No. 15-2056

In the
United States Court of Appeals for the Fourth Circuit

G.G., by his next friend and mother, Deirdre Grimm,
Plaintiff-Appellant,
v.
GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellee.

On Appeal from the
United States District Court for
the Eastern District of Virginia at Newport News

Brief *Amicus Curiae* of Public Advocate of the United States, United States Justice Foundation, Citizens United, Citizens United Foundation, and Conservative Legal Defense and Education Fund in Support of Defendant-Appellee and Affirmance

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-2056 Caption: G.G. v. Gloucester County School Board

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Foundation, and Conservative Legal Defense and Education Fund

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Signature: /s/ Robert J. Olson Date: May 15, 2017

Counsel for: Public Advocate of the U.S., et al.

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I certify that on May 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Robert J. Olson (signature) May 15, 2017 (date)

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INTEREST OF *AMICI CURIAE*

Public Advocate of the United States and Citizens United are exempt from federal income taxation under section 501(c)(4) of the Internal Revenue Code ("IRC"). United States Justice Foundation, Citizens United Foundation, and Conservative Legal Defense and Education Fund are exempt from federal income taxation under IRC section 501(c)(3). Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.[1] These *amici* filed two prior briefs in this case: an *Amicus* Brief in the Fourth Circuit on May 10, 2016[2] and an *Amicus* Brief in the U.S. Supreme Court on January 10, 2017.[3]

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[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] *See* Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Court of Appeals for the Fourth Circuit (May 10, 2016), http://lawandfreedom.com/wordpress/wp-content/uploads/2016/05/Gloucester-amicus-brief.pdf.

[3] *See* Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court (Jan. 10, 2017), http://lawandfreedom.com/wordpress/wp-content/uploads/2017/01/Gloucester-Amicus-Brief-final.pdf.

STATEMENT

The federal government action instigating this litigation dates back to early 2015. On January 7, 2015, the Obama Administration issued a policy Letter to Emily Prince, purporting to give specific direction to the School Board of Gloucester County, Virginia to open all school bathrooms and locker/shower facilities to persons of either sex. Fifteen months later, on May 13, 2016, the Obama Administration issued a further policy letter seeking to impose its transgender bathroom and locker/shower policy nationwide. Curiously characterized as a Dear Colleague letter, these mandates appear as though they were being written to equals. However, both of those Obama Administration policy letters have now been rescinded by the Trump Administration, pursuant to a February 22, 2017, Trump Administration Guidance letter, signed by the Acting Assistant Secretary for Civil Rights for the Department of Education and the Acting Assistant Attorney General for Civil Rights.

Now on remand to the Fourth Circuit, the issue before the Court no longer relates to the policy position taken by the Obama Administration, or on Auer deference to administrative action, the grounds upon which the Fourth Circuit panel previously ruled. G.G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 719-723 (4th Cir. 2016). Rather, the issue now is whether the Obama Administration's

policy preferences are mandated either by federal law or by the U.S. Constitution.

ARGUMENT

I. GAVIN GRIMM IS NOT A BOY.

Appellant's brief alleges that Gavin "is a boy who is transgender," and "is a boy who was identified as female at birth." Supplemental Brief of Plaintiff-Appellant ("ACLU brief") at 4, 22, 26, 27. But in spite of these attempts to make it appear as if Gavin were a boy, the reality is that Gavin is not a boy — she is a girl. She was born female. Thus, she is, has always been, and will always be female. That is a reality which Gavin, her parents, her ACLU lawyers, and yes, even this Court, cannot escape. All references that state or imply that Gavin is a boy are simply papier-mâché.

A. Appellant's Brief Contains Half Truths, Obfuscation, and Clever Terminology.

Recognizing that Gavin is in fact a girl — a scientific and biologically provable fact — does not make one anti-boy, anti-girl, anti-Gavin, or anti-"transgender" — whatever the term "transgender" may mean.[4] Certainly this brief *amicus curiae* is not intended to be "degrading," "stigmatiz[ing]," "isolat[ing]," "demeaning,"

[4] *See* discussion of evolving notions of transgenderism at Section III, *infra*.

"shameful," or "disadvantag[eous]" to Gavin (*see* ACLU Brief at 1, 5, 9, 36).[5] Rather, its purpose is to dispel illusion and to put truth on the record for all to see. On the other hand, the ACLU's entire brief is an effort to circumvent the reality of Gavin's sex, and confuse the reader through obfuscation, half truths, and clever terminology invented by academics and progressive activists.

This manipulation of truth begins with the first line of Appellant's brief. Appellant claims that "Gavin Grimm was **banished** from using the same restrooms as **other boys**...." *Id.* at 1 (emphasis added).[6] But Gavin is not a boy, so she cannot be likened to "other boys." Similarly, a 15-year-old student who believes himself or herself to be five years old cannot claim to be **banished** from a kindergarten class "as the **other five-year olds**" because, regardless of the number of "positive affirmations" made, that student is still not five years old. Similarly, Gavin is not a boy — no matter how hard she wants to be a boy, and no matter what she and her doctors do to her female body.

Appellant's brief next claims that Gavin was "required" and "forced to use separate single-stall facilities...." *Id.* at 1, 29. However, Gavin was never "forced"

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[5] The ACLU Brief even treats an accurate reference made to Gavin as a "young lady" as though it were a vile epithet. ACLU Brief at 9.

[6] The ACLU Brief deliberately invokes this misnomer no fewer than 28 times throughout its brief.

to use a gender neutral bathroom. To the contrary, it was Gavin who initially asked and was allowed to use the bathroom in the nurse's office, only to abandon that choice after she allegedly felt "stigmatized."[7] Even then, she has always been free to use the girls' room the same as all the "**other girls**." The only bathroom that Gavin cannot use is the boys' room.

Next, the ACLU's brief claims that Gavin's school "has continued to single him out...." *Id.* at 1. Again, this is simply not true. Gavin has been treated no differently from any other girl in the school district — all of whom are barred from using bathrooms for boys, just as all the boys are barred from using bathrooms for girls. ACLU's brief claims that Gavin has been prevented "'from participating fully in our society....'" *Id.* at 2. Again, not true. Gavin is welcome to participate fully in society the same as **any other girl**. The only thing that Gavin may not do is certain things that only boys may do — distinctions grounded in the natural order that the law and the courts have long recognized as being perfectly lawful

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[7] Later in her brief, Appellant relies on this false claim to show that Gavin was discriminated against. Appellant claims that "[t]he single-stall restrooms available to Gavin are not comparable in form or substance." *Id*. at 36 n.22. Appellant claims that "forcing" Gavin to use the single stall bathrooms "'denie[s] [him] the benefits' of school." *Id*. Again, however, this is a *non sequitur*. Gavin has not been forced to use the gender neutral bathrooms. She is perfectly welcome to use the girls' bathrooms that correspond to her biological gender. Moreover, under the school policy, any student is free to use (or not to use) the gender neutral bathrooms.

and acceptable by the larger community.[8]

B. The ACLU Cannot Remake Gavin into a Boy.

ACLU's brief claims that Gavin is "**recognized** ... **as** a boy ... by his family, his medical providers, the Virginia Department of Health, **and the world at large**...." ACLU Brief at 2 (emphasis added). Of course, it is clearly not the case that the "world at large" recognizes Gavin as a boy, or else this case would not exist.[9] As for evidence of such recognition, the ACLU claims that Gavin:

> has undergone hormone therapy, had chest reconstruction surgery, and changed his sex to male both on his state-issued identification card and on his birth certificate. He supplied school administrators with a "treatment documentation letter" from his psychologist. [*Id.* at 27.]

Nevertheless, a noted feminist, Camile Paglia, has observed:

> Sex reassignment surgery, even today with all of its advances, cannot in fact change anyone's sex.... You can define yourself as a trans man ... [b]ut ultimately, every single cell in the human body, the DNA in that cell, remains coded for your biological birth.

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[8] *See* Supplemental Brief of Gloucester County School Board at 20, *et seq*.

[9] The record shows that at the Gloucester school board's meeting leading up to this case, "most of those who spoke were in favor of the proposed resolution." 822 F.3d at 716. Nationwide, "fewer than one-in-four Americans agree that people should be allowed to freely change their legal sex by switching their preferred 'gender identity.'" N. Munro, "Poll: Transgender Goal Supported by Only 22.7 Percent of Americans," Breitbart (Jan. 1, 2017), http://goo.gl/Daj7zR. *See also* E. Green, "Half of Americans Don't Think Transgender People Should Be Able to Pick Their Bathroom," The Atlantic (Sept. 28, 2016), http://goo.gl/jS2p30.

> So there are a lot of lies being propagated at the present moment, which I think is not in anyone's best interest. [S. Dorman, "Paglia: 'Transgender Mania' is a Symptom of West's Cultural Collapse," CNSNews.com (Nov. 3, 2015).]

Thus, just because certain other persons choose to "**recognize**" Gavin "**as a boy**" does not mean that she **is** a boy. The fact that a delusion is suffered widely does not mean it ceases to be a delusion. Drugs, a scalpel, and a few pieces of government-issued paper do not make a girl into a boy any more than stockings, high heels, lipstick, and a wig make a transvestite man into a woman.

Instead, as Appellant's own brief admits, "gender dysphoria" is a mental disorder.[10] ACLU Brief at 3 n.2. And, as the American Psychiatric Association points out, "Gender dysphoria is **not** the same as gender nonconformity ... Gender nonconformity is not a mental disorder."[11] Attempting to make Gavin's disorder

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[10] In these *amici*'s prior brief in this case before the U.S. Supreme Court, they catalogued other types of related mental disorders. *See* Brief *Amicus Curiae* of Public Advocate, *et al.* (Jan. 10, 2017) at 24-31. For example, people who are "transabled" will attempt to transform their fully working bodies by obtaining a physical impairment (cutting off a limb, pouring drain cleaner into one's eyes to become blind, etc.), because they believe their outward physical appearance does not match their inward "reality" of disability. Additionally, other people claim they are "trans species," and identify as things such as a wizard, a dog, an elf — or just about anything else one can imagine. Further, *amici*'s brief also noted that many people who suffer from these sorts of delusions also suffer from the delusion that they are transgender.

[11] R. Parekh, M.D., M.P.H., "What Is Gender Dysphoria?" American Psychiatric Association (Feb. 2016), http://goo.gl/GWCTj8.

appear normal, Appellant's brief claims that "[t]here is a **medical and scientific consensus** [as to] the treatment for gender dysphoria." *Id.* at 3-4 n.2. First, it is simply not true that such a consensus exists. In fact, as several renowned doctors and psychiatrists pointed out in their *amicus* brief to the Supreme Court, "[t]here is **no scientific or medical support** for treating gender dysphoric children in accordance with their gender identity rather than their sex."[12] In fact, these *amici* asserted that such "treatment" is abusive to the child.

> For instance, an anorexic child is not encouraged to lose weight. She is not treated with liposuction; instead, she is encouraged to align her belief with reality – i.e., to see herself as she really is. Indeed, this approach is not just a good guide to sound medical practice. It is common sense. [*Id.*]

However, even if there were a **medical and psychological** consensus that the best **treatment** for this particular delusion is to play along with the person's delusion, that still does not **scientifically and legally** make Gavin a boy.

C. Looking Like a Boy Does Not Make One a Boy.

Appellant claims that gender is the same as sex because "[a] person's transgender status is an inherently **sex-based characteristic**." *Id.* at 22 (emphasis added). It may be that gender is "sex-based," but it is not "sex." That's like

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[12] Brief of *Amici Curiae* Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. in Support of Petitioner (No. 16-273) (Jan. 10, 2017) at 11.

saying a plant-based cleaning agent **is** a plant — everyone knows that liquid hand soap is not a geranium. And, while the length and style of a person's hair is often thought of as a **sex-based characteristic**, a boy with cascading locks is no more a girl than a girl with a "high-and-tight" hairstyle is a boy. In order to bridge this chasm between gender and sex, Appellant's brief mixes concepts. Appellant claims that transgender persons such as Gavin have "undergone a **gender** transition from the **sex** identified for them at birth." *Id.* at 23 (emphasis added). But of course, there is no such thing as a "sex change." Appellant claims that "[t]he **reality** is that" some transgenders have "**characteristics**" of the opposite sex — but appearance is not necessarily reality. *Id.* at 38. Apparently Gavin has had her female breasts removed or re-shaped to look like a man's (*id*. at 10), but that does not make her a boy. Appellant claims that transgender boys "**look** very different" from other girls, transgender girls "**look** very different" from other boys, and that hormone therapy "alters the **appearance of** a person's genitals" and other traits like "facial and body hair in boys and breasts in girls." *Id*. at 38 (emphasis added). But these are simply appearances. Boiled down to its essence, transgenderism is a technologically advanced, medically assisted 21st Century version of transvestitism. *See generally* C. Williams, "Transgender," TRANSGENDER STUDIES QUARTERLY, Duke U. Press, vol. 1, nos. 1-2 (2014). A

woman can be surgically altered to appear like a man, can choose to dress like a man, be made to sound like a man, or can adopt mannerisms to walk like a man — but still, she is not a man.[13] Even changing the genitalia does not change the genetic makeup of the individual.

D. Sex Is a Biological Fact Fixed at Conception, Not a Matter of One's Preference or Choice.

Appellant's brief claims that a person's sex is not fixed, but rather is arbitrarily assigned to them on a birth certificate — "**identified** for them at birth." *Id.* at 23 (emphasis added). Appellant claims that "[t]o be sure, most boys are **identified** as boys at birth" (*id.* at 25 (emphasis added)), but apparently there are some occasions where the doctors (and the parents) simply get it wrong — such as Gavin's case, where Appellant argues that "Gavin had a different sex **identified for him** at birth." *Id.* at 24 (emphasis added). Appellants are not referring to that small number of hermaphrodites whose sex is outwardly ambiguous or otherwise difficult to determine. Rather, they refer to boys who are clearly male, and every cell, gene, and hormone in their body is male — and yet allegedly are not male because they do not "feel" that way.

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[13] *See* Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court, at 19.

Appellant claims that sex is nothing more than a set of societal "stereotypes," "generalizations," "assumptions," and "expectations." *Id.* at 24. On the contrary, sex is a fixed, scientific principle, which is constant and unchanging. It boils down to how many X and how many Y chromosomes are in a person's DNA. Sex is math. Two plus two is not "stereotypically" four, "generally" four, "assumed" to be four, or "expected" to be four. Two plus two **is** four. Appellant claims that the concept of the male and female biological sexes is nothing more than "**some dictionary's definition** of the word 'sex,'" (*id.* at 37 (emphasis added)), as if the dictionary just arbitrarily made it up on its own. After all, what gives a dictionary the right to define a word? Appellant claims that the Court should instead take "social realities into account." *Id.* at 30 n.19. But how about the realities of the English language?

E. Transgenderism Is Seriously Problematic and Is Itself Discriminatory.

It seems self-evident that permitting everyone to use any bathroom that corresponds to self-proclaimed "gender identity" would lead to real problems. Appellant attempts to dispel such arguments by claiming that "a letter from a doctor **or parent** can easily provide corroboration." *Id.* at 43 (emphasis added). Of course, as these *amici* discussed in their brief in the U.S. Supreme Court (cited *supra*), what about so-called "gender fluid" individuals whose gender allegedly

changes depending on their mood or circumstances around them? What about individuals who claim not to identify with either binary gender? What about individuals who identify as penguins?[14] Appellant purports to do away with scientific reality (that Gavin is female) as a means to determine bathroom usage, and instead insists the school board should take a parent's word for it, asserting that relying on such a letter is the better way to determine a student's gender. *Id*.

Finally, the ACLU brief claims that Gavin — a female — using male restrooms "does not infringe on anyone else's privacy rights." *Id.* at 44. Indeed, the ACLU goes one giant step further, contending that the board "policy had no effect on other students, all of whom continue to use the same restrooms they used before. Transgender students are the only students who are affected." *Id*. at 28. This claim is contradicted by the ACLU's answer for any boys who object to girls using their bathroom, which is to have those boys use the previously maligned, gender neutral, single stall bathrooms that Gavin refuses to use. *Id.* at 45. Appellant claims that "Gloucester High School ... provides a private restroom for anyone uncomfortable using the same restroom as Gavin...." *Id.* at 46. In other words, the boys' bathroom belongs to Gavin. Appellant would have this court subject those

[14] *See* https://www.youtube.com/watch?v=HTqFUWSvVUE.

students who currently "identify" with their "assigned" biological sex to a "degrading and stigmatizing policy" — "Tolerance" for me, but not for thee.

II. A CONCURRING OPINION ISSUED APRIL 7, 2017, CALLS INTO QUESTION THE IMPARTIALITY OF TWO JUDGES OF THIS COURT.

Just over a month ago, two judges of this court tacked what they called a "concurring opinion" onto a purely ministerial order by the Court, which was in no way required in any pending matter. Rather, the concurrence was a gratuitous statement from Senior Judge Davis who authored the opinion, and Judge Floyd, who expressly authorized his name to be attached to the opinion. In that concurrence, these judges made several remarkable statements that raise questions about their authority to continue as judges in this case.

Significantly, these judges adopted a legal position even more extreme than the ACLU argued. Without any scientific or any other credible evidentiary basis, these two judges personally embraced the fiction that Gavin is a boy. Although the ACLU brief never directly claimed that Gavin **is** a boy without reference to his transgender status, these judges bluntly presumed that this case is simply "about a boy asking his school to treat him just like any other boy." 2017 U.S. App. LEXIS 6034, *3. Ignoring the reality that Gavin Grimm **is** a female, they ignored the fact that her school has treated her no differently from any other female. She was not

"segregated." She was not "banished." She was not the victim of "invidious discrimination." She was not denied "human dignity." She was not "oppressed." *Id*. at *2-4. She was treated exactly the same as any other female student would be treated. *See* G.G., 824 F.3d at 452-53 (Niemeyer, J., dissent).

Moreover, in that "opinion," the two jurists expressed their personal animosity and disdain for the parents of many students, and towards anyone who dares question the "right" of girls everywhere to use boys' bathrooms. *Id*. at *4. Instead of acting according to the ordinary judicial process as neutral and impartial magistrates, they have resorted to *ad hominem* attacks rather than dispassionate legal analysis, accusing others of "hatred, intolerance, and discrimination...."[15]

Indeed, these judges go so far as to express disdain for our "government [which] organizes society by outdated constructs like biological sex and gender." In other words, these judges disagree not only with the public policy decision to keep transgender "boys" (girls) like Gavin out of the boys' bathroom, but also with the decision to keep anyone out of any bathroom. These judges apparently disagree with the public policy behind the text of Title IX itself, even though the

[15] *Id*. at *4. These are the same two judges who, in their 2016 panel opinion, claimed that one "display[s] hostility" by referring to Gavin as "young lady." 822 F.3d at 709, 716.

judges admitted previously, "[n]ot all distinctions on the basis of sex are impermissible under Title IX." 822 F.3d at 718.

The School Board notes that these judges' decision "would usher in a new world where biological males occupy not only the same restrooms, locker rooms, showers as females, but the same basketball, lacrosse, and wrestling teams." School Board Supplemental Brief at *3-4. The school board ever so politely pointed out that such a policy is one that "Congress must enact ..., not an administrative agency or a court." *Id.* at *4. However, these judges have taken upon themselves the role of legislators, creating a Brave New World by reforming American society into their own image. As Judge Niemeyer wrote, dissenting from the denial of rehearing *en banc*, "Virtually every civilization's norms on this issue stand in protest." G.G. v. Gloucester Cnty. Sch. Bd., 824 F.3d 450, 452 (4th Cir. 2016).

Indeed, in their concurrence, Judges Davis and Floyd have rejected both the national commitment to a God-created Order, subscribed to in the nation's charter,[16] and the modern scientific evolutionary theory of natural selection of the

[16] *See* Declaration of Independence ("We hold th[is] truth[] to be self-evident, that all men are created equal...."). *See also* Genesis 5:1-2 ("God created man, in the likeness of God made he him; Male and female, created he them....").

two sexes.[17] They seek to cower the School Board to be on the "right side of history," irrespective of being "against evidence and reason..."[18]

That concurring opinion was issued less than a month before Judge Davis' May 5, 2017 retirement announcement[19] (effective August 31, 2017), and constituted a parting shot at those with whom he disagreed politically. Judge Davis asserted that "[o]ur country has a long and ignominious history of discriminating against our most vulnerable and powerless." 2017 U.S. App. LEXIS 6034, *2-3. When challenges to such discrimination have been brought, "the judiciary's response has been decidedly mixed." *Id.* at *3.

As problematic as all of these statements are, Judge Davis' opinion — simultaneously demeaning Gloucester County and lionizing Gavin — demonstrates that neither Judge Davis nor Judge Floyd can any longer be depended on to render a dispassionate decision on the merits. With respect to Gloucester County, Judge Davis asserted "the perpetuation of stereotypes is one of

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[17] *See* C. Darwin, The Descent of Man and Selection in Relation to Sex (D. Appleton & Co.: 1871).

[18] *See* D. Graham, "The Wrong Side of 'the Right Side of History,'" The Atlantic (Dec. 21, 2015).

[19] *See* Judge Andre M. Davis to retire August 31, 2017 (May 5, 2017), http://www.ca4.uscourts.gov/news-announcements/latest-news-announcements/2017/05/05/judge-andre-m.-davis-to-retire-august-31-2017.

many forms of invidious discrimination [based on Gavin as a boy who] did not conform to some people's ideas about who is a boy." *Id*. at *2. He said that Gloucester County "will not protect the rights of others unless compelled to do so" using the terms "hatred, intolerance, and discrimination" and "unjust policies rooted in invidious discrimination." *Id*. at *4.

On the other hand, in resisting Gloucester County, Judge Davis extolled Gavin, concluding that Gavin "takes his place among other modern-day human rights leaders...." *Id.* at *4. He likened Gavin to "Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving."[20] *Id.* at *3. His concurrence "drew praise from the left last month for [comparing Gavin] to plaintiffs in other historic civil rights case...."[21] Summing up, Judge Davis extolled Gavin as a person who "is and will be famous, and justifiably so..." for Gavin was in the tradition of other "brave

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[20] It is worth noting that the Dred Scott, Korematsu, or Loving opinions contained neither harsh language nor *ad hominem* attacks, but regardless of their result, constituted a dispassionate analytical consideration of the opposing legal claims. Even in the most contentious (and many believe unsupported) decisions such as Roe v. Wade, Justice Blackmun put aside his passionate beliefs about the subject matter, striving "to resolve the issue by constitutional measurement, free of emotion and of predilection." *Id.,* 410 U.S. 113, 116 (1973). The language employed by some of the judges of this Court in the concurring opinion is of a quite different type.

[21] L. Broadwater and I. Duncan, "Pugh names federal Judge Andre Davis as Baltimore's new city solicitor," The Baltimore Sun (May 3, 2017), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-andre-davis-solicitor-20170503-story.html.

individuals" who "refused to accept quietly the injustices that were perpetuated against them" by the nation. *Id.* And Judge Davis then waxed eloquent as an Ode to Gavin in applying the words of someone described as "the renowned Palestine-American poet Naomi Shihab Nye, in her extraordinary poem, *Famous*." *Id*. at *5.

Viewed as a whole, these statements of Judges Davis and Floyd express contempt for Appellee and veneration for Appellant. Particularly because these statements were not made in the context of any decision required to be issued by the court, they trigger the requirements of 28 U.S.C. § 455 which mandate that "[a]ny ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

III. THE LAW IS NOT WHAT THE ACLU SAYS IT IS.

The ACLU asserts that the U.S. Supreme Court "has remanded th[is] case for this Court to examine the statute and regulation without deference and 'say what the law is.'" ACLU Brief at 1-2. Adopting Judge Davis' jurisprudence that "the law eventually catches up to the **lived facts** of people,"[22] the ACLU argues that

[22] G.G. v. Gloucester Cnty. Sch. Bd., 2017 U.S. App. LEXIS 6034, *4 (4th Cir. Apr. 7, 2017). Although awkwardly stated, Judge Davis is not the first judge to espouse this theory. The eminent Oliver Wendell Holmes, Jr., wrote more eloquently that "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy ... even the prejudices which judges share with their fellow-men [primarily] determin[e] the rules by which men should be governed." O.W. Holmes, The Common Law at 1 (1887). Not only is Holmes' realist view of

discrimination on the basis of being transgender **is** discrimination on the basis of her trans-male sex, because:

- Gavin herself says so (*id*. at 3-5, 7-8, 27);
- "his family" says so (*id*. at 2, 3-4, 27);
- "his medical providers" say so (*id.* at 2, 4-5, 27);
- "The Virginia Department of Health" says so (*id.* at 2, 9-11, 27);
- "the Virginia Department of Motor Vehicles" says so (*id.* at 10);
- "The National Association of Secondary School Principals, the National Association of Elementary School Principals, and the American School Counselor Association" all say so (*id.* at 5);
- "the American Psychological Association and the National Association of School Psychologists" say so (*id.* at 5-6);
- the United States Department of Education (despite President Trump) still says so (*see id.* at 14-16);

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the role of a common law judge contrary to that of the judge extolled by the great William Blackstone in his Commentaries – "[who is] being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one," but Holmes' view has absolutely no place in a case, such as this which concerns the meaning of words written in statute. As the late Justice Antonin Scalia wrote: "[Ours is a] government of laws, not of men. Men may intend what they will; but it is only the laws that [are] enact[ed] which bind us." A. Scalia, A Matter of Interpretation: Federal Courts and the Law at 17 (Amy Gutmann ed., 1997).

- the United States Military says so (*see id.* at 41);
- the Boy Scouts and Girl Scouts say so (*see id.* 41-42);
- the Seven Sisters colleges say so (*id.*);
- the National Collegiate Athletic Association says so (*id.*);
- the Virginia High School League says so (*id.*); and
- even "the world at large" says so (*id.* at 2, 27, 38).

Is it any wonder, then, that the "First, Sixth, Ninth, and Eleventh Circuits" also say so? *Id.* at 21-22. Identifying such an array of authorities, the ACLU confidently urges this Court to "join that established consensus," and rule that the Gloucester School District has violated Title IX of the Civil Rights Act because it discriminated against Gavin on the basis of her transgenderism and, thus, "on the basis of sex." *Id.* at 21-22.

Yet despite its impressive array of authorities cobbled together to support its request, the ACLU has failed to address just one not-so-small thing: What did Congress say about transgenderism when it enacted Title IX? After all, as Judge Diane Sykes has cogently observed:

> Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. [Hively v. Ivy Tech Comm. College of Indiana, 853 F.3d 339, 2017 U.S.

App. LEXIS 5839, *50 (7th Cir. 2017) (Sykes, J., dissenting). *See also* School Board Supplemental Brief at 23-29.]

The ACLU has completely bypassed this first principle. Paying absolutely no attention to the original meaning of "sex" discrimination as contemplated by the Title IX text, the ACLU has "infuse[d] the text with a new [and] unconventional meaning[,] updat[ing] it to respond to changed social [and] political conditions." *Id.*[23] To put the question succinctly, as Judge Sykes did just a little more than a month ago in a case where the Seventh Circuit shoehorned "sexual orientation" into Title VII's ban on "discrimination 'because of sex'":

> Is it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation? The answer is no, of course not. [*Id*. at *46.]

Nor is it remotely possible that, in 1964, when Title IX was adopted, any reasonable person would have understood a law banning discrimination "on the basis of sex" to ban discrimination on the basis of "gender dysphoria." *See* ACLU Brief at 3, 22, and 41. Nevertheless, the ACLU pressures this Court to interpret a statute in a way that no ordinary person would have done at the time it was written.

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[23] In so doing, the ACLU does so without regard for the legislative history of Title IX or any other related statute. *See* Board Brief at 28-32.

Thus, the ACLU asserts that, in Gavin's case, "[t]he incongruence between his gender identity and his sex identified at birth is what makes him transgender." *Id.* at 22. And "[t]reating a person differently because of the relationship between those two sex-based characteristics is literally discrimination 'on the basis of sex.'" *Id.* However, no matter how clearly the ACLU has tried to urge its view, it did not claim and could not demonstrate that the ordinary meaning of the word "sex" at the time of Title IX's enactment includes the concept of being "transgender."

Indeed, it was not until the year after the 1964 law was enacted that the word "transgender" was even coined.[24] In a reference work written by Columbia University Psychiatrist John F. Oliven entitled Sexual Hygiene and Pathology: A Manual for the Physician and the Professions (J.B. Lippincott & Co.: 1965), the term "transgender" was chosen to substitute for "transsexualism" because "sexuality is not a major factor in primary transvestism." *See* C. Williams, "Transgender," TRANSGENDER STUDIES QUARTERLY, Duke U. Press, vol. 1, nos. 1-2 (2014). Thus, transgenderism was originally employed to describe people who wanted to live cross-gender without sex reassignment surgery. It was not until the 1980's that transgender became an expansive umbrella term encompassing "cross-

[24] *See* "A Trans Timeline," TransmediaWatch, http://www.transmediawatch.org/timeline.html.

dressers" and anyone "transitioning." *Id*. And, even then, the word transgender was not included in the unabridged Webster's Third International Dictionary published in 1981.

It would be even more outlandish to claim, as the ACLU implies, that "sex" includes one's "gender identity," as a male or a female, changeable at one's unfettered individual discretion and, therefore, entitled to special privileges on account of having chosen a new sexual identity. *See* ACLU Brief at 2-5, 7-8, 10-12, 19-20, and 22-27. Moreover, the ACLU Brief asserts that the "'dispositive realit[y]' is that Gavin is recognized by his family, his medical providers, the Virginia Department of Health, and the world at large as a boy." *Id.* at 39. Yet, in an attempt to appease this Court and to deflect the counterclaim that, if "gender identity" is such a fluid self-defined status, it opens the door to sexual identification anarchy — the ACLU claims that school boards could require some evidence of true transgender status, as Gavin has provided in this case. *See id.* at 41-42. But that proposal fails on two counts.

First, requiring some evidence of true transgenderism would itself be subject to individual fiat. Although the original designation of a person's sex at birth may be outside one's control, one's subsequent "gender identity" is not. Just as there has

never been proven to be a gay gene,[25] whether a person is a "transgender" could never be described as an "inherently sex-based characteristic;" rather, it is a matter of personal choice. *See id.* at 41-42.

Second, it is totally naive to think that school officials could implement a process by which public school authorities would identify persons in the student body who are "transgender" by anything but guesswork. No doubt if any school board did what the ACLU suggests (asking for a letter from a parent or from a doctor), one could expect the very same ACLU banging on the doors of the courthouse the next day claiming that such action was discriminatory — "singling out" those "suspected" of transgender status for special treatment — requiring them to "prove" who they are. Any notion that adoption of such a pre-screening process would be smooth sailing is belied by the facts of this very case in which

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[25] *See, e.g*. interview with Paul McHugh, M.D., Henry Phipps professor of psychiatry, director of the Department of Psychiatry and Behavioral Sciences at the Johns Hopkins University School of Medicine. L. Evans, "Dr. Paul McHugh: There is No Gay Gene," Virtue On Line (Jan. 26, 2010), http://www.virtue online.org/charleston-sc-dr-paul-mchugh-there-no-gay-gene; L. S. Mayer, Ph.D. and P.R. McHugh, M.D., "Sexuality and Gender," The New Atlantis (Fall 2016) ("The understanding of sexual orientation as an innate, biologically fixed property of human beings — the idea that people are "born that way" — is not supported by scientific evidence." at 8. "Compared to the general population, adults who have undergone sex-reassignment surgery continue to have a higher risk of experiencing poor mental health outcomes. One study found that, compared to controls, sex-reassigned individuals were about 5 times more likely to attempt suicide and about 19 times more likely to die by suicide." at 9), http://www.thenewatlantis.com/publications/number-50-fall-2016.

the school authorities attempted in good faith to accommodate Gavin with a separate restroom — only to have her change her mind and make further demands once her initial demands were met. In short, there is no acceptable way for a school district to run a school, but to accommodate without question the individual student's choice of restroom. Any policy short of that would single out transgenders in a way that other students are not and, thus, would be criticized as discriminating on the basis of sex.

CONCLUSION

This is not a case where a student simply wants to be left alone. Rather, this is a case where a student with a radical agenda wants everyone else to bend to her demands and to accommodate to her delusion. She wants not just tolerance — tolerance has already been given — she wants conformity to her will. Anyone who refuses to do so is accused of hate and prejudice and labeled a "discriminator." Enough is enough. Appellant's claim based on Title IX should be rejected, and the district court decision dismissing that claim should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support of Defendant-Appellee and Affirmance complies with the page limitation set forth by Rule 29(a)(5) and this Court's order of April 13, 2017, because this brief contains 6,173 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Defendant-Appellee and Affirmance, was made, this 15th day of May, 2017, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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