No. 15-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* 50 GLOUCESTER STUDENTS, PARENTS, AND GRANDPARENTS, ET AL. IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING *EN BANC*

JEREMY D. TEDESCO
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@adflegal.org

JORDAN LORENCE
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(202) 393-8690
jlorence@adflegal.org

DAVID A. CORTMAN
J. MATTHEW SHARP
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@adflegal.org
msharp@adflegal.org
rgray@adflegal.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

50 Gloucester Students, Parents, Grandparents, and Community Members is an unincorporated association made up of individual citizens. They are not members of any relevant corporation, no relevant corporation is publicly held, and no other entity owns 10% or more of a relevant corporation's stock. The Family Foundation of Virginia is not publicly held, has no parent corporations, and no other entity owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

50 Gloucester Students, Parents, Grandparents, and Community Members are students who attend school in Gloucester County, Virginia, and whose interests in bodily privacy are at issue in this case, or their parents, grandparents, or fellow community members who are concerned about maintaining students' right to bodily privacy. The Addendum lists them in full. It is this constitutional right to bodily privacy that is negatively impacted by the panel majority's decision. The Family Foundation of Virginia (FFV) is a non-partisan, non-profit organization that exists to strengthen families in Virginia through citizen advocacy and education. FFV's interest in this case derives directly from its members throughout Virginia, including in Gloucester County, with children in public schools whose rights to bodily privacy are harmed by the panel majority's decision.

Amici file this brief under FRAP 29(a). All parties consented to its filing.

RULE 29(c) STATEMENT

No counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money to fund this brief, and no person or entity, other than *amici* and their counsel, funded the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Both the plain language of Title IX and its legislative history clearly indicate Congress' intent to allow schools to maintain separate restrooms and locker rooms

for boys and girls based on biological sex. Because the term "sex" is unambiguous, the Department of Education's ("DOE") re-definition of "sex" to include "gender identity" is not entitled to deference. Additionally, DOE did not follow notice-and-comment procedures under the APA when promulgating its re-definition of "sex." Nonetheless, DOE is holding "a gun to the head" of Gloucester and other school districts across the country by threatening to revoke all of their federal education funding if the districts do not comply with this new definition of "sex." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012).

ARGUMENT

Title IX bans "discrimination" against students enrolled in an educational program receiving federal financial assistance "on the basis of sex." 20 U.S.C. § 1681. But it does not prohibit taking basic anatomy into account. *Cf. Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("need for privacy justifies separation"). En banc review is necessary to correct the panel majority's contrary conclusion.

I. The Plain Text of Title IX and the Governing Regulations Unambiguously Allow for Sex-Specific Private Facilities.

The plain language of Title IX rejects the Department of Education's non-binding guidance and renders inappropriate the "controlling weight" the panel majority ascribed to it. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016). Congress in 1972, when Title IX was passed, clearly had a binary view of "sex" and used the phrase "both

sexes"—referring to biological males and females—twice. 20 U.S.C. § 1681. Congress also permitted schools to "maintain[] separate living facilities for the different sexes," specifically allowing separate spaces for biological males and females. 20 U.S.C. § 1686; *see also* 34 C.F.R. 106.32 (allowing "separate housing on the basis of sex"). DOE, through a significant guidance document that is "non-binding [in] nature," and which the Federal Register pointedly explains should not be "improperly treated as [imposing] legally binding requirements," 72 Fed. Reg. 3432, 3433, 3435 (Jan. 25, 2007), seeks to change all of that. But the Title IX regulations cannot bear the weight DOE ascribes to them.

The 1975 Title IX regulations—like Title IX itself—plainly take a binary view of sex. The regulations allow schools to "separat[e] … students by sex within physical education classes" and have "separate sessions for *boys and girls*" during classes "that deal primarily with human sexuality," 34 C.F.R. § 106.34 (emphasis added), based on physical differences between males and females. Physiological differences require distinctive and separate spaces, which is why the Title IX regulations expressly allow schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. 106.33; *cf. Faulkner*, 10 F.3d at 232 ("The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different."). In situations where privacy or common sense dictates that biological boys and girls should be

separated, Title IX allows schools to do just that.

Numerous courts have recognized this fact. *See, e.g.*, *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 673 (W.D. Pa. 2015), *appeal docketed*, No. 15-2022 (3rd Cir. Apr. 24, 2015), *appeal dismissed* (March 30, 2016) (recognizing that Title IX allows "separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use"); *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) (finding it "clear" that Title IX and its regulations allow "separate toilet, shower and locker room facilities"); *Doe v. Clark Cty. Sch. Dist.*, No. 206-CV-1074-JCM-RJJ, 2008 WL 4372872, at *4 (D. Nev. Sept. 17, 2008) (noting that Title IX does not grant students access to opposite-sex restrooms based on their gender identity).

But the panel majority ignored the unambiguous language of Title's IX's text and governing regulations and gave "controlling weight," *G.G.*, 2016 WL 1567467, at *8, to an agency's nonbinding interpretation that is not only facially inconsistent with both, but also unprecedented in Title IX's forty-four year history, and unsupported by any persuasive logic. Administrative agencies simply lack power to "rewrite both the statute and the regulations" based on policy preferences. *Breeden v. Weinberger*, 493 F.2d 1002, 1009-10 (4th Cir. 1974). *But see G.G.*, 2016 WL 1567467, at *9 ("[A] subsequent administration [may] choose to implement a different policy …."). It is the intent of the "Congress, which enacted

[Title IX], that controls." *Moore v. Harris*, 623 F.2d 908, 821-22 (4th Cir. 1980).

II. Title IX's Legislative History Shows That Congress Did Not Intend to Ban Separate Private Facilities for Men and Women.

Title IX's sponsors recognized that it allowed separate facilities based on biological sex where privacy is concerned. Indeed, when Senator Birch Bayh introduced the bill, Senator Peter Dominick asked him about its scope:

> Mr. DOMINICK. The words "any program or activity," in what way is the Senator thinking here? Is he thinking in terms of dormitory facilities, is he thinking in terms of athletic facilities or equipment, or in what terms are we dealing here? Or are we dealing with just educational requirements?
>
> I think it is important, for example, because we have institutions of learning which, because of circumstances such as I have pointed out, may feel they do not have dormitory facilities which are adequate, or they may feel, as some institutions are already saying, that you cannot segregate dormitories anyway. But suppose they want to segregate the dormitories; can they do it?
>
> Mr. BAYH. The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. … We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated.

117 Cong. Rec. 30407 (1971) (emphasis added).

The following year, when Title IX was passed, Senator Bayh made clear that the statute would not force biological males and females to share private facilities:

> These regulations would allow enforcing agencies to permit differential treatment by sex only [sic]—very unusual cases where such treatment is absolutely necessary to the success of the program—

> such as in … sports facilities or other instances where personal privacy must be preserved.

118 Cong. Rec. 5807 (1972) (emphasis added).

The same was true in the House. Representative Fletcher Thompson, concerned about men and women using the same facilities, offered an amendment:

> I have been disturbed however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes. … The amendment simply would state that nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex.

117 Cong. Rec. 39260 (1971) (emphasis added). This amendment was eventually introduced and passed. 117 Cong. Rec. 39263 (1971); *see* 20 U.S.C. § 1686.

Congress plainly gave schools the authority to have separate private facilities for each biological sex. But the panel majority's ruling that gender identity trumps sex when the two conflict renders impossible the sex-specific facilities that Title IX expressly allows. Because Congress' intent in enacting Title IX is clear and both this Court and the DOE are "bound to give it effect," *Kofa v U.S. I.N.S.*, 60 F.3d 1084, 1093 (4th Cir. 1995), *en banc* review is required.

III. No Deference is Due the DOE's Nonbinding Guidance.

Rather than going through the proper notice-and-comment rulemaking process, DOE is attempting to redefine Title IX's definition of "on the basis of sex" through a nonbinding Questions and Answers document placed on its website.

OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf (stating that Title IX prohibits "discrimination based on gender identity."). Deferring to the DOE's reading in these circumstances would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). This the Administrative Procedure Act does not allow.

This Court should not defer to an unprecedented interpretation of Title IX that first appeared forty-years after its enactment. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (stating a "very lengthy period of conspicuous inaction" yields "unfair surprise"). Particularly as Title IX is Spending Clause legislation, which must clearly state what it requires. *Madison v. Virginia*, 474 F.3d 118, 125 (4th Cir. 2009) (noting that under the Spending Clause Congress must "impose a condition in clear and unmistakable statutory terms."). Title IX does not extend beyond biological sex, nor does it require schools to allow students into opposite sex restrooms—facts that were clearly understood by states and school districts when they accepted federal education funding. DOE's redefinition of "sex" under Title IX represents "a shift in kind, not merely degree," *Nat'l Fed'n of Indep. Bus.* 132 S. Ct. at 2605, and exceeds federal Spending Clause authority.

CONCLUSION

The Court should grant Defendant-Appellee's petition for rehearing *en banc*.

Respectfully submitted this 11th day of May, 2016.

/s/ J. Matthew Sharp

David A. Cortman
J. Matthew Sharp
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Road, NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org
msharp@ADFlegal.org
rgray@ADFlegal.org

Jordan Lorence
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington DC 20001
(202) 393-8690
jlorence@ADFlegal.org

Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@ADFlegal.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This *amici* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B), because this brief contains seven pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 Microsoft Word in Times New Roman 14-point font.

Dated: May 10, 2016

s/ J. Matthew Sharp
J. MATTHEW SHARP
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@adflegal.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I electronically filed the foregoing *amici* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

Rebecca K. Glenberg
ROGER BALDWIN FOUNDATION OF ACLU, INC.
180 N. Michigan Ave., Suite 2300
Chicago, IL 60601

Gail Deady
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219

Joshua A. Block
Leslie Cooper
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004

Jeremy David Capps
David Patrick Corrigan
Maurice Scott Fisher, Jr.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
P. O. Box 70280
Richmond, VA 23255-0000

s/ J. Matthew Sharp
J. MATTHEW SHARP
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE

Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
msharp@ADFlegal.org

Counsel for Amici Curiae

ADDENDUM

Students:

1. J.M.C.
2. K.C.
3. H.W.S.
4. H.E.S.
5. N.V.
6. A.N.W.

Parents:

7. Christopher Coates
8. Wayne Sturgeon
9. Maria Sturgeon
10. Ralph Van Ness
11. Alexis Williams

Grandparents:

12. Sue Blake
13. Joel Coates
14. Mary Coates
15. Evelyn Crump
16. Barbara Ettner
17. Richard Whiteheart

Community Members:

18. Dick Beasley
19. Debbie Gray
20. Mike Gray
21. Steven F. Gray
22. Bernice Green
23. Billy W. Hogge
24. Carolyn Hunt
25. Delores Johnson
26. Terry Allan Johnson
27. Jerry D. Johnson
28. Phyllis Johnson
29. Lynn Jolly
30. Kenneth Larson
31. Leslee Larson
32. Ruth Litschewski
33. Garry Livermon
34. Becky Livermon
35. Sue Long
36. Sandra Loveland
37. Andrew Maggard
38. R. Clayton Rogers, Ph.D.
39. Rebekah Sandridge
40. Robert Sherill
41. Mary Sherill
42. Craig Smith
43. Debbie Smoot
44. Tom West
45. Rita West

46. Dean E. Wheeler
47. E.H. Williams
48. Lucy K. Williams
49. Ivan Williams
50. Ruth Williams