In these proceedings, including all applications associated with the proceedings, the names of the applicant young person, his father and his mother shall be anonymized. The applicant young person shall be referred to as AB, his father shall be referred to as CD and his mother shall be referred to as EF.
6. The publication by any person of any information that may disclose the identities ofAB, his father or his mother is prohibited.
7. The application by CD is dismissed.

[39] Bowden J. declined to issue a publication ban in relation to the medical professionals named in CD's petition. This aspect was reconsidered by Justice Marzari.

[40] In reasons issued 15 April 2019, indexed as 2019 BCSC 603, Marzari J. found that, in the time since Bowden J.'s decision, "substantial online commentary analogizing AB's medical treatment to child abuse, perversion and even pedophilia" had been published online. Further, the doctors treating AB had received threatening emails. These communications gave rise to "reasonable and significant apprehension of harm" for the medical professionals involved. Given the change in circumstances, Marzari J. issued a publication ban for the medical professionals.

[41] Marzari J. also addressed the deficiencies in CD's petition: first, that it should have properly been filed as a notice of family claim, given its main grounds of relief were under the FLA; and second, that it was "largely duplicative" of the response CD filed to AB's notice of family claim.

[42] Consequently, she directed CD to bring his case into compliance with the SupremeCourt Family Rules by attending at the registry and re-filing his petition as an action.

**15 April 2019: Protection order issued**

[43] On 8 April 2019, AB brought an application for a protection order under § 183 of the FLA. In a second set of reasons released 15 April 2019, Marzari J. found that AB was an at-risk family member and issued the order.

[44] This application followed multiple alleged breaches of the publication ban on the proceedings. Two different organizations had, following the summary trial before Bowden J., published AB's identifying information. AB had sought and obtained court orders issued on 5 March and 28 March 2019 compelling these organizations to remove identifying information from their websites. Both breaches were apparently supported by CD, who had given interviews to both organizations.

[45] The first organization, Culture Guard, had published two interviews where both CD and his legal counsel referred to AB as a girl and used female pronouns for him in these interviews, in alleged violation of Bowden J.'s order. Marzari J. found that CD's comments expressed opposition to AB's chosen course of treatment and "discusse[d] in detail AB's medical history, and trivialize[d] AB's suicide attempt."

[46] CD had further posted comments on Culture Guard's website under his own name

and agreed to be a speaker at an event of theirs, although he later withdrew from speaking.

[47] The second organization, an online conservative newspaper called the *Federalist*, had also published two interviews with CD, one before and one after Bowden J.'s reasons were released.

[48] In these interviews, CD once again referred to AB as a girl and expressed his disapproval of AB's medical choices. Marzari J. noted that one article stated CD "understood that this statement might be construed as a violation of the court's interdict against 'referring to[AB] as a girl … to third parties.'"

[49] The *Federalist* articles further provided links to materials in the case, including a copy of a letter sent to CD by AB's doctor, unredacted for anonymity.

[50] In the application before Marzari J., AB asked that his father be ordered to stop giving interviews and sharing documents pertaining to his case, including his personal medical information, with media organizations. EF supported the application.

[51] CD argued that bringing public attention to AB's case was important to society andto his rights as a parent.

[52] Marzari J. granted a protection order. She noted that Bowden J. had already made an order declaring that referring to AB as a girl, whether directly or to third parties, was a form of family violence. She considered this order binding on her unless or until it was overturned on appeal. She further distinguished between CD's objective of using AB's case to bring publicity to his cause, and the FLA objective of protecting the child.

[53] Marzari J. made the following order (the Marzari Order):

1. CD shall be restrained from:
    i. attempting to persuade AB to abandon treatment for gender dysphoria;
    ii. addressing AB by his birth name; and
    iii. referring to AB as a girl or with female pronouns whether to AB directly or to third parties;
2. CD shall not directly, or indirectly through an agent or third party, publish or share information or documentation relating to AB's sex, gender identity, sexual orientation, mental or physical health, medical status or therapies, other than with the following:
    i. His legal counsel;
    ii. Legal counsel for AB, EF, and the named respondents in the Petition currently filed as Vancouver Registry S-191565;
    iii. The Court;
    iv. Medical professionals engaged in AB's care or CD's care;
    v. Any other person authorized through written consent of AB; and
    vi. Any other person authorized by order of this court;
3. CD shall not authorize anyone, other than his own retained counsel, to access or makecopies of any of the files from the Registry in relation to this proceeding or any related proceeding, including CD's petition proceedings currently filed as S-191565; and
4. The term of the protection order shall be one year, subject to any extension issued bythe court.

**4 July 2019: CD's action dismissed**

[54] In accordance with the direction of Marzari J., CD refiled his petition as a family law action on 23 May 2019. He then filed an application seeking production of "all medical, counselling or other health related files, records and documents regarding A.B.'s gender dysphoria."

[55] In response, AB, Dr. GH, PHSA, and Dr. IJ filed notices of motion to strike CD's claim. EF filed a notice of motion consenting to the relief sought in AB's notice. The respondents argued that, among other flaws, CD's application was abusing this second process to seek production of documents for use in his appeal.

[56] On 4 July 2019, Justice McEwan dismissed the re-filed action and CD's application along with it (the McEwan Order). He found that CD's action disclosed no substantive claim, asit again only asked for an injunction against AB pursuing treatment, and in that way duplicated the relief CD sought in response to the action initiated by AB. He found the claim vexatious and dismissed it as an abuse of process. He ordered special costs to AB.

....

**3. On appeal**

[58] CD appeals the Bowden Order, the Marzari Order and the McEwan Order.

....

**2. CD: Fresh and new evidence**

....

[85] It] is our view that a court's role in reviewing the capacity of minors to make their own medical decisions is limited. The Infants Act assigns the role of assessing capacity to the medical professionals who provide health care. A court can only consider the limited question of whether § 17 of the Infants Act has been complied with.

[86] Consequently, we would conclude that CD's affidavits are inadmissible .... Affidavits of medical professionals without specific knowledge of AB's contextual medical history, needs, and capacity are not relevant to the question before this court: whether the healthcare providers dealing with AB's specific history, needs, and capacity complied with the Infants Act.

....

**A. The Bowden Order (2019 BCSC 254)**

[90] There are two threshold issues of jurisdiction in this proceeding: first, that raised bythe procedural irregularities on how the matter came to be disposed of by Justice Bowden; and second, that concerning the propriety of the court making what we will term "bald declarations" as to the best interests of AB purportedly under §§ 37 and 38 of the FLA. Along with this latter question, we will consider the question of the judicial reviewability of decisions by AB and his healthcare providers under § 17 of the Infants Act.

**1. Procedural fairness**

....

[93] The first matter heard on 19 February was the application by CD brought in his petition proceeding. That proceeding followed on CD's Provincial Court applications which in turn resulted in orders of that court enjoining the commencement of AB's treatment pending CD's proceedings in Supreme Court. As we have related, CD began his Supreme Court petition proceeding on 13 February 2019. In that petition CD sought, amongst a number of other orders, an interlocutory injunction restraining the administration of testosterone injections and other treatments for AB ....

[94] The application in respect of the Infants Act issues raised in the relief sought in the petition arose in the context of a written agreement CD entered into with EF on 30 January 2015 (the Family Agreement). There the parties agreed (in part):

1. THAT CD and EF will each continue to exercise all parental responsibilities with respect to AB and

…

> (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
>
> …
>
> (h) giving, refusing or withdrawing consent for the child, if consent isrequired; [. ]

....

[97] In the petition proceeding, CD sought an order extending the Provincial Court order restraining the treatment of AB for 45 days, until 5 April 2019....

[98] The second application before Justice Bowden was the application of AB brought inhis family law action. The relief sought there must be set out in some detail.

[99] AB sought, amongst others, these orders:

> 1. An Order pursuant to paragraph 201(2)(b) of the Family Law Act that the Applicant is permitted to bring this action and to defend any further or future proceedings concerning his gender identity brought by any person;
>
> …
>
> 4. A Declaration under section 37 of Family Law Act, that it is in the best interest of the Applicant that he obtains necessary medical treatment for gender dysphoria.
>
> 5. A Declaration under the Family Law Act that, regardless of who his guardian is or maybe from time to time, the Applicant is exclusively entitled to consent to medical treatmentfor gender dysphoria and to take any necessary legal proceedings in relation to his medical treatment.
>
> 6. An Order declaring that it is in the best interests of the Applicant that:
>
> a. He be acknowledged and referred to as male, both generally and with respect to any matters arising in this proceeding, now or in the future; and that any references to him in this proceeding, now or in the future, employ only male pronouns;
>
> b. That he be identified, both generally and in these proceedings, by the nameA.B., notwithstanding that his birth certificate presently identifies him [under a different name—Eds.].
>
> 7. An Order declaring that
>
> a. Attempting to persuade the Applicant to abandon treatment for gender dysphoria;
>
> b. Addressing the Applicant by his birth name (also known as "Dead Name")
>
> c. Referring to the Applicant as a girl, or with female pronouns, whether to the Applicant directly, or to third parties;
>
> d. Taking any legal proceeding to attempt to interfere with medical treatment ofthe Applicant
>
> constitutes family violence pursuant to section 38 of the Family Law Act.
>
> 8. An Order under the Family Law Act that the Respondent C.D. not have contact or parenting time with the Applicant unless and until he agrees to respect the Applicant's gender identity and gender expression, supports treatment for the Applicant's gender dysphoria, and is taking no legal proceedings to interfere with medical treatment for theApplicant.
>
> 9. An Order that the Respondent not refer to the Applicant by any name other than A.B.to any third parties including schools and doctors; and that he use male pronouns when referring to the Applicant to any person.

(AB also sought the change of name and gender identification amendments we earlier described.)

....

[106] [Based on a review of the proceedings below, the court concludes—Eds.] it rings

hollow when CD suggests that he was not aware that the central issue in the proceedings was before the court on 19 and 20 February 2019.

[107] That said, the "central issue" did not include the orders sought in para. 7 of AB's notice of application declaring certain conduct to be "family violence" under § 38 of the FLA. [We] accept CD's argument that this issue was not properly before Bowden J. and we would therefore set aside para. 2(c) of his order....

....

**2. Authority to consider compliance with § 17 of the Infants Act**

....

[118] Clearly the issue of an infant's best interests in matters of health care, by statute, is within the purview, at least initially, of the child's "health care provider" under § 17 ....

[119] If we view § 37 of the FLA as countenancing the making of a bald "best interests" declaration in the matter of the provision of "health care services," we are risking the court's interference with the best interests determination, which is, by statute, entrusted to the child's "health care provider." In our view, § 37 deals only with considerations to be taken into accountin "the making of an agreement or order …respecting guardianship, parenting arrangements or contact with the child." The provision does not contemplate freestanding judicial declarations as to the "best interests of the child" that are unconnected with agreements or orders respecting guardianship, parenting arrangements, or contact. In particular, where a child has consented to health care in accordance with § 17 of the Infants Act, § 37 of the FLA does not furnish a court with authority to enter upon a de novo consideration of the child's best interests in respect of medical treatment.

[120] How does this analysis impact the case? Declaration 1(a) [i.e., that it is in the best interests of A.B. that he receive the medical treatment for gender dysphoria recommended by the Gender Clinic at BCCH] cannot stand, but the effective outcome—upholding AB's consent to gender transition treatment—can be sustained, as we discuss below.

**3. The best interests declarations**

....

[126] While acknowledging the evidence at the summary trial of disingenuity on CD's part, Bowden J. considered CD's application in the context of CD's shared responsibility under the Family Agreement regarding "consent to medical, dental and other health related treatments for the child," a responsibility acknowledged to be subject to § 17 of the Infants Act. Given this,his order could not have addressed the issue of consent to medical treatment unless it was shownthat valid consent to such treatment had not been given under § 17 of the Infants Act.

....

[128] Bowden J. first gave little weight to the expert evidence tendered by CD tending to question the efficacy of the gender transition treatment proposed for AB. Generally, he noted that neither expert had examined or interviewed AB and offered only "general opinions." He considered their views to be "of such a generic nature that they are of little use in evaluating the best interests of AB." More specifically, the judge accepted the view that the treatment should not be further delayed in light of AB's risk of suicide.

[129] Critically, in the context of § 17 of the Infants Act, Bowden J. found that AB'sconsent was sufficient for the treatment to proceed. He then concluded (at para. 56):

> Having considered the form of consent signed by A.B. and the evidence of I.J., G.H. and A.C., I am satisfied that A.B.'s health care providers have explained to A.B. the nature and consequences as well as the foreseeable benefits and risks of the treatment recommended by

them, that A.B. understands those explanations and the health care providers have concluded that such health care is in A.B.'s best interests.

[130] Essentially, and correctly in our view, Bowden J. approached the review of the § 17 issue—whether AB had the capacity to consent under ... the Infants Act—with a deferential review of the actions and determinations of the health care providers in purported compliance with the prerequisites to a valid consent set by [§ 17].

[131] On the record here we see no basis to suggest that the judge's conclusion in this regard was in error ....

[133] The larger question, however, is whether a consent given under § 17 of the Infants Act, and in particular whether §17(3) has been complied with, is open to review by a court. In our view, the answer must be "yes." The issues encompassed by §17 must be justiciable, but the jurisdiction is limited.

[134] One way in which the issue may come before the courts is in an application to determine the extent of parental responsibilities under § 41(f) of the FLA. Under § 41(f), parental responsibility for "giving, refusing or withdrawing consent to medical, dental and other health related treatments for the child" is subject to § 17 of the Infants Act....

[135] Clearly "subject to § 17" means subject to a lawful exercise of the rights accordedto mature minors under § 17. The lawful exercise of those rights requires a health care provider to assess whether the "infant" understands the nature, consequences, benefits, and risks of the proposed treatment, and whether the treatment is in that individual's best interests.

[136] The court's approach to that review must be deferential given the legislative intent behind § 17 to recognize the autonomy of mature minors and the expertise and good faith of the health care providers.

[137] [The] relief sought in CD's petition is vastly beyond the scope of permissible review of a § 17 determination. The Infants Act has made it clear that health care professions, not judges, are best placed to conduct inquiries into the state of medical science and the capacityof their patients when it comes to questions of minors' medical decision-making. The statutory deference accorded to health care providers appropriately protects minors' medical autonomy by providing a limited scope of review. In this case, Bowden J.'s ultimate finding on this issue was made in accordance with this principle and within his limited jurisdiction.

[139] The established jurisprudence will guide the reviewing court in scrutinizing the determination of capacity and informed consent.

[140] Clearly, in the course of exercising the court's Part 4 FLA jurisdiction, the court may opine on what is in the child's "best interests" and may well make findings in that regard. In considering the possibility of family violence in assessing the "best interests," the court may identify past conduct amounting to that, but an appropriate order would not include a bald declaration that serves no useful purpose …. Where the concern about family violence warrants consideration of an order beyond those provided for in Part 4 of the FLA, the court must look to Part 9 and the factors to be considered in making protection orders (discussed below).

[142] Further, the court should not presume to make a general declaration as to a minor's capacity to consent to medical treatment, as it did in para. 2(a) of the Bowden Order. In declaringAB "exclusively entitled to consent to medical treatment for gender dysphoria," the judge again went beyond what was appropriate in the circumstances of this case.… At law, [minor AB] is exclusively entitled to consent to a specific treatment for gender dysphoria only if that specific treatment is one he understands and that a health care provider has determined is in his best interests. If these

requirements are not met, his consent to treatment remains the responsibility ofthose accorded that parenting responsibility on his behalf under the FLA.

[143] Accordingly, we would set aside the declarations in paras. 1(a) and 2(a) of the Bowden Order, and substitute them with a declaration that in respect of the gender transition treatment proposed for AB (and already begun), § 17 of the Infants Act has been complied with, AB's consent to that treatment is valid, and no further consent from his parents, in particular CD, is required in that regard.

....

**B. The Marzari Order (2019 BCSC 604)**

[145] Before Marzari J., AB sought a protection order under §§ 183(2) and 183(3)(a)(i)and (e) of the FLA to restrain CD from giving interviews and sharing documents pertaining to his case, including AB's personal medical information, with media organizations. CD opposed the application on the basis that bringing public attention to AB's case was important to societyand to his rights as a parent.

[146] Marzari J. considered herself bound by Bowden J.'s declaration that family members addressing AB by his birth name, referring to him as a female or attempting to persuade him to abandon treatment was a form of family violence. The focus of her reasons, however, reflected the focus of AB's concerns regarding CD's willingness to provide interviewsto the media and to social media outlets where he identified AB as female, used a female pseudonym, discussed AB's personal and medical information and expressed his opposition to the treatment.

...

[148] With respect to family violence, Marzari J. rejected an assertion by CD that AB was not harmed by CD's publicly expressed concerns or comments about AB's chosen gender identity and medical treatment. She considered the risk to AB to be not simply a risk that AB could be identified through CD's public opposition to his position but also that publishing and sharing deeply private information was harmful to AB. The judge relied on the "determinations" made by Bowden J., considering that they were "not open to re-determination," as well as the evidence before her of CD's conduct of publicly sharing AB's information ....

[149] Marzari J. also rejected CD's argument that his freedom of thought and speech aswell as his rights as a parent would be compromised by a protection order ....

[151] In granting the protection order, Marzari J. made these additional findings:

> [68] I find that CD's sharing of AB's private information has exposed his child to degrading and violent public commentary. CD has nevertheless continued to support themedia organizations posting this commentary with additional interviews, and has expressed a desire for further opportunities to do so.
>
> [69] I find that CD is using AB to promote his own interests above those of his child, bymaking AB the unwilling poster child (albeit anonymously) of CD's cause.
>
> [70] I find that this conduct puts AB at a high risk of public exposure and acts of emotional or physical violence, in the form of bullying, harassment, threats, and physicalharm, including self-harm.
>
> [71] I find that CD's attempts at anonymizing himself and AB do not immunize AB fromthe harms associated with this publicity or the commentary arising from it. AB knows that his father, the public commentators, and online posters are all talking about him.
>
> ....

**1. Protection orders and family violence**

[156] Protection orders, which fall under Part 9 of the FLA entitled "Protection fromFamily Violence," are powerful tools to address family violence.

[157] "Family violence" is defined in § 1 of the FLA as:

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence; [....]

[161] Sections 184 and 185 prescribe what must be considered in determining whether to make a protection order [. ....]

[162] What is apparent from reading these provisions generally is that the protection order framework is predicated on a finding that conduct meets the definition of family violence in § 1. Once this is determined, an assessment of factors that include a history of family violence and whether it is repetitive or escalating, can lead to an order restraining or limiting certain behaviour....

....

**2. Application to the Marzari Order**

[165] Paragraph 1 of the Marzari Order restrains CD from

i. attempting to persuade AB to abandon treatment for gender dysphoria;

ii. addressing AB by his birth name; and

iii. referring to AB as a girl or with female pronouns whether to AB directly or to third parties…

[166] Paragraph 2 restrains CD from, directly or indirectly through an agent or thirdparty, publishing or sharing information or documentation

2. … relating to AB's sex, gender identity, sexual orientation, mental or physical health, medical status or therapies, other than with the following:

i. his legal counsel;

ii. legal counsel for AB, EF, and the named respondents in the Petition currently filed as Vancouver Registry S-191565;

iii. the Court;

iv. medical professionals engaged in AB's care or CD's care;

v. any other person authorized through written consent of AB; and

vi. any other person authorized by order of this court; [….]

[167] In this case, Marzari J. assumed that the conduct identified in para. 2(c) of the Bowden Order—attempting to persuade AB to abandon the treatment, addressing him by his birth name and referring to him as a girl or with female pronouns—constituted family violenceas defined in the FLA. She made additional findings that CD's conduct in speaking publicly about AB's personal issues was

harmful to AB.

....

[172] Without more, there was insufficient evidence in the unique circumstances here to ground a finding of family violence—that is, emotional or psychological abuse—as defined in the FLA. Significantly, neither judge conducted an analysis of whether CD's conduct in relation to the name and pronouns he used with AB, and his discussions of AB's treatment choices, were sufficiently intentional or unresponsive to AB's communications with him to ground a finding of family violence....

[173] It is not our intention to minimize in any way the pain that AB feels due to his father's refusal to accept his decision to identify as male and proceed with hormone treatment. It is also not our intention to condone CD's conduct in refusing to engage with the medical professionals responsible for AB's care and refusing to engage in a more constructive way to communicate his views to AB.

[174] However, CD is entitled to his views and he is entitled to communicate those views to AB. As difficult as this is, this difference of opinion alone cannot justify a finding of family violence. As set out above, the evidence shows that AB is a mature minor with the capacity to make his own decision about the medical treatment recommended at this stage, and such capacity includes the ability to listen to opposing views. It also includes the ability to disengage in conversations that he finds uncomfortable or offensive. In fact, the evidence available suggeststhat AB has done just that, and that CD has generally respected this decision to disengage.

[175] In circumstances that do not fit squarely within the more obvious parameters of the family violence provisions in the FLA, it is our view that some caution should be exercised in identifying "psychological or emotional abuse" as constituting "family violence." This is especially important in cases such as this, which involve a complex family relationship stemming from a profound disagreement about important issues of parental roles and medical treatment. Moreover, a finding of family violence in such circumstances is inconsistent with the continuation of CD's parenting responsibilities.

[176] That said, CD's refusal to accept AB's chosen gender and address him by the namehe has chosen is disrespectful of AB's decisions and hurtful to him. As we discuss below, there are other ways to address such conduct in a family law case.

[177] Paragraph 2 of the Marzari Order was based on the judge's own finding on therecord before her that CD's conduct in continuing to publish and share AB's deeply private information was harmful to AB. The record before her, which she reviewed in her reasons, supports this finding so far as it relates to publication. For example:

[178] In bringing his concerns to public forums like the *Federalist* and Culture Guard, CD apparently took no account of the extent to which AB would be negatively affected. Not only did CD continue to disrespect AB's decisions, he also appeared to be oblivious to the effect of his conduct on AB as well as the very derogatory public comments related to AB posted on the *Federalist* website. Marzari J.'s finding that CD had made AB "an unwilling poster child (albeit anonymously)" was well founded.

[179] As concerning as CD's conduct was, however, it does not necessarily follow that such conduct equates to the kind of psychological or emotional abuse that would constitute "family violence" under the FLA. As we have observed, the evidence does not suggest that CD deliberately intended to harm AB; rather the evidence suggests that CD cares deeply for AB but, Marzari J. found, he has been irresponsible in the way in which he has dealt with his disagreement with AB about what

is in AB's best interests. We agree that his conduct in this regard has been seriously misguided but in the unique circumstances of this case, we do not agree that it should be characterized as "family violence" justifying the issuance of a protection order.

....

**3. Other remedies: Conduct orders**

[182] In a family law case, there are other ways to address conduct that has been found to cause harm to another party. One way is by a conduct order under §§ 222 and 227(c), which fall under Part 10, Division 5 of the FLA. These provisions give the court broad powers to regulate the conduct of parties to a family law proceeding.

[183] Section 222 provides the purposes which should guide conduct orders:

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

(a) to facilitate the settlement of a family law dispute or of an issue that maybecome the subject of a family law dispute;

(b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;

(c) to prevent misuse of the court process;

(d) to facilitate arrangements pending final determination of a family law dispute.

[184] Under § 227(c), a court may make an order requiring a party to

(c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222.

[185] Finally, § 225 gives specific authority to make orders restricting communication: 225 Unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions respectingcommunications between parties, including respecting when or how communications may be made.

....

[187] The conduct order provisions, like all provisions in the FLA, are guided by the best interests of the child, including minimizing the impact of conflict on a child....

[188] In our view, a conduct order, rather than a protection order with its serious implications, is a tool that allows the court to ensure that a proceeding such as this is conductedin a manner that strives to minimize the conflict between the parties.

[189] [In] crafting appropriate conduct orders, particularly orders that restrict a party's ability to communicate with others, courts should take into account a party's right to freedom of expression....

[190] Notwithstanding these concerns, it is our view that CD's conduct would more appropriately have been addressed in the form of a conduct order under § 227(c) of the FLA. Although the relief sought in the original application did not include conduct orders, and although such relief was not sought on appeal, we are of the view that it is proper to consider thegranting of such orders. CD has been afforded a full opportunity to address the substance of an order that restricts his manner of communication and the conduct orders we are considering are less severe and the terms less restrictive than the protection orders granted below.

....

**C. Charter values**

[193] CD challenges both the Bowden Order and the Marzari Order on the basis that they violate his rights under §§ 2(a) and (b) of the Canadian Charter of Rights and Freedoms to freedom

of conscience or belief and freedom of expression, as well as his liberty right under § 7 of the Charter to make important decisions for his child....

**2. Analysis**

[203] The law is clear that the Charter does not apply to judicial orders made in private disputes .... but …. underlying Charter values are not to be ignored by courts when making such decisions.

....

[205] Charter values have no role to play in interpreting legislation in the absence of an ambiguity.… Here, however, the issue does not involve interpreting legislation per se, but rather whether orders permissible under legislation should nonetheless be made in light of Charter values. We appreciate that there are limits on a consideration of Charter values in this context. Such considerations do not engage traditional Charter analysis but simply take into account important underlying values that are embodied in the Charter when orders are sought that may interfere with an individual's rights, such as freedom of expression. In taking these values into account, it is also important to recognize that no Charter rights are absolute, but are subject to thereasonable limits imposed by § 1.

[206] As CD points out, the values underlying the right to freedom of expression include finding the truth through the open exchange of ideas, which extends to protecting minority beliefs that the majority regard as wrong or false. However, because the right to freedom of expression is not absolute, limitations may be justified in light of competing rights, interests, and values.

[207] Competing rights, interests, and values, in the context of a private family law dispute, will of course include consideration of the best interests of the child. As McLachlin J. ... held in *Young*, the Charter guarantee of freedom of expression does not protect conduct thatviolates the best interests of the child test.

[208] Similarly, the right of parents to make decisions for their child in fundamental matters such as medical care, which is part of the liberty interest of parents protected under § 7 of the Charter, is not unconstrained. That liberty interest is based on the common law's long-standing recognition that parents are in the best position to make all necessary decisions to ensure the well-being of their child. That recognition is based on the presumption that parents actin the best interests of their child. In circumstances where parents are not acting in the best interests of their child, that parental liberty interest may be infringed where it is necessary for the state to intervene to protect a child whose life and security are in jeopardy. This occurs in circumstances where the child is unable to assert his or her rights.

[209] In the circumstances of this case, however, the child AB is able to assert his rights, and has done so in accordance with the law. In addition, the court below has made findings that CD's conduct has been contrary to AB's best interests. In this context, it is our view that CD's assertion that his parental rights under § 7 of the Charter have been violated by the kind of ordersmade has no merit. The same can be said for CD's rights under § 2(a).

....

[211] In general, caution should be exercised in limiting a parent's discretion, guided bytheir own opinion and belief, to parent as they see fit. However, as we have noted, this is a unique case that involves a father's disagreement about what is in his child's best interests in relation to the child's identity, gender, and medical treatment for which the child has validly consented.

[212] CD's refusal to respect AB's decisions regarding his gender identity is troublesome. The evidence shows that his rejection of AB's identity has caused AB significant pain and has

resulted in a rupture of what both parties refer to as an otherwise loving parent-child relationship. This rupture is not in AB's best interests. He clearly wants and needs acceptance and support from his father.

[213] While of course CD is fully entitled to his opinions and beliefs, he cannot forget that AB, now a mature 15-year-old, with the support of his mother and his medical advisors, haschosen a course of action that includes not only hormone treatment, but a legal change of his name and gender identity.

[214] It is our view that in these circumstances, a limited conduct order, made with the objective of protecting the best interests of AB, is consistent with the Charter values …. CD has the right to his opinion and belief about AB's gender identity and choice of medical treatment. His right to hold a contrary opinion would not be unduly affronted by an order that CD respect AB's choices by acknowledging them in his communications with AB and publicly with third parties, both generally and in respect of these proceedings. His right to express his opinion publicly and to share AB's private information to third parties may properly be subject to constraints aimed at preventing harm to AB. However, we would not restrict CD's right to express his opinion in his private communications with family, close friends and close advisors, provided none of these individuals is part of or connected with the media or any public forum, and provided CD obtain assurances from those with whom he shares information or views that they will not share that information with others.

[215] We would also not prohibit CD from expressing his opinion to AB about AB's choice to continue with hormone treatment. We consider such a direction to interfere too closelyin the role of a parent. As acknowledged by this court in *Van Mol v. Ashmore*, 1999 BCCA 6, a child's capacity to consent does not remove all parental involvement from their medical decisions:

> [89] The position of the parents at common law is straightforward. If the child does not have sufficient intelligence and understanding to have the capacity to consent, then onlythe parents can consent and their consent will be sufficient. But once the child has sufficient intelligence and understanding to have the capacity to consent, then only the consent of the child will do. The capacity of the parents to consent on behalf of the childdoes not coexist with the child's own capacity to consent or to refuse consent. It could not be otherwise. *But that is not to say that the parents need not be involved in the process of explanation, instruction and advice leading to the obtaining of the informed consent of the child. They should be involved as part of that process wherever possible.* [Emphasis added.]

[216] CD's attempts to be involved in the process leading to AB giving his consent to the hormone treatment have been fueled by positional stances without any direct involvement with AB's medical team. This is so despite the evidence of the team's efforts to bring him into the discussion. This is not the kind of parental involvement contemplated by the above passage. We therefore urge CD to do two things: first, engage with AB's medical team in an effort to considerother points of view and understand the basis for their recommendations; and second, exercise restraint in his approach with AB and make every effort to listen to AB's point of view. If he fails to do these two things, the rupture in his relationship with AB will likely not heal, which would not be in AB's best interests.

[217] Finally, we would restrict these conduct orders to the same one-year term as the previous protection order, subject to any extension on application to the Supreme Court.

....

**F. The McEwan Order**

[225] The thrust of CD's position in appealing the dismissal of his action is that, because

Marzari J. directed that he refile his petition as an action, it "must be taken to be a compliant family action." Because of Marzari J.'s order, he submits ... his action continuing ... was not vexatious or an abuse of process.

….

[227] ... CD's position is without merit. He filed a petition under the Supreme Court Civil Rules, B.C. Reg. 168/2009 seeking relief under the FLA. Marzari J.'s order that he refile it as a family law action simply recognized the procedural impropriety of this.

[227] Correcting a procedural defect in an action does not prevent it from being vexatious or an abuse of process. As McEwan J. correctly assessed, and identified over the course of the hearing, CD's action was both of those things.

[228] It is clearly both vexatious and an abuse of process to start a second proceeding for identical issues being litigated in an already-commenced proceeding.

[229] Further, in CD's own argument on appeal, he states that he sought to use the second proceeding to access documents for appeal of the first, which is also an obvious abuse of processin its attempt to breach the implied undertaking rule ....

[230] Special costs awards, which are discretionary, are entitled to deference. The Supreme Court Family Rules specifically provide the discretion to award these costs where the pleading is struck as vexatious or an abuse or process. We would decline to interfere with the chambers judge's exercise of discretion in awarding these costs.

[231] We would therefore dismiss the appeal from the McEwan Order.

**IV. COSTS**

[232] While we would allow the appeals of the Bowden and Marzari Orders to the extent indicated, we would replace the orders with the declaration and conduct orders set out above. Given this, it is our view AB has nevertheless been substantially successful in this litigation andwe would grant him his costs of the appeals of all three orders.

The Honourable Chief Justice Bauman
The Honourable Madam Justice Fisher

I AGREE:
The Honourable Mr. Justice Groberman

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**Discussion**

What restraints should one think that government may, consistent with freedom of speech, impose on parents' rejection of a child's professed transgender identity and such parents'efforts to publicize their views on gender identity and gender transitions? What kinds of showingor harm or potential harm to the children should be required to justify restraints on a parent's freespeech rights or parental rights (e.g., custody or visitation)? What kind of showing should government be able to require, if any, before a parent is allowed to provide "cross-sex" hormones to a child, either where the parents agree about the best treatment for a child or where the parents disagree? How if at all should a child's age play into the analysis of such issues?

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## CHAPTER 10 RELIGIOUS EXEMPTIONS

**Insert the following on p.538 before Religiously Justified Resistance to Civil Equality:**

### *Note on* Fulton v. City of Philadelphia

In *Fulton v. City of Philadelphia*, ___ S.Ct. ___, 2021 WL 2459253 (June 17, 2021), the Supreme Court once again avoided any broad pronouncement about the resolution of conflicts between antidiscrimination laws—and in particular, laws against sexual orientation discrimination—and exemption claims based on the right to the free exercise of religion. It had previously done similarly in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018), where a majority of the Court held that Colorado violated a Christian baker's constitutional right to the free exercise of religion, not from the bare fact that the state restricted his legal freedom to discriminate against a same-sex couple seeking to buy a wedding cake fromhis bakery but because of ostensibly anti-religious animus displayed by one or two of the commissioners who adjudicated the statutory claim brought against him by the couple.

*Fulton*, described more fully in Chapter 10, *supra*, at pp.537-538, presented a free exercise challenge by Catholic Social Services ("CSS") to Philadelphia's refusal to contract with them for services evaluating prospective foster couples because CSS disregarded their civil marriages and viewed them as not married within their religious understanding of marriage. The lower courts ruled against CSS, but the Supreme Court reversed. In an opinion by Chief Justice Roberts, the six-member majority held Philadelphia's action violated the Free Exercise Clause (as incorporated to apply against states by the Due Process Clause of the Fourteenth Amendment).

The majority opinion interpreted Philadelphia's standard contract with agencies performing theseparental evaluations to confer unrestricted "sole discretion" (in the contract's wording) upon the Commissioner of the City's Department of Human Services. With nothing in the contract (or other law, in the majority's view) constraining that discretion, the majority considered the law not to be "generally applicable" within the rule of *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), Chapter 10, *supra*, at p.533, that the Free Exercise Clause does not generally confer exemptions from neutral laws of general applicability. The unconstrained discretion here brought the case within an exception from *Smith* for laws providing for "individualized exemptions," requiring the city to prove that its refusal to grant such an exemption to a religious claimant satisfied strict scrutiny. Here, the majority concluded that there was no compelling reason advanced by the city to deny an exemption to CSS when its contracts allow it to grant exceptions to others.

Justice Barret, joined by Justice Kavanaugh, wrote a concurring opinion. Their first paragraph suggested that there was no (clear?) historical evidence that the Free Exercise Clause was intended to grant exemptions from neutral laws of general applicability, but that despite historical silence on that issue, textual and structural arguments suggest that Smith's rule was wrong. Then, joined for the rest of their opinion by Justice Breyer, they defended the Court's decision not to reexamine (and perhaps overrule) Smith in this case, a case in which the Court concluded that even under Smith CSS was entitled to an exemption from Philadelphia's anti-discrimination rule.

Justice Alito concurred in the judgment. He wrote an opinion five times the length of the majority opinion, joined by Justices Thomas and Gorsuch, in which he extensively argued that Smith was incorrectly decided and could properly be overruled consistently with stare decisis.

Justice Gorsuch wrote a much shorter concurrence. His opinion, joined by Justices Thomas and Alito, called into question multiple aspects of the majority's statutory interpretation of Philadelphia's standard foster care agency contract (which the majority concluded afforded standardless discretion to give agencies exemptions from the ban on sexual orientation discrimination) and the city's public accommodations law (which, contrary to the district judge's analysis, the majority held did not apply to agencies providing foster care services pursuant to contracts with the city).

Because the majority in *Fulton* crucially depended on the standardless discretion in the city contracts both to conclude that the city's nondiscrimination policy regarding foster care service providers was subject to individualized exemptions and not generally applicable (thus triggering strict scrutiny under *Smith*), and to conclude that the policy did not survive strict scrutiny, the decision is, as Justice Alito's opinion noted, strikingly narrow: "This decision mightas well be written on the dissolving paper sold in magic shops. The City has been adamant aboutpressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power."

*Fulton* thus may signal that this Supreme Court is inclined to rule in favor of religiously justified discrimination and against antidiscrimination rules that could protect LGBTQ+ people. But if breaks no real new doctrinal ground—it leaves *Smith* in place, for now. Thus, lower courtsgrappling with the claims of those who would discriminate against trans people based on their avowed religious beliefs will continue to adjudicate these clashes under the law that they have been using—for now.

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## CHAPTER 11 HEALTH INSURANCE EXCLUSION AND DISCRIMINATION

**On p.667 replace Discussion note 1 with the following:**

1. This decision by the Board of Departmental Appeals that National Coverage Determination 140.3 is invalid has allowed *Medicare* to cover transition-related care for seniors. It also helps pave the way for more states' *Medicaid* programs to cover transition-related care fortransgender seniors. Nevertheless, the invalidation of NCD 140.3 does not, by itself, require states to include such care. Although Medicare standards regarding coverage for transition- related healthcare can be persuasive for Medicaid programs, *see, e.g.*, Kellan Baker, Ashe McGovern, Sharita Gruberg, & Andrew Cray, *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations* 9 (Center for American Progress 2016), at https://cdn.americanprogress.org/wp-content/uploads/2016/08/08125221/2LGBTMedicaidExpansion-brief.pdf (noting that after Medicare excluded transition-related care in 1980 on grounds that it was "'cosmetic'" and "'experimental,'" "numerous state Medicaid programs, as well as most private insurance plans, quickly followed suit"), they are not binding on Medicaid. That would take additional litigation challenging exclusions or such care and/or state legislative or administrative action to cover such care expressly.

There has been progress on this front: At least Alaska, Colorado Connecticut, Maine, Maryland, Massachusetts Michigan, Minnesota, Montana, Nevada, New Jersey, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, D.C., and Puerto Rico all have (through legislative, administrative, or judicial action) eliminated categorical exclusions of transition-related care from or expressly included such care in their Medicaid programs since this 2014 Board of Departmental Appeals decision. *See* Movement Advancement Project, *Healthcare Laws and Policies: Medicaid Coverage for Transition-Related Care* (June 30, 2021), at https://www.lgbtmap.org/img/maps/ citations-medicaid.pdf; Christy Williams & William Tentindo, *Medicaid Coverage for Gender-Affirming Care* (The Williams Institute Oct. 2019), at https://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Gender-Care-Oct-2019.pdf; Lambda Legal, *VICTORY! Alaska Removes Medicaid Ban on Transition-Related Health Care* (June 29, 2021), at https://www.lambdalegal.org/blog/being_ak_20210628_alaska-removes-medicaid-ban-on- transition-related-health-care; Lambda Legal, *Victory! Connecticut Expands Medicaid to Cover Transition-Related Healthcare* (Mar. 26, 2015), at https://www.lambdalegal.org/blog/20150326_ct-expands-medicaid; TLDEF's Trans Health Project, *Minnesota Medicaid Regulations and Guidance* (2021), at https://transhealthproject.org/resources/medicaid-regulations-and-guidance/minnesota/; Parker Marie Molloy, *Oregon Removes State Medicaid's Trans Exclusions*, The Advocate, Aug. 15, 2014, at https://www.advocate.com/politics/transgender/2014/08/15/oregon-removes-state-medicaids-trans-exclusions; Pennsylvania Department of Human Services, *Medical Assistance Rule—Subject: Federal Final Rule, "Nondiscrimination in Health Programs and Activities" and Implication for Coverage of Services Related to Gender Transition*, at https://transequality.org/sites/default/files/PA-Medical-Assistance-Bulletin.pdf; TGI Network of RI, Rhode Island Says Transgender Health Insurance Exclusions Are Prohibited Under State Law (Nov. 24, 2015), at http://www.tginetwork.org/media/trans-health-insurance-announcement ;Office of the Health Insurance Commissioner, State of Rhode Island, *Health Insurance Bulletin 2015-3, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression* (Nov. 23, 2015), at https://docs.google.com/viewer?a=v&pid=sites&srcid= dGdpbmV0d29yay5vcmd8aW5kZXh8Z3g6MTkzMmE1ZDg3ODEzMjA2Yg; TLDEF's Trans Health Project, *Washington Medicaid*

*Regulations and Guidance* (2021), at https://transhealthproject.org/resources/medicaid-regulations-and-guidance/washington/; Washington Apple Health—Gender Affirming Interventions for Gender Dysphoria, WAC 182- 531-1675 (Apr. 5, 2021); National Health Law Program, Transgender Medicaid Beneficiaries Secure Victory in Landmark Class Action Health Care Rights Lawsuit Against State of Wisconsin (Dec. 10, 2019), at https://healthlaw.org/news/transgender-medicaid-beneficiaries-secure-victory-in-landmark-class-action-health-care-rights-lawsuit-against-state-of-wisconsin/. (Although the Puerto governor's Advisory Council on LGBTT (lesbian, gay, bisexual, transgender, and transsexual) Issues announced that the territory's Medicaid program (Government Health Insurance Program—Mi Salud) expressly will cover medications/hormonesused for gender transition, Michael K. Lavers, *Puerto Rico Medicaid Program Now Covers Transition-Related Health Care*, WASHINGTON BLADE, Oct. 15, 2020, https://www.washingtonblade.com/2020/10/15/puerto-rico-medicaid-program-now-covers-transition-related-health-care/, at the time of that announcement Puerto Rico's Medicaid regulations continued to exclude coverage for "procedures for sex change, including hospitalizations and complications," *Medicaid Regulations and Guidance: Puerto Rico*, TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND, Oct. 16, 2020, https://transhealthproject.org/resources/medicaid-regulations-and-guidance/us-territories/explicit-exclusion/.)

# CHAPTER 13 STUDENT RIGHTS UNDER TITLE IX AND OTHER LAWS

**Insert the following on p.912 before *Reading Guide for* Doe v. Boyertown Area School District:**

The Gloucester County School Board appealed its loss before Judge Arenda Wright Allento the U.S. Court of Appeals for the Fourth Circuit. With Judge Niemeyer again dissenting, the panel that decided the case affirmed in the opinion that follows.

***Reading Guide for* Grimm v. Gloucester County School Board (August 2020 panel opinion)**

1. What is the school board's argument in section III.A that transgender boy Gavin Grimm's suit over being denied use of boys' restrooms became moot prior to this decision? What reasons does the court give for rejecting the argument? What is the school board's other "threshhold" argument in section III.B for why the court should not reach the merits of Gavin'ssuit, and what reasons does the court give for rejecting it?

2. In sub-subsection IV.A.1.a, the court concludes that the school board's treatment of Gavin constitutes discrimination on the basis of sex, and hence is subject to intermediate scrutiny under the Equal Protection Clause, for two independent reasons. What is the first reason, and on what supporting authority does the court rely? What is the second reason ("Moreover, ..."), and on what supporting authority does the court rely? The board then argues in the same part of the opinion that its restroom policy does not classify on the basis of sex and that even if it does, it cannot violate equal protection principles. What is each argument? What reasons does the court give for rejecting each? Besides seeing sex discrimination, the majority offers an additional argument for applying intermediate scrutiny in sub-subsection IV.A.1.b. How does the court characterize the discrimination in this alternative argument, what factors from Supreme Court precedent does it analyze, and why does it think each factor supports its conclusion?

3. In IV.A. 2, the court applies intermediate scrutiny (one form of what it sometimes just refers to as "heightened scrutiny") to hold that the policy violates the Equal Protection Clause. Which prong (governmental purpose, or fit of the discrimination to the purpose) does the court rule is not satisfied, and for what reasons? In IV.B, the court fairly quickly concludes that the board's refusal to update the sex listed on Gavin's school records violated equal protection. What was the board's only argument in defense of its position on this issue and for what reasons does the court reject it?

4. In part V of its opinion, the court addresses Gavin's claims that the board's restroom policy and refusal to amend his records violated the ban on sex discrimination in Title IX of the Education Amendments of 1972. In section V.A, the court concludes first that the restroom policy discriminated against Gavin on the basis of sex, second that it caused Gavin legally cognizable harm, and third that this sex discrimination violated Title IX. What reasons does it give for each conclusion? In its argument for the third conclusion here, how does the court treat the Department of Education implementing regulation 34 C.F.R. § 106.33? In V.B, the court quickly concludes that the board's refusal to amend Gavin's school records violated Title IX; what is its reasoning?

5. In part I of his concurring opinion, Judge Wynn argues that the board's restroom policy is arbitrary. What is his argument in I.A that the policy does not provide a consistent basis for allocating restroom access to transgender students? What is his argument in I.B that the policy causes (more of) the same privacy harms it purports to address? And what does he note in I.C to underscore the arbitrariness of the policy? In part II, what is his argument about why the restroom policy's treatment of Gavin is unlike the maintenance of male and female restrooms—how does he conclude

the policy affects transgender people? What analogy does he draw to show the harmfulness of the policy? What "myth" does he believe the policy perpetuates, and what comparisons does he draw to explain its perniciousness? In part III, what arguments does he make to reject the dissent's charge that the majority is pursuing its policy preferences rather than applying the law?

6. Part II of Judge Niemeyer's dissenting opinion is a short introduction to his substantive analyses in parts III (Title IX) and IV (equal protection). In part III of his opinion, what arguments does Niemeyer make as to what "sex" means in Title IX? What arguments does he make about the purpose of Title IX's allowance of sex-segregated "living facilities" (and the arguably broader exemption in the implementing regulation)—"what the exceptions in Title IX are all about" per Niemeyer? Regarding part IV of Niemeyer's dissent, note that (even in the full opinion) he does not seem to argue that the restroom policy does not discriminate on the basis of sex, or even clearly to apply equal protection intermediate scrutiny; rather than follow the usual doctrinal analysis, he puts primary weight on his assertion that (the school board was entitled to maintain that) Gavin was not "similarly situated" to cisgender boys.

**Gavin GRIMM v. GLOUCESTER COUNTY SCHOOL BOARD**
972 F.3d 586 (4th Cir. 2020), cert. denied, — S.Ct. —, 2021 WL 2637992 (June 28, 2021)

[On this appeal, Gavin Grimm was represented by the national ACLU and the ACLU of Virginia. He was supported by amici 22 states and D.C.; school administrators from 29 states and D.C. represented by counsel including Tara Borelli of Lambda Legal; 17 medical, public health, and mental health organizations; "eight organizations that combat injustice against transgender students and work with families to advocate for open, supportive schools where transgender youth can lead authentic lives without facing discrimination" (PFLAG, Trans YouthEquality Foundation, Gender Spectrum, Gender Diversity, Campaign for Southern Equality, He She Se And We, Side by Side, and Gender Benders) with counsel including Asaf Orr and Shannon Minter from the National Center for Lesbian Rights and Lynly Egyes from the Transgender Law Center; national education organizations (the National PTA, GLSEN, the American School Counselor Association, and the National Association of School Psychologists);the Trevor Project; Fairfax County School Board, Alexandria City School Board, Arlington School Board, and Falls Church City School Board; interACT: Advocates for Intersex Youth; and the NAACP Legal Defense & Educational Fund with counsel including Prof. Suzanne Goldberg of the Columbia Law School Sexuality and Gender Law Clinic.]

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge.

Before [Paul V.] NIEMEYER, [James A.] WYNN, [Jr.,] and [Henry F.] FLOYD, Circuit Judges.

**FLOYD, Circuit Judge:**

At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender. We join a growing consensus of courts in holding that the answer is resoundingly yes.

Now a twenty-year-old college student, Plaintiff-Appellee Gavin Grimm has spent the past five years litigating against the Gloucester County School Board's refusal to allow him as a

transgender male to use the boys restrooms at Gloucester County High School. Grimm's birth-assigned sex, or so-called "biological sex," is female, but his gender identity is male. Beginning at the end of his freshman year, Grimm changed his first name to Gavin and expressed his male identity in all aspects of his life. After conversations with a school counselor and the high schoolprincipal, Gavin entered his sophomore year living fully as a boy. At first, the school allowed him to use the boys bathrooms. But once word got out, the Gloucester County School Board (the"Board") faced intense backlash from parents, and ultimately adopted a policy under which students could only use restrooms matching their "biological gender."

The Board built single-stall restrooms as an "alternative" for students with "gender identity issues." Grimm suffered from stigma, from urinary tract infections from bathroom avoidance, and from suicidal thoughts that led to hospitalization. Nevertheless, he persevered in his transition; he underwent chest reconstruction surgery, received a state-court order stating thathe is male, and amended his birth certificate to accurately reflect his gender. But when he provided the school with his new documentation, the Board refused to amend his school records.

Grimm first sued in 2015, alleging that, as applied to exclude him from the boys bathrooms, the Board's policy violated the Equal Protection Clause of the Fourteenth Amendment and constituted discrimination on the basis of sex, in violation of Title IX of theEducation Amendments of 1972, 20 U.S.C. § 1681(a). Since then, Grimm amended his complaint to add that the Board's refusal to amend his school records similarly violates both equal protection and Title IX. In 2019, after five winding years of litigation, the district court finally granted Grimm summary judgment on both claims. It awarded Grimm nominal damages,declaratory relief, attorney's fees, and injunctive relief from the Board's refusal to correct his school records. The Board timely appealed. Agreeing with the district court's considered opinion, we affirm.

## I. BACKGROUND

### A.

....

There is no question that there are students in our K-12 schools who are transgender. Formany of us, gender identity is established between the ages of three and four years old. Thus, some transgender students enter the K-12 school system as their gender; others, like Grimm, begin to live their gender when they are older. By the time youth are teenagers, approximately 0.7% identify as transgender. That means that there are about 150,000 transgender teens in the United States. That is not to suggest that people are either cisgender or transgender, and that everyone identifies as a binary gender of male or female.… But today's question is limited to how school bathroom policies implicate the rights of transgender students who "consistently,persistently, and insistently" express a binary gender.

Transgender students face unique challenges in the school setting. In the largest nationwide study of transgender discrimination, the 2015 U.S. Transgender Survey (USTS), 77% of respondents who were known or perceived as transgender in their K-12 schools reported harassment by students, teachers, or staff. For such students who were known or perceived to be transgender:

- 54% reported verbal harassment;
- 52% reported that they were not allowed to dress in a way expressing their gender;
- 24% reported being physically attacked because people thought they were transgender;
- 20% believed they were disciplined more harshly because teachers or staff thought they were transgender;
- 13% reported being sexually assaulted because people thought they were transgender;and

- 17% reported having left a school due to severe mistreatment.

USTS Report. Unsurprisingly, then, harassment of transgender students is also correlated with academic success: students who experienced greater harassment had significantly lower grade point averages. And harassment at school is similarly correlated with mental health outcomes for transgender students. The opposite is also true, though: transgender students have better mental health outcomes when their gender identity is affirmed.

Using the school restrooms matching their gender identity is one way that transgender students can affirm their gender and socially transition, but restroom policies vary. In one survey, 58% of transgender youth reported being discouraged from using the bathroom that corresponds with their gender. When being forced to use a special restroom or one that does not align with their gender, more than 40% of transgender students fast, dehydrate, or find ways not to use the restroom. Such restroom avoidance frequently leads to medical problems. To respond to the needs of transgender students, school districts across the country have implemented policies that allow transgender students to use the restroom matching their gender identity, and they havedone so without incident.

**B.**

....

[Following the events in the introduction to this opinion—Eds.] [for] seven weeks, Grimm used the boys restrooms at Gloucester County High School without incident. Despite that smooth transition, adults in the community caught wind of the arrangement and began to complain.

Superintendent Clemons, Principal Collins, and Board members began receiving numerous complaints via email and phone not only from adults within that school district but also from adults in neighboring communities and even other states. Only one student personally complained to Principal Collins, and that student did so before the restroom privacy improvements [that the school adopted].

Following these complaints, Board member Carla Hook, who had expressed her opposition to having a transgender male in the boys bathrooms, proposed the following policy atthe Board's public meeting on November 11, 2014:

> Whereas the [Gloucester County Public Schools (GCPS)] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and toprotect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

....

Although some community members supported creating a separate restroom for Grimm, by and large, they vehemently opposed allowing Grimm to use the boys restrooms....

The Board was set to vote on the proposed policy at that very meeting but voted 4-3 to delay the vote. Come the next meeting, held on December 9, 2014, the comment period was even uglier. One person called Grimm a "freak" and likened him to a dog, asking: "must we use tax dollars to install fire hydrants where you can publicly relieve yourselves?" *School Board Meeting*, Gloucester County School Board (Dec. 9, 2014), http://gloucester.granicus.com/player/clip/1090?view_id=10,

*cited by* Opening Br.… More than one person talked about Grimm's gender identity as a choice. *See id.* ("Is it morally right for us to kneel or bow to the very few who demand that they receive a special identification to meet needs of their own perceived body functions?"); *id.* (woman discussing her "former" lesbianism as an "addiction" from which "Jesus Christ set [her] free"). And more than one citizen stated thatthey would vote out the Board members if they allowed Grimm to use the boys restroom. *See id.*

At both meetings, Grimm and his parents spoke out against the proposed policy. Grimm explained in part how "alienating" and "humiliating" it had been to use the nurse's office, and that it "took a lot of time away from [his] education." He also explained that he was currently using the men's public restrooms in Gloucester County without "any sort of confrontation of any kind."

The Board passed the proposed policy on December 9, 2014 by a 6-1 vote.…

As a corollary to the policy, the Board approved a series of updates to the school's restrooms to improve general privacy for all students. The updates included the addition or expansion of partitions between urinals in male restrooms, the addition of privacy strips to the doors of stalls in all restrooms, and the construction of three single-stall unisex restrooms available to all students.

At the same time that the bathroom policy was going into place in December 2014, Grimm began hormone therapy. Hormone therapy "deepened [his] voice, increased [his] growth of facial hair, and [gave him] a more masculine appearance." But until the single-stall bathrooms were completed, Grimm's only option was to use the girls bathrooms or the restroom in the nurse's office. Grimm recalls an incident when he stayed after school for an event, realized the nurse's office was locked, and broke down in tears because there was no restroom he could use comfortably. A librarian witnessed this and drove him home. In a similar vein, and even after the single-user restrooms had been built, Grimm could not use those restrooms when at football games. He recounts a friend having to drive him to a hardware store to use the restroom; on another occasion, his mother had to come pick him up early.

....

As commonly occurs for transgender students prohibited from using the restroom matching their gender identity, *see supra* Part I.A, Grimm practiced restroom avoidance. This caused Grimm to suffer from recurring urinary tract infections, for which his mother kept medication "always stocked at home."

During his junior year, Grimm was hospitalized for suicidal ideation resulting from beingin an environment where he felt "unsafe, anxious, and disrespected." ....

.... In June 2015, before his junior year, the Virginia Department of Motor Vehicles issued Grimm state identification reflecting that he was male. In June 2016, Grimm underwent chest reconstruction surgery (a double mastectomy).[4] The Gloucester County Circuit Court found this to be a type of "gender reassignment surgery," and on September 9, 2016, it issued anorder declaring that Grimm is "now functioning fully as a male" and directing the Virginia Department of Health to issue him a birth certificate accordingly. Grimm's new birth certificate was issued on October 27, 2016.

Shortly thereafter, Grimm and his mother provided Gloucester County High School withhis new birth certificate and asked that his school records be updated to reflect his gender as male. The decision of whether to amend Grimm's records accordingly, though, lay with the Board. In January

[4] The parties agree that Grimm could not have undergone gender confirmation surgery of the genitalia until he was at least eighteen years old.

2017, through legal counsel, the Board informed Grimm in a letter that it declined to update his records. The Board did not provide a reason, but did inform Grimm of hisright to a hearing, which Grimm did not request.

....

Grimm graduated high school on June 10, 2017. He now attends community college in California and intends to transfer to a four-year university. To do so, he will need to provide his high school transcript, which still identifies him as female.

## II. PROCEDURAL HISTORY

…. Grimm first sued the Board on June 11, 2015[,] alleg[ing] that the Board's restroom policy impermissibly discriminated against him in violation of both Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution…. Because he only challenges his exclusion from the boys restrooms, we refer to the policy as the "bathroom" or "restroom" policy throughout.

The Board filed a motion to dismiss .... In the first ruling ..., the district court denied Grimm's motion for a preliminary injunction and dismissed his Title IX claim, holding that it would not defer to a Guidance Document issued by the Department of Education's Office for Civil Rights (OCR), which, at that time, directed in part that "[u]nder Title IX, a recipient mustgenerally treat transgender students consistent with their gender identity …." *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015). The district court heldthat an implementing regulation of Title IX, 34 C.F.R. § 106.33, "clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth [or —Eds.] biological sex."

[This] Court reversed, holding that the Guidance Document was entitled to deference. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016). However, after that decision, the Department of Education and Department of Justice withdrew its prior Guidance Document, issuing a new one. Accordingly, the Supreme Court, which had granted theBoard's petition for writ of certiorari and had scheduled oral arguments, summarily vacated this Court's decision and remanded for reconsideration in light of the shift in agency perspective. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

Having graduated from high school, Grimm then filed an amended complaint, which was assigned to a different district court judge. The amended complaint did not seek compensatory damages—only nominal damages and declaratory relief.… The Board once again filed a motion to dismiss for failure to state a claim. In an opinion that would build the basis for summary judgment, the district court denied the Board's motion to dismiss.…

After this win, Grimm filed a second amended complaint, adding a claim that the Board's refusal to update his gender on his school transcripts violates Title IX and equal protection.

Grimm and the School Board then filed cross-motions for summary judgment. Again, the districtcourt ruled in Grimm's favor, granting him summary judgment on both his Title IX and equal protection claims.

…

On the merits, and applying its prior Title IX holding as further supported by additional intervening caselaw, the district court granted Grimm's Motion for Summary Judgment on [his statutory and constitutional claims].

In addition to declaratory relief, the district court awarded nominal damages to Grimm inthe amount of one dollar for the Board's Title IX and equal protection violations, as well as attorney's fees. The Board timely appealed.

## III. THE BOARD'S THRESHOLD CHALLENGES TO GRIMM'S CLAIMS

At the outset, we reject the Board's two threshold challenges to Grimm's claims on appeal ….

### A. Mootness of Challenge to Restroom Policy

First, the Board contends that we lack jurisdiction over Grimm's challenges to the restroom policy because those claims are mooted by his own amendments to the complaint, which removed his request for injunctive relief and compensatory damages. As characterized by the Board, by only seeking nominal damages and declaratory relief as to the restroom policy, "Grimm seeks nothing more than a judicial stamp of approval, which is not a proper remedy." Finding a live controversy, we reject this argument.

Our jurisdiction is restricted by Article III of the Constitution to "Cases" and "Controversies." *See Chafin v. Chafin*, 568 U.S. 165 (2013). A case becomes moot and jurisdiction is lost if, at any time during federal judicial proceedings, "'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *See id.* (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013)). But the bar for maintaining a legally cognizable claim is not high: "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *See id.* (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012)). Naturally, then, plausible claims for damages defeat mootness challenges. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019) ("If there is any chance of money changing hands, [the] suit remains live."); *see also* 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.3 (3d ed. April 2020 Update) (hereinafter "WRIGHT & MILLER").

That is true even when the claim is for nominal damages. *See* WRIGHT & MILLER § 3533.3 (collecting cases); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (Alito, J., dissenting) (same). And the implications are particularly important in the civil rights context, because such rights are often vindicated through nominal damages. *See N.Y. State Rifle & Pistol Ass'n, Inc.* (Alito, J., dissenting) (citing *Riverside v. Rivera*, 477 U.S. 561 (1986) (plurality opinion)); *see also Riverside* (plurality opinion) ("Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damagesawards.").[6]

> [Here] the Board unquestionably applied its policy against Grimm. To this day, the Board and Grimm "vigorously contest" the legality of the bathroom policy as applied to Grimm. *See Chafin* (holding that a case was not moot when the parties continued to "vigorously contest the question of where their daughter w[ould] be raised"). [We] are presented with a "live controversy," *Hall v. Beals*, 396 U.S. 45 (1969), that is "likely to be redressed by a favorable judicial decision," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472 (1990). As seen by this drawn-out litigation, it will only be redressed by a favorable judicial decision.

### B. Administrative Exhaustion of School Records Decision

Second, the Board asserts that Grimm was required to exhaust his administrative remedies by requesting a hearing after he learned of the Board's final decision.… The Board is correct that the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, under which Grimm requested that his records be amended, provides for a hearing. See 34 C.F.R. § 99.20(c) ("If

[6] Additionally, winning nominal damages under 42 U.S.C. § 1983 allows for a recovery of attorney's fees under 42 U.S.C. § 1988, thereby allowing plaintiffs with insufficient funds to hire an attorney at market rate, and with little prospect of a great recovery, to be matched with a civil rights attorney. *See generally Riverside*, 477 U.S. at 576-80 (plurality opinion) (discussing the importance of the § 1988 framework for vindicating civil rights). Holding that claims for nominal damages are moot would undermine this framework by discouraging attorneys fromtaking cases such as Grimm's.

the educational agency or institution decides not to amend the record asrequested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.")....

[The court holds that FERPA does not require exhaustion of remedies, that it leaves that to the court's discretion, that because the "gravamen" (quoting *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017)) of Gavin's suit was discrimination against him not technical FERPA violations, and that because an administrative hearing seemed pointless given the school's refusal to change its treatment of Gavin even after a court-ordered birth certificate amendment, itwould not require exhaustion here.]

## IV. GRIMM'S EQUAL PROTECTION CLAIM

[W]e review the district court's grant of summary judgment to Grimm de novo. Summary judgment is only appropriate when there is "no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law."

### A. The Board's Restroom Policy

.... The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). The Equal Protection Clause protects usnot just from state-imposed classifications, but also from "intentional and arbitrary discrimination." *See Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) (quoting *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441 (1923)). Put another way, state action is unconstitutional when it creates "arbitrary or irrational" distinctions between classes of people out of "a bare … desire to harm a politically unpopular group." *Cleburne* (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)); *see also United States v. Virginia*, 518 U.S. 515 (1996) (sex-based classifications "may not be used, as they once were, to create or perpetuate the legal,social, and economic inferiority of women" (citation omitted)).

....

**1.**

[M]ost classifications are generally benign and are upheld so long as they are "rationally related to a legitimate state interest," *Cleburne*, whereas race-based classifications are "inherently suspect" and must be "strictly scrutinized," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Sex is somewhere in the middle, constituting a quasi-suspect class. Sex[8] is only *quasi*- suspect because, although it "frequently bears no relation to the ability to perform or contribute to society,'" *Cleburne* (quoting *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion)), the Supreme Court has recognized "inherent differences" between the biological sexes that might provide appropriate justification for distinctions, *see Virginia* (citing, as examples of appropriate sex-based distinctions, "compensat[ing] women for particular economic disabilities" and "promot[ing] equal employment opportunity" (internal quotation marks omitted)); *see also Tuan Anh Nguyen v. I.N.S.*, 533 U.S.A 53 (2001) (holding that less burdensome citizenship application requirements for the child of a citizen mother than for than that of a citizen father withstands [*sic*] intermediate scrutiny, in part because "[t]o 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").

[8] We acknowledge that the Supreme Court has, in certain equal protection cases, used both the terms "gender" and "sex" interchangeably. *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Virginia*. Therefore, Grimm has preserved an argument that transgender individuals necessarily fall under this line of cases based on gender discrimination. Because we need not reach this question in order to resolve Grimm's appeal, we treat this line of cases on perhaps its narrower terms—that is, as referring to classifications based on biological sex.

Because sex-based classifications are quasi-suspect, they are subject to a form of heightened scrutiny. *Cleburne*. Specifically, they are subject to intermediate scrutiny, meaning that they "fail[] unless [they are] substantially related to a sufficiently important governmentalinterest." *See id.* To survive intermediate scrutiny, the state must provide an "exceedingly persuasive justification" for its classification. *See Virginia*.

**a.**

On its face, the Board's policy creates sex-based classifications for restrooms. It states that the school district will "provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders." The only logical reading is that "corresponding biological genders" refers back to "male and female." And, although the Board did not define "biological gender," it has defended its policy by taking the position that it will rely on the sex marker on the student's birth certificate. We agree with the Seventh and now Eleventh Circuits that when a "School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate," the policy necessarily rests on a sex classification. *See Whitaker ex rel. Whitaker v. Kenosha UnifiedSch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *see also Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. Aug. 7, 2020) (same). As in *Whitaker*, such apolicy "cannot be stated without referencing sex." *See id.*; *accord M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018). On that ground alone, heightened scrutiny should apply.

Moreover, and as the district court held, "Grimm was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by the Policy." Many courts, including the Seventh and Eleventh Circuits, have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of theEqual Protection Clause because such policies punish transgender persons for gender non- conformity, thereby relying on sex stereotypes. *See, e.g.*, *Whitaker* (holding that the School District's bathroom policy "treat[ed] transgender students ... who fail to conform to the sex-basedstereotypes associated with their assigned sex at birth, differently"); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *M.A.B.* (holding thata school locker room policy was subject to heightened scrutiny because it "classifie[d] [the plaintiff] differently on the basis of his transgender status, and, as a result, subject[ed] him to sexstereotyping"); *see also Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (military bans on transgender persons subject to heightened scrutiny because they "punish individuals for failing toadhere to gender stereotypes"), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir.2019); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017) (adopting *Doe 1* rationale); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015) (holding that discrimination on the basis of transgender status is subject to intermediate scrutiny in part under sex-stereotyping theory).[9] In so holding, these courts have recognized a central tenet of equal protection in sex discrimination cases: that states "must not rely on overbroad generalizations" regarding the sexes. *See Virginia*; *see also Miss. Univ. for Women* ("Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning

[9] **Error! Main Document Only.**As relied on by the Board, one 2015 district court case goes the other way, *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 663 (W.D. Pa. 2015), but the same district court later chose not to follow that decision, see *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) ("*Johnston* also acutely recognized that cases involving transgender status implicate a fast-changing and rapidly-evolving set of issues that must be considered in their own factual contexts. To be sure, *Johnston*'s prognostication of that reality was profoundly accurate." (citation omitted)).

the roles and abilities of males and females.").

> For each of these independent reasons, we hold that the Board's policy constitutes sex-based discrimination as to Grimm and is subject to intermediate scrutiny....
>
> [The] Board contends that all students are treated the same, regardless of sex, because the policy applies to everyone equally. See Reply Br. (noting that any student may use a "private, single-stall restroom," and "[n]o student is permitted to use the restroom of the opposite sex").
>
> But that is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race. No one would suppose that also providing a "race neutral" bathroom option would have solved the deeply stigmatizing and discriminatory nature of racial segregation; so too here. Rather, the Board said what it meant: "students with gender identity issues shall be provided an alternative appropriate private facility." The single-stall restrooms were created for "students with gender identity issues." And by "students," the Board apparently meant Grimm, as, per its own deposition witness, it "only ha[d] a sample size of one." The Board suggests that this purpose insulates its policy from intermediate scrutiny, because it shows that the policy "relies solely on transgender status." But again, how does the Board determine transgender status, if not by looking to what it calls "biological gender"?
>
> Second, the Board contends that even if the policy necessarily involves sex-based discrimination, it cannot violate equal protection because Grimm is not similarly situated to cisgender boys. Instead, it asks us to compare Grimm's treatment under the policy to the treatment of students it would consider to be "biological" girls, because Grimm's "choice of gender identity did not cause biological changes in his body, and Grimm remain[ed] biologically female." But embedded in the Board's framing is its own bias: it believes that Grimm's gender identity is a choice, and it privileges sex-assigned-at-birth over Grimm's medically confirmed, persistent and consistent gender identity. The overwhelming thrust of everything in the record from Grimm's declaration, to his treatment letter, to the amicus briefs—is that Grimm was similarly situated to other boys, but was excluded from using the boys restroom facilities based on his sex-assigned-at-birth. Adopting the Board's framing of Grimm's equal protection claim here would only vindicate the Board's own misconceptions, which themselves reflect "stereotypic notions." See Miss. Univ. for Women ("Care must be taken in ascertaining whether the [state's] objective itself reflects archaic and stereotypic notions.").[10]

**b.**

Alternatively, and as held by the district court in this case, we conclude that heightened scrutiny applies because transgender people constitute at least a quasi-suspect class.

Although the Seventh Circuit declined to reach the question of whether heightened scrutiny applies to transgender persons in *Whitaker*, many district courts, including the district court here, have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class.[10] As articulated by one district court, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951-53 (W.D. Wis.

[10] **Error! Main Document Only.**Our dissenting colleague's opinion reveals why this is so. To avoid a conclusion that Grimm was similarly situated to other boys, the dissent fails to "meaningfully reckon with what it means for [Grimm] to be a transgender boy." *See Adams*, 968 F.3d 1286. We have been presented with a strong record documenting the modern medical understanding of what it means to be transgender, and considering that evidence is definitively the role of this Court.

2018). Moreover, the Ninth Circuit recently joined the many district courts inholding that transgender people constitute a quasi-suspect class. *See Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019). Only one court of appeals decision holding otherwise remains good law, but it reluctantly followed a since-overruled Ninth Circuit opinion. *See Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995) (noting that "[r]ecent research concluding that sexual identity may be biological suggests reevaluation of [*Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977),]" but following it regardless because the plaintiff's allegations were "too conclusory to allow proper analysis").

.... We consider four factors to determine whether a group of people constitutes a suspector quasi-suspect class. First, we consider whether the class has historically been subject to discrimination. *Bowen v. Gilliard*, 483 U.S. 587 (1987). Second, we determine if the class has a defining characteristic that bears a relation to its ability to perform or contribute to society. *Cleburne*. Third, we look to whether the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics. *Bowen*. And fourth, we consider whether the class is a minority lacking political power. *Id.* Each factor is readily satisfied here.

First, take historical discrimination. Discrimination against transgender people takes many forms. Like the district court, we provide but a few examples to illustrate the broader picture. As explained in the Brief of the Medical Amici, being transgender was pathologized for many years. As recently as the DSM-3 and DSM-4, one could receive a diagnosis of "transsexualism" or "gender identity disorder," "indicat[ing] that the clinical problem was the discordant gender identity." ... "[G]ender identity disorder" was not removed until the DSM-5 was published in 2013. What is more, even though being transgender was marked as a mental illness, coverage for transgender persons was excluded from the Americans with Disabilities Actof 1990 (ADA) after a floor debate in which two senators referred to these diagnoses as "sexual behavior disorders." The following year, Congress added an identical exclusion to the Rehabilitation Act of 1973, "stripping transgender people of civil rights protections they had enjoyed for nearly twenty years."

The transgender community also suffers from high rates of employment discrimination, economic instability, and homelessness. According to the *National Transgender Discrimination Survey* (NTDS),[12] people who are transgender are twice as likely as the general population to have experienced unemployment. When employed, 97% of NTDS respondents reported experiencing some form of mistreatment at work, or "hiding their gender transition to avoid such treatment." Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507 (2016). NTDS respondents were "four times more likelythan the general population to have a household income of less than $10,000 per year," and two and a half times more likely to have experienced homelessness. *Id.*

.... Transgender people frequently experience harassment in places such as schools (78%), medical settings (28%), and retail stores (37%), and they also experience physical assaultin places such as schools (35%) and places of public accommodation (8%). Indeed, transgender people are more likely to be the victim of violent crimes. So, in 2009, Congress expanded federal protections against hate crimes to include crimes based on gender identity. In so doing, the House Judiciary Committee recognized the "extreme bias against gender nonconformity" and the"particularly violent" crimes perpetrated against transgender persons.

Of course, current measures and policies continue to target transgender persons for

[12] **Error! Main Document Only.**The NTDS is a major national survey on transgender discrimination. Along with its successor, the USTS, the NTDS has been relied upon by many amici to this case, as well as other courts. *See, e.g.*, *Whitaker* (citing to the NTDS); *M.A.B.* (citing to both the NTDS and the USTS); *Adkins* (relying on the NTDS).

differential treatment. Without opining on the *legality* of such measures, we note that policies precluding transgender persons from military service, even after the repeal of "Don't Ask, Don't Tell," have recently been re-implemented as to most transgender service members. And this year,the Governor of Idaho signed into law a bill that would ban transgender individuals from changing the gender marker on their birth certificates, as Virginia law allowed Grimm to do.

Further still, the Department of Health and Human Services recently issued a final rule redefining "sex discrimination" for purposes of Section 1557 of the Affordable Care Act toencompass only biological sex, and not gender identity. The list surely goes on.

Next, we turn to the second factor—whether the class has a defining characteristic that "bears [a] relation to ability to perform or contribute to society.'" *Cleburne* (quoting *Frontiero*). Being transgender bears no such relation. Seventeen of our foremost medical, mental health, andpublic health organizations agree that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Although some transgender individuals experience gender dysphoria, and that could cause some level of impairment, not all transgender persons have gender dysphoria, and gender dysphoria is treatable. "Importantly, 'transgender' and 'impairment' are not synonymous." Barry et al.

That leaves the third and fourth factors. As to the third factor, transgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice. Rather, it is as natural and immutable as being cisgender. But unlike being cisgender, being transgender marks the group for different treatment.

Fourth and finally, transgender people constitute a minority lacking political power.

Comprising approximately 0.6% of the adult population in the United States, transgender individuals are certainly a minority. Even considering the low percentage of the population that is transgender, transgender persons are underrepresented in every branch of government. It was not until 2010 that the first openly transgender judges took their place on their states' benches, and we know of no openly transgender federal judges. There is a similar dearth of openly transgender persons serving in the executive and legislative branches. In 2017, nine openly transgender individuals were elected to office—more than doubling the total number of transgender individuals in any elected office across the country. And the examples of discrimination cited under the first factor affirm what we intuitively know: Transgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process.

The Board does not, and truly cannot, contend that transgender people do not constitute a quasi-suspect class under these four factors. Instead, it counsels judicial modesty, suggesting thatwe are admonished not to name new suspect classes. *See Cleburne* ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choice as to whether, how, and to what extent those interests should be pursued."); *see also Johnston*.

But no hard-and-fast rule prevents this Court from concluding that a quasi-suspect class exits, nor have *Cleburne*'s dicta prevented many other courts from so concluding.

For the foregoing reasons, we hold that the Board's restroom policy constitutes sex-based discrimination and, independently, that transgender persons constitute a quasi-suspect class.

**2.**

[We] apply heightened scrutiny to hold that the Board's policy is not substantially related to

its important interest in protecting students' privacy.[13]

No one questions that students have a privacy interest in their body when they go to the bathroom. But the Board ignores the reality of how a transgender child uses the bathroom: "by entering a stall and closing the door." *Whitaker*; *see also Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018). Grimm used the boys restrooms for *seven weeks* without incident. When the community became aware that he was doing so, privacy in the boys restrooms actually increased, because the Board installed privacy strips and screens between the urinals. Given these additional precautions, the Board's ... witness could not identify any other privacy concern. The Board does not present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student. Put another way, the record demonstrates that bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms.

Therefore, the Board's policy was not substantially related to its purported goal.

The insubstantiality of the Board's fears has been borne out in school districts across the country, including other school districts in Virginia. Nearly half of Virginia's public-school students attend schools prohibiting discrimination or harassment based on gender identity. Although community members espoused similar fears at school board meetings before the anti-discrimination measures, none of those fears have materialized....

The same can be said across the country. *See* Br. of School Administrator Amici (explaining that in amici's states, the concerns raised by the Board have not materialized).… And the National PTA, GLSEN, American School Counselor Association, and National Association of School Psychologists similarly assure us that the experiences of schools and school districts across the country "put the lie to supposed legitimate justifications for restroom discrimination: preventing students who pretend to be transgender from obtaining access to opposite-gender restrooms and protecting privacy."

We thus agree with the district court's apt conclusion that "the Board's privacy argument 'is based upon sheer conjecture and abstraction.'" Notably, both the Third and Ninth Circuits have now rejected privacy-related challenges brought by cisgender students to the shared use of restrooms with transgender students of the opposite biological sex. *See Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018). And before this opinion was filed, the Eleventh Circuit, applying heightened scrutiny to a transgender student's equal protection challenge to his high school's bathroom policy, similarly held that application of the policy did not withstand such scrutiny due, in part, to the hypothetical nature of the asserted privacy concerns. *See Adams*, 968 F.3d 1286.

Moreover, we conclude that the Board's policy is "marked by misconception and prejudice" against Grimm. *See Tuan Anh Nguyen*. The Board's proposed policy was concocted amidst a flurry of emails from apparently concerned community members and adopted in the context of two heated Board meetings filled with vitriolic, off-the-cuff comments, such as referring to Grimm as a "freak." Parents threatened to vote out the Board members if they allowed Grimm to continue to use the boys restrooms. One would be hard-pressed to look at the record and think that the Board sought to understand Grimm's transgender status or his medical need to socially transition, as identified by his treating physician....

[13] **Error! Main Document Only.**Grimm argues on appeal that he wins even under rational basis review. In light of our holding above, we need not analyze his claim under that level of review.

By relying on so-called "biological gender," the Board successfully excluded Grimm from the boys restrooms. But it did not create a policy that it could apply to other students, such as students who had fully transitioned but had not yet changed their sex on their birth certificate. As demonstrated by the record and amici such as interACT, the Board's policy is not readily applicable to other students who, for whatever reason, do not have genitalia that match the binary sex listed on their birth certificate—let alone that matches their gender identity. *See* Br. for Amicus Curiae interACT: Advocates for Intersex Youth in Supp. of Pl.-Appellee. Instead, the Board reacted to what it considered a problem, Grimm's presence, by isolating him from his peers.

**B. The Board's Failure to Amend Grimm's School Records**

Having held that the Board's bathroom policy violated Grimm's equal protection rights, we easily conclude that the Board's continued refusal to update his school records similarly violates those rights.[14] Unlike students whose gender matches their sex-assigned-at-birth, Grimm is unable to obtain a transcript indicating that he is male. The Board's decision is not substantially related to its important interest in maintaining accurate records because Grimm's legal gender in the state of Virginia is male, not female.

The Board's only rebuttal is that Grimm did not provide a lawfully obtained amended birth certificate.… The Board complains that the copy said "VOID," that it did not say the word "amended," and that the Gloucester County Circuit Court granted Grimm's motion to change his sex to male based on chest reconstruction surgery. As found by the district court, however: "It is obvious from the face of the amended birth certificate that the photocopy presented to the Boardwas marked 'void' because it was a copy of a document printed on security paper, not because it was fabricated." Moreover, while the Board may disagree with the Gloucester County Circuit Court's order granting Grimm's motion to change his sex to male because it believes that chest reconstruction does not classify as gender reassignment surgery under Virginia law, we must give full faith and credit to that state court's order, which cannot be collaterally attacked in this appeal. *See* 28 U.S.C. § 1738. And in the face of the declaration of State Registrar and Director of the Division of Vital Records assuring that she issued Grimm a valid amended birth certificate, we grow weary of the Board's repeated arguments that it received anything less than an official document.

...

* * *

For the foregoing reasons, we affirm the district court's grant of summary judgment toGrimm on his equal protection claim.

**V. GRIMM'S TITLE IX CLAIM**

We next address Grimm's claim that the Board's restroom policy and refusal to amend his school records also violated Title IX. Title IX provides that "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To grant summary judgment to Grimm on his Title IX claim, we must find (1) that he was excluded from participation in an education program "on the basis of sex"; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused him

[14] **Error! Main Document Only.**The dissent does not address Grimm's school records, presumably because it would hold that Grimm is not similarly situated to other boys—full stop. Yet Virginia recognized Grimm as male and *amended his birth certificate*. Although preserving sex-assigned-at-birth separated restrooms may rouse more sentiment, the less-contentious school records issue sheds light on why application of such a restroom policy to transgender students is problematic.

harm. *See Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994). There is no question that the Board received federal funding or that restrooms are part of the education program. At issue in this case is whether the Board acted "on the basis of sex," and if so, whether that was unlawful discrimination that harmed Grimm.

**A. The Board's Restroom Policy**

We first address the restroom policy. After the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex." Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007). In *Bostock*, the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex." As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions. As explained above in the equal protection discussion, the Board could not exclude Grimm from the boys bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys restrooms "on the basis of sex."[15]

> We similarly have no difficulty holding that Grimm was harmed. As the district court found: In his Declaration, Mr. Grimm described under oath feeling stigmatized and isolated by having to use separate restroom facilities. His walk to the restroom felt like a "walk of shame." He avoided using the restroom as much as possible and developed painful urinary tract infections that distracted him from his class work. This stress "was unbearable" and the resulting suicidal thoughts he suffered led to his hospitalization at Virginia Commonwealth University Medical Center Critical Care Hospital.

Grimm also "broke down sobbing" when a restroom was unavailable after school, and he could not attend football games without worrying about where he would use the restroom.

The Board … has quibbled with the amount of harm Grimm felt, asserting below, for example, that he needed a medical expert to prove urinary tract infections. But in a nominal damages case, Grimm's harm need not be precisely calculated. For summary judgment purposes it matters only that there is no genuine issue of material fact as to whether the bathroom policy harmed Grimm. There is

[15] We pause to note another theory under which Grimm may have been discriminated [*sic*] "on the basis of sex." In *Price Waterhouse v. Hopkins*, the Supreme Court held that sex stereotyping constitutes discrimination on the basis of gender for purposes of Title VII. *See* 490 U.S. 228 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). Various circuits have applied *Price Waterhouse* to Title VII gender stereotyping claims in the LGBTQ+ context, although we have not. Most notably, in *Hively v. Ivy Tech Community College*, the Seventh Circuit applied the logic of *Price Waterhouse* and held in an en banc opinion that a lesbian woman who was fired could state a Title VII gender-stereotyping claim. *See* 853 F.3d 339 (7th Cir. 2017) (en banc). The district court similarly relied on *Price Waterhouse* below. For the reasons discussed above in the equal protection section of our opinion, we agree that the policy punished Grimm for not conforming to his sex-assigned-at-birth. But having had the benefit of *Bostock*'s guidance, we need not address whether Grimm's treatment was also "on the basis of sex" for purposes of Title IX under a *Price Waterhouse* sex-stereotyping theory.

no question that Grimm suffered legally cognizable harm for at least two reasons.

First, on a practical level, the physical locations of the alternative restrooms were inconvenient and caused Grimm harm.… The distance caused him to be late for class or awayfrom class for longer than students and teachers perceived as normal. And when he attended after-school events, he had to be driven away just to use the restroom.

Second, in a country with a history of racial segregation, we know that "[s]egregation not only makes for physical inconveniences, but it does something spiritually to an individual." Martin Luther King, Jr., *"Some Things We Must Do," Address Delivered at the Second Annual Institute on Nonviolence and Social Change at Holt Street Baptist Church* (Dec. 5, 1957); *see also* Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Supp. of Pl.-Appellee (outlining the harms and erroneous rationales of racial segregation). The stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX, as it "invite[s] more scrutiny and attention" from other students, "very publicly brand[ing] all transgender students with a scarlet 'T.'" *Boyertown* (quoting *Whitaker*); *see also id.* (rejecting the suggestionthat transgender students be offered single-stall restrooms, rather than be allowed to use the regular restrooms matching their gender identity). Even Grimm's high school principal "understood [Grimm's] perception" that the policy sent the following message: Gavin was not welcome. Although the principal assumed some students may have used that restroom, Grimm never saw anyone else use the restrooms created for students with "gender identity issues." The resulting emotional and dignitary harm to Grimm is legally cognizable under Title IX. *See Adams*, 968 F.3d 1286 (holding that a transgender student's "psychological and dignitary harm" caused by a school bathroom policy was legally cognizable under Title IX).

Having determined that Grimm was harmed, we finally turn to the heart of the Title IX question in this case: whether the policy unlawfully discriminated against Grimm. *Bostoc*k expressly does not answer this "sex-separated restroom" question. In the Title IX context, discrimination "mean[s] treating that individual worse than others who are similarly situated." *Id.* (citing *Burlington N. & Santa Fe Ry. v. White*). In light of our equal protection discussion above, this should sound familiar: Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender. Unlike the other boys, he had to use either the girls restroom or a single-stall option. In that sense, he was treated worse than similarly situated students.

Nevertheless, the Board emphasizes a Department of Education implementing regulation, 34 C.F.R. § 106.33, which interprets Title IX to allow for "separate toilet, locker room, and shower facilities on the basis of sex," so long as they are "comparable" to each other. But Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity. *See also Adams*, 968 F.3d 1286 (holding that § 106.33 did not preclude a transgender student's Title IX claim, because he was not challenging sex-separated restrooms, but "simply seeking access to the boys' restroom as a transgender boy."). And the implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what "sex" means.[16] *See Adams* (holding

[16] **Error! Main Document Only.**So too for the more generic Title IX provision allowing for sex-separated living facilities. *See* 20 U.S.C. § 1686 (Title IX shall not "be construed to prohibit any educational institution" to which it applies "from maintaining separate living facilities for the different sexes."). Again, this is a broad statement that sex-separated living facilities are not unlawful—not that schools may act in an arbitrary or discriminatory manner when dividing

that "nothing in *Bostock* or the language of § 106.33 justifie[d] the School Board's discrimination" against a male transgender student seeking accessto the boys restrooms).[17]

As explained above, Grimm consistently and persistently identified as male. He had been clinically diagnosed with gender dysphoria, and his treatment provider identified using the boys restrooms as part of the appropriate treatment. Rather than contend with Grimm's serious medical need, the Board relied on its own invented classification, "biological gender," for whichit turned to the sex on his birth certificate. And even when Grimm provided the school with his amended birth certificate, the Board *still* denied him access to the boys restrooms.

For these reasons, we hold that the Board's application of its restroom policy against Grimm violated Title IX.[18]

### B. The Board's Failure to Amend Grimm's School Records

Applying the same framework to the Board's refusal to update Grimm's school records, we hold that it too violated Title IX. Again, the Board based its decision not to update Grimm's school records on his sex—specifically, his sex as listed on his original birth certificate, and as it presupposed him to be. This decision harmed Grimm because when he applies to four-year universities, he will be asked for a transcript with a sex marker that is incorrect and does not match his other documentation. And this discrimination is unlawful because it treats him worse than other similarly situated students, whose records reflect their correct sex.

Accordingly, we affirm the district court's grant of summary judgment on Grimm's Title IX claim, and the relief granted, in full.

## VI. CONCLUSION

Grimm's four years of high school were shaped by his fight to use the restroom that matched his consistent and persistent gender identity …. We are left without doubt that the Board acted to protect cisgender boys from Gavin's mere presence—a special kind of discrimination against a child that he will no doubt carry with him for life.

The Board did so despite advances in the medical community's understanding of the nature of being transgender and the importance of gender affirmation. It did so after a major nationwide

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students into those sex-separated facilities. In any event, because 34 C.F.R. § 106.33 is more specific to bathrooms, it is where the parties have focused their attention.

[17] **Error! Main Document Only.**The dissent suggests that Grimm should have challenged Title IX as unconstitutional, because Grimm's use of the boys restrooms would somehow upend sex-separated restrooms in schools. But Grimm does not think that sex-separated restrooms are unconstitutional, and neither do we. The dissent's feared loss of sex-separated restrooms has not been borne out in any of the many school districts that allow transgender students to use the sex-separated restroom matching their gender identity. So it cannot be the physical loss of sex-separated restrooms that the dissent laments, but some emotional, intangible loss wrought by the mere presence of transgender persons. This type of argument calls to mind recent arguments against gay marriage, to the effect that allowing gay people to marry would "harm marriage as an institution." *See Obergefell v. Hodges*, 576 U.S. 644 (2015). With no "foundation for the conclusion" that such "harmful outcomes" would occur, *see id.*, we similarly reject this institutional-harm type argument.

[18] **Error! Main Document Only.**Noting that Title IX was passed under the Spending Clause, the Board also asserts that, if ambiguous, we must construe Title IX to allow application of its bathroom policy to Grimm in order to give the Board fair notice. *See generally Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). But *Bostock* forecloses that "on the basis of sex" is ambiguous as to discrimination against transgender persons, and notes that Title VII "has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them." *See Bostock* ("Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time."). So too Title IX. And the Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination. We reject the Board's *Pennhurst* argument.

survey, the NTDS, put stark numbers to the harmful discrimination faced by transgender people in many aspects of their lives, including in school.

It also did so while schools across Virginia and across the country were successfully implementing trans-inclusive bathroom policies, again, without incident. Those schools' experiences, as outlined in three amicus briefs, demonstrate that hypothetical fears such as the "predator myth" were merely that—hypothetical. Perhaps unsurprisingly, those schools also discovered that their biggest opponents were not students, but adults....

The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. *Compare Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and *Bowers v. Hardwick*, 478 U.S. 186 (1986), with *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955), and *Obergefell v. Hodges*. How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.

It is time to move forward. The district court's judgment is

*AFFIRMED*.

**WYNN, Circuit Judge, concurring:**

I fully concur in Judge Floyd's opinion and write separately to emphasize several particularly troublesome aspects of the Board's policy. In particular, the Board's classification onthe basis of "biological gender"—defined in this appeal as the sex marker on a student's birth certificate—is arbitrary and provides no consistent reason to assign transgender students to bathrooms on a binary male/female basis. Rather, the Board's use of "biological gender" to classify students has the effect of shunting individuals like Grimm—who may not use the boys' bathrooms because of their "biological gender," and who cannot use the girls' bathrooms because of their gender identity—to a third category of bathroom altogether: the "alternative appropriate private facilit[ies]" established in the policy for "students with gender identity issues."

That is indistinguishable from the sort of separate-but-equal treatment that is anathema under our jurisprudence. No less than the recent historical practice of segregating Black and white restrooms, schools, and other public accommodations, the unequal treatment enabled by the Board's policy produces a vicious and ineradicable stigma. The result is to deeply and indelibly scar the most vulnerable among us—children who simply wish to be treated as equals at one of the most fraught developmental moments in their lives—by labeling them as unfit for equal participation in our society. And for what gain? The Board has persisted in offering hypothetical and pretextual concerns that have failed to manifest, either in this case or in myriadothers like it across our nation. I am left to conclude that the policy instead discriminates againsttransgender students out of a bare dislike or fear of those "others" who are all too often marginalized in our society for the mere fact that they are different. As such, the policy grossly offends the Constitution's basic guarantee of equal protection under the law.

**I.**

**A.**

First, the Board's policy provides no consistent basis for assigning transgender students—who often possess a mix of male and female physical characteristics—to a particular bathroom....

.... Broadly, the Board claims that "biological gender" is defined solely in terms of

physiological characteristics.[1]

That suggests that the Board can identify some set of physical characteristics that fully identify someone as "male" or "female"—and thus neatly partition transgender students into those two categories. Yet the Board has offered no set of physical characteristics determinative of its "biological gender" classification in the five-year pendency of this case.

Nor could it, given that transgender individuals often defy binary categorization on the basis of physical characteristics alone. For instance, although Grimm was born physically female and had female genitals during his time at Gloucester High, he also had physical features commonly associated with the male sex: he lacked breasts (due to his chest reconstruction surgery); had facial hair, a deepened voice, and a more masculine appearance (due to hormone therapy); and presented as male through his haircut....

Rather than address this reality, the Board has instead narrowed its definition of "biological gender" to refer to the sex marker on a student's birth certificate—which, unless updated during a transgender individual's transition, merely tells the Board what physical sex characteristics a person was born with. But, as this case shows, a person's birth sex is not dispositive of their actual physiology.

Moreover, by focusing on an individual's birth certificate, the Board ensures the policy lacks a basic consistency: it fails to treat even transgender students alike....

Consider a student physically identical to Grimm in every respect—that is, a student who appeared outwardly male, but who had female genitals. If, unlike Grimm, this hypothetical student had obtained a birth certificate identifying him as male prior to enrolling at Gloucester High, then that student would have been able to use the boys' restrooms under the Board's current interpretation of its own policy. It is arbitrary that this hypothetical transgender student would not be subject to the policy, whereas Grimm would.

.... [Its] shifting definitions of "biological gender" suggest that the policy is ends-driven and motivated more by discomfort with the presence of someone who appeared as a boy (but nonetheless had female genitals) using the boys' bathroom than concerns for a person's designation at birth.

**B.**

That suggestion is bolstered by another disturbing inconsistency in the policy: it produces the very privacy harms it purportedly seeks to avoid. Despite appearing wholly male except for his genitals, Grimm could have used the girls' restroom under the policy. Female students would thus have found themselves in a private situation in front of someone with the physiology of the opposite biological sex—the exact harm to male students posited by the Board and my dissenting colleague, Judge Niemeyer.

Specifically, the Board claims the policy protects the privacy interests of students who do not wish to be exposed to, or in a state of undress in front of, those with physical characteristics of the opposite sex. That is undoubtedly a long-recognized and important government interest, as Judge Niemeyer points out. But, as Judge Floyd notes, the Board can identify no instance of such harms to the privacy interests of its students—a result consistent with the experiences of numerous school boards nationwide.

That is unsurprising because, as a matter of common sense, any individual's appropriate use of a public bathroom does not involve exposure to nudity—an observation that is particularly

[1] **Error! Main Document Only.**I note that the Board's use of the term "gender" in "biological gender," along with the policy's reference to students with "gender identity issues," suggests that Grimm's gender identity played a part in the Board's bathroom designation, despite the Board's protestations to the contrary.

true given the privacy enhancements installed in the bathrooms at Gloucester High.

Judge Niemeyer in dissent suggests that the "*mere presence*" of someone with female genitals in a male bathroom would create an untenable intrusion on male privacy interests. That assertion is debatable at the least, in the context of both male and female bathrooms. And it echoes the sort of discomfort historically used to justify exclusion of Black, gay, and lesbian individuals from equal participation in our society.....But it is ultimately beside the point, because the Board identified only three scenarios of concern in which boys would have felt unduly exposed to Grimm: when they used the stalls, when they used the urinals, and when they opened their pants to tuck in their shirts. The Board has identified no instances where such exposure occurred.

.... Grimm's male characteristics—no breasts, masculine features and voice timbre, facial hair, and a male haircut—would have been readily apparent to any person using the girls' restroom. Put simply, Grimm's entire outward physical appearance was male. As such, there can be no dispute that had he used the girls' restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students. The Board's stated privacy interests thus cannot be said to be an "exceedingly persuasive" justification of the policy. *Virginia*.

Further, if the Board's concern were truly that individuals might be exposed to those with differing physiology, it would presumably have policies in place to address differences between pre-pubescent and post-pubescent students, as well as intersex individuals who possess some mix of male and female physical sex characteristics and who comprise a greater fraction of the population than transgender individuals. That the Board's policy does not address those circumstances further suggests that its privacy justification is a post-hoc rationalization based on mere hypotheticals. *Virginia*.

**C.**

One final note. Under the Board's policy, Grimm should have been able to use the boys' restroom if he had provided an updated birth certificate listing him as male. Of course, *he did just that*. But the Board baldly refused to apply its own policy, instead assembling a variety of post-hoc administrative justifications for its noncompliance—justifications that were ultimately meritless.

**II.**

The above problems notwithstanding, the Board audaciously invites us to ignore the policy's poorly formulated, arbitrary character, claiming that "[e]very student can use a restroom associated with their physiology, whether they are boys or girls. If students choose not to use therestroom associated with their physiology, they can use a private, single-stall restroom." But that choice is no choice at all because, its above-described physiological misunderstandings and omissions aside, the Board completely misses the reality of what it means to be a transgender boy.

[We] must take a careful and practical look at the options he realistically faced. Grimm was of course barred from the boys' restrooms because of his Board-defined "biological gender."And despite the Board's assurances, he effectively could not use the girls' restrooms. His gender identity has always been male. He could no more easily use the girls' restrooms than a cisgender boy.[2] The Board pointedly ignores this basic fact.

So, Grimm was effectively left with one option: the single-stall restrooms. But he did not use

[2] Grimm had, of course, used girls' restrooms before his transition. But that fact says nothing about the harm he suffered from doing so. Grimm suffered from gender dysphoria as a result of living as a girl (including use of girls' bathrooms) despite identifying as a boy.

those restrooms at all because doing so "made [him] feel even more stigmatized and isolated than using the nurse's office" to which he had been previously relegated. Specifically, "everyone knew that they were installed for [him] in particular, so that other boys would not have to share the same restroom as [him]." [No] other students used the single-stall restrooms.

This problem is all too familiar. Forced segregation of restrooms and schools along racial lines—a blight on this country's history—occurred well within living memory. *See* Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Supp. of Pl.-Appellee (hereinafter "Br. of NAACP") (describing various laws passed to segregate restroom facilities and schools on the basis of race). Such segregation was infamously justified on the ground that no harm could inhere if separate but equal facilities were provided to African American schoolchildren. We now know that to be untrue: it is axiomatic that discriminating against students on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Ed. of Topeka* (1954).

I see little distinction between the message sent to Black children denied equal treatment in education under the doctrine of "separate but equal" and transgender children relegated to the "alternative appropriate private facilit[ies]" provided for by the Board's policy. The import is the same: "the affirmation that the very being of a people is inferior." Martin Luther King, Jr., *"The Other America," Remarks Given at Stanford University* (Apr. 14, 1967) (transcript available at https://www.rev.com/blog/transcripts/the-other-america-speech-transcript-martin-luther-king-jr); see also *Boyertown Area Sch. Dist.* (holding that a policy forcing transgender students to use separate single-user facilities "would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school").

Judge Niemeyer in dissent notes that Title IX and equal protection permit separate but equal accommodations in schools on a male/female basis. But that observation says nothing about what happened in this case: separation of transgender students from their cisgender counterparts through a policy that ensures that transgender students may use *neither* male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned- at-birth. That segregation generates harmful stigma, which was exacerbated in this case by the fact that the facilities were separate, but not even equal—there were no single-stall restrooms atfootball games, and the single-stall restrooms in the school building were located much farther from Grimm's classes than the boys' and girls' restrooms.

Moreover, it is important to note that the harm arising from the policy's message—that transgender students like Grimm should exist only at the margins of society, even when it comes to basic necessities like bathrooms—although foreign to the experiences of many, is not hypothetical. Nor does the policy merely engender discomfort or embarrassment for transgender students. Instead, the pain is overwhelming, unceasing, and existential. In an experience all too common for transgender individuals (particularly children), early in his junior year at Gloucester High, Grimm was hospitalized for suicidal thoughts resulting from being in an environment of "unbearable" stress where "every single day, five days a week" he felt "unsafe, anxious, and disrespected."

[The] Board's policy perpetuates a harmful and false stereotype about transgender individuals; namely, the "transgender predator" myth, which claims that students (usually male) will pretend to be transgender in order to gain access to the bathrooms of the opposite sex—thus jeopardizing student safety. Indeed, the policy expresses concern that the presence of transgender students in school bathrooms endangers students. Although not relied upon by the Board on appeal, one of the policy's stated purposes is to "provide a safe learning environment for all students."

The "transgender predator" myth echoes similar arguments used to justify segregation along racial lines. In the 1950s, segregationists spread false rumors that Black women would spread venereal diseases to toilet seats, and that Black men would sexually prey upon white women if public swimming pools were integrated. *See* Br. of NAACP. Although history eventually proved the lie of such claims, the injustice was severe.

Even more recently, privacy concerns similar to those championed by the Board were invoked by opponents of gay and lesbian equality. These opponents argued that such individuals,especially gay men, must not be allowed to come into contact with young children or adolescents. They justified such claims by pointing either to a supposed uncontrollable, predatory sexual attraction among gay men toward children, or to an insidious desire to convert young people to an immoral (which is to say, non-heterosexual) lifestyle. *See id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as ... scoutmasters for their children [or] as teachers in their children's schools[.]")).

The "transgender predator" myth—although often couched in the language of ensuring student privacy and safety—is no less odious, no less unfounded, and no less harmful than these race-based or sexual-orientation-based scare tactics. As one of our sister Circuits noted during the era of racial segregation: "[t]he law can never afford to bend in this direction again. The Constitution of the United States recognizes that every individual ... is considered equal before the law. As long as this principle is viable, full equality of educational opportunity must prevail over theoretical sociological and genetical arguments which attempt to persuade to the contrary."*Haney v. Cnty. Bd. of Educ. of Sevier Cnty.*, 410 F.2d 920 (8th Cir. 1969).

**III.**

In sum, the picture that emerges from this case is damning.

[I] have little difficulty concluding that the Board's policy is orthogonal to its stated justifications. Far from ensuring student privacy, it has been applied to marginalize and demean Grimm for the mere fact that he, like other transgender individuals, is different from most. Even worse, it did so to a child at school.

Common experience teaches that high school is a challenging environment, in which every child perceives significant pressure to belong within their peer group while also defining their own personal identity and sense of self. Even the most trivial differences from others may take on outsized significance to an adolescent. How harrowing it must be for transgender individuals like Grimm to navigate that fraught setting while facing an unceasing daily reminderthat they are not wanted, and that circumstances for which they are blameless render them members of a second class.

Of course, deriding those who are different—whether due to discomfort or dislike—is not new. But the Constitution's guarantee of equal protection prohibits the law from countenancing such discrimination. "The Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429 (1984); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that policies enacted with "a bare ... desireto harm a politically unpopular group" cannot be upheld under equal protection (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973))).

For that reason, I disagree with Judge Niemeyer's assertion that the panel majority attempts to "effect policy rather than simply apply law." That argument is meritless because "[t]he Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is

harmed, even if the broader public disagrees and even if the legislature refuses to act." *Obergefell*. Ensuring the Constitution's mandate of equal protection issatisfied for marginalized and minority groups, separate from the "vicissitudes of political controversy," is one of our most vital and solemn duties. *Id.* (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943)).

Discrimination like that faced by Grimm has reared its ugly head throughout American history. Yet, for most Americans, time has rendered it an embarrassment to the legacies of the individuals inflicting it. With that observation, I join in the thorough and well-reasoned opinion of my colleague, Judge Floyd.

**NIEMEYER, Circuit Judge, dissenting:**

....

I cast no doubt on the genuineness of Gavin Grimm's circumstances, and I empathize with his adverse experiences. But judicial reasoning must not become an outcome-driven enterprise prompted by feelings of sympathy and personal views of the best policy. The judiciary's role is simply to construe the law. And the law, both statutory and constitutional, prohibits discrimination only with respect to those who are *similarly* situated. Here, Grimm was born a biological female and identifies as a male, and therefore his circumstances are different from the circumstances of students who were born as biological males. For purposes of restroom usage, he was not similarly situated to students who were born as biological males.

Accordingly, I would conclude that Grimm's complaint failed to state a claim on whichrelief can be granted.

**[II]**

[Grimm's] claim does not challenge the High School's provision of separate restrooms but rather asserts that treating transgender males differently than biological males in permitting access to those restrooms constitutes illegal discrimination. This argument thus rests on the proposition that transgender males and biological males are similarly situated with respect to using male restrooms.

The School Board, however, determined that the physical differences between transgender males and biological males were material with respect to the use of restrooms and locker rooms ....

.... Any requirement that schools treat male, female, and transgender students differently from the way the High School treated them would be a matter for Congress to address. But, until then, the High School comported with what both Title IX and the Equal Protection Clause require....

**III**

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination underany education program or activity receiving Federal financial assistance." But the statute contains several exceptions to its nondiscrimination provision, one of which specifies that "[n]otwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, *from maintaining separate living facilities for the different sexes*." *Id*. § 1686 (emphasis added). And the applicable regulations give further detail, permitting schools to provide "separate housing on the basis of sex," as long as the housing is "[p]roportionate" and "[c]omparable," 34 C.F.R. § 106.32(b), and "separate toilet, locker room, and shower facilities on the basis of sex," so long asthe facilities "provided for students of one sex shall be comparable to such facilities provided forstudents of the other sex," *id.* § 106.33. We must therefore determine what it means to provide separate toilet, locker room, and shower facilities *on the basis of sex* in a situation where a student's gender identity diverges from the sex manifested

by the student's biological characteristics.

As several sources make clear, the term "sex" in this context must be understood as referring to the traditional biological indicators that distinguish a male from a female, not the person's internal sense of being male or female, or their outward presentation of that internally felt sense.

Title IX was enacted in 1972, and its implementing regulations were promulgated shortly thereafter. And during that period of time, virtually every dictionary definition of "sex" referred to the physiological distinctions between males and females—particularly with respect to their reproductive functions. *See, e.g.*, THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); WEBSTER'S NEW COLLEGIATE DICTIONARY (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); [others omitted]. Indeed, even today, the word "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g.*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants aredivided, with reference to their reproductive functions"); ....

[In] the context of interpreting Title VII's nondiscrimination provision enacted in 1964, the Supreme Court's recent decision in *Bostock v. Clayton County* relied on this same understanding of the word "sex." To be sure, the *Bostock* Court determined that its resolution ofthe parties' dispute did not require it to determine definitely the meaning of the term. But its analysis proceeded on the assumption that, in 1964, the term sex "referr[ed] only to biological distinctions between male and female" and did not include "norms concerning gender identity."

Moreover, that the word "sex" in Title IX refers to biological characteristics, not gender identity, becomes all the more plain when one considers the privacy concerns that explain why,in the first place, Title IX and its regulations allow schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex." To state the obvious, what bathroom, locker room, shower, and living facilities all have in common is that they are places where people are, at some point, in a state of partial or complete undress to engage in matters ofhighly personal hygiene. An individual has a legitimate and important interest in bodily privacythat is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present, as courts have long recognized. *See, e.g.*, *Doe v. Luzerne Cty.*, 660 F.3d 169 (3d Cir. 2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489 (6th Cir. 2008) (explaining that "the constitutional right to privacy includes the right to shield one's body from exposure to viewing by the opposite sex"); *Sepulveda v. Ramirez*, 967 F.2d 1413, (9th Cir. 1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating"). Moreover, these privacy interests are broader than *the risks of actual bodily exposure. They include the intrusion created by mere presence.* In short, we want to be alone—to have our

privacy—when we "shit, shower, shave, shampoo, and shine."

In light of the privacy interests that arise from the physical differences between the sexes,it has been commonplace and universally accepted—across societies and throughout history—to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time. Indeed, both the Supreme Court and our court have previously indicated that it is this type of physiological privacy concern that has led to the establishment of such sex-separated facilities. *See Virginia* (recognizing that "[p]hysical differences between men and women" are "enduring" and render "the two sexes … not fungible" and acknowledging, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex" (cleaned up)); *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns").

In short, the physical differences between males and females and the resulting need for privacy is what the exceptions in Title IX are all about.

.... Grimm does not challenge the constitutionality of Title IX or the legitimacy of its regulations, nor does he challenge the statute's underlying policy interests. He argues simply that because he identifies as male, he must be allowed to use the male restrooms and that denying him that permission discriminates against him on the basis of his sex.

Grimm's argument, however, is facially untenable. [The] implementation of his position would allow him to use restrooms contrary to the basis for separation. [Requiring] the school to allow him, a biological female who identifies as male, to use the male restroom compromises the separation as explicitly authorized by Title IX.

Seeking to overcome this logical barrier, the majority maintains that the School Board applied "its own discriminatory notions of what 'sex' means." But the School Board did no such thing. In implementing its policy, it relied on the commonly accepted definition of the word "sex" as referring to the anatomical and physiological differences between males and females and concluded that, for purposes of access to its sex-separated facilities, Grimm's sex remained female during the time he was a student at Gloucester High School.

Not to be persuaded, the majority further states that the regulation permitting schools to provide separate toilets on the basis of sex "cannot override the statutory prohibition against *discrimination* on the basis of sex." But strikingly, this overlooks the fact that Congress expressly provided *in the statute* that nothing in its prohibition against discrimination "shall beconstrued to prohibit" schools "from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The majority's oversight can only be taken as a way to reach conclusions on how schools *should* treat transgender students, rather than a determination of what the statute requires of them.

In short, Gloucester High School did not deny Grimm suitable restrooms. It created three new unisex restrooms that allowed him, as well as the other students, the privacy protected by separating bathrooms on the basis of sex.

**IV**

Grimm also contends that ... the School Board ... discriminated against him in violation of the Equal Protection Clause …. He does so without arguing that Title IX violates the Equal Protection Clause in allowing educational institutions to separate restrooms on the basis of sex.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." As long recognized by the Supreme Court, the Clause is "essentially a direction that all persons *similarly situated* should be treated alike." *Cleburne*

(emphasis added). In this manner, the provision "simply keeps governmental decisionmakers from treating differently persons *who are in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (emphasis added). As such, a plaintiff asserting a violation of the Equal Protection Clause must "demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001);*see also Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) (noting that the Equal Protection Clause "secure[s] every person within the State's jurisdiction against intentional andarbitrary discrimination").

In general, a state-created classification will be "presumed to be valid and will be sustained if [it] is rationally related to a legitimate state interest." *Cleburne*. The Supreme Court has recognized, however, that legislative classifications based on sex "call for a heightened standard of review." *Id.* Thus, when state actors treat people differently on the basis of sex, they must show "that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*. "The justification must be genuine," and it may not "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* Nonetheless, "[t]o fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it." *Tuan Anh Nguyen*.

Here, Grimm appears to acknowledge that a public school may, consistent with the Equal Protection Clause, establish one set of restrooms for its male students and another set for its female students, as long as the two sets of facilities are comparable—a "separate but equal" arrangement that would obviously be unconstitutional if the factor used to assign students to restrooms was instead race. And the reason it is constitutional for a school to provide separate restrooms for its male and female students—but not, for example, to its Black and White students—is because there are biological differences between the two sexes that are relevant withrespect to restroom use in a way that a person's skin color is demonstrably not. As noted above, all individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in personal hygiene, and this privacy interest is heightened when persons of the opposite sex are present. Indeed, this privacy interest is heightened yet further when children use communal restrooms and similar spaces, because children, as the School Board notes, "are still developing, both emotionally and physically."

[Because] a public school may lawfully establish, consistent with the Constitution, separate restrooms for its male and female students in order to protect bodily privacy concerns that arise from the anatomical differences between the two sexes[,] Grimm cannot claim that he was discriminated against when he was denied access to the male restrooms because he was not,in fact, similarly situated to the biologically male students who used those restrooms. While he no doubt identifies as male and also has taken the first steps to transition his body, at all times relevant to the events in this case, he remained anatomically different from males. Because such anatomical differences are at the root of why communal restrooms are generally separated on the basis of sex, I conclude that by adopting a policy pursuant to which Grimm was not permitted touse male student restrooms, the School Board did not "treat[] differently persons who are in all *relevant* respects alike," *Nordlinger* (emphasis added), and therefore did not violate the Equal Protection Clause. And there is no claim or evidence in the record that Grimm was treated differently from any other transgender student.

In reaching the opposite conclusion, the majority fails to address why it is permissible for schools to provide separate restrooms to their male and female students to begin with. [That] would

have demonstrated that it was not "bias" for a school to have concluded that, in assigninga student to either the male or female restrooms, the student's biological sex was relevant.

....

* * *

[I] readily accept the facts of Grimm's sex status and gender identity and his felt need tobe treated with dignity. Affording all persons the respect owed to them by virtue of their humanity is a core value underlying our civil society. At the same time, our role as a court is limited. We are commissioned to apply the law and must leave it to Congress to determine policy. In this instance, the School Board offered its students male and female restrooms, legitimately separating them on the basis of sex. It also provided safe and private unisex restrooms that Grimm, along with all other students, could use. These offerings fully complied with both Title IX and the Equal Protection Clause.

Accordingly, I would reverse and remand with instructions to dismiss Grimm'scomplaint.

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**Discussion**

1. Note that in the October 2020 term the Supreme Court considered "[w]hether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right." *Uzuegbunam v. Preczewski*, No. 19-968, cert. granted 141 S.Ct. 195 (July 9, 2020). This was an issue that had split the Courts of Appeals, with many holding that nominal damages claims preclude mootness when the government changes a policy for which it was sued but others holding to the contrary generally or at least in certain circumstances. Over Chief Justice Roberts's sole dissent, the Court held that a request for nominal damages satisfies the redressability requirement for standing where a plaintiff has suffered a completed violation of apersonal legal right. 141 S.Ct. 792 (2021). Given *Uzuegbunam*, Gavin Grimm's nominal damages request would seem to satisfy the redressability requirement for Article III standing. Are nominal damages (typically, $1) likely to deter future violations of other trans students' rights by the defendants?

2. The *Grimm* court concluded that the board's restroom policy classified on the basis of sex on its face. Although the majority insisted that it and Gavin were not challenging the constitutionality of separate men's and women's restrooms, doesn't the court's classification reasoning apply to such facilities—and mean that they would need to survive intermediate scrutiny to be consistent with the Equal Protection Clause?

3. The majority said that the restroom policy discriminated against Gavin on the basis of his sex "because he was viewed as failing to conform to the sex stereotype propagated by" it. But what sex stereotype did the policy embody or "propagate"?

4. How does the majority's racially segregated bathroom analogy work here? The majority basically said that racial divisions of restrooms were unconstitutional. But Gavin challenged not the board's provision of sex-segregated bathrooms but only which of two unchallenged communal restrooms he may use. Wouldn't his case be closer to Homer Plessy's less well-known historical argument that he was arbitrarily classified as "black" for purposes of Louisiana's law requiring racial segregation of railroad cars? (The Supreme Court deemed that argument to raise only issues of state law, not federal constitutional law.) Perhaps connected to the issue in question 3, *supra*, the majority here seemed to imply that the board's definition of male and female—its "privileg[ing of] sex-assigned-at-birth over Grimm's ... gender identity"—is unconstitutional, a product of "the Board's

own misconceptions, which themselves reflect 'stereotypic notions.'" The board and dissenting Judge Niemeyer, however, appeared to believe that the board was acting on *the definition of* sex, rather than on some *stereotype about* sex. (*Cf.* the majority's conclusion that Gavin faced sex discrimination with respect to his school records because cisgender boys could get records stating they were male.) On what basis should we think the majority or dissent is right or wrong about the constitutionally prescribed (or allowed) definition of sex—medical authority (and how much would be required to displace contrary governmental views about the definition of sex)?

5. How much legislative success can a small minority of the population, such as transgender people, have and still be properly considered to lack political power for purposes of the heightened equal protection scrutiny factors articulated by *Bowen v. Gilliard*?

6. The majority accused the board and the dissent of embracing an "abstract[]" notion of bodily privacy, such that a violation is occasioned not only by students' having their genitalia (or underwear?) viewed by someone with different genitalia but by the "mere presence" of such a student in a shared restroom with them. That appears to be the basis for the majority's rejection of the dissent's conclusion that allowing Gavin to use boys' restrooms "would somehow upend sex-separated restrooms in schools" (in the majority's words). Niemeyer, however, may be read not as stating that schools will throw in the towel and no longer reserve some restrooms for girls and some for boys. Rather, his opinion can be read to say that Gavin *is* a girl (for constitutional and Title IX purposes, at least), so that allowing him to use boys' restrooms means those will no longer *be* "boys'" restrooms limited to use by boys (and men). If that is the key difference here, how ought one decide what definitions of "male" and "female" Title IX and/or the Equal Protection Clause presuppose/use? How ought one decide whether the majority or the dissent was right about whether or not Gavin was "similarly situated" to cisgender boys with respect to restroom usage for equal protection purposes?

7. Judge Wynn's concurrence suggested that because of Gavin's "male characteristics," making him use girls' restrooms would mean that "female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students." Is the *risk* of exposure to someone with different *genitals*, though, a distinct harm that would flow from Gavin's use of boys' restrooms but not girls' restrooms? If society thinks that itis improper for (cisgender) female guards to strip search male prisoners, and vice versa, would that have implications for the restrooms a person with a certain type of genitalia should use? Wynn also argued that the board's restroom policy "ensures that transgender students may use neither male nor female bathrooms due to the incongruence between their gender identity and their sex-assigned-at-birth." That is not formally the case. Should courts judge it to be functionally a necessary ramification of the policy for equal protection and/or Title IX purposes? Wynn also argued that the policy perpetuates "a harmful and false stereotype about transgender individuals."But that "'transgender predator' myth" is about cisgender boys or men (generally) pretending to be trans to gain access to female restrooms. How is that a "stereotype *about transgender*" people?

8. Note that dissenting Judge Niemeyer's claim that "[a]cross societies and throughout history" sex-segregated "public restrooms, locker rooms, and shower facilities" have been "universally accepted" might be read to overlook both the many societies that have provided or do provide public bathing and toileting facilities that are not sex-segregated as well as the development of such restrooms only centuries after the U.S. was first colonized. *Cf.* Terry Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1212 (2017) (flagging that in the United States, "the multi-user public restroom ... dates back only to the 1870s"). In addition, Niemeyer seemed to think that "the physical differences between males and females"

themselves "result[ in a] need for privacy," but that derives a *normative* conclusion (about what we *ought* to do) from a *descriptive* claim about the world (and sexed humanity) (how we *are*). Without an intermediate proposition, this reasoning is incomplete, an instance of what philosophers have sometimes criticized as "the naturalistic fallacy." *See, e.g.*, EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION 300 (1999), cited in David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1011 n.60 (2002).

9. On February 19, 2021, the school district petitioned the U.S. Supreme Court for a writof certiorari in this case. *Gloucester County School Board v. Gavin Grimm*, No. 20-1163. On June 28, 2021, the Supreme Court denied review; Justices Thomas and Alito would have granted the petition ___ S.Ct. ___, 2021 WL 2637992.

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**Insert the following at end of p.940:**

## ATHLETIC COMPETITION

Different authorities have adopted different rules regarding when transgender and intersex athletes may participate or compete in sex-segregated sports consistent with their gender identity. The International Olympic Committee (IOC) allows transgender male athletes "to compete in the male category without restriction." International Olympic Committee, IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM NOVEMBER 2015 2 (2015). To compete in the female category, transgender women must declare a female gender identity (and cannot change such declaration for athletics purposes for at least 4 years), have a total blood testosterone level lower than 10 nmol/L for at least a year prior to first Olympic competition and throughout the period of desired eligibility, with the possibility of a case-by-case determination whether this level must be maintained for more than a year "to minimize any advantage in women's competition"; failure to comply (with compliance monitorable by testing) leads to a year's suspension. *Id.* at 2-3. In discussing intersex athletes, the IOC guidelines magnanimously provide that "[t]o avoid discrimination, if not eligible for female competition the athlete should be eligible to compete in male competition." Under these guidelines, a transgender woman weightlifter was judged eligible to compete on the New Zealand women's team in the 2021 Olympics in Tokyo, *see* Barnaby Lane, *A New Zealand Weightlifter Has Become the First Openly Transgender Athlete Picked to Compete at the Olympics*, INSIDER (June 21, 201), at https://www.insider.com/laurel-hubbard-first-transgender-athlete-to-compete-at-olympics-2021-6, but a transgender woman track and field champion was "not allowed to compete in the women's 400-meter hurdles US Olympic Trials" due to testosterone levels exceeding the guideline amount, *see* Jill Martin, *Transgender Runner Cece Telfer Is Ruled Ineligible to Compete in Us Olympic Trials*, CNN (June 25, 2021), at https:// edition.cnn.com/2021/06/25/sport/transgender-athlete-cece-telfer-trials-olympics-spt/index.html. It had been reported that the IOC will be issuing new guidelines regarding participation by transgender athletes after the Tokyo Olympics, when it is likely to cut in half the allowed testosterone levels. *See* Associated Press, *Olympic Advice on Transgender Athletes Due after Tokyo Games*, NBC News (Mar. 5, 2021), at https://www.nbcnews.com/feature/nbc-out/ olympic-advice-transgender-athletes-due-after-tokyo-games-n1150426.

The National Collegiate Athletic Association (NCAA) has adopted different "best practices and recommended policies" for college athletes playing in events with their member

organizations. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA INCLUSION OF TRANSGENDER STUDENT ATHLETES 4 (2010). Under NCAA policy, a transgender man "can compete on a men's team at any point; however, a [transgender] man can only compete on a women's team if he is not undergoing testosterone treatment. [A transgender] woman can compete on the men's team without restriction; however, a [transgender] woman can only compete on a women's team after completing one calendar year of cross-gender hormone therapy." Michael J. Lenzi, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 AM. U. L. REV. 841, 859 (2018). High schoolpolicies vary across high school athletic associations, school districts, and states with some generally allowing transgender students to compete consistently with their gender identity regardless of any medical interventions they have or have not had.

In the short span of time since COVID-19 locked down much of the world, there has rapidly emerged a campaign to preclude transgender students from participating in sex-segregated athletics consistent with their gender identity. The campaign includes litigation contending that states that allow transgender girls to compete in girls' athletics are unlawfully discriminating on the basis of sex. *See, e.g.*, *Soule by Stanescu v. Connecticut Association of Schools, Inc.*, 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (dismissing suit brought by Christian right legal advocacy group Alliance Defending Freedom challenging the trans-inclusive policy of the Connecticut Interscholastic Athletic Conference as moot as to request to enjoin transgender girls from competing in girls' sports following graduation of the only transgender student athletes of whom ADF knew; dismissing request to change records in plaintiffs' past events to show how they would have ranked absent the competition from two (Black) transgender high school girls as only speculatively improving educational or employment prospects; and dismissing claim for damages under Title IX of the Education Amendments of 1972 for lack of adequate notice that allowing transgender students to compete consistently with their gender identities, as the U.S. Department of Education had opined that schools must, could subject them to money damages).

In somewhat more detail, four cisgender female high school track athletes who lost competitions to transgender female athletes sued over Connecticut's trans inclusive athletics policy in *Soule*, alleging that having to compete against transgender female peers caused them to lose out on significant opportunities to win competitions and further advance in their track careers. Legal proceedings began in June 2019 when the plaintiffs submitted a complaint with the Department of Education Office of Civil Rights (OCR) alleging that the policy amounted to sex discrimination in violation of Title IX. The plaintiffs alleged that by allowing transgender girls to compete in girls' sporting events, the defendant school districts violated cisgender girls' rights by failing to provide an effective accommodation for the interests and abilities of cisgender girls by failing to provide them with an appropriate competitive environment, and failing to provide "equal treatment, benefits, and opportunities" for cisgender girls in sports compared to boys (on the theory that cisgender girls face a competitive disadvantage in girls' sports that cisgender boysdo not face when required to compete against transgender boys in boys' sports). The complaint specifically named (and misgendered) transgender girl student athletes Andraya Yearwood and Terry Miller. The OCR then launched an investigation into the plaintiffs' complaints. On February 12, 2020, the plaintiffs filed suit in the U.S. District Court for the District of Connecticut against their school districts and the Connecticut Interschool Athletic Conference. Represented by ADF, the plaintiff's federal court suit sought essentially the same relief requestedin the OCR complaint.

On March 24, 2020, the Department of Justice filed a statement of interest in *Soule*

suggesting that "[the] Court [in *Soule*] should not read Title IX to compel schools to require students to participate on sex-specific teams solely on the basis of their gender identity," a move that conflicted or at least was in great tension with numerous judicial decisions protecting transgender students (and their access to restrooms consistent with their gender identity) under Title IX. The case was filed just as the COVID-19 pandemic was beginning to impact the operations of public schools nationwide. Accordingly, on April 8, 2020 Judge Robert N. Chatigny denied the plaintiffs' a preliminary injunction on the grounds that it was highly unlikely that the spring track season would occur and therefore plaintiffs had no need of such relief. On April 17, 2020, the plaintiffs filed an amended complaint seeking essentially the samerelief. On May 29, 2020, the OCR ruled that allowing transgender girls to compete in school sports with cisgender girls is a violation of federal law, and began issuing threats to withhold federal education funding from the state of Connecticut unless it reversed its current policy.

On February 23, 2021, U.S. Attorney for Connecticut John Durham, a Trump holdover, informed the District Court of Hartford that the Department of Justice was withdrawing its earlier statement of interest in the case, and the Department of Education stated that it no longer wished to be a party to the federal lawsuit. *See* Dawn Ennis, *Biden Justice Dept. Withdraws from Connecticut Federal Lawsuit Opposing Trans Student-Athletes*, SBNATION OUTSPORTS (Feb. 24, 2021), at https://www.outsports.com/2021/2/24/22298858/biden-justice-connecticut-trans-student-athletes-federal-lawsuit-adf-terry-miller-andraya-yearwood (last visited Aug. 4, 2021). On April 26, 2021, U.S. District Judge Robert Chatigny dismissed the lawsuit on basically procedural grounds owing to the fact that the two transgender athletes had graduated and the plaintiffs could not identify any other transgender athletes, leaving no concrete dispute to resolve. Nonetheless, Chatigny left the door open to future litigation, remarking that a "legally cognizable inquiry" could be established if a transgender student were to run in the same events and achieve "substantially similar times." The plaintiffs said that they will appeal the ruling. *See* Lori Riley, *Federal Judge Dismisses Lawsuit That Sought to Block Transgender Female Athletes from Competing in Girls High School Sports in Connecticut*, HARTFORD COURANT (Apr. 26, 2021), at https://www.courant.com/sports/high-schools/hc-sp-hs-transgender-case-dismissed-20210425-twgpmkmsrvhnhl64u2tr32tg3y-story.html.

For an examination of the *Soule* litigation and some of the broader issues it raises, see Dylan O. Malagrinò, *May They Play:* Soule v. Connecticut Association of Schools, Inc.*, Title IX, and A Policy of Inclusion for High School Transgender Athletes Without Prerequiring Hormone Therapy or Puberty Blockers*, 31 MARQ. SPORTS L. REV. 35 (2020). For a defense under Title IX and the Equal Protection Clause of the exclusion of transgender students from participation in sex-segregated athletics and access to sex-segregated restrooms and locker rooms, see Ray D. Hacke, *"Girls Will Be Boys, and Boys Will Be Girls": The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools That Want to Keep Their Playing Fields Level—for Athletes of Both Genders*, 18 TEX. REV. ENT. & SPORTS L. 131 (2018).

The first state to pass a law to *forbid* schools from *allowing* transgender students to participate in sex-segregated athletics consistent with their gender identities was Idaho, with the governor signing the "Fairness in Women's Sports Act," IDAHO CODE ANN. § 33-6201–6206, into law on March 30, 2020. Subsequently, four additional states had enacted similar laws by the writing of this Update. *See* Fairness in Women's Sports Act, S.B. 354, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021), available at https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R %2FPublic%2FSB354.pdf; Fairness in Women's Sports Act, S.B. 1028, 2021

S., Reg. Sess. (Fla. 2021), available at https://www.flsenate.gov/Session/Bill/2021/1028/BillText/er/PDF; An Act to Require Any Public School, Public Institution of Higher Learning or Institution of Higher Learning That Is a Member of the NCAA, NAIA, MHSAA or NJCCA to Designate Its Athletic Teams or Sports According to Biological Sex; to Provide Protection for Any School or Institution of Higher Education That Maintains Separate Athletic Teams or Sports for Students of the Female Sex; to Create Private Causes of Action; and for Related Purposes, S.B. 2536, 2021 S., Reg. Sess. (Miss. 2021), http://billstatus.ls.state.ms.us/documents/2021/pdf/SB/2500-2599/SB2536SG.pdf; SB 228, 2021 S. (Tenn. 2021), https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0228. In addition, the Governor of South Dakota issued two executive orders to limit participation in girls' or women'sathletic events "sanctioned" by public schools, school districts, or specified associations to "females, based on their biological sex, as reflected on their birth certificate or affidavit providedupon initial enrollment" under specified state law. Executive Order 2021-05, Governor of S.D. (2021), https://governor.sd.gov/doc/2021-05.pdf. Similar bills have been proposed in at least Alabama, Arizona, Connecticut, Georgia, Hawaii, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, North Dakota, New Hampshire, New Jersey, New Mexico, Ohio,Oklahoma, Pennsylvania, South Carolina, Texas, Wisconsin, and West Virginia. *See* https://www.aclu.org/legislation-affecting-LGBT-rights-across-country (last visited June 8, 2021) (section C).

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**IDAHO HOUSE BILL NO. 500**

**AN ACT**
RELATING TO THE FAIRNESS IN WOMEN'S SPORTS ACT; AMENDING TITLE 33, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 62, TITLE 33, IDAHO CODE, TO PROVIDE A SHORT TITLE, TO PROVIDE LEGISLATIVE FINDINGS AND PURPOSE,TO PROVIDE FOR THE DESIGNATION OF ATHLETIC TEAMS, TO PROVIDE PROTECTION FOR EDUCATIONAL INSTITUTIONS, TO PROVIDE FOR A CAUSE OF ACTION, AND TO PROVIDE SEVERABILITY.

Be It Enacted by the Legislature of the State of Idaho:

**SECTION 1**. That Title 33, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 62, Title 33, Idaho Code, and to read as follows:

CHAPTER 62
FAIRNESS IN WOMEN'S SPORTS ACT
33-6201. SHORT TITLE. This chapter shall be known and may be cited as the "Fairness inWomen's Sports Act."

33-6202. **LEGISLATIVE FINDINGS AND PURPOSE. (1)** The legislature finds that there are "inherent differences between men and women," and that these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an

individual's opportunity," *United States v. Virginia*, 518 U.S. 515, 533 (1996);
**(2)** These "inherent differences" range from chromosomal and hormonal differences tophysiological differences;
**(3)** Men generally have "denser, stronger bones, tendons, and ligaments" and "larger hearts,greater lung volume per body mass, a higher red blood cell count, and higher haemoglobin,"Neel Burton, *The Battle of the Sexes*, PSYCHOLOGY TODAY (July 2, 2012);
**(4)** Men also have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development of type 2 muscle fibers, all of which result in men being able to generate higher speed and power during physical activity, Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW AND CONTEMPORARY PROBLEMS 63, 74 (2017) (quoting Gina Kolata, *Men, Women and Speed. 2 Words: Got Testosterone?*, N.Y. TIMES (Aug. 21, 2008));
**(5)** The biological differences between females and males, especially as it relates to natural levels of testosterone, "explain the male and female secondary sex characteristics which develop during puberty and have life-long effects, including those most important for success in sport: categorically different strength, speed, and endurance," Doriane Lambelet Coleman and Wickliffe Shreve, *"Comparing Athletic Performances: The Best Elite Women to Boys and Men,"*DUKE LAW CENTER FOR SPORTS LAW AND POLICY;
**(6)** While classifications based on sex are generally disfavored, the Supreme Court has recognized that "sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promote equal employment opportunity, [and] to advance fulldevelopment of the talent and capacities of our Nation's people," *United States v. Virginia*, 518 U.S. 515, 533 (1996);
**(7)** One place where sex classifications allow for the "full development of the talent andcapacities of our Nation's people" is in the context of sports and athletics;
**(8)** Courts have recognized that the inherent, physiological differences between males and females result in different athletic capabilities. *See e.g. Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) ("Because of innate physiological differences, boysand girls are not similarly situated as they enter athletic competition."); *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that "high school boys [generally possess physiological advantages over] their girl counterparts" and that those advantages give them an unfair lead over girls in some sports like "high school track");
**(9)** A recent study of female and male Olympic performances since 1983 found that, although athletes from both sexes improved over the time span, the "gender gap" between female and male performances remained stable. "These suggest that women's performances at the high level will never match those of men." Valerie Thibault et al., *Women and men in sport performance: The gender gap has not evolved since 1983*, 9 JOURNAL OF SPORTS SCIENCE AND MEDICINE 214, 219 (2010);
**(10)** As Duke Law professor and All-American track athlete Doriane Coleman, tennis champion Martina Navratilova, and Olympic track gold medalist Sanya Richards-Ross recently wrote: "The evidence is unequivocal that starting in puberty, in every sport except sailing, shooting, andriding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science," Doriane Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don't Abandon Title IX*, WASHINGTON POST (Apr. 29, 2019);
**(11)** The benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones. A recent study on the impact of such treatments

found that even "after 12 months of hormonal therapy," a man who identifies as a woman and is taking cross-sex hormones "had an absolute advantage" over female athletes and "will still likely have performance benefits" over women, Tommy Lundberg et al., "*Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen*," KAROLINKSA INSTITUTET (Sept. 26, 2019); and

**(12)** Having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams accomplish this by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognitionand accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors.

33-6203. **DESIGNATION OF ATHLETIC TEAMS**. **(1)** Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public school or any school that is a member of the Idaho high school activities association or a public institution of higher education or any higher education institution that is a member of the national collegiate athletic association (NCAA), national association of intercollegiate athletics (NAIA), or national junior college athletic association (NJCAA) shall be expressly designated as one (1) of the following based on biological sex:

**(a)** Males, men, or boys;

**(b)** Females, women, or girls; or

**(c)** Coed or mixed.

**(2)** Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.

**(3)** If disputed, a student may establish sex by presenting a signed physician's statement that shall indicate the student's sex based solely on:

**(a)** The student's internal and external reproductive anatomy;

**(b)** The student's normal endogenously produced levels of testosterone; and

**(c)** An analysis of the student's genetic makeup.

33-6204. **PROTECTION FOR EDUCATIONAL INSTITUTIONS**. A government entity, any licensing or accrediting organization, or any athletic association or organization shall not entertain a complaint, open an investigation, or take any other adverse action against a school oran institution of higher education for maintaining separate interscholastic, intercollegiate, intramural, or club athletic teams or sports for students of the female sex.

33-6205. **CAUSE OF ACTION**. **(1)** Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against theschool or institution of higher education.

**(2)** Any student who is subject to retaliation or other adverse action by a school, institution of higher education, or athletic association or organization as a result of reporting a violation of this chapter to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or institutions of higher education in the state, shall have a private cause of action for injunctive relief, damages, and anyother relief available under law against the school, institution, or athletic association or organization.

**(3)** Any school or institution of higher education that suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting organization, or athletic association or organization.
**(4)** All civil actions must be initiated within two (2) years after the harm occurred. Persons or organizations who prevail on a claim brought pursuant to this section shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

3 33-6206. **SEVERABILITY**. The provisions of this chapter are hereby declared to be severableand if any provision of this chapter or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this chapter.

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### *Reading Guide for* Hecox v. Little

1. What constitutional and statutory claims do the transgender and cisgender female athlete plaintiffs in this case raise in their challenge here to Idaho's statute designed to excludetransgender female athletes from women's and girls' teams?

2. What does the court judge to be a "protectable interest" of the cisgender female athletes seeking to intervene as defendants as of right under Federal Rule of Civil Procedure 24(a) to try to uphold Idaho's statute excluding transgender female athlete from female sports teams, and why? (On what precedents does each side rely? What else does the court address?) Why is there a presumption that the governmental defendants will adequately represent the interests of the proposed intervenors? What does it take to overcome that presumption, in generalor in this case? About what conditions or limitations on permissive intervention under F. R. Civ. P. 24(b) do the parties parties disagree? What conduct by the proposed intervenors' counsel Alliance Defending Freedom does the court find troubling and why, and how does the court treat that conduct in analyzing the permissive intervention motion?

3. What is the court's reasoning about transgender woman athlete Lindsay Hecox's alleged injury-in-fact (required by constitutional standing doctrine for her to be able to sue in federal court)? In a portion of its opinion not reproduced below, the court holds that pseudonymous cisgender girl athlete Jane Doe has standing because she is subject to disparate rules for participation on girls' teams than cisgender boy athletes who seek to participate on boys' teams face. Also omitted is the court's analysis wherein it dismisses the plaintiffs' *facial* Fourteenth Amendment challenges to Idaho's statute under *U.S. v. Salerno* (1987), which when applicable precludes facial constitutional challenges unless the challenged law could be constitutionally applied in *no* set of circumstances.

4. What kind of scrutiny does the court use when it gets to the question whether the plaintiffs have established a likelihood of success on the merits of their claim that Idaho's law violates the Equal Protection Clause of the Fourteenth Amendment? How does the court assess the governmental interests claimed to justify the statute? How does it evaluate the evidentiary support for those interests? How does it assess the fit or tailoring of the statute to the asserted interests? What does the court say about the defendants' suggested interpretation that the law allows trans students to play on single-sex teams consistent with their gender identity so long as they have a health provider sign a

statement that they are that sex? What does the court reason about the statute's actual purpose?

5. In determining whether to grant the plaintiffs a preliminary injunction against enforcement of Idaho's statute, the court considers several well-established factors. Omitted below is the court's analysis of why the plaintiffs face irreparable harm if they are denied an injunction; the full opinion reasons that the (likely) violation of both plaintiffs' constitutional rights, the permanent loss of a year of eligibility for NCAA competition for Ms. Hecox, and the prospect of "embarrassment, harassment, and invasion of privacy through having to verify her sex" for Ms. Doe constitute irreparable harms. How does the court evaluate the balance of the equities (between the plaintiffs and the defendants) and the public interest?

## HECOX V. LITTLE

479 F.Supp.3d 930 (D. Idaho 2020)
Appeal Filed by *Lindsay Hecox, et al v. Madison Kenyon, et al.*, and
*Lindsay Hecox, et al v. Bradley Little, et al.*, 9th Cir., September 17, 2020

[The plaintiffs were represented by local(/regional) counsel, the ACLU LGBT Project, and the ACLU of Idaho. The intervenors were represented by Alliance Defending Freedom and perhaps affiliated counsel.]

### MEMORANDUM DECISION AND ORDER

**DAVID C. NYE, Chief U.S. District Court Judge**

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction, proposed intervenors' Motion to Intervene, and Defendants' Motion to Dismiss. The Court held oral argument on July 22, 2020 and took the matters under advisement.

Upon review, and for the reasons stated below, the Court GRANTS the Motion for Preliminary Injunction; GRANTS the Motion to Intervene; and GRANTS in PART and DENIES inPART the Motion to Dismiss.

### I. OVERVIEW

Plaintiffs in this case challenge the constitutionality of a new Idaho law which excludes transgender women from participating on women's sports teams. Defendants assert Plaintiffs lack standing, that their claims are not ripe for review, that certain of their claims fail as a matterof law, and that they are not entitled to injunctive relief. The proposed intervenors seek to intervene to advocate for their interests as female athletes and to defend the law Plaintiffs challenge. The United States has also filed a Statement of Interest in support of Idaho's law.

The primary question before the Court—whether the Court should enjoin the State of Idaho from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports—involves complex issues relating to the rights of student athletes, physiological differences between the sexes, an individual's ability to challenge the gender of other student athletes, female athlete's rights to medical privacy and to be free from potentially invasive sex identification procedures, and the rights of all students to have complete access to educational opportunities, programs, and activities available at school. The debate regarding transgender females' access to competing on women's sports teams has received nationwide attention and is currently being litigated in both traditional courts and the court of public opinion.

Despite the national focus on the issue, Idaho is the first and only state to categorically bar

the participation of transgender women in women's student athletics. This categorical bar to girls and women who are transgender stands in stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally–including the National Collegiate Athletic Association ("NCAA") and the International Olympic Committee ("IOC")—which allow transgender women to participate on female sports teams once certain specific criteria aremet.

In addition to precluding women and girls who are transgender and many who are intersex from participating in women's sports, Idaho's law establishes a "dispute" process that allows a currently undefined class of individuals to challenge a student's sex. If the sex of any female student athlete—whether transgender or not—is disputed, the student must undergo a potentially invasive sex verification process. This provision burdens all female athletes with therisk and embarrassment of having to "verify" their "biological sex" in order to play women's sports. Similarly situated men and boys—whether transgender or not—are not subject to the dispute process because Idaho's law does not restrict individuals who wish to participate on men's teams.

Finally, as an enforcement mechanism, Idaho's law creates a private cause of action against a "school or institution of higher education" for any student "who is deprived of an athletic opportunity" or suffers any harm, whether direct or indirect, due to the participation of a woman who is transgender on a women's team. Idaho schools are also precluded from taking any "retaliation or other adverse action" against those who report an alleged violation of the law, regardless of whether the report was made in good faith or simply to harass a competitor.

Plaintiffs seek a preliminary injunction which would enjoin enforcement of Idaho's law pending trial on the merits. The Court will ultimately be required to decide whether Idaho's law violates Title IX and/or is unconstitutional, but that is not the question before the Court today. The question currently before the Court is whether Plaintiffs have met the criteria for enjoining enforcement of Idaho's law *for the present time* until a trial on the merits can be held. To issue an injunction preserving the status quo by enjoining the law's enforcement, the Court must primarily decide whether Plaintiffs have constitutional and prudential standing to challenge the law, whether they state facial or only as-applied constitutional challenges, and whether they are likely to succeed on their claim, based upon the current record, that the law violates the Equal Protection Clause of the Fourteenth Amendment.

## II. BACKGROUND

On March 30, 2020, Idaho Governor Bradley Little ("Governor Little") signed the Fairness in Women's Sports Act (the "Act") into law. IDAHO CODE ANN. § 33-6201–6206. Plaintiffs' Complaint challenges the constitutionality of the Act. Among other things, Plaintiffs contend that the Act violates their constitutional rights to equal protection, due process, and theright to be free from unconstitutional searches and seizures. Plaintiffs seek preliminary relief solely on their equal protection claim, arguing the Act discriminates on the basis of transgender status by categorically barring transgender women from participating in women's sports, and also discriminates on the basis of sex by subjecting all women student-athletes to the risk of having to undergo invasive, unnecessary tests to "verify" their sex, while permitting all men student-athletes to participate in men's sports without such risk. Plaintiffs seek a preliminary injunction to enjoin enforcement of the Act pending trial on the merits.....

### B. The Parties

#### 1. Plaintiffs

Plaintiffs in this action include Lindsay Hecox, and Jean and John Doe on behalf of theirminor daughter, Jane Doe …. Lindsay is a transgender woman athlete who lives in Idaho and attends Boise

State University ("BSU"). As part of her treatment for gender dysphoria, Lindsay has undergone hormone therapy by being treated with testosterone suppression and estrogen, which lower her circulating testosterone levels and affect her bodily systems and secondary sex characteristics. Lindsay is a life-long runner who intends to try out for the BSU women's cross-country team in fall 2020, and for the women's track team in spring 2021. Under current NCAArules, Lindsay could compete at NCAA events in September—when she has completed one year of hormone treatment.

Jane is a 17-year old girl and athlete who is cisgender. Jane has played sports since she was four and competes on the soccer and track teams at Boise High School, where she is a rising senior. After tryouts in August, Jane intends to play on Boise High's soccer team again in fall 2020. Because most of her closest friends are boys, she has an athletic build, rarely wears skirts or dresses, and has at times been thought of as "masculine," Jane worries that one of her competitors may dispute her sex pursuant to section 33-6203(3) of the Act.

**2. Defendants**

The defendants named in this action..... include Governor Little; Idaho Superintendent of Public Instruction Sherri Ybarra; the individual members of the Idaho State Board of Education...; Idaho state educational institutions BSU and Independent School District of Boise City #1 ("Boise School District"); BSU's President, Dr. Marlene Tromp; Superintendent of the Boise School District, Coby Dennis; the individual members of the Boise School District's Board ofTrustees ...; and the individual members of the Idaho Code Commission ....

**3. Proposed Intervenors**

Proposed intervenors Madison ("Madi") Kenyon and Mary ("MK") Marshall (collectively "Madi and MK" or the "Proposed Intervenors") are Idaho cisgender female athletes.Like Lindsay and Jane, Madi and MK are "female athletes for whom sports is a passion and life-defining pursuit." Dkt. 30-1, at 2. Madi and MK both run track and cross-country on scholarship at Idaho State University ("ISU") in Pocatello, Idaho. Both competed against a transgender woman athlete last year at the University of Montana and had "deflating experiences" of running against and losing to that athlete. The Proposed Intervenors support the Act and wish to have their personal concerns fully set forth and represented in this case.

## C. The Act

**1. Overview**

Idaho passed House Bill 500 ("H.B. 500"), the genesis for the Act, on March 16, 2020. Inthe United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association ("IHSAA"). The NCAA sets policies for member colleges and universities, including BSU. Priorto the passage of H.B. 500, the IHSAA policy allowed transgender girls in K-12 athletics in Idaho to compete on girls' teams after completing one year of hormone therapy suppressing testosterone under the care of a physician for purposes of gender transition. Similarly, the NCAA policy allows transgender women attending member colleges and universities in Idaho to compete on women's teams after one year of hormone therapy suppressing testosterone.

**2. Legislative History**

On February 13, 2020, H.B. 500 was introduced in the Idaho House by Representative Barbara Ehardt ("Rep. Ehardt"). On February 19, 2020, the House State Affairs Committee heard testimony on H.B. 500. Ty Jones, Executive Director of the IHSAA, answered questions atthat hearing and noted that no Idaho student had ever complained of participation by transgender athletes, and no transgender athlete had ever competed under the IHSAA policy regulating inclusion of

transgender athletes. In addition, millions of student-athletes have competed in the NCAA since it adopted its policy in 2011 of allowing transgender women to compete on women's teams after one year of hormone therapy suppressing testosterone, with no reported examples of any disturbance to women's sports as a result of transgender inclusion. Rep. Ehardt admitted during the hearing that she had no evidence any person in Idaho had ever challenged anathlete's eligibility based on gender.

On February 21, 2020, H.B. 500 was passed out of the House committee. On February 25, 2020, Idaho Attorney General Lawrence Wasden … warned in a written opinion letter that H.B. 500 raised serious constitutional and other legal concerns due to the disparate treatment and impact it would have on both transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes. On February 26, 2020, the House debated the bill. Rep. Ehardt referred to two high school athletes in Connecticut and one woman in college who are transgender and who participated on teams for women and girls. Rep. Ehardt argued that the mere fact of these athletes' participation exemplified the "threat" the bill sought to address. The bill passed the House floor after the debate.

After passage in the House, H.B. 500 was heard in the Senate State Affairs Committee and was passed out of Committee on March 9, 2020. The next day, the bill was sent to the Committee of the Whole Senate for amendment, and minor amendments were made. One day later, on March 11, 2020, the World Health Organization declared COVID-19 a pandemic and many states adjourned state legislative sessions indefinitely. By contrast, the Idaho Senate remained in session and passed H.B. 500 as amended on March 16, 2020. After the House concurred in the Senate amendments, the bill was delivered to Governor Little on March 19, 2020.

Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that "there is no legitimate reason to seek to bar all trans girls and women from girls' and women's sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail." Professor Coleman endorsed the existing NCAA rule, which mirrors the IHSAA policy, and stated: "No other state has enacted such a flat prohibition against transgender athletes, and Idaho shouldn't either."

Five former Idaho Attorneys General likewise urged Governor Little to veto the bill "to keep a legally infirm statute off the books." They urged Governor Little to "heed the sound advice" of Attorney General Wasden, who had "raised serious concerns about the legal viabilityand timing of this legislation." Nevertheless, based on legislative findings that, *inter alia*, "inherent, physiological differences between males and females result in different athletic capabilities," Governor Little signed H.B. 500 into law on March 30, 2020.[6] IDAHO CODE § 33-6202(8).

For purpose of the instant motions, the Act contains three key provisions. First, the Act provides that "interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education" shall be "expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed." IDAHO CODE § 33-6203(1). The Act mandates, "[a]thletic teams or sports designated for females,women, or girls shall not be

[6] On the same day, Governor Little also signed another bill into law, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. Enforcement of H.B. 509 is currently being litigated in *F.V. and Dani Martin v. Jeppesen et al.*, because another judge of this Court previously permanently enjoined Idaho from enforcing a prior law that restricted transgender individuals from altering the sex designation on their birth certificates. *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018).

open to students of the male sex." *Id.* at § 33-6203(2). The Act does not contain comparable limitation for any individuals—whether transgender or cisgender—who wish to participate on a team designated for males.

Second, the Act creates a dispute process for an undefined class of individuals who maywish to "dispute" any transgender or cisgender female athlete's sex. This provision provides:

> A dispute regarding a student's sex shall be resolved by the school or institution byrequesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. The health care provider may verify the student's biological sexas part of a routine sports physical examination relying only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenouslyproduced testosterone levels. The state board of education shall promulgate rules for schools and institutions to follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

*Id.* at § 33-6203(3).

Third, the Act creates an enforcement mechanism to ensure compliance with its provisions. Specifically, the Act creates a private cause of action for any student negatively impacted by violation of the Act, stating:

> (1) Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or institution of higher education.
>
> (2) Any student who is subject to retaliation or other adverse action by a school, institution of higher education, or athletic association or organization as a result of reporting a violation of this chapter to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency withoversight of schools or institutions of higher education in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.
>
> (3) Any school or institution of higher education that suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting organization, or athletic association or organization.
>
> (4) All civil actions must be initiated within two (2) years after the harm occurred. Persons or organizations who prevail on a claim brought pursuant to this section shall beentitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

*Id.* at § 33-6205.

**D. Procedural Background**

Plaintiffs filed the instant suit on April 15, 2020. The lawsuit primarily seeks: (1) a judgment declaring that the Act violates the United States Constitution and Title IX, and also violates such rights as applied to Plaintiffs; (2) preliminary and permanent injunctive relief enjoining the Act's enforcement; and (3) an award of costs, expenses, and reasonable attorneys' fees. On April 30, 2020, Plaintiffs filed the instant Motion for Preliminary Injunction, seeking preliminary relief on their Equal Protection Claim. The Proposed Intervenors filed a Motion to Intervene on May 26, 2020, and Defendants filed a Motion to Dismiss on June 1, 2020. After each was fully briefed, the Court held

oral argument on all three motions on July 22, 2020.

## III. ANALYSIS

....

### A. Motion to Intervene

The Proposed Intervenors seek to intervene to advocate for their interests and to defend the Act, arguing they "face losses to male athletes" and "stand opposed to any legally sanctioned interference with the opportunities that they have enjoyed as female competitors, and that would deprive them and other young women of viable avenues of competitive enjoyment and success within a context that acknowledges and honors them as females." The Proposed Intervenors request intervention as a matter of right, or, alternatively, permissive intervention, under Federal Rule of Civil Procedure 24. Plaintiffs oppose the Motion to Intervene. Defendants are in favor ofintervention and suggest the Proposed Intervenors' perspectives "can help inform the Court whenit balances hardships and determines the public consequences of the relief Plaintiffs seek."

....

**2. Analysis**

**a. Intervention as of Right**

....

**ii. Protectable Interest**

To warrant intervention as of right, a movant must show both "an interest that is protected under some law" and "a 'relationship' between its legally protected interest and the plaintiff's claims." *California ex rel. Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006). "Whether an applicant for intervention demonstrates sufficient interest in an action is a practical,threshold inquiry. No specific legal or equitable interest need be established." *Berg*, 268 F.3d at 818 (citing *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993))....

The Proposed Intervenors claim a significant and protected interest in having and maintaining "female-only competitions and a competitive environment shielded from physiologically advantaged male participants to whom they stand to lose." Plaintiffs characterizethis interest as a mere desire to exclude transgender students from single-sex sports, which is not significantly protectable. As Plaintiffs note, the Ninth Circuit has held cisgender students do not have a legally protectable interest in excluding transgender students from single-sex spaces. *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (rejecting Title IX and constitutionalclaims of cisgender students based on having to share single sex restrooms and locker facilities with transgender students).

However, the Ninth Circuit has also held that redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is unquestionably a legitimate and important interest, which is served by precluding males from playing on teams devoted to female athletes. *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982). Regardless of how the Proposed Intervenors' interest is characterized—either as a right to a level playing field or as a more invidious desire to exclude transgender athletes—they do claim a protectable interest in ensuring equality of athletic opportunity. The importance of this interest is the basic premise of almost fifty years of Title IXlaw as it applies to athletics, and, as recognized by the Ninth Circuit, is unquestionably a legitimate and important interest.…

Further, Defendants acknowledged at oral argument what seems beyond dispute—Idaho passed the Act to protect cisgender female student athletes like Madi and MK....

....

**iv. Adequacy of Representation**

The "most important factor" to determine whether a proposed intervenor is adequately represented by an existing party to the action is "how the [proposed intervenor's] interest compares with the interests of existing parties." When an existing party and a proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies. There is also an assumption of adequacy where, as here, the government is acting on behalf of a constituency that it represents...

... [T]he ultimate objective of both the Proposed Intervenors and Defendants is to defendthe constitutionality of the Act. Given this shared objective, the presumption of adequacy of representation applies, and the Proposed Intervenors must make "a very compelling showing" to defeat this presumption....

The Court ... concludes that .....[t]hrough the presentation of direct evidence that

Defendants "will take a position that actually compromises (and potentially eviscerates) the protections of [the Act]," the Proposed Intervenors have overcome the presumption that Defendants will act in their interests. *Lockyer*.

Liberally construing Rule 24(a), the Court finds that the Proposed Intervenors have metthe test for intervention as a matter of right. Alternatively, however, the Court finds permissive intervention is also appropriate.

**2. Permissive Intervention**

....

Finally, Plaintiffs argue intervention could prejudice the adjudication of their claims because counsel for the Proposed Intervenors have a history of utilizing misgendering tactics that will delay and impair efficient resolution of litigation. For instance, the Motion to Intervene is replete with references to Lindsay using masculine pronouns and refers to other transgender women by their former male names. The Court is concerned by this conduct, as other courts have denounced such misgendering as degrading, mean, and potentially mentally devastating to transgender individuals. *T.B., Jr. ex rel. T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566 (4th Cir. 2018) (describing student's harassment of transgender female teacher by referring to herwith male gender pronouns as "pure meanness."); *Hampton v. Baldwin*, 2018 WL 5830730 (S.D.Ill. Nov. 7, 2018) (referencing expert testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating.").

Counsel for the Proposed Intervenors responds that they have used such terms not to be discourteous, but to differentiate between "immutable" categories of sex versus "experiential" categories of gender identity, and that the terms they use simply reflect "necessary accuracy." Such "accuracy," however, is not compromised by simply referring to Lindsay and other transgender females as "transgender women," or by adopting Lindsay's preferred gender pronouns.[11] *See, e.g., Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019) (consistently referring to transgender female prisoner using her chosen name and female gender pronouns); *Canada v. Hall*, 2019 WL 1294660 (N.D. Ill. March 21, 2019) ("Although immaterial to this ruling, the Court would be derelict if it failed to note the defendants' careless disrespect for the plaintiff's transgender identity, as reflected through … the consistent use of male pronouns to identify the plaintiff. The Court cautions against maintaining a similar tone in future filings."); *Lynch v. Lewis*, 2014 WL 1813725 (M.D. Ga. May 7, 2014) ("The

[11] The Court does not take issue with identifying Lindsay (or any other transgender women) as a transgender woman or transgender female, a male-to-female transgender athlete or individual, or as a person whose sex assigned at birth (male) differs from her gender identity (female). *Edmo*. Each of these descriptions makes counsel's point without doing so in an inflammatory and potentially harmful manner.

Court and Defendants will use feminine pronouns to refer to the Plaintiff in filings with the Court. Such use is not to be taken as a factual or legal finding. The Court will grant Plaintiff's request as a matter of courtesy, and because it is the Court's practice to refer to litigants in the manner they prefer to be addressed when possible.").[12]

Ultimately, however, that the Proposed Intervenors' counsel used gratuitous language in their briefs is not a reason to deny Madi and MK the opportunity to intervene to support a law ofwhich they are the intended beneficiaries. Moreover, during oral argument, counsel for the Proposed Intervenors was respectful in advocating for Madi and MK without needlessly attempting to shame Lindsay or other transgender women. That counsel did so illustrates there is no need to misgender Lindsay or others in order to "speak coherently about the goals, justifications, and validity of the Fairness in Women's Sports Act." Dkt. 52, at 8. Counsel should continue this practice in future filings and arguments before the Court.

In sum, the Court will allow Madi and MK to intervene as of right, and, alternatively, finds permissive intervention is also appropriate. The Court will accordingly collectively refer toMadi and MK hereinafter as the "Intervenors."

### B. Motion to Dismiss

Defendants filed a Motion to Dismiss Plaintiffs' action, contending Plaintiffs lack standing, that their claims are not ripe for review, and that their facial challenges fail as a matterof law.

....

**2. Analysis**

**a. Standing**

....

Defendants suggest Plaintiffs lack standing because they have failed to allege that they have suffered an injury in fact. "To establish injury in fact, a plaintiff must show that he or she has suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" "A plaintiff threatened with future injury has standing to sue if the threatened injury is 'certainly impending,' or there is a 'substantial riskthat the harm will occur.'" A plaintiff cannot establish standing by alleging a threat of future harm based on a chain of speculative contingencies.

Defendants argue …. that Lindsay's alleged harm of being subject to exclusion from participation on a women's sport teams, and Jane's alleged harm of being required to verify her sex, cannot occur unless each Plaintiff first makes a women's athletic team, and a third party then disputes either Plaintiffs' sex according to regulations that the State Board of Education has not yet promulgated....

The harm Lindsay alleges—the inability to participate on women's teams—arose when the Act went into effect on July 1, 2020. That Lindsay has not yet tried out for BSU athletics or been subject to a dispute process is irrelevant because the Act bars her from trying out in the first place....

In sum, the Court is not convinced an exception to *Salerno* applies to Plaintiffs' facial Fourteenth Amendment challenges and will dismiss such claims. The Court will not dismiss Plaintiffs' as-applied Fourteenth Amendment challenges to the Act.

### C. Motion for Preliminary Injunction

....

[12] Personal preferences or beliefs and organizational perceptions or positions notwithstanding, the Court expects courtesy between all parties in this litigation. In an ever contentious social and political world, the Courts will remain a haven for fairness, civility, and respect—even in disagreement.

**2. Analysis**

**a. Equal Protection Clause**

....

**b. Appropriate level of scrutiny**

Plaintiffs argue heightened scrutiny is appropriate in this case because the Act discriminates on the basis of both transgender status and sex. Defendants ... suggest the Act does not discriminate on the basis of transgender status or sex because it simply "treats all biological males the same and prohibits them from participating in female sports to protect athletic opportunities for biological females." While contending[] "[n]either the Supreme Court nor the Ninth Circuit has recognized 'gender identity' as a suspect class," the Intervenors argue the Act nonetheless passes heightened scrutiny. Finally, the United States contends that even assuming, *arguendo*, that the Act triggers heightened scrutiny, it "readily withstand[s] this form of review."

Because all parties focus their arguments on the Act's ability to withstand heightened scrutiny, and because the Court finds heightened scrutiny is appropriate pursuant to *Craig v. Boren* (1976), *VMI*, 518 U.S. at 53, *Barron*, and *Karnoski*, the Court applies this level of review.

**c. Likelihood of Success on the Merits—Lindsay**

**i. Discrimination based on transgender status**

Defendants and the United States suggest the Act does not discriminate against transgender individuals because it does not expressly use the term "transgender" and because theAct does not ban athletes on the basis of transgender status, but rather on the basis of the innate physiological advantages males generally have over females....

[The] Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity. Hence, while the physiological differences the Defendants suggest support the categorical bar on transgender women's participation in women's sports may justify the Act, they do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status.

As mentioned, the Ninth Circuit has held that classifications based on transgender status are subject to heightened scrutiny. *Karnoski*. The Court accordingly applies heightened scrutiny to the Act. Under this level of scrutiny, four principles guide the Court's equal protection analysis. The Court: (1) looks to the Defendants to justify the Act; (2) must consider the Act's actual purposes; (3) need not accept hypothetical, *post hoc* justifications for the Act; and (4) must decide whether Defendants' proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them Further, under heightened scrutiny review, the Court must examine the Act's "actual purposes and carefully consider the resulting inequality to ensure thatour most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014) ("*Latta II*") (quoting *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014)).

**ii. The Ninth Circuit's holding in *Clark***

At the outset, the Court recognizes that sex-discriminatory policies withstand heightened scrutiny when sex classification is "not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464 (1981) (upholding law that held only males criminally liable for statutory rape because the consequences of teenage pregnancy essentially fall only on girls, so applying statutory rape law solely to men was justified since men suffer fewer consequences of their conduct). The

Equal Protection Clause does not require courts to disregard the physiological differences between men and women. *Michael M*; *Clark*.

As repeatedly highlighted by Defendants, the Intervenors, and the United States (collectively hereinafter the Act's "Proponents"), the Ninth Circuit in *Clark* held that there "is no question" that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" is "a legitimate and important governmental interest" justifying rules excluding males from participating on female teams. In *Clark*, the Ninth Circuit determined a policy in Arizona of excluding boys from girls' teams simply recognized "the physiological fact that males would have an undue advantage competing against women," and would diminish opportunity for females. The *Clark* Court also explained that "even wiser alternatives to the one chosen" did not invalidate Arizona's policy since it was "substantially related to the goal" of providing fair and equal opportunities for females to participate in athletics.

... *Clark*'s holding regarding general sex separation in sport, as well as the justifications for such separation, do not appear to be implicated by allowing transgender women to participateon women's teams. In *Clark*, the Ninth Circuit held that it was lawful to exclude cisgender boys from playing on a girls' volleyball team because: (1) women had historically been deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities to women; and (3) according to stipulated facts, average physiological differences meant that "males would displace females to a substantial extent" if permitted to play on women's volleyball teams. These principals do not appear to hold true for women and girls who are transgender.

First, like women generally, women who are transgender have historically been discriminated against, not favored. *See, e.g., Barron*. In a large national study, 86% of those perceived as transgender in a K–12 school experienced some form of harassment, and for 12%, the harassment was severe enough for them to leave school. [USTS.] According to the same study, 48% of transgender people in Idaho have experienced homelessness in their lifetime, and 25% were living in poverty. Rather than a general separation between a historically advantaged group (cisgender males) and a historically disadvantaged group (cisgender women), the Act excludes a historically disadvantaged group (transgender women) from participation in sports, and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process. The first justification for the Arizona policy at issue in *Clark* is not present here.

Second, under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in *Clark*, who generally had equal athletic opportunities. Dkt. (explaining that forcing a transgender woman to participate on a men's team would be forcing her to be cisgender, which is "associated with adverse mental health outcomes."). Participating in sports on teams that contradict one's gender identity "is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical." Dkt.[33] As such, the Act's

[33] The Intervenors rely on an expert opinion from Dr. Stephen Levine claiming gender-affirming policies (such as allowing transgender individuals to play on sports teams consistent with their gender identity) are instead harmful to transgender individuals. However, another judge of this Court previously determined that Dr. Levine is an outlier in the field of gender dysphoria and placed "virtually no weight" on his opinion in a case involving a transgender prisoner's medical care. Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103 (D. Idaho 2018) (*vacated in part on other grounds in Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019)); *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188-89 (N.D. Cal. 2015) (noting Dr. Levine's expert opinion overwhelmingly relied on generalizations about gender dysphoria, contained illogical inferences, and admittedly included references to a fabricated anecdote). At this stage of the proceedings, the Court accepts Plaintiffs' evidence regarding the harm forcing transgender individuals to deny their gender identity can

categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports—and also subjects all cisgender women to unequal treatment simply to play sports—while the men in *Clark* had generally equal athletic opportunities.

Third, it appears transgender women have not and could not "displace" cisgender womenin athletics "to a substantial extent." *Clark*. Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender. Presumably, this means approximately one half of one percent of the population is made up of transgender females. It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women. It appears untenable that allowing transgender women to compete on women's teams would substantially displace female athletes.[34]

And fourth, it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women. The Court discusses the distinction between physical differences between men and women in general, and physical differences between transgender women who have suppressed their testosterone for one year and women below. However, the interests at issue in *Clark*—Defendants' central authority—pertained to sex separation in sport generally and are not necessarily determinative here.[35]

**iii. The Act's justifications**

The legislative findings and purpose portion of the Act suggests it fulfills the interests of promoting sex equality, providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades. Plaintiffs do not dispute that these are important governmental objectives. They instead argue that the Act is not substantially related to such important governmental interests. At this stage of the litigation, and without further development of the record, the Court is inclined to agree.

***(1) Promoting Sex Equality and Providing Opportunities for Female Athletes***

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cause.

[34] The United States suggests the Ninth Circuit held participation by just one cisgender boy on the girls' volleyball team would "set back" the "goal of equal participation by females in interscholastic sports." Dkt. 52 (citing *Clark by and through Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191 (1989)) ("*Clark II*"). The part of *Clark II* the United States references responded to plaintiff's "mystifying" argument that the Arizona school association had been "wholly deficient in its efforts to overcome the effects of past discrimination against women in interscholastic athletics, and that this failure vitiate[d] its justification for a girls-only volleyball team." The Ninth Circuit noted that it was true that participation in Arizona interscholastic sports was still far from equal. In light of this inequity, the *Clark II* Court could not see how plaintiff's "remedy" of allowing him to play on the girl's team would help. Thus, the *Clark II* Court's statement regarding participation by one male athlete was in the context of plaintiff's argument that he should be permitted to play on the girl's team because there was no justification for women's teams. The *Clark II* Court remained focused on the risk that a ruling in plaintiff's favor would extend to all boys and would engender substantial displacement of girls in school sports. *Id.* (observing that the issue of "males ... outnumber[ing] females in sports two to one" in school sports would "not be solved by opening the girls' team to Clark *and other boys.*") (emphasis added); *see also id.* ("Clark does not dispute our conclusion in *Clark II* that 'due to physiological differences, *males would displace females to a substantial extent if they were* allowed to compete for positions on the volleyball team.") (quoting *Clark*, 695 F.2d at 1131) (emphasis added).

[35] As Attorney General Wasden advised the legislature before it passed the Act: "The issue of a transgender female wishing to participate on a team with other women requires considerations beyond those considered in Clark and presents issues that courts have not yet resolved." Letter from Attorney General Wasden to Rep. Rubel (Feb. 25, 2020), https://www.idahostatesman.com/latest-newsarticle240619742.ece/BINARY/HB% 20500% 20Idaho% 20AG% 20response.pdf.

As discussed, *supra*, section II.C, the legislative record reveals no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote "sex equality" or to "protect athletic opportunities for females" in Idaho. Rather than presenting empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities for women, both the Act itself and Proponents' rely exclusively on three transgender athletes who have competed successfully in women's sports.

Specifically, during the entire legislative debate over the Act, the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were notably, also defeated by cisgender girls in recent races. [*See*] *also* Associated Press, *Cisgender female who sued beats transgender athlete in high school race*, https://www.fox61.com/article/news/local/transgender-athlete-loses-track-race-lawsuit-ciac-high-school-sports/520-df66c6f5-5ca9-496b-a6ba-61c828655bc6 (Feb. 15, 2020). Notably, unlike the IHSAA and NCAA rules in place in Idaho before the Act, Connecticut does not require a transgender woman athlete to suppress her testosterone for any time prior to competingon women's teams.

The Intervenors identify a third transgender athlete, June Eastwood, and argue that their athletic opportunities were limited by Eastwood's participation in women's sports. The State also highlights this example. However, Eastwood was not an Idaho athlete and the competition at issue took place at the University of Montana. So, the Idaho statute would have no impact on Eastwood. More importantly, although the Intervenors lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. And, losing to Eastwood at one race did not deprive the Intervenors from the opportunity to compete in Division I sports, as both continue to compete on the women's cross-country and track teams with ISU.

The evidence cited during the House Debate on H.B. 500 and in the briefing by the Proponents regarding three transgender women athletes who have each lost to cisgender women athletes does not provide an "exceedingly persuasive" justification for the Act. *VMI*. Heightenedscrutiny requires that a law solves an actual problem and that the "justification must be genuine, not hypothesized." *VMI*. In the absence of any empirical evidence that sex inequality or access toathletic opportunities are threatened by transgender women athletes in Idaho, the Act's categorical bar against transgender women athletes' participation appears unrelated to the interests the Act purportedly advances.

Plaintiffs have also presented compelling evidence that equality in sports is *not* jeopardized by allowing transgender women who have suppressed their testosterone for one yearto compete on women's teams. Plaintiffs' medical expert, Dr. Joshua Safer, suggests that physiological advantages are not present when a transgender woman undergoes hormone therapyand testosterone suppression. Before puberty, boys and girls have the same levels of circulating testosterone. After puberty, the typical range of circulating testosterone for cisgender women is similar to before puberty, and the circulating testosterone for cisgender men is substantially higher.

Dr. Safer contends there "is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes." Dr. Safer highlights the only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes. The smallstudy showed that after undergoing gender affirming intervention, which included lowering their testosterone levels, the athletes' performance was reduced so that relative to cisgender women, their performance was proportionally the same as it had been relative to cisgender men prior to any medical

treatment. In other words, a transgender woman who performed 80% as well as the best performer among men of that age before transition would also perform at about 80% as wellas the best performer among women of that age after transition.

Defendants' medical expert, Dr. Gregory Brown, also confirms that male's [*sic*] performance advantages "result, in large part (but not exclusively), from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty." While Dr. Brown maintains that hormone and testosterone suppression cannot fully eliminate physiological advantages once an individual has passed through male puberty, the Court notes some of the studies Dr. Brown relies upon actually held the opposite. Further, the majority of the evidence Dr. Brown cites, and most of his declaration, involve the differences between male and female athletes in general, and contain no reference to, or information about, the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone.

Yet, the legislative findings for the act contend that even after receiving hormone and testosterone suppression therapy, transgender women and girls have "an absolute advantage" over non-transgender girls. In addition to the evidence cited above, several factors undermine this conclusion. For instance, there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all. These transgender girls never experience the high levels of testosterone and accompanying physical changes associated with male puberty, and instead go through puberty with the same levels of hormones as other girls. As such, they develop typically female physiological characteristics, including muscle and bone structure, and do not have an ascertainable advantage over cisgender female athletes. Defendants do not address how transgender girls who never undergo male puberty can have "an absolute advantage" over cisgender girls. Nor do Defendants address why transgender athletes who have never undergone puberty should be categorically excluded from playing women's sports in order to protect sexualequality and access to opportunities in women's sports.

The Act's legislative findings do claim the "benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones." However, the study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed. Defendants provide no explanation as to why the Legislators relied on the pre-peer review version of the article or why Defendants did not correct this fact in their briefing after the peer reviewed version was published. In fact, the study did not involve transgender athletes at all, but instead considered the differences between transgender men who increased strength and muscle mass with testosterone treatment, and transgender women who lost some strength and muscle mass with testosterone suppression. The study also explicitly stated it "is important to recognize that we only assessed proxies for athleticperformance ... it is still uncertain how the findings would translate to transgender athletes." Anna Wiik et. al, *Muscle Strength, Size, and Composition Following 12 months of Gender-affirming Treatment in Transgender Individual*, J. CLIN. METAB., 105(3):e805-e813 (2020).[37]

In addition, several of the Act's legislative findings which purportedly demonstrate the

[37] The legislative findings and the citations in the Proponents' briefs cite this study as Tommy Lundberg et al., *Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for transwomen*, Karolinska Institute (Sept. 26, 2019). The correct reference for the published study is Anna Wiik et al., *Muscle Strength, Size, and Composition following 12 Months of Gender-affirming Treatment in Transgender Individuals*, J. Clin. Metab., 105(3):e805-e813 (2020).

"absolute advantage" of transgender women are based on a study by Doriane Lambelet Coleman. Professor Coleman herself urged Governor Little to veto H.B. 500 because her work was misused, and she also endorsed the NCAA's rule of allowing transgender women to participate after one year of hormone and testosterone suppression. Betsy Russell, *Professor whose work is cited in HB500a, the transgender athletes bill, says bill misuses her research and urges veto*, IDAHO PRESS, https://www.idahopress.com/eyeonboise/professor-whose-work-is-cited-in-hb-a-the-transgenderarticle_0e800202-cacl-5721-a7690328665316a8.html (Mar. 19, 2020).

The policies of elite athletic regulatory bodies across the world, and athletic policies of most every other state in the country, also undermine Defendants' claim that transgender womenhave an "absolute advantage" over other female athletes. Specifically, the International Olympic Committee and the NCAA require transgender women to suppress their testosterone levels in order to compete in women's athletics. The NCAA policy was implemented in 2011 after consultation with medical, legal, and sports experts, and has been in effect since that time. Millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion.[38] Similarly, every other state in the nation permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation. The Proponents' failure to identify any evidence of transgender women causing purported sexual inequality other than four athletes (at least three of whom who have notably lost to cisgenderwomen) is striking in light of the international and national policy of transgender inclusion.

Finally, while general sex separation on athletic teams for men and women may promote sex equality and provide athletic opportunities for females, that separation preexisted the Act and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act. IHSAA Non-Discrimination Policy ("If a sport is offered for both boys and girls, girls must play on the girls team and boys must play on the boys team ... If a school sponsors only a single team in a sport ... Girls are eligible to participate on boys' teams.... Boys are not eligible to participate on girls' teams."). However, the IHSAA policy also allows transgender girls to participate on girls' teams after one year of hormone suppression. Similarly, the existing NCAA rules also preclude men from playing on women's teams but allow transgender women to compete after one year of testosterone suppression. Because Proponents fail to show that participation by transgender women athletes threatened sexual equality in sportsor opportunities for women under these pre-existing policies, the Act's proffered justifications donot appear to overcome the inequality it inflicts on transgender women athletes.

The Ninth Circuit in *Clark* ruled that sex classification can be upheld only if sex represents "a legitimate accurate proxy." The *Clark* Court further explained the Supreme Court has soundly disapproved of classifications that reflect "archaic and overbroad generalizations," and has struck down gender-based policies when the policy's proposed compensatory objectivewas without factual justification. Given the evidence highlighted above, it appears the "absolute advantage" between transgender and cisgender women athletes is based on overbroad generalizations without factual justification.

[38] In their Response to the Motion for Preliminary Injunction, Defendant's highlight the circumstances of one transgender woman athlete who competed in women's sports after suppressing her hormones, Cece Telfer, to suggest testosterone suppression does not eliminate the physiological advantages of transgender women athletes. The Court finds, and Defendants concede, that such anecdotal evidence does not establish that hormone therapy is ineffective in reducing athletic performance advantages in transgender women athletes.

Ultimately, the Court must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence. However, the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.

***(2) Ensuring Access to Athletic Scholarships***

The Act also identifies an interest in advancing access to athletic scholarships for women. Yet, there is no evidence in the record to suggest that the Act will increase scholarship opportunities for girls. Just as the head of the IHSAA testified during the legislative debate on H.B. 500 that he was not aware of any transgender girl ever playing high school girls' sports in Idaho, there is also no evidence of a transgender person ever receiving any athletic scholarship in Idaho. Nor have the scholarships of the Intervenors—the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenors continue to run track and cross-country on scholarship with ISU, despite their loss to a transgender woman athlete at the University of Montana. The Act's incredibly broad sweep also belies any genuine concern with an impact on athletic scholarships. The Act broadly applies to interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, or a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education. IDAHO CODE § 33-6203(1). Thus, any female athlete, from kindergarten through college, is generally subject to the Act's provisions. Clearly, the need for athletic scholarships is not implicated in primary school and intramural sports in the same way that it may be for high school and college athletes. As such, "the breadth of the [law] is so far removed from [the] particular justifications" put forth in support of it, that it is "impossible to credit them." *Romer v. Evans* (1996).

Based on the dearth of evidence in the record to show excluding transgender women from women's sports supports sex equality, provides opportunities for women, or increases access to college scholarships, Lindsay is likely to succeed in establishing the Act violates her right to equal protection. This likelihood is further enhanced by Defendants' implausible argument that the Act does not actually ban transgender women, but instead only requires a health care provider's verification stating that a transgender woman athlete is female.

Defense counsel confirmed during oral argument that if Lindsay's health care provider signs a health form stating that she is female, Lindsay can play women's sports. In turn, Plaintiffs' counsel affirmed that Lindsay's health care provider will sign a form verifying Lindsay is female. If this is indeed the case, then each of the Proponents' arguments claiming that the Act ensures equality for female athletes by disallowing males on female teams falls away. Under this interpretation, the Act does not ensure sex-specific teams at all and is instead simply a means for the Idaho legislature to express its disapproval of transgender individuals. If "equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U.S. Dep't of Agriculture v. Moreno* (1973).

***(3) The Act's Actual Purpose***

The Act's legislative findings reinforce the idea that the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women. For instance, the Act's criteria for determining "biological sex" appear designed to exclude transgender women and girls and to reverse the prior IHSAA and NCAA rules that implemented sex-

separation in sports while permitting transgender women to compete.

Specifically, an athlete subject to the Act's dispute process may "verify" their sex using three criteria: (1) reproductive anatomy, (2) genetic makeup, or (3) endogenous testosterone, i.e., the level of testosterone the body produces without medical intervention. This excludes some girls with intersex traits because they cannot establish a "biological sex" of female based on these verification metrics. It also completely excludes transgender girls.

Girls under eighteen generally cannot obtain gender-affirming genital surgery to treat gender dysphoria, and therefore will not have female reproductive anatomy. Many transgenderwomen over the age of eighteen also have not had genital surgery, either because it is not consistent with their individualized treatment plan for gender dysphoria or because they cannot afford it. With respect to genetic makeup, the overwhelming majority of women who are transgender have XY chromosomes, so they cannot meet the second criteria. And, by focusing on "endogenous" testosterone levels, rather than actual testosterone levels after hormone suppression, the Act excludes transgender women whose circulating testosterone levels are within the range typical for cisgender women.

Thus, the Act's definition of "biological sex" intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance. Significantly, the preexisting Idaho and current NCAA rules instead focus on that factor. That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.

In addition, it is difficult to ignore the circumstances under which the Act was passed. As COVID-19 was declared a pandemic and many states adjourned state legislative session indefinitely, the Idaho Legislature stayed in session to pass H.B. 500 and become the first and only state to bar all women and girls who are transgender from participating in school sports. At the same time, the Legislature also passed another bill, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. Governor Little signed H.B. 500 and H.B. 509 into law on the same day.

That the Idaho government stayed in session amidst an unprecedented national shut down to passtwo laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion, rather than equality for women athletes, particularly when the national shutdown preempted school athletic events, making the rush to thepass the law unnecessary.

Finally, the Proponents turn the Act on its head by arguing that transgender people seek "special" treatment by challenging the Act. This argument ignores that the Act excludes *only* transgender women and girls from participating in sports, and that Lindsay simply seeks the status quo prior to the Act's passage, rather than special treatment. Further, the Proponents' argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex. The Ninth Circuit rejected such arguments in *Latta II*, as did the Supreme Court in *Bostock*.

In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics. As such, Lindsay is likely to succeed on the merits of her equal protection claim. Again, at this stage, the Court

only discusses the "likelihood" of success based on the information currently in the record. Actual success—or failure—on the merits will be determined at a later stage.

**d. Likelihood of Success—Jane**

The Act additionally triggers heightened scrutiny by singling out members of girls' and women's teams for sex verification. *VMI* (["A]ll gender-based classifications today warrant heightened scrutiny"). Defendants argue that the Act does not treat females differently because "it requires any athlete subject to dispute, whether male or female, to verify his or her sex." Defendants suggest males are equally subject to the sex verification process because they may try to participate on a woman's team. This claim ignores that all cisgender women are subject to the verification process in order to play on the team matching their gender identity, while only a limited few (if any) cisgender men will be subject to the verification process if they try to play ona team contrary to their gender identity.

Defendants' argument also contradicts the express language of the Act, which mandates, "[a]thletic teams or sports designated for females, women, or girls *shall* not be open to students of the male sex." (emphasis added). Males are not subject to the dispute process because femaleteams are not open to them under the Act.[39] By arguing that people of any sex who seek to play women's sports would be subject to sex verification, Defendants ignore that the Act creates a different, more onerous set of rules for women's sports when compared to men's sports. Where spaces and activities for women are "different in kind ... and unequal in tangible and intangible ways from those for men, they are tested under heightened scrutiny." *VMI*.

It is also clear that a sex verification examination is unequal to the physical sports exam amale must have in order to play sports. Being subject to a sex dispute is itself humiliating. The Act's dispute process also creates a means that could be used to bully girls perceived as less feminine or unpopular and prevent them from participating in sports. And if, as the Act states, sex must be verified through a physical examination relying "only on one (1) or more of the following: the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels," girls like Jane may also have to endure invasive medical tests thatcould constitute an invasion of privacy in order to "verify" their sex.

....

Given the significant burden the Act's dispute process places on all women athletes, the Court must decide whether Defendants' proffered justifications overcome the injury and indignity inflicted on Jane and all other female athletes through the dispute process. *SmithKline*. Instead of ensuring "long-term benefits that flow from success in athletic endeavors for women and girls," it appears that the Act hinders those benefits by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations. Because, as discussed above, Defendants have not offered evidence that the Act is substantially related to its purported goals of promoting sex equality, providing opportunities for female athletes, or increasing femaleathlete's access to scholarship, Jane is also likely to succeed on her equal protection claim....

The Court … finds Plaintiffs will likely suffer irreparable harm if the Act is not enjoined.

**f. Balance of the Equities and Public Interest**

[39] Moreover, males were already excluded from female sports teams under the long-standing rules in Idaho prior to the Act's passage. Defendants do not explain why women must risk being subject to the onerous sex verification process in the name of equality in sports when women already had single sex teams without the risk of a sex dispute prior to the Act's passage.

Where, as here, the government is a party, the "balance of the equities" and "public interest" prongs of the preliminary injunction test merge.… As explained above, Plaintiffs' harms weigh significantly in favor of injunctive relief.

In stark contrast to the deeply personal and irreparable harms Plaintiffs face, a preliminary injunction would not harm Defendants because it would merely maintain the status quo while Plaintiffs pursue their claims. If an injunction is issued, Defendants can continue to rely on the NCAA policy for college athletes and IHSAA policy for high school athletes, as they did for nearly a decade prior to the Act. In the absence of any evidence that transgender women threatened equality in sports, girls' athletic opportunities, or girls' access to scholarships in Idaho during the ten years such policies were in place, neither Defendants nor the Intervenors would beharmed by returning to this status quo.

Further, the Intervenors are themselves subject to disparate treatment under the Act. While the Intervenors have never competed against a transgender woman athlete from Idaho, or in Idaho, they risk being subject to the Act's sex dispute process simply by playing sports. As Plaintiffs' counsel noted during oral argument, the Act "isn't a law that pits some group of women against another group of women. This is a law that harms all women in the state, all women who are subject to ... the sex verification process, and, of course, particularly women andgirls who are transgender and are now singled out for categorical exclusion."

Moreover, it is "always in the public interest to prevent the violation of a party's constitutional rights." By establishing a likelihood that the Act violates the Constitution, Plaintiffs "have also established that both the public interest and the balance of the equities favor a preliminary injunction."....

**V. ORDER**

Now, therefore IT IS HEREBY ORDERED:

1. The Motion to Intervene is GRANTED;
2. The Motion to Dismiss is GRANTED IN PART and DENIED IN PART. It is GRANTED with respect to Plaintiffs' facial Fourteenth Amendment constitutional challenges, it is DENIED with respect to Plaintiffs' as-applied constitutional claims and in all other respects;
3. The Motion for Preliminary Injunction is GRANTED.

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**Discussion**

1. ++Represented by the Christian Right advocacy organization Alliance Defending Freedom, the intervenors in the case wished to defend Idaho's statutory exclusion of trans girls from girls' sports because they "'stand opposed to any legally sanctioned interference with the opportunities that they have enjoyed as female competitors, and that would deprive them and other young women of viable avenues of competitive enjoyment and success within a context that acknowledges and honors them as females.'" What does it mean for a "context"—what context?—to "honor[] them as females"? How is this different from earlier articulations of "separate spheres" ideology, in which men and women were claimed to be equal while relegatedto different spheres of activity, such as business for men and "the home" for women? Is it the existence of "real differences" in the (usually, average) physical capabilities of male and femalepersons?

2. According to the court, ADF's briefing on behalf of the intervenors repeatedly misgendered plaintiff Lindsay Holcomb, yet Roger Brooks's oral argument on behalf of the then proposed intervenors apparently did not. What might account for that difference? And in criticizing "Defendants' claim that transgender women have an 'absolute advantage' over *other* female athletes"

(emphasis added), did the district court improperly disply bias toward Hecox's position in the litigation (by indicating that Hecox is female)? *Cf. US v Varner*, 948 F.3d 250 (5th Cir. 2020), *infra* Chapter 15 (fretting about perception of judicial bias were the court to referto a transgender woman with pronouns consistent with her gender identity).

3. Although the court granted the plaintiffs a preliminary injunction based on their equal protection claim, it may have made the state's burden lighter than it should be. The court creditsthe plurality opinion in *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981), a decision upholding a sex discriminatory statutory rape law that was used by the Ninth Circuit Court of Appeals in 1982 in the *Clark* case relied on by the defendants, *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), for the governing standard for equal protection challenges to sex discriminatory laws. Yet then Justice Rehnquist's *Michael M.* plurality opinion may not have even applied intermediate scrutiny as required at the time by themajority opinion in *Craig v. Boren*, 429 U.S. 190 (1976). (This is a problem wholly aside from the fact that it is not clear that Rehnquist's is the "narrowest" reasoning of those justices upholding the law challenged in *Michael M.* as required under *Marks v. United States*, 430 U.S.188 (1977), for it to state the holding of the Court.)

The *Michael M.* plurality first sought to downplay the clarity of the doctrine established by *Craig*: "the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications," Rehnquist wrote, *Michael M.*, 450 U.S. at 468. Rehnquist's opinion next endorsed Justice Powell's attempt in *Craig* to read that case as *not* adopting an intermediate tier of scrutiny (which of course is exactly how the SupremeCourt has read *Craig* for decades now): "[T]he traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged." *Id.* (quoting *Craig*,429 U.S. at 210 n.* (1976) (Powell, J., concurring)). The *Michael M.* plurality then reaches back even further, to *Reed v. Reed*, 404 U.S. 71 (1971), *see Michael M.* (plurality), 450 U.S. at 468, whose rational basis test, see *Reed*, 404 U.S. at 75-76, it misleadingly implies is preserved with different wording ("restated") by *Craig. Michael M.*, 450 U.S. at 468. The plurality goes on to rely on decisions including ones rendered *before Craig* adopted intermediate scrutiny, cases decided under *Reed*'s *rational basis* review. *See, e.g.*, *Michael M.* (plurality), 450 U.S. at 469 (invoking *Schlesinger v. Ballard*, 419 U.S. 498 (1975), *Kahn v. Shevin*, 416 U.S. 351 (1974), and*Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)).

The *Hecox* plaintiffs, rather, invoked current governing equal protection doctrine as articulated in *United States v. Virginia* ("*VMI*"), 518 U.S. 515 (1996). That turns on whether a statute *classifies* on the basis of sex, underscoring the unfaithfulness of the *Michael M.* plurality to the intermediate scrutiny required by *Craig*. Rehqnist in *Michael M.* stated that the plurality found "nothing to suggest that men, because of past discrimination or peculiar disadvantages, arein need of the special solicitude of the courts." 450 U.S. at 476. But *Craig* rejected this view that the nature of the scrutiny depended on whether it was women or instead men burdened by a sex-discriminatory law, a contention that Rehnquist pressed in his *dissent* in *Craig*. (Subsequently, ofcourse, Chief Justice Rehnquist made no similar defense of race-based affirmative action laws on the ground that white people were not shown to have suffered past discrimination or peculiar disadvantages—it was enough that a law *classified* on the basis of race for him to find heightened scrutiny appropriate.) The *Michael M.* plurality accepted what it thought "could ... have been" the purpose of the challenged law, *id.* at 470, whereas VMI rejects hypothetical purposes and insiststhat only a state's "actual purpose" can justify a sex-discriminatory law under the Equal Protection Clause, 518 U.S. at 533, 535-36. The plurality in *Michael M.* does not state that the sex discrimination there was "substantially related" to an important governmental purpose as required by *Craig* and intermediate scrutiny; it

concludes only that the discrimination "is *sufficiently* related to the State's objectives to pass constitutional muster." 450 U.S. at 472-73 (emphasis added). And, echoing the language not of intermediate scrutiny but of rational basis review, the plurality opines that the state law was "hardly unreasonable," *id.* at 473, and "reasonably" reflects the greater burden of pregnancies for "the female" than for "the male," *id* at 476.

All of which suggests that the plaintiffs' case against Idaho's law is stronger than eventhis supportive court indicated.

4. Are there legitimate concerns about trans people competing in sex-segregated athletics consistent with their gender identity? (What would you want to know, specifically, to answer that question?) If there are, what sorts of regulations would be appropriate?

_____

# CHAPTER 15 NAME CHANGES AND NAMING PRACTICES

**Insert at the end of page 1096:**

## MISGENDERING

### *Reading Guide for* Meriwether v. Hartop

1. In this lawsuit by a professor disciplined for refusing to follow a university's policy requiring referring to students by their preferred gendered pronouns and honorifics, what kind of speech by public university professors/under what circumstances does the Court of Appeals say the First Amendment protects? (It phrases it more than one way in the opinion below.)

2. Why does the court conclude in part II.A.2 that the general rule of *Garcetti v. Ceballos* (that speech by government employees pursuant to their official duties is not protected by the First Amendment) does not apply to university professors? What three interests does the court say are at stake "in the college classroom"?

3. For what reason(s) does the court conclude that Prof. Meriwether's choice of gendered pronouns and honorifics to refer to the university's students in the classes he teaches is within the scope of such protected freedom (which the court styles an "exception" to *Garcetti*)? What message does the court take choices regarding the use of gendered pronouns and honorifics to convey?

4. What did Meriwether inquire whether he might include in his syllabus for the course he was teaching for the university (basically two things—Eds.)? How does the court characterizethe university's direction regarding that syllabus? What might have motivated the university's decision on this issue?

5. What do the *Pickering* and *Connick* cases require a court applying them to balance when determining whether a government employee's speech is protected? What reasons does the court give for reaching its conclusion about which way the balance tips in this case?

6. What evidence does the court hold would (if established) allow a factfinder to conclude that Shawnee didn't treat Meriwether's request to treat Doe as he wished with religious neutrality?

7. For what reasons does the court reject Meriwether's vagueness challenge to the policy?

**Nicholas K. Meriwether, Plaintiff-Appellant**

**v.**

**Francesca Hartop, [et. al.], Trustees of Shawnee State University, in their official capacities; Jeffrey A. Bauer, Roberta Milliken, Jennifer Pauley, Tena Pierce, Douglas Shoemaker, and Malonda Johnson, in their official capacities, Defendants-Appellees, Jane Doe; Sexuality and Gender Acceptance, Intervenors-Appellees**

992 F.3d 492 (6th Cir. 2021), rehearing en banc denied (July 8, 2021)

[Plaintiff-appellant Meriwether was represented by Alliance Defending Freedom and private counsel. Intervenor-Appellees Jane Doe, the transgender student regarding whom Meriwether refused to use female pronouns and honorifics, and Sexuality and Gender Acceptance (SAGA), the LGBTQ student group at Shawnee State, were represented by the National Center for Lesbian Rights and private counsel. Meriwether was supported on appeal by amici including Paul McHugh, other medical

professionals, Christian and Catholic Healthcare organizations, and the American College of Pediatricians; the Bader Family Foundation; the radical feminist TERFgroup Women's Liberation Front (WoLF); and, in a jeremiad against "the displacement of sex with the concept [of 'gender identity'],"nineteen professors mostly of philosophy.]

**THAPAR, Circuit Judge.**

.... Shawnee State ... punished a professor for his speech on a hotly contested issue. And itdid so despite the constitutional protections afforded by the First Amendment. The district court dismissed the professor's free-speech and free-exercise claims. We ... reverse.

**I.**

The district court decided this case on a motion to dismiss, so we construe the complaint in the light most favorable to the plaintiff. That means we must accept the complaint's factual allegations as true and draw all reasonable inferences in Meriwether's favor. Under this standard,we must reverse the district court's dismissal unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

**A.**

Nicholas Meriwether is a philosophy professor at Shawnee State University, a small public college in Portsmouth, Ohio. [For] twenty-five ... years, Professor Meriwether has been a fixture at the school.… Up until the incident that triggered this lawsuit, Meriwether had a spotless disciplinary record.

Professor Meriwether is also a devout Christian. He strives to live out his faith each day.And, like many people of faith, his religious convictions influence how he thinks about "humannature, marriage, gender, sexuality, morality, politics, and social issues." Meriwether believes that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." He also believes that he cannot "affirm as true ideas and concepts that arenot true." Being faithful to his religion was never a problem at Shawnee State. But in 2016, things changed.

At the start of the school year, Shawnee State emailed the faculty informing them thatthey had to refer to students by their "preferred pronoun[s]." Meriwether asked university officials for more details about the new pronoun policy, and the officials confirmed that professors would be disciplined if they "refused to use a pronoun that reflects a student's self-asserted gender identity." What if a professor had moral or religious objections? That didn't matter: The policy applied "regardless of the professor's convictions or views on the subject."

When Meriwether asked to see the revised policy, university officials pointed him to the school's existing policy prohibiting discrimination "because of ... gender identity." That policy applies to all of the university's "employees, students, visitors, agents and volunteers"; it appliesat both academic and non-academic events; it applies on all university property (including classrooms, dorms, and athletic fields); and it sometimes applies off campus.

Meriwether approached the chair of his department, Jennifer Pauley, to discuss hisconcerns about the newly announced rules. Pauley was derisive and scornful....

Meriwether continued to teach students without incident until January 2018. On the first day of class, Meriwether was using the Socratic method to lead discussion in his course on Political Philosophy. When using that method, he addresses students as "Mr." or "Ms." He believes "this formal manner of addressing students helps them view the academic enterprise as aserious, weighty endeavor" and "foster[s] an atmosphere of seriousness and mutual respect." He "has found that

addressing students in this fashion is an important pedagogical tool in all of his classes, but especially in Political Philosophy where he and [the] students discuss many of the most controversial issues of public concern." In that first class, one of the students Meriwether called on was Doe. According to Meriwether, "no one … would have assumed that [Doe] was female" based on Doe's outward appearances. Thus, Meriwether responded to a question from Doe by saying, "Yes, sir." This was Meriwether's first time meeting Doe, and the university hadnot provided Meriwether with any information about Doe's sex or gender identity.

After class, Doe approached Meriwether and "demanded" that Meriwether "refer to [Doe] as a woman" and use "feminine titles and pronouns." This was the first time that Meriwether learned that Doe identified as a woman. So Meriwether paused before responding because his sincerely held religious beliefs prevented him from communicating messages aboutgender identity that he believes are false. He explained that he wasn't sure if he could comply with Doe's demands. Doe became hostile—circling around Meriwether at first, and then approaching him in a threatening manner: "I guess this means I can call you a cu--." Doe promised that Meriwether would be fired if he did not give in to Doe's demands.

Meriwether reported the incident to senior university officials, including the Dean of Students and his department chair, Jennifer Pauley. University officials then informed their TitleIX office of the incident. Officials from that office met with Doe and escalated Doe's complaintto Roberta Milliken, the Acting Dean of the College of Arts and Sciences.

Dean Milliken went to Meriwether's office the next day. She "advised" that he "eliminate all sex-based references from his expression"—no using "he" or "she," "him" or "her," "Mr." or"Ms.," and so on. Meriwether pointed out that eliminating pronouns altogether was next to impossible, especially when teaching. So he proposed a compromise: He would keep using pronouns to address most students in class but would refer to Doe using only Doe's last name. Dean Milliken accepted this compromise, apparently believing it followed the university'sgender-identity policy.

Doe continued to attend and participate in Meriwether's class. But Doe remained dissatisfied and, two weeks into the semester, complained to university officials again. So DeanMilliken paid Meriwether another visit. This time, she said that if Meriwether did not address Doe as a woman, he would be violating the university's policy.

Soon after, Meriwether accidentally referred to Doe using the title "Mr." before immediately correcting himself. Around this time, Doe again complained to the university's TitleIX Coordinator and threatened to retain counsel if the university didn't take action. So Dean Milliken once again came to Meriwether's office. She reiterated her earlier demand and threatened disciplinary action if he did not comply.

Trying to find common ground, Meriwether asked whether the university's policy wouldallow him to use students' preferred pronouns but place a disclaimer in his syllabus "noting thathe was doing so under compulsion and setting forth his personal and religious beliefs about gender identity." Dean Milliken rejected this option out of hand. She insisted that putting a disclaimer in the syllabus would itself violate the university's gender-identity policy.

During the rest of the semester, Meriwether called on Doe using Doe's last name, and "Doe displayed no anxiety, fear, or intimidation" while attending class. In fact, Doe excelled and participated as much or more than any other student in the course. At the end of the semester, Meriwether awarded Doe a "high grade." This grade reflected Doe's "very good work" and "frequent participation in class discussions."

**B.**

As the semester proceeded, Meriwether continued to search for an accommodation of his personal and religious views that would satisfy the university. But Shawnee State was not willingto compromise. After Dean Milliken's final meeting with Meriwether, she sent him a formal letter reiterating her demand: Address Doe in the same manner "as other students who identify themselves as female." The letter said that if Meriwether did not comply, "the University may conduct an investigation" and that he could be subject to "informal or formal disciplinary action."

Then, just a few days later—and without waiting for a response from Meriwether—Milliken announced that she was "initiating a formal investigation." She claimed that she was doing so because she received "another complaint from a student in [Meriwether's] class." The complaint was again from Doe. When Meriwether again asked whether an accommodation mightbe possible given his sincerely held beliefs, Milliken shot him down. She said he had just two options: (1) stop using *all* sex-based pronouns in referring to students (a practical impossibility that would also alter the pedagogical environment in his classroom), or (2) refer to Doe as a female, even though doing so would violate Meriwether's religious beliefs.

Dean Milliken referred the matter to Shawnee State's Title IX office. Over the comingmonths, the university's Title IX staff conducted a less-than-thorough investigation. They interviewed just four witnesses—Meriwether, Doe, and two other transgender students. They did not ask Meriwether to recommend any potential witnesses. And aside from Doe and Meriwetherthemselves, none of the witnesses testified about a single interaction between the two.

Shawnee State's Title IX office concluded that "Meriwether's disparate treatment [of Doe] ha[d] created a hostile environment" in violation of the university's nondiscrimination policies. Those policies prohibit "discrimination against any individual because of ... gender identity." They define gender identity as a "person's innermost concept of self as male or femaleor both or neither." And they define a hostile educational environment as "any situation in whichthere is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant's) and an objective (reasonable person's) viewpoint." The Title IX report concluded that because Doe "perceives them self as a female," and because Meriwether has "refuse[d] to recognize" that identity by using female pronouns, Meriwether engaged in discrimination and "created a hostile environment." The report did not mention Meriwether's request for an accommodation based on his sincerely held religious beliefs.

After the Title IX report issued, Dean Milliken informed Meriwether that she was bringing a "formal charge" against him under the faculty's collective bargaining agreement. She then issued her own report setting forth her findings: "Because Dr. Meriwether repeatedly refused to change the way he addressed [Doe] in his class due to his views on transgender people, and because the way he treated [Doe] was deliberately different than the way he treated others in the class, ... he effectively created a hostile environment for [Doe]." Milliken's whole explanation of how Meriwether violated university policy spanned just one paragraph. Finally, tocreate a "safe educational experience for all students," Dean Milliken concluded that it was necessary to discipline Meriwether. She recommended placing a formal warning in his file.

Provost Jeffrey Bauer was tasked with reviewing Milliken's disciplinary recommendation before it was imposed. Meriwether wrote Provost Bauer a letter stating that he treated Doe exactly the same as he treated all male students; that he began referring to Doe without pronouns and by Doe's last name as an accommodation to Doe; and that Doe's "access to educational benefits and opportunities was never jeopardized." Meriwether further explained that he could not use female pronouns to refer to Doe due to his "conscience and religious convictions." He asked Provost Bauer

to allow "reasonable minds ... to differ" on this "newly emerging cultural issue." Provost Bauer rejected Meriwether's request, stating that he "approve[d] Dean Milliken'srecommendation of formal disciplinary action." Bauer did not address Meriwether's arguments to the contrary, nor did he grapple with Meriwether's request for a religious accommodation.

Shawnee State then placed a written warning in Meriwether's file. The warning reprimanded Meriwether and directed him to change the way he addresses transgender students to "avoid further corrective actions." What does "further corrective actions" mean? Suspension without pay and termination, among other possible punishments.

**C.**

The Shawnee State faculty union then filed a grievance on Meriwether's behalf. It askedthe university to (1) vacate the disciplinary action, and (2) allow Meriwether to keep speaking in a manner consistent with his religious beliefs.

Provost Bauer, who had already rejected Meriwether's claim once, was tasked with deciding the grievance. A union representative, Dr. Chip Poirot, joined Meriwether to present the grievance at a hearing. From the outset, Bauer exhibited deep hostility. Indeed, Bauer was so hostile that the union representative "was not able to present the grievance." Bauer denied the grievance.

The next step in Shawnee State's grievance process involved an appeal to the university's president.… Shortly after Provost Bauer denied the grievance, he was appointed interim university president. Bauer designated two of his representatives, Shawnee State's Labor Relations Director and General Counsel, to meet with Meriwether and Poirot on his behalf.

The officials agreed with the union that Meriwether's conduct had not "created a hostile educational environment." But they recommended ruling against Meriwether anyway. This was, they said, not a hostile-environment case; instead, it was a "differential treatment" case. This change in theory contradicted the Title IX investigation and Dean Milliken's disciplinary recommendation (which Provost Bauer approved)—both of which accused Meriwether of violating university policy by "creat[ing] a hostile environment for [Doe]." The officials justifiedthe university's refusal to accommodate Meriwether's religious beliefs by equating his views to those of a hypothetical racist or sexist. Since the university would not accommodate religiously motivated racism or sexism, it ought not accommodate Meriwether's religious beliefs. Bauer adopted his representatives' findings and denied the grievance again.

That was the end of the grievance process at Shawnee State. Because Meriwether now fears that he will be fired or suspended without pay if he does not toe the university's line on gender identity, he alleges he cannot address "a high profile issue of public concern that has significant philosophical implications." He steers class discussions away from gender-identity issues and has refused to address the subject when students have raised it in class. The warningletter in Meriwether's file will also make it "difficult, if not impossible," for him to obtain a position at another institution once he retires from Shawnee State.

**D.**

Out of options at Shawnee State, Meriwether filed this lawsuit. He alleged that the university violated his rights under: (1) the Free Speech and Free Exercise Clauses of the FirstAmendment; (2) the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the Ohio Constitution; and (4) his contract with the university.

The district court referred the case to a magistrate judge. Doe and an organization, Sexuality and Gender Acceptance, then moved to intervene, and the magistrate granted their motion. Next, the defendants and intervenors filed separate motions to dismiss under Rule 12(b)(6). The magistrate

recommended dismissing all of Meriwether's federal claims and declining to exercise supplemental jurisdiction over his state-law claims. Meriwether then objected to the magistrate's report and recommendation. But the district court adopted it in full.

Meriwether now appeals the district court's decision, except for its dismissal of his equal-protection claim. We first address Meriwether's free-speech claim before turning to his free- exercise and due-process claims.

**II.**

.... The district court ... held that a professor's speech in the classroom is never protectedby the First Amendment. We disagree: Under controlling Supreme Court and Sixth Circuit precedent, the First Amendment protects the academic speech of university professors. Since Meriwether has plausibly alleged that Shawnee State violated his First Amendment rights bycompelling his speech or silence and casting a pall of orthodoxy over the classroom, his free-speech claim may proceed.

**A.**

**1.**

.... The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705 (1977). Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). When the government tries to do so anyway, it violates this "cardinal constitutional command." *Janus v. Am. Fed'n of State, Cnty. &Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

It should come as little surprise, then, "that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with whichthey disagreed." *Id.* (citing examples including Thomas Jefferson, Oliver Ellsworth, and Noah Webster). Why? Because free speech is "essential to our democratic form of government." *Id.* Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish. *See id.*

Courts have often recognized that the Free Speech Clause applies at public universities. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). Thus, the state may not act as though professors or students "shed their constitutional rights to freedom of speech or expression at the[university] gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

Government officials violate the First Amendment whenever they try to "prescribe what shall beorthodox in politics, nationalism, religion, or other matters of opinion," and when they "force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

To be sure, free-speech rules apply differently when the government is doing the speaking. And that remains true even when a government employee is doing the talking. Thus, in*Garcetti v. Ceballos*, the Supreme Court held that normally "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. 410 (2006).

**2.**

Here, the threshold question is whether the rule announced in *Garcetti* bars Meriwether'sfree-speech claim. It does not.

*Garcetti* set forth a general rule regarding government employees' speech. But it expressly declined to address whether its analysis would apply "to a case involving speech related to scholarship

or teaching." Although *Garcetti* declined to address the question, we can turn to the Supreme Court's prior decisions for guidance. Those decisions have "long recognizedthat, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Start with *Sweezy v. New Hampshire*. 354 U.S. 234 (1957) (plurality opinion). During the McCarthy era, New Hampshire instituted a loyalty program "to eliminate 'subversive persons' among government personnel." The state legislature authorized the Attorney General to become a "one-man legislative committee" and take appropriate action if he found that a person was "subversive." When the Attorney General questioned public university professor Paul Sweezy, he declined to reveal the contents of a lecture he had delivered to "100 students in [a] humanitiescourse." The Attorney General then had the court hold him in contempt. The ... Supreme Court ...held that a legislative inquiry into the contents of a professor's lectures "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression." The Court explained that it "could not be seriously debated" that a professor's "right to lecture" is protectedby the Constitution. And it emphasized "[t]he essentiality of freedom in the community of American universities." When the state targets professors' academic freedom rather than protectsit, scholarship, teaching, and education "cannot flourish." *Id.*; *see also id.* (Frankfurter, J., concurring in result) ("Political power must abstain from intrusion into this activity of freedom ...except for reasons that are exigent and obviously compelling.").

A decade later, in a case involving a similar New York law banning "subversive" activities, the Supreme Court affirmed that the Constitution protects "academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). It characterized academic freedom as "a special concern of the First Amendment" and said that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." After all, the classroom is "peculiarly the 'marketplace of ideas.'" And when the state stifles a professor's viewpoint on a matter of public import, much more than the professor's rights are at stake. Our nation's future "depends upon leaders trained through wide exposure to [the] robust exchange of ideas"—not through the "authoritative" compulsion of orthodox speech. *Id*; *accord Sweezy* (plurality opinion) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

Together, *Sweezy* and *Keyishian* establish that the First Amendment protects the free-speech rights of professors when they are teaching. *See also Healy v. James*, 408 U.S. 169 (1972) ("[W]e break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."); *Tinker* ("First Amendment rights ... are available to teachers[.]").

As a result, our court has rejected as "totally unpersuasive" "the argument that teachershave no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001). And we have recognized that "a professor's rights to academic freedom and freedom of expression are paramount in the academic setting." *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001); *see Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).[1] Simply put, professors at public universities retain First

[1] Shawnee State and the intervenors suggest that our decision in *Evans-Marshall v. Board of Education of Tipp City* is to the contrary. 624 F.3d 332 (6th Cir. 2010). Not so. There, we held that "the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools." We distinguished college and university professors and made clear that our holding was limited to schoolteachers.

Amendment protections at least when engaged in core academic functions, such as teaching and scholarship. *See Hardy*.

In reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth. In *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011), the Fourth Circuit held that the rule announced in *Garcetti* does not apply "in the academic context of a public university." The Fifth Circuit has also held that the speech of publicuniversity professors is constitutionally protected, reasoning that "academic freedom is a special concern of the First Amendment." *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019) (analyzing the claim under the *Pickering-Connick* framework). Likewise, the Ninth Circuit has recognized that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014). Thus, it held that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."

One final point worth considering: If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as "comrades." That cannot be. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe" such orthodoxy. *Barnette*.

**3.**

Shawnee State and the intervenors raise several arguments in response.

*First*, they suggest that we ought not apply the Supreme Court's academic-freedom casesthat preceded *Garcetti*. But our job as lower court judges is to apply existing Supreme Court precedent unless it is expressly overruled. *Agostini v. Felton*, 521 U.S. 203 (1997). And here, theSupreme Court has not overruled its academic-freedom cases.… Nor is it our prerogative to cast aside our holding "that a teacher's in-class speech deserves constitutional protection." *Hardy*....

*Second*, they argue that even if there is an academic-freedom exception to *Garcetti*, it does not protect Meriwether's use of titles and pronouns in the classroom. As they would have it,the use of pronouns has nothing to do with the academic-freedom interests in the substance of classroom instruction. But that is not true. Any teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously. That is especially so here because Meriwether's choices touch on gender identity—a hotly contested matter of public concern that "often" comes up during class discussion in Meriwether's political philosophy courses. R. 34, Pg. ID 1492; *see Janus* (describing gender identity as a "controversial [and] sensitive political topic[] of profound value and concern to the public").

By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion. Under the First Amendment, "the mere dissemination of ideas … on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v.Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (per curiam). Rather, the lesson of *Pickering* and the Court's academic-freedom decisions is that the state may do so only when its interest in restricting a professor's in-class speech outweighs his interest in speaking.

Remember, too, that the university's position on titles and pronouns goes both ways. By defendants' logic, a university could likewise *prohibit* professors from addressing university students

by their preferred gender pronouns—no matter the professors' own views. And it could even impose such a restriction while denying professors the ability to explain to students why they were doing so. But that's simply not the case. Without sufficient justification, the state cannot wield its authority to categorically silence dissenting viewpoints.

Thus, the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor's in-class speech to his students is anything but speech by anordinary government employee. Indeed, in the college classroom there are three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints. *See Lane v. Franks*, 573 U.S. 228 (2014); *Sweezy* (plurality opinion). Because the First Amendment "must always be applied 'in light of the special characteristics of the ... environment' in the particular case," *Healy* (alteration in original) (quoting *Tinker*), public universities do not have a license to act as classroom thought police. They cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy. Otherwise, our public universities could transform the next generation of leaders into "closed-circuit recipients of only that which the State chooses to communicate." *Tinker*. Thus, "what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." *Dambrot*.

Of course, some classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment. Shawnee State says that the rule at issue is similarly ministerial. But as we discuss below, titles and pronouns carry a message. The university recognizes that and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth. But Meriwether does not agree with that message, and he does not want to communicate it to his students. That'snot a matter of classroom management; that's a matter of academic speech.

*Finally*, defendants argue that academic freedom belongs to public universities, not professors. But we've held that university professors "have ... First Amendment rights when teaching" that they may assert against the university. *Hardy*; *see Bonnell*. So this arguments fails.

**B.**

Although *Garcetti* does not bar Meriwether's free-speech claim, that is not the end of the matter. We must now apply the longstanding *Pickering-Connick* framework to determine whether Meriwether has plausibly alleged that his in-class speech was protected by the First Amendment. *See Hardy* (taking this approach in an academic-speech case); *Adams* (same); *Buchanan* (same); *Demers* (same). Under that framework, we ask two questions: First, was Meriwether speaking on "a matter of public concern"? *Connick v. Myers*, 461 U.S. 138 (1983). And second, was his interest in doing so greater than the university's interest in "promoting the efficiency of the public services it performs through" him? *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

**1.**

To determine whether speech involves a matter of public concern, we look to the "content, form, and context of a given statement, as revealed by the whole record." *Connick*. When speech relates "to any matter of political, social, or other concern to the community," it addresses a matter of public concern. *Id.* Thus, a teacher's in-class speech about "race, gender, and power conflicts" addresses matters of public concern. *Hardy*. A basketball coach using racialepithets to motivate his

players does not. *Dambrot*. "The linchpin of the inquiry is, thus, for bothpublic concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.*

Meriwether did just that in refusing to use gender-identity-based pronouns. And the "*point* of his speech" (or his refusal to speak in a particular manner) was to convey a message. *Id.* Taken in context, his speech "concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes." Professors' Amicus Br. at 1. That is, his mode of address *was* the message. It reflected his conviction that one's sex cannot be changed, a topic which has been in the news on many occasions and "has become an issue of contentious political ... debate." *See Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001).

From courts to schoolrooms this controversy continues. Recently, the Fifth Circuit rejected an appellant's motion to be referred to by the appellant's preferred gender pronouns—over an "emphatic[] dissent." *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020). And, on theother side, a Texas high school generated controversy when it permitted its students to display preferred gender pronouns on their online profiles.[2] Further examples abound. In short, the use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.

The history of pronoun usage in American discourse underscores this point. Following the 1745 publication of Anne Fisher's *A New Grammar*, the "idea that *he*, *him* and *his* should go both ways caught on and was widely adopted."[3] But in the latter half of the twentieth century, gendered pronouns became imbued with new meaning. The feminist movement came to view thegeneric use of masculine pronouns as "a crucial mechanism for the conceptual invisibility of women." Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 LOY. L.A. L. REV. 225 (1993). It regarded the "generic masculine pronoun" as rooted in "pre-existing cultural prejudice" and subtly "influencing our perceptions and recirculating the sexist prejudice." DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 137 (2d ed. 1992). As a result, "feminist attempts at language reform" served as a means for "sensitiz[ing] individuals to waysin which language is discriminatory towards women." Susan Ehrlich & Ruth King, *Gender-Based Language Reform and the Social Construction of Meaning*, 3 DISCOURSE & SOC'Y 151, 156 (1992). To the feminist cause, pronouns mattered.

And history tends to repeat itself. Never before have titles and pronouns been scrutinizedas closely as they are today for their power to validate—or invalidate—someone's perceived sexor gender identity. Meriwether took a side in that debate. Through his continued refusal to address Doe as a woman, he advanced a viewpoint on gender identity. *See Dambrot*. Meriwether's speech manifested his belief that "sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." The "focus," "point," "intent," and "communicative purpose" of the speech in question was a matterof public concern. *Farhat v. Jopke*, 370 F.3d 580 (6th Cir. 2004).

And even the university appears to think this pronoun debate is a hot issue. Otherwise, why would it forbid Meriwether from explaining his "personal and religious beliefs about gender identity" in his syllabus? No one contests that what Meriwether proposed to put in his syllabus involved a matter of public concern. *See Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006)

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[2] Alexandra Cronin, *Controversy Sparks over Frisco Transgender Students' Right to Choose Preferred Pronouns*, Local Profile (Sept. 28, 2020), https://localprofile.com/2020/09/28/frisco-transgender-students-preferred-pronouns/.

[3] Patricia T. O'Conner & Stewart Kellerman, *All-Purpose Pronoun*, N.Y. Times Mag. (July 21, 2009), https://www.nytimes.com/2009/07/26/magazine/26FOB-onlanguage-t.html.

(holding that "intended speech" which the plaintiff was later "unable" to make "touched on a matter of public concern"). In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.

**2.**

Because Meriwether was speaking on a matter of public concern, we apply *Pickering* balancing to determine whether the university violated his First Amendment rights. This test requires us "to arrive at a balance between the interests of the [professor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Here, that balance favors Meriwether.

Start with Meriwether's interests. We begin with "the robust tradition of academic freedom in our nation's post-secondary schools." *Hardy.* That tradition alone offers a strong reason to protect Professor Meriwether's speech. After all, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*. And the First Amendment interests are especially strong here Because Meriwether's speech also relates to his core religious and philosophical beliefs. Finally, this caseimplicates an additional element: potentially compelled speech on a matter of public concern.

And "[w]hen speech is compelled ... additional damage is done." *Janus*.

Those interests are powerful. Here, the university refused even to permit Meriwether to comply with its pronoun mandate while expressing his personal convictions in a syllabus disclaimer. That ban is anathema to the principles underlying the First Amendment, as the "proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744 (2017) (plurality opinion) (quoting *UnitedStates v. Schwimmer*, 279 U.S. 644 (1929) (Holmes, J., dissenting)). Indeed, the premise that gender identity is an idea "embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."*Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

And this is particularly true in the context of the college classroom, where students' interest in hearing even contrarian views is also at stake. "Teachers and students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding."*Sweezy* (plurality opinion); *see also Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) (noting that "the efficient provision of services" by a university "actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern").

On the other side of the ledger, Shawnee State argues that it has a compelling interest in stopping discrimination against transgender students. It relies on *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* in support of this proposition. 884 F.3d 560 (6th Cir. 2018). But *Harris* does not resolve this case. There, a panel of our court held that an employer violates Title VII when it takes an adverse employment action based on an employee's transgender status.[4] The panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the government always has a compelling interest in regulating employees' speech on matters of public concern. Doing so would reduce *Pickering* to a shell. And it would allow universities to discipline professors, students, and staff any time their speech might cause offense. That is not the law. *See Street v. New York*, 394 U.S. 576 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas

[4] Title VII differs from Title IX in important respects: For example, under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in "maintaining separate living facilities for the different sexes."20 U.S.C. § 1686. Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.

are themselves offensive to some of their hearers.").

Purportedly neutral non-discrimination policies cannot be used to transform institutions of higher learning into "enclaves of totalitarianism." *Tinker*.

[The] university's interest in punishing Meriwether's speech is comparatively weak.

When the university demanded that Meriwether refer to Doe using female pronouns, Meriwetherproposed a compromise: He would call on Doe using Doe's last name alone. That seemed like a win-win. Meriwether would not have to violate his religious beliefs, and Doe would not be referred to using pronouns Doe finds offensive. Thus, on the allegations in this complaint, it is hard to see how this would have "create[d] a hostile learning environment that ultimately thwarts the academic process." *Bonnell*. It is telling that Dean Milliken at first approved this proposal.

And when Meriwether employed this accommodation throughout the semester, Doe was an active participant in class and ultimately received a high grade.

As we stated in *Hardy*, "a school's interest in limiting a teacher's speech is not great when those public statements 'are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.'" (quoting *Pickering*). The mere "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*. At this stage of the litigation, there is no suggestion that Meriwether's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doeany educational benefits. *See Bonnell*. Without such a showing, the school's actions "mandate[] orthodoxy, not anti-discrimination," and ignore the fact that "[t]olerance is a two-way street." *Ward*. Thus, the *Pickering* balance strongly favors Meriwether.

Finally, Shawnee State and the intervenors argue that Title IX compels a contrary result.We disagree. Title IX prohibits "discrimination under any education program or activity" basedon sex. 20 U.S.C. § 1681(a). The requirement "that the discrimination occur 'under any education program or activity' suggests that the behavior [must] be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). But Meriwether's decision not to refer to Doe using feminine pronouns did not have any such effect. As we have already explained, thereis no indication at this stage of the litigation that Meriwether's speech inhibited Doe's education or ability to succeed in the classroom. *See* 20 U.S.C. § 1681(a); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018) (holding that a Title IX hostile-environment claim requires that one's "educational experience [be] permeated with discriminatory intimidation, ridicule, and insult thatis sufficiently severe or pervasive so as to alter the conditions of the victim's educational environment"). Bauer even admitted that Meriwether's conduct "was not so severe and pervasive that it created a hostile educational environment." Thus, Shawnee State's purported interest in complying with Title IX is not implicated by Meriwether's decision to refer to Doe by name rather than Doe's preferred pronouns.

* * *

In sum, "the Founders of this Nation ... 'believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.'" *Dale* (quoting *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring)). Shawnee State allegedly flouted that core principle of the First Amendment. Taking the allegations as true, we hold that the university violated Meriwether's free-speech rights.

**III.**

Meriwether next argues that as a public university, Shawnee State violated the Free Exercise

Clause when it disciplined him for not following the university's pronoun policy. We agree.

The Constitution requires that the government commit "itself to religious tolerance." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*,138 S. Ct. 1719 (2018) (citation omitted). Thus, laws that burden religious exercise are presumptively unconstitutional unless they are both neutral and generally applicable. *Emp't Div., Dep't of Human Res. of Or. v. Smith*,494 U.S. 872 (1990). To determine whether a law is neutral, courts must look beyond the text and scrutinize the history, context, and application of a challenged law. *Masterpiece*; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In this way, the Free Exercise Clause guards against "even subtle departures from neutrality on matters of religion." *Masterpiece*.

**A.**

Meriwether has plausibly alleged that Shawnee State's application of its gender-identity policy was not neutral for at least two reasons. First, officials at Shawnee State exhibited hostility to his religious beliefs. And second, irregularities in the university's adjudication and investigation processes permit a plausible inference of non-neutrality.

**1.**

State actors must give "neutral and respectful consideration" to a person's sincerely held religious beliefs. *Masterpiece*. When they apply an otherwise-neutral law with religious hostility,they violate the Free Exercise Clause. *Id.* In this case, "the pleadings give rise to a sufficient 'suspicion' of religious animosity to warrant 'pause' for discovery." *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020) (quoting *Masterpiece*). Meriwether "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided." *Masterpiece*. And that, he at least plausibly did not receive.

.... Meriwether came to [Department Chair Jennifer Pauley] to discuss his religious concerns about the new policy. Pauley might have responded with tolerance, or at least neutral objectivity. She did not. Instead, she remarked that religion "oppresses students" and said that even its "presence" at universities is "counterproductive." Christians in particular, she said, were"primarily motivated out of fear." In her view, "Christian doctrines ... should not be taught." Andfor good measure, she added that Christian professors "should be banned" from teaching courseson Christianity—knowing that Meriwether had done so for decades. Neutral and non-hostile? Asalleged, no. In fact, it has the makings of the very religious intolerances that "gave concern to those who drafted the Free Exercise Clause." *Lukumi*.

[The university] claims that Pauley was not involved in formulating, interpreting, or applying the university's gender-identity policy, and that she was not involved in the action against him. Maybe so. But at the motion-to-dismiss stage, courts must accept the allegations astrue. And here, the complaint alleges that Pauley was involved.[7]

And Pauley was not the only allegedly hostile actor. After Meriwether was disciplined, a union representative presented Meriwether's grievance to Provost Bauer—a supposedly neutral adjudicator. But Bauer did not seem so neutral. He repeatedly interrupted the union representative and made clear that he would not discuss the "academic freedom and religious discrimination

[7] Ultimately, Meriwether bears the burden of proving that Pauley was involved in the decision-making process. And if these were the only allegations in the complaint, this would be a much more difficult case since Meriwether's assertion that Pauley was involved does not make clear how she influenced the disciplinary decision. But we need not resolve this difficult question now because Meriwether has alleged sufficient additional facts against the university to withstand a motion to dismiss.

aspects" of the case. The union representative tried to explain Meriwether's religious beliefs and the teachings of his church. But Provost Bauer responded with open laughter.[8] And after the laughter, Bauer became "so uncooperative" that the union representative"was not able to present the grievance" at all. Bauer's alleged actions and words demonstrated anything but the "neutral and respectful consideration" that the Constitution demands. *Masterpiece*.

Shawnee State's Director of Labor Relations (Bauer's representative) then piled on when he reviewed the grievance. In his view, Meriwether's convictions were no better—and no more worthy of tolerant accommodation—than religiously motivated racism or sexism. Bauer adopted this reasoning in denying Meriwether's grievance once again.

If this sounds familiar, it should. In *Masterpiece Cakeshop*, the Supreme Court reversed a decision of the Colorado Civil Rights Commission when the Commission made hostile statements that "cast doubt on the fairness" of the adjudication. The Commission had said that "religion has been used to justify all kinds of discrimination throughout history," suggesting that the defendant was using religion as a pretext for discrimination. The Supreme Court called such comments "inappropriate" and said they called the Commission's impartiality into question. That same rationale applies here. Meriwether respectfully sought an accommodation that would both protect his religious beliefs and make Doe feel comfortable. In response, the university derided him and equated his good-faith convictions with racism. An inference of religious hostility is plausible in these circumstances.

In sum, Meriwether has plausibly alleged that religious hostility infected the university's interpretation and application of its gender-identity policy. Whether this claim ultimately prevails will depend on the results of discovery and the clash of proofs at trial. For now, we simply hold that Meriwether has plausibly alleged a free-exercise claim based on religious hostility.

**2.**

While the hostility Shawnee State exhibited would be enough for Meriwether's claim to survive a motion to dismiss, Meriwether …. alleges that various irregularities in the university's investigation and adjudication processes also permit an inference of non-neutrality. We agree.

Not all laws that look "neutral and generally applicable" are constitutional. *Lukumi* ("Facial neutrality is not determinative."). The Free Exercise Clause "forbids subtle departures from neutrality and covert suppression of particular religious beliefs." *Id.*; *Ward* (noting that while a law might appear "neutral and generally applicable on its face, ... in practice [it may be] riddled with exemptions or worse [be] a veiled cover for targeting a belief or a faith-based practice"). Thus, courts have an obligation to meticulously scrutinize irregularities to determine whether a law is being used to suppress religious beliefs. *See Lukumi*; *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477 (6th Cir. 2020).[9] And here, that scrutiny reveals signs of non-neutrality.

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[8] The defendants and the district court stress that Poirot's notes referencing the open laughter state that Bauer laughed "at some point" during the presentation, without saying precisely when. But the complaint itself clarifies that the laughter occurred "[w]hen Dr. Poirot outlined the religious beliefs that Dr. Meriwether and his church hold." R. 34, Pg. ID 1488; *accord* R. 34-24, Pg. ID 1780 (discussing the laughter in the context of the religious aspects of the presentation). Pending discovery, we must accept that allegation as true.

[9] The obligation to scrutinize irregularities is longstanding. In *Yick Wo v. Hopkins*, for example, the Supreme Court scrutinized the application of a new city ordinance that appeared "fair on its face" only to find that it was being "administered ... with an evil eye." 118 U.S. 356 (1886). The Supreme Court held that San Francisco violated the Equal Protection Clause when it declined to renew the petitioner's laundry-business license under its new ordinance. The Court held that the city acted out of discriminatory animus because the petitioner—a Chinese immigrant—had operated his business for twenty-two years without incident, and because San Francisco tended to use its "arbitrary power" under the new ordinance to deny licenses only to Chinese immigrants. The Court found it constitutionally "intolerable" that a man's

*First*, the university's alleged basis for disciplining Meriwether was a moving target. The Title IX report claimed that Meriwether violated the university's gender-identity policy by creating a "hostile educational environment." Dean Milliken agreed and recommended disciplining Meriwether for this "hostile environment." Yet when Meriwether grieved his discipline, university officials conceded that Meriwether had never created a hostile environment. Instead, they said the case was about "disparate treatment." But at oral argument, the university changed its position once again: It said that "this really is a hostile-environment case."

These repeated changes in position, along with the alleged religious hostility, permit a plausible inference that the university was not applying a preexisting policy in a neutral way, but was instead using an evolving policy as pretext for targeting Meriwether's beliefs. *See Ward*. And it is also plausible that the re-interpretation of the policy was an "after-the-fact invention" designed to justify punishing Meriwether for his religiously motivated speech, not a neutral interpretation of a generally applicable policy. *See Ward* (noting that "after-the-fact invention[s]" permit an inference of religious discrimination).

*Second*, the university's policy on accommodations was a moving target. Why does this matter? Because when "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Lukumi* (quoting *Smith*).

When Dean Milliken told Meriwether that he was violating the university's gender-identity policy, Meriwether proposed a compromise: He would address Doe using Doe's last name and refrain from using pronouns to address Doe. Dean Milliken accepted this accommodation. But several weeks later, she retracted the agreed-upon accommodation and demanded that Meriwether use Doe's preferred pronouns if he intended to use pronouns to refer to other students. Now the university claims that its policy does not permit *any* religious accommodations.

This about-face permits a plausible inference that the policy allows accommodations, but the university won't provide one here. If this inference is supported through discovery and trial, a jury could conclude that the university's refusal to stick to its accommodation is "pretext for punishing [Meriwether's] religious views and speech." *Ward*.

*Third*, the university's Title IX investigation raises several red flags. On their own, these issues might not warrant an inference of non-neutrality. But combined with the other allegations in the complaint, they provide probative "circumstantial evidence" of discrimination. *Lukumi*.

For starters, the Title IX investigator interviewed just four witnesses, including Meriwether and Doe. She did not interview a single non-transgender student in any of Meriwether's classes, nor did she ask Meriwether to recommend any potential witnesses. Indeed, except for Meriwether and Doe, not a single witness testified about any interactions between the two. Even so, the Title IX officer concluded that Meriwether "created a hostile environment."

Under the university's policies, a hostile environment exists only when "there is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant's) and an objective (reasonable person's) viewpoint." But the Title IX report does not explain why declining to use a student's preferred pronouns constitutes harassment. It does not explain how Meriwether's conduct interfered with or denied Doe or Doe's classmates *any* "educational benefits or opportunities," let alone how an "objective observer" could reach such a

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"means of living" could be disrupted by the "mere will" of a public official who harbors discriminatory animus against him. The Equal Protection Clause does not tolerate irregular, discriminatory application of "neutral" laws. Nor does the Free Exercise Clause.

conclusion. And it does not grapple with Meriwether's request for an accommodation based on his sincerely held religious beliefs. In short, the university's cursory investigation and findings provide circumstantial evidence of "subtle departures from neutrality." *Lukumi*. And this suggests that the "neutral ... consideration to which [Meriwether] was entitled was compromised here." *Masterpiece*.

**3.**

The university raises several counterarguments, none of which we find persuasive.

*First*, ... in *Harris Funeral Homes*[,] a panel of our court held that Title VII prevented an employer from firing a transgender employee because of the employee's transgender status.... [Ultimately,] the panel determined that compliance with Title VII did not burden the employer's religious beliefs because "requiring the [employer] to refrain from firing an employee with different ... views ... does not, as a matter of law, mean that [the employer] is endorsing or supporting those views." As the university would have it, that means that compliance with a nondiscrimination law can never amount to coerced endorsement of contrary religious views.

That is not what we said, and that is not the law. Depending on the circumstances, the application of a nondiscrimination policy could force a person to endorse views incompatible with his religious convictions. And a requirement that an employer *not fire* an employee for expressing a transgender identity is a far cry from what we have here—a requirement that a professor affirmatively change his speech to recognize a person's transgender identity. The university itself recognizes that *Harris* was careful not to require an "endorsement regarding the mutability of sex." Remember, too, that Meriwether proposed a compromise: He would consider referring to students according to their self-asserted gender identity if he could also include a note in the syllabus about his religious beliefs on the issue. The university said no; Meriwether would violate the policy even by disclaiming a belief in transgender identity. It cannot now argue that the policy did not require Meriwether to endorse a view on gender identity contrary to his faith.

*Next*, the intervenors submit that because Milliken "issued [the] written warning," and because "there is no allegation that Milliken harbored any animus toward plaintiff's religious beliefs," Meriwether's free-exercise claim must fail...

.... *Masterpiece* forecloses this argument: A disciplinary proceeding that is fair at the beginning still violates the Free Exercise Clause if it is influenced by religious hostility later.... It doesn't matter that some stages of a proceeding are fair and neutral if others are not. What matters is whether unconstitutional animus infected the proceedings.

*Finally*, the university argues that Meriwether simply could have complied with the alternative it offered him: Don't use any pronouns or sex-based terms at all. This offer, the university says, would not violate Meriwether's religious beliefs. But such an offer has two problems. First, it would prohibit Meriwether from speaking in accordance with his belief that sex and gender are conclusively linked. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781 (1988) (explaining that the "difference between compelled speech and compelled silence ... is without constitutional significance"). And second, such a system would be impossible to comply with, especially in a class heavy on discussion and debate. No "Mr." or "Ms." No "yes sir" or "no ma'am." No "he said" or "she said." And when Meriwether slipped up, which he inevitably would (especially after using these titles for twenty-five years), he could face discipline. Our rights do not hinge on such a precarious balance.

The effect of this Hobson's Choice is that Meriwether must adhere to the university's orthodoxy (or face punishment). This is coercion, at the very least of the indirect sort. And we know the Free Exercise Clause protects against both direct and indirect coercion. *Trinity Lutheran Church*

*of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *see also McDaniel v. Paty*, 435 U.S. 618 (1978) (Brennan, J., concurring in judgment) (The "proposition – that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment – is ... squarely rejected by precedent."). Simply put, the alternative the university offered does not save its policy.

**B.**

For the reasons just explained, Meriwether has plausibly alleged that Shawnee State burdened his free-exercise rights. Thus, we apply "the most rigorous of scrutiny" to the university's actions. *Lukumi*. We uphold them only if they "advance interests of the highest order" and are "narrowly tailored in pursuit of those interests." The university does not even argue that its application of the policy meets this standard. Thus, we hold that Meriwether's free-exercise claim may proceed.

**[IV].**

Meriwether's final claim is that the policy is unconstitutionally vague as applied to him.... Even where First Amendment values are at stake, "employment standards 'are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk'" of discipline. *Dade v. Baldwin*, 802 F. App'x 878 (6th Cir. 2020)....

.... As Meriwether alleges, the policy prohibits gender-identity discrimination, with gender-identity being defined to include "how individuals perceive themselves and what they call themselves." When Meriwether asked the university administrators for guidance, they ultimately told him he had to use Doe's preferred pronouns. And when he didn't comply, they disciplined him. Since he was clearly on notice that the policy applied to his conduct, he may not challenge it for vagueness. *See Parker v. Levy*, 417 U.S. 733 (1974).

....

**[V].**

For the reasons set forth above, we affirm the district court's due-process holding, reverse its free-speech and free-exercise holdings, vacate its dismissal of the state-law claims, and remand for further proceedings consistent with this opinion.

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**Discussion**

1. Assume the Court of Appeals panel is correct that a ruling that Meriwether had to follow the university's rule requiring faculty to use students' preferred gender pronouns (despite the First Amendment) would mean that a professor would have no First Amendment right to disregard a hypothetical university rule prohibiting faculty from using students' preferred pronouns (presumably, more precisely, a rule requiring faculty to use gendered pronouns consistent with the sex students were assigned at birth, or perhaps the sex designated on other official government ID). Does that mean there would be no other constitutional objection to a state university professor's misgendering students?

2. Why if at all should we think that the First Amendment protects "all classroom speech [by a public university professor] related to matters of public concern, whether that speech is germane to the contents of the lecture or not"? What negative consequences could such a broad interpretation have for public universities/their students?

3. Does the court omit any "interests" from its list that are relevant to public university professors' use of gendered pronouns and honorifics to refer to their students in class? Might a professor's use of a student's preferred gendered pronouns pursuant to a university's policy

mandating their use *not* express what Meriwether and the court say it does?

4. Is the court's distinction between a public university coach's using a racial epithet torefer to a player and a public university professor's use of a gendered pronoun deliberately inconsistent with a student's gender identity coherent and persuasive for First Amendment protection purposes?

5. Why should we think a public university professor has *any* "interests..., *as a citizen*, in commenting upon matters of public concern" (emphasis added) not in the content of their lecture but in the pronouns they use to refer in class to students? Would Meriwether or Shawnee be unable to advance "students' interest in hearing even contrarian views" if Meriwether is deniedthe authority to use male pronouns and honorifics to refer to Ms. Doe? If Shawnee prevailed against Meriwether's free expression claim, would that mean public university professors couldbe punished "any time their speech might cause offense"? Private universities generally are notbound by the Constitution. Has the lack of constitutionality led to widespread punishment of offensive speech by such institutions or the demise of academic freedom within them?

6. On the other side of the *Pickering-Connick* balance rests the governmental interest(s), here, the university's interest(s). Note that the court oddly frames this as Shawnee's "interest in punishing Meriwether's speech," instead of formulating the interest in terms of what the university is trying affirmatively to accomplish with its nondiscrimination rules. Compare this tothe similar, and similarly odd, framing of the governmental interest offered by the religious exemption claimant in *Harris Funeral Homes*, Chapter 8, Section D. (Recall that the exemption claimants in that case and this one were both represented by Alliance Defending Freedom.)

7. The court suggests that Meriwether's inquiry about using just Doe's last name to referto her, while referring to every other student with gendered honorifics and pronouns, "seemed like a win-win." Seemed to whom/from whose perspective? Why might Ms. Doe not agree withthat assessment? Why might someone think that Meriwether's treatment of Doe *did* "impede[] the teacher's proper performance of his daily duties in the classroom"?

8. Remember that the court is reviewing an order dismissing Meriwether's complaint for failure to state a claim. It therefore must treat his factual allegations as true for this purpose, though no factfinder has so ruled and indeed some of them might not be substantiated on remand. So, assuming that in fact there was religious bias in the way Doe's complaint against Meriwether was handled, would it follow that the Free Exercise Clause would forbid the university going forward to maintain a universally applied rule that its faculty must address its students by their preferred gendered pronouns and honorifics?

9. The court says that Dean Milliken's initial acceptance and subsequent disallowance of Meriwether calling Doe (and Doe alone) just by her last name permits a factfinder to infer that the university makes exceptions from its pronoun/honorific policy but refused to do so for him. Is there any other plausible explanation for why she might have acted as she did?

10. Is there any reason besides desire to make Meriwether express a message that Shawnee might have refused to let him "explain" his anti-trans religious beliefs in the course syllabus? And is the court right to include that it would be impossible for a professor to eschewgendered pronouns?

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### *Reading Guide for* U.S. v. Varner

1. For what reason does the majority of the Court of Appeals conclude the district court lacked jurisdiction over the transgender woman appellant's motion to change the name on her

judgment of confinement? For what reason does the dissenting judge believe that conclusion erroneous, and how would the dissent rule on the appeal of the district court's denial of that name change motion?

2. What does the majority interpret the appellant's motion to use female pronouns when addressing her to be asking? For what reasons does it deny the motion so construed? (What is its argument about lack of authority? What is its argument about federal statutes or rules? What is its judicial impartiality argument? What is its argument about nonbinary gender?) What does it say about the appellant's motion to submit a photograph or to appear at the appeal?

3. How does the dissenting judge construe the appellant's pronoun motion? What is the dissent's preferred resolution of that motion? In the alternative, how would the dissenting judge resolve the motion? On what grounds does the dissent criticize the majority's resolution?

**United States of America v. Norman Varner**
948 F.3d 250 (2020)

Before SMITH, DENNIS, and DUNCAN, Circuit Judges.

**STUART KYLE DUNCAN, Circuit Judge:**

Norman Varner, federal prisoner # 18479-078, appeals the denial of his motion to change the name on his judgment of confinement to "Kathrine Nicole Jett." The district court denied the motion as meritless. We conclude that the district court lacked jurisdiction to entertain the motion and so vacate the court's judgment. In conjunction with his appeal, Varner also moves that he be addressed with female pronouns. We will deny that motion.

**I.**

In 2012, Varner pled guilty to one count of attempted receipt of child pornography and was sentenced to 180 months in prison, to be followed by 15 years supervised release.… In 2018, Varner wrote a letter to the district court requesting that the name on his judgment of committal ("Norman Keith Varner") be changed to reflect his "new legal name of Kathrine Nicole Jett." Varner's letter explained that he "ca[me] out as a transgender woman" in 2015, began "hormone replacement therapy" shortly after, and planned to have "gender reassignment surgery in the nearfuture" in order to "finally become fully female." Attached to Varner's letter was a certified copy of a 2018 order from a Kentucky state court changing Varner's name.

The government opposed Varner's request, arguing principally that Varner alleged no defect in the original judgment and that a "new preferred name" was not a basis for amending ajudgment. *See* FED. R. CRIM. P. 36 (upon notice, court may "correct a clerical error in a judgment, order, or other part of the record"). The government also pointed out that, under Bureau of Prisons ("BOP") regulations, Varner would be able to use his preferred name as a secondary name or alias. Finally, the government argued that Varner's name change was, in anyevent, improperly obtained under Kentucky law: Varner swore in his petition that he was then aresident of "Covington, Kentucky," when, in fact, he was at the time incarcerated at a federal facility in Waymart, Pennsylvania.

The district court construed Varner's letter as a motion to correct his judgment of committal and denied it on the merits. The court reasoned that a "new, preferred name is not alegally viable basis to amend the previously entered Judgment" …. Additionally, the court concluded that Varner "does not appear to have legally changed his name" under Kentucky law because his prison records reflected that he was not a resident of Kentucky when he petitioned for a name change. Finally, the

court noted that the relief Varner sought is "achievable without amending the Judgment." As the court explained, BOP regulations allow Varner to use "Kathrine Nicole Jett" as a secondary name and also authorize BOP staff "to use either gender-neutral or an inmate's requested gender-specific pronoun or salutation when interacting with transgender inmates."

Varner appealed the district court's denial of his motion to amend the judgment, which we review *de novo*. Along with his appeal, Varner has filed various motions in our court, including a "motion to use female pronouns when addressing Appellant" and motions to "submit[his] photograph into evidence" or to "appear ... either by phone, video-conference, or in person."

**II.**

**A.**

[Varner's] letter request does not fall into any of the recognized categories of postconviction motions. Although a district court has authority to correct a sentence under Federal Rule of Criminal Procedure 35 and to correct clerical mistakes in judgments and ordersunder Federal Rule of Criminal Procedure 36, Varner's request does not fall under either rule....

A name change obtained six years after entry of judgment is not a clerical error within the meaning of Rule 36.

Nor was Varner's request authorized under 18 U.S.C. § 3582(c)(2) because it was not based upon an amendment to the Sentencing Guidelines. Additionally, the district court could not construe the request as a motion arising under 18 U.S.C. § 3742, which applies only to directappeals. Finally, the request did not arise under 28 U.S.C. § 2255 because Varner did not challenge the validity of his conviction or sentence. In sum, Varner's request to change the name on his judgment was an unauthorized motion that the district court lacked jurisdiction to entertain.

**B.**

We next consider Varner's motion for the "use [of] female pronouns when addressing [Varner]." We understand Varner's motion as seeking, at a minimum, to require the district courtand the government to refer to Varner with female instead of male pronouns.[1] Varner cites no legal authority supporting this request.… Varner's reply brief elaborates that "[r]eferring to me simply as a male and with male pronouns based solely on my biological body makes me feel very uneasy and disrespected." We deny the motion for the following reasons.

First, no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric[2] litigants with pronouns matching their subjective gender identity. Federal courts sometimes choose to refer to gender-dysphoric parties by their preferred pronouns. On this issue, our court has gone both ways.… But the courts that have followed this "convention" have done so purely as a courtesy to the parties. *See, e.g., Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) (using female pronouns to respect [petitioner's] preference"). None has adopted the practice as a matter of binding precedent, and none has purported to obligate litigants or others to follow the practice.).

[1] The district court's order refers to Varner with male pronouns, as does the government's letter brief.

[2] "Gender dysphoria" refers to a condition where persons perceive a "marked incongruence" between their birth sex and "their experienced/expressed gender." Someone suffering from this condition may identify with the opposite sex, but the condition "may include a desire to be of an alternative gender" beyond the "binary" of male and female. DSM-5. The condition affects a tiny fraction of people. *See id.* (estimating prevalence for adult males from "0.0005% to 0.014%" and for adult females from "0.002% to 0.003%"). When it affects children, the condition often does not persist into adolescence or adulthood. *See id*. (estimating persistence for boys from "2.2% to 30%" and for girls from "12% to 50%"). Finally, "gender dysphoria" is to be distinguished from a "disorder of sex development," in which the development of male or female sex organs is affected by genetic or hormonal factors.

Varner's motion in this case is particularly unfounded. While conceding that "biological[ly]" he is male, Varner argues female pronouns are nonetheless required to prevent "discriminat[ion]" based on his female "gender identity." But Varner identifies no federal statuteor rule requiring courts or other parties to judicial proceedings to use pronouns according to a litigant's gender identity. Congress knows precisely how to legislate with respect to gender identity discrimination, because it has done so in specific statutes.… Congress has expressly proscribed gender identity discrimination in laws such as the Violence Against Women Act, the federal Hate Crimes Act, and elsewhere. But Congress has said nothing to prohibit courts from referring to litigants according to their biological sex, rather than according to their subjective gender identity.

Second, if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality. Federal judges should always seek to promote confidence that they will dispense evenhanded justice. *See* Canon 2(A), CODE OF CONDUCT FOR UNITED STATES JUDGES (requiring judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"). At its core, this judicial impartiality is "the lack of bias for or against either party to the proceeding," which "assures equal application of the law." *Repub. Party of Minn. v. White*, 536 U.S. 765 (1992). Increasingly, federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity. *See, e.g.*, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018)([restroom and locker room access for transgender students]); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018) (stating that "what this case is about" is "whether Drew Adams is a boy"). In cases like these, a court may have the most benign motives in honoring a party's request to be addressed with pronouns matching his "deeply felt, inherent sense of [his] gender." *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019). Yet in doing so, the court may unintentionally convey its tacit approval of the litigant's underlying legal position. *See*, *e.g.*, *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977) (observing that a trial judge "must make every effort to preserve the appearanceof strict impartiality," including by "exhibit[ing] neutrality in his language"). Even this appearance of bias, whether real or not, should be avoided.

Third, ordering use of a litigant's preferred pronouns may well turn out to be more complex than at first it might appear. It oversimplifies matters to say that gender dysphoric people merely prefer pronouns opposite from their birth sex—"her" instead of "his," or "his" instead of "her." In reality, a dysphoric person's "[e]xperienced gender may include alternative gender identities beyond binary stereotypes." DSM-5. Given that, one university has created this widely-circulated pronoun usage guide for gender-dysphoric persons:

| 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|
| (f)ae | (f)aer | (f)aer | (f)aers | (f)aerself |
| e/ey | em | eir | eirs | eirself |
| he | him | his | his | himself |
| per | per | pers | pers | perself |
| she | her | her | hers | herself |

| | | | | |
|---|---|---|---|---|
| they | them | their | theirs | themself |
| ve | ver | vis | vis | verself |
| xe | xem | xyr | xyrs | xemself |
| ze/zie | hir | hir | hirs | hirself |

*Pronouns—A How To Guide,* LGBTQ+ Resource Center, University of Wisconsin-Milwaukee, https://uwm.edu/lgbtrc/support/gender-pronouns/; *see also* Jessica A. Clark, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 957 (2019) (explaining "[s]ome transgender people may request ... more unfamiliar pronouns, such as ze (pronounced 'zee') and hir (pronounced 'hear'))." If a court orders one litigant referred to as "her" (instead of "him"), then the court can hardly refuse when the next litigant moves to be referred to as "xemself" (instead of "himself"). Deploying such neologisms could hinder communication among the parties and the court. And presumably the court's order, if disobeyed, would be enforceable through its contempt power. When local governments have sought to enforce pronoun usage, they have had to make refined distinctions based on matters such as the types of allowable pronouns and the intent of the "misgendering" offender. *See* Clark (discussing New York City regulation prohibiting "intentional or repeated refusal" to use pronouns including "them/them/theirs or ze/hir" after person has "made clear" his preferred pronouns).[4] Courts would have to do the same. We decline to enlist the federal judiciary in this quixotic undertaking.

***

We VACATE the district court's judgment. Varner's motion to require use of female pronouns, to submit a photograph, and to appear are DENIED. Varner's motion to file an out-of-time reply brief is GRANTED.

**JAMES L. DENNIS, Circuit Judge, dissenting:**

I respectfully dissent....

**I.**

The majority errs in concluding that the district court did not have jurisdiction to considerand rule on Varner's pro-se motion to amend the judgment of conviction to recognize her change of name. Federal Rule of Criminal Procedure 36 allows the court, at any time, to correct "a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." FED. R. CRIM. PROC. 36.… The majority determines that because Varner's request to amend the judgment of conviction fails on the merits under Rule 36, the district court lacked jurisdiction to entertain her motion. I disagree.

We have repeatedly denied relief under Rule 36 when the motion failed on the merits without questioning the district court's jurisdiction to entertain the motion. Moreover, we have evaluated prisoners' motions to change their names in the judgment of conviction, again without questioning

[4] *See also* NYC Commission on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3* (2002); N.Y.C. Admin. Code § 8-102(23), 4-5 (2015) https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf [https://perma.cc/C994-QAMV]; D.C. Mun. Regs. tit. 4, § 808.2(a) (2017) (making evidence of "unlawful harassment and hostile environment," *inter alia*, "[d]eliberately misusing an individual's preferred name form [*sic* – Eds.] of address or gender-related pronoun," in light of the "totality of the circumstances ... including the nature, frequency, and severity of the behavior, [and] whether it is physically threatening or humiliating, or a mere offensive utterance").

the district court's jurisdiction.

The cases cited by the majority as authority for its conclusion that the district court lacked jurisdiction to entertain Varner's motion are inapposite here. For example, in *United States v. Early*, 27 F.3d 140 (5th Cir. 1994), the defendant appealed the district court's denial ofhis motion for a reduction of his sentence, arguing that this court had jurisdiction under 18 U.S.C. § 3742(a). We found that § 3742 provided no jurisdictional basis for Early's motion because "[t]he provisions for modification of a sentence under § 3742 are available to a defendant only upon direct appeal of a sentence or conviction," and Early did not file a notice ofappeal from final judgment. We also evaluated other statutes and determined that none provideda jurisdictional basis for Early's motion to reduce his sentence.

Unlike the defendant's motion in *Early*, Federal Rule of Criminal Procedure 36 provides the jurisdictional basis for Varner's motion. The rule plainly provides a court with authority to, atany time, correct a clerical error in its judgment. This necessarily recognizes a court's authority to entertain motions to ascertain whether there is an error that falls within the rule's ambit and therefore must be corrected. I have found no cases interpreting a failure to succeed on the merits under Rule 36 as precluding a court's jurisdiction to entertain the motion. I agree with the majority that "[a] name change obtained six years after entry of judgment is not a clerical error within the meaning of Rule 36," but I believe this is a basis for affirming the district court's denial of Varner's motion, not for concluding that the district court lacked jurisdiction to consider it....

I do not question the district court's jurisdiction to entertain Varner's motion to have her judgment of conviction altered to reflect her new name, and I would affirm that judgment for the reasons stated by the district court.

**II.**

In addition to her appeal, Varner, a pro-se prisoner, submitted the following motion tothis court:

> Motion to Use Female Pronouns When Addressing Appellant
>
> I am a woman and not referring to me as such leads me to feel that I am being discriminated against based on my gender identity. I am a woman—can I not be referred to as one?

The majority concludes that, based on Varner's two-sentence, pro-se motion, Varner seeks, "at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns." But Varner's request is not so broad. The terms "district court" and "government" are not mentioned in Varner's motion. The motion was filed in *this* court and is titled "Motion to Use Female Pronouns When Addressing Appellant." Varner's use of the term "appellant" to describe herself leads to the conclusion that her request is confined tothe terms used by this court in this proceeding.

In my view, Varner is simply requesting that *this court*, *in this proceeding*, refer to Varner using her preferred gender pronouns. Not only is this the most faithful interpretation of her motion given the language she uses, it is also the narrowest. Because I would affirm the district court for the reasons it assigns without writing further, I think it is not necessary to useany pronoun in properly disposing of this appeal.

If it were necessary to write more and use pronouns to refer to Varner, I would grant Varner the relief she seeks. As the majority notes, though no law compels granting or denying such a request, many courts and judges adhere to such requests out of respect for the litigant's dignity. [String citation of nine cases with parenthetical quotations from First through Fourth and Sixth through Tenth Circuits

omitted.]

Ultimately, the majority creates a controversy where there is none by misinterpreting Varner's motion as requesting "at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns," when she in fact simply requests that this court address her using female pronouns while deciding her appeal. The majority then issues an advisory opinion on the way it would answer the hypothetical questions that only it has raised.

Such an advisory opinion is inappropriate, unnecessary, and beyond the purview of federal courts. The majority's lengthy opinion is dictum and not binding precedent in this court. *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980) ("We are not bound by dicta, even of our own court.").

For these reasons, I respectfully but emphatically dissent.

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**Discussion**

1. Does the disagreement between the majority and the dissent on the question of thedistrict court's jurisdiction have any practical significance?

2. If the appellant's motion regarding pronoun use were construed as the dissent would have interpreted it, how much weight if any would the majority's arguments about lack of binding judicial or statutory authority carry?

3. Is the majority's judicial impartiality argument persuasive? If a court ought not refer to a party litigating an issue related to their gender by pronouns consistent with their gender identity, how ought it to refer to that party (and avoid what the majority purports to be avoiding)? Is the majority's argument about nonbinary gender persuasive, or are there defensible ways for courts to avoid the consequences about which the majority claims to be concerned?

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**Note on *Forstater v. GCD Europe and Others***

Jurisdictions outside the U.S. have grappled with questions concerning protection for vs. regulation of misgendering speech. In *Forstater v. GCD Europe and Others*, Appeal No. UKEAT/0105/20/JOJ (UK Employment Appeal Tribunal June 10, 2021), the United Kingdom's Employment Appeal Tribunal distinguished between *expression* of even offensive anti-trans beliefs and anti-trans *harassment*, finding the former to be protectable as "belief" under Article I Section 9 of the European Convention on Human Rights and thus Section 10 of the UK EqualityAct 2010 (s.10, EqA), even while the latter might be unlawful.

Claimant Maya Forstater was "a researcher, writer and adviser on sustainable development" who, as an appointed visiting fellow, did paid consulting for CGD Europe ["CGDE"], a UK-based organization closely linked to the Center for Global Development, a U.S.-based not-for-profit think tank focusing on international development. Ms. Forstater became concerned about proposed changes to the U.K.'s Gender Recognition Act 2004 (GRA) that would make it easier for trans people to change their birth certificates to have their gender legally recognized. (The UK government ultimately opted against proposed such measures like allowing trans people to self-attest to their gender identity without needing a medical diagnosis, instead focusing on administrative adjustments such as reducing fees and allowing online application. *See* Jessica Parker, *Changes to Gender Recognition Laws Ruled Out*, BBC NEWS (Sept. 22, 2020) (last visited June 25, 2021); https://www.bbc.com/news/uk-politics-54246686 Stonewall, *What Does the Government Announcement on the Gender Recognition Act Mean?*, https://www.stonewall.org.uk/what-does-uk-

government-announcement-gender-recognition-act- mean (last visited June 25, 2021).)

Forstater actively communicated her "gender-critical" views on social media, including her personal Twitter account. Some staff of CGDE and later some of the Center for Global Development "raised concerns about some of the Claimant's tweets, alleging that they were 'trans-phobic,' 'exclusionary or offensive' and were making them feel 'uncomfortable.' An investigation into the Claimant's conduct followed, the end result of which was that the Claimant was not offered further consultancy work and her visiting fellowship was not renewed. The Claimant lodged proceedings in the Tribunal alleging, amongst other matters, direct discrimination because of her 'gender-critical' beliefs and/or harassment related to those beliefs" in violation of the EqA. Following a hearing, the Tribunal concluded that Forstater's belief was not a "philosophical belief" protected by section 10 of the EqA. From the testimony and record and reasoning based on *Grainger plc v. Nicholson* [2010] ICR 360, the Tribunal had concluded that "the Claimant is absolutist in her view of sex and it is a core component of her belief that shewill refer to a person by the sex she considered appropriate even if it violates their dignity and/orcreates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society[,]" and hence excluded from protection under the European Convention on Human Rights and thus from the Equality Act.

The Employment Appeal Tribunal ("EAT") concluded that the Tribunal legally erred. It "clarified" that the fifth of five criteria required for a belief to be protected as philosophic under the Eq.A. pursuant to its earlier *Grainger* decision—"It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others"—was narrow, "'apt only to exclude the most extreme beliefs akin to Nazism or totalitarianism or which incite hatred or violence,'" and so "very few" beliefs would fail to satisfy that criterion. Concluding that the Claimant's beliefs were not so extreme, itremanded the case for a differently constituted Tribunal to determine whether the beliefs were the reason for the employment action about which Forstater complained.

The EAT reached its judgment "on the basis that the Claimant's belief is as summarised by the Tribunal at para 77 of the Judgment, read with the passages at paras 39 to 41." In said paragraph 77, the Tribunal below had concluded:

> 77. The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female;or that is a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than "gender," "gender identity" or "gender expression." She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds.

Paragraphs 39-41 of the Tribunal's judgment specified:

> 39. In the Claimant witness statement she stated:
>
> 39.1 "I believe that people deserve respect, but ideas do not."
>
> 39.2 "I do not believe it is incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender."
>
> 39.3 "I believe that there are only two sexes in human beings (and indeed in all mammals): male and female. This is fundamentally linked to reproductive biology. Males are

people with the type of body which, if all things are working, are able to produce male gametes (sperm).

Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy."

39.4 "Women are adult human females. Men are adult human males."

39.5 "Sex is determined at conception, through the inheritance (or not) of a working copy of a piece of genetic code which comes from the father (generally, apart from in very rare cases, carried on the Y chromosome)."

39.6 "Some women have conditions which mean that they do not produce ova or cannot conceive or sustain a pregnancy. Similarly, some men are unable to produce viable sperm. These people are still women and men."

39.7 "I believe that it is impossible to change sex or to lose your sex. Girls grow up to be women. Boys grow up to be men. No change of clothes or hairstyle, no plastic surgery, no accident or illness, no course of hormones, no force of will or social conditioning, no declaration can turn a female person into a male, or a male person into a female.

39.8 "Losing reproductive organs or hormone levels through illness or surgery does not stop someone being a woman or a man."

39.9 "A person may declare that they identify as (or even are) a member of the opposite sex (or both, or neither) and ask others to go along with this. This does not change their actual sex.

39.10 There are still areas of scientific discovery about the pathways of sexual development, including chromosomal and other 'disorders of sexual development' (so called 'intersex' conditions), and about the psychological factors underlying transgender identification and gender dysphoria. However I do not believe that any such research will disprove the basic reality that there are two sexes."

39.11 "Under the Gender Recognition Act 2004, a person may change their legal sex. However this does not give them the right to access services and spaces intended formembers of the opposite sex. It is an offence for a person who has acquired information in an official capacity about a person's GRC to disclose that information. However this situation where a person's sex is protected information relates to a minority of cases where a person has a GRC, is successfully 'passing' in their new identity and is not open about being trans. In many cases people can identify a person's sex on sight, or they may have known the person before transition, or the person may have made it public information that they are trans. There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain."

39.12 "In most social situations we treat people according to the sex they appear to be. And even when it is apparent that someone's sex is different from the gender they seek to portray through their clothing, hairstyle, voice and mannerisms, or the name, titleand pronoun they ask to be referred to by, it may be polite or kind to pretend not to notice, or to go along with their wish to be referred to in a particular way. But there is no fundamental right to compel people to be polite or kind in every situation."

39.13. "In particular while it may be disappointing or upsetting to some male people who identify as women to be told that it is not appropriate for them to share female-only services and spaces, avoiding upsetting males is not a reason to compromise women's safety, dignity and ability to control their own boundaries as to who gets to see and touch their

> bodies."
>
> 40. [These] passages reflect core aspects of the Claimant's belief.
>
> 41. When questioned during live evidence the Claimant stated that biological males cannot be women. She considers that if a trans woman says she is a woman that is untrue, even if she has a Gender Recognition Certificate. On the totality of the Claimant's evidence it was clear that she considers there are two sexes, male and female, there is no spectrum in sex and there are no circumstances whatsoever in which a person can changefrom one sex to another, or to being of neither sex. She would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a "woman's space," but also more generally. If a person has a Gender Recognition Certificate this would not alter the Claimant's position. The Claimant made it clear that her view is that the words man and woman describe a person's sex and are immutable. A person is either one or the other, there is nothing in between and it is impossible to change form one sex to the other.

Regarding misgendering, the EAT concluded that "[o]n a proper reading of the Tribunal's findings, it seems to us that the most that can be said is that the Claimant will sometimes refuse to use preferred pronouns if she considered it relevant to do so, e.g. in a discussion about a transwoman being in what the Claimant considered to be a women-only space."

The EAT reached its narrow view of the disputed *Grainger* exclusion criterion in part in reliance on "the high importance attached by the [European Court of Human Rights] to diversity or pluralism of thought, belief and expression and their foundational role in a liberal democracy." In particular, the EAT emphasized that "[t]he freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable thananother, and ensuring that groups opposed to one another tolerate each other." The EAT understood "Article 17, ECHR [European Convention on Human Rights], [to] prohibit[] the use of the ECHR to destroy the rights of others. It becomes relevant where a State, group or person seeks to rely on Convention rights in a way that blatantly violates the rights and values protectedby the Convention. One cannot, for example, rely on the right to freedom of expression to espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the principlesof democracy." The EAT noted that rationality in any strong sense is not required for a belief to be protected under the Eq.A., as "[a] person who is dogmatic in their belief, even in the face of overwhelming evidence tending to undermine it, is no less entitled to protection for their belief than a person whose belief has the support, say, of the majority of the scientific community." Moreover, the EAT acknowledged, "[b]eliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted"

And the Gender Recognition Act, although providing that a person's "acquired gender" is their gender "for all purposes," "means 'for all legal purposes'" (and is subject to certain exceptions). The EAT explained: "the effect of [the relevant section of the] GRA is not to erase memories of a person's gender before the acquired gender or to impose recognition of the acquired gender in private, non-legal contexts …." After discussing the fact that some trans people in some circumstances may be happy to discuss their sex assigned at birth (our terminology—Eds.), the EAT somewhat conclusorily contrasts Forstater's protected beliefs from an example of an unprotected belief:

> Some beliefs, for example a belief that all non-white people should be forcibly deported for the good of the nation, are such that any manifestation of them would be highly likely to espouse hatred and incitement to violence. In such cases, it would be open to the Tribunal to say that the belief fails to satisfy Grainger V. However, the rationale for doing so would be that it is the kind of case to which Article 17 [of the ECHR] might be applied because of the inevitability that the rights of others would be destroyed. The Claimant's belief is not comparable.

The EAT later states that it is moved as well by the evidence that "gender-critical" beliefs such as Forstater's are "widely shared, including amongst respected academics." Second, the EAT states that "the Claimant's belief that sex is immutable and binary is, as the Tribunal itself correctly concluded, consistent with the law"; it believed that to be true of English common law following *Corbett v. Corbett* (Chapter 17, *infra*), which it reasoned was "still the leading case" on the issue.

The EAT allows that Forstater cannot "go about indiscriminately 'misgendering' transpersons with impunity.… The Claimant is subject to [the] same prohibitions on discrimination, victimisation and harassment under the EqA as the rest of society. Should it be found that her misgendering on a particular occasion, because of its gratuitous nature or otherwise, amounted toharassment of a trans person (or of anyone else for that matter), then she could be liable for such conduct under the EqA. The fact that the act of misgendering was a manifestation of a belief falling with s.10, EqA would not operate automatically to shield her from such liability."

Rights of freedom of speech tend to be broader in the U.S. than in most other nations. Even taking that into account, when should we conclude that misgendering of a transgender person amounts to unlawful harassment (on the basis of sex or on the basis of gender identity or transgender status)that is not shielded from liability by free speech rights?

The most extensive analyses of misgendering in legal scholarship have been conducted by Chan Tov McNamarah. In *Misgendering as Misconduct*, 68 UCLA L. REV. DISC. 40 (2020), they examine misgendering in Supreme Court amicus filings in *Gloucester County School Board v. GG*, 137 S. Ct. 369 (2016), remanded to *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F. 3d 286 (4th Cir. 2017); *Kenosha Unified School District v. Whitaker*, 138 S. Ct. 1260 (2018); and *R.G. & G.R. Harris Funeral Homes v. EEOC*, 139 S. Ct. 1599 (2019) (mem.), aff'd sub nom. *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020). In this article McNamarah refutes a number of defenses of misgendering of trans people: "(1) that gender-appropriate language is a concession antithetic to advocates' positions; (2) that pronouns are strictly tied to biological sex; (3) that misgendering is not meant to be disrespectful; (4) that misgendering is acceptable since the trans parties' gender is 'at issue' in the case; and (5) (a) that trans parties have no right to be addressed as they wish, or (b) if they did, it would trigger a slippery slope of increasingly ridiculous modes of address in court." *Id.* at 47. Thir article proceeds to argue that misgendering can amount to ethical misconduct sanctionable under professional conduct rules (useful since courts have done little to stop such "verbal misconduct" by attorneys) and that such application of the rules does not violate the First Amendment on either the ground that it improperly restricts attorney speech or the ground that it impermissibly compels speech.

McNamarah's second major article on the topic is *Misgendering*, 109 CAL. L. REV. ___ (forthcoming 2021), revised draft 1.4 available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3683490 (last visited Aug. 5, 2021). *Misgendering* again refutes common objections to using pronouns, names, and honorifics consistent with transgender people's gender identity: that "calls for pronoun respect [are] fraught demand[s] for

'special rights' from a vocal queer minority"; that, "semantically, gendered pronouns, honorifics, and titles cannot constitute slurs or epithets"; "that these gendered labels are 'just words,' and the consequences of their misuse, if any, are trivial and legally incognizable"; and "that sanctions against misgendering violate the First Amendment for both unconstitutionally compelling and restricting speech." The lengthy article argues that "misgendering is simply the latest link in a concatenation of disparaging modes of reference and address. From addressing Black persons by only their first names, the intentional omission of women's professional titles, and the deliberate butchering of the ethnically-marked names of minorities, these verbal slights have long been used to symbolize the subordination of societally disfavored groups." McNamarah draws upon "original interviews, collected accounts, case law, philosophical scholarship, medical literature, and social science research" to identify and explicate the harms misgendering wreaks upon "gender minorities' autonomy, dignity, privacy, and self-identity." The article then addresses how law should deal with misgendering and its harms, including not just First Amendment law but also "divergent areas … from religious freedom and criminal law, to even the law of incarceration and professional responsibility, among others."