

# A BRAVE NEW WORLD OF TRANSGENDER POLICY

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## INTRODUCTION

On New Year's Eve 2016, a group of Roman Catholic nuns breathed a heavy sigh of relief just before the clock struck twelve. That night a federal judge placed a nation-wide injunction on a Department of Health and Human Services (HHS) mandate that would have forced all healthcare plans regulated under Obamacare to cover sex-reassignment procedures, and that would have forced all relevant healthcare workers to perform them.<sup>1</sup> Because of the judge's ruling, the hospital run by the nuns would be safe. So, too, would the health insurance plan they provide to their employees.

Think back to Hobby Lobby and the Little Sisters of the Poor, and their victories at the Supreme Court.<sup>2</sup> This Transgender Mandate was the HHS Contraception Mandate on steroids—or hormones, as the case may be. The federal judge enjoined the mandate not simply because it was likely to violate religious liberty—though it was—but also because it was likely to be contrary to the very words of the statute it purported to implement.<sup>3</sup> As this article explains, the healthcare transgender regulation was unlawful because HHS redefined the word “sex” to mean “gender identity” without legal authority to do so. In attempting to impose this “gender identity” policy, the HHS regulations would have penalized medical professionals and health care organizations that, as a matter of faith, moral conviction, or professional medical judgment, believe that

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1. See *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 681, 692, 696 (N.D. Tex. 2016).

2. See *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (*Little Sisters of the Poor*); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

3. See *Franciscan*, 227 F. Supp. 3d at 687–89.

maleness and femaleness are biological realities to be respected and affirmed, not altered or treated as diseases.<sup>4</sup>

On the same day that the HHS regulation was finalized, May 13, 2016, the Departments of Justice and Education sent a gender identity “Dear Colleague” letter to our nation’s schools. This letter told schools that they must allow “students to participate in sex-segregated activities and access sex-segregated facilities consistent with their gender identity” because “both federal agencies treat a student’s gender identity as the student’s sex for purposes of enforcing Title IX.”<sup>5</sup>

Title IX is a 1972 law banning discrimination on the basis of sex in federally funded education programs.<sup>6</sup> It was intended to protect women and girls from harassment and discrimination, to ensure that they receive equal opportunities in education. Forty-four years later, the Obama administration was unlawfully re-writing it to say that schools must allow boys unfettered access to the girls’ bathrooms, locker rooms, dorm rooms, hotel rooms, and shower facilities. Anything less than full access to the sex-specific intimate facility of one’s choice, apparently, is a transphobic denial of civil rights and equality.

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4. The Department of Health and Human Services finalized these regulations on May 13, 2016. The regulations reinterpret Section 1557 of the Affordable Care Act, which bans discrimination by sex, to cover gender identity, requiring coverage and performance of sex reassignment surgeries and access to facilities based on patients’ chosen gender identity. The rule was placed under nationwide injunction on December 31, 2016. See Ryan T. Anderson, *New Obamacare Transgender Regulations Threaten Freedom of Physicians*, DAILY SIGNAL (May 13, 2016), <http://dailysignal.com/2016/05/13/new-obamacare-transgender-regulations-threaten-freedom-of-physicians/> [https://perma.cc/DW8E-WYXF].

5. Press Release, U.S. Dep’t of Educ., U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students (May 13, 2016), <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students> [https://perma.cc/GA4U-8J2G]; see also Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEP’T JUST. & U.S. DEP’T EDUC. 2–3 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [https://perma.cc/8P42-PCQQ]; Ryan T. Anderson, *Obama Unilaterally Rewrites Law, Imposes Transgender Policy on Nation’s Schools*, DAILY SIGNAL (May 13, 2016), <http://dailysignal.com/2016/05/13/obama-unilaterally-rewrites-law-imposes-transgender-policy-on-nations-schools/> [https://perma.cc/Y9L5-KBLY].

6. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

The Obama administration explicitly rejected compromises such as single-occupancy facilities, stating, "A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so."<sup>7</sup> And when it came to campus housing or hotels for off-campus trips, the Obama administration said that "a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations."<sup>8</sup>

The guidelines also stated that a "school may not require transgender students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate or other identification document before treating them consistent with their gender identity."<sup>9</sup> The administration went on to say, "Gender identity refers to an individual's internal sense of gender."<sup>10</sup> In other words, sheer say-so makes it so. The Obama administration, in essence, entirely gave into the demands of transgender activists.

Prior to the Obama administration's actions, parents, teachers, and local school districts could have conversations about how best to accommodate the dignity, privacy, and safety concerns of students who identify as transgender while also addressing the dignity, privacy, and safety concerns of other students. Schools could create balanced solutions that were age-appropriate and nuanced given the type of institution: kindergartens and grade schools, high schools and colleges, and graduate schools and law schools could all adopt well-tailored policies. No one assumed that a one-size-fits-all federal mandate would be appropriate for students of all ages in all types of educational institutions.

Parents, teachers, principals, and school administrators, in conjunction with students, tried to find win-win solutions for all of the parties involved and came up with appropriately tailored proposals. Schools facing this issue were sensitive to the

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7. Lhamon & Gupta, *supra* note 5, at 3.

8. *Id.* at 4.

9. Press Release, U.S. Dep't of Educ., *supra* note 5.

10. Lhamon & Gupta, *supra* note 5, at 1 (emphasis omitted).

feelings of embarrassment and discomfort that students who identify as transgender would face were they to be required to share bathrooms or locker rooms with persons of the same biological sex. At the same time, they recognized that students of the other biological sex also had dignity, privacy, and safety concerns of their own.

The solution that schools generally settled upon was to give the student who identified as transgender limited access to other facilities—such as faculty facilities, the teacher’s lounge, or the faculty locker room—or to provide single-occupancy restrooms for any student that did not feel comfortable using a multiple-occupancy intimate facility. They found a way to accommodate both the student who identified as transgender and the rest of the students. These nuanced solutions addressed all involved and reflected their dignity, privacy, and safety concerns.

These proposed solutions existed long before the recent surge in high-profile media attention on transgender issues, and details were being worked out at the local level without generating much controversy. But activists attacked these commonsense compromise policies as “transphobic.” And so, on May 13, 2016, the Departments of Justice, Education, and Health and Human Services all capitulated to the demands of trans activists.

A few months later, on September 20, 2016, the Department of Housing and Urban Development finalized a rule that required homeless shelters, battered-women shelters, and other emergency shelters to “provide all individuals, including transgender individuals and other individuals who do not identify with the sex they were assigned at birth, with access to programs, benefits, services, and accommodations in accordance with their gender identity.”<sup>11</sup> This new rule overturned a 2012 rule that exempted single-sex emergency shelters with

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11. Press Release, U.S. Dep’t. of Hous. & Urban Dev., No. 16-137, *HUD Issues Final Rule to Ensure Equal Access to Housing and Services Regardless of Gender Identity* (Sept. 20, 2016), [https://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2016/HUDNo\\_16-137](https://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-137) [<https://perma.cc/2894-H8WF>]; see also *Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64,763 (Sept. 21, 2016) (to be codified at 24 C.F.R. pt. 5) [hereinafter *HUD Rule*].

shared sleeping areas or bathrooms from President Obama's gender identity policy.

Previously, the administration was willing to admit that granting access to sex-specific shelters based on biology was not bigotry. Not so any longer. The new rule not only overturned that previous exemption for emergency shelters, it also contained no exemption for shelters run by religious organizations. And it paid no consideration at all to the particular vulnerabilities of people who need emergency shelters—women fleeing domestic and sexual abuse, or homeless people who themselves on average have higher rates of sexual abuse and mental health problems—and how gender identity policies might negatively impact these people.<sup>12</sup>

Examples of political overreach on “gender identity” can be multiplied. But these three examples are sufficient for now to help illustrate the problem. In healthcare, in education, and in housing, the government was attempting to impose a radical transgender agenda on citizens by redefining “sex” as “gender identity”—and then saying long-standing laws prohibiting discrimination on the basis of “sex” now require special privileges based on “gender identity.”

This article explains why these new gender identity policies are unlawful and why they are bad policy. For example, when Congress passed Title IX of the Education Amendments in 1972, no one could have thought that “sex” meant “gender identity.” “Sex” did not mean “gender identity” then, and “sex” does not mean “gender identity” now. Federal bureaucrats have unlawfully attempted to rewrite federal law. And in doing so they have attempted to impose a bad policy on the nation. The Obama administration turned the purpose of Title IX on its head and favored the concerns of students who identify as transgender while entirely ignoring the concerns of other students. As this article explains, valid safety, privacy, and equality concerns exist, and the Obama administration ignored them. States and local schools should take these concerns seriously and find solutions that respect all Americans.

Part of the problem in using long-standing antidiscrimination laws to now enforce “gender identity” policies is that there

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12. See *HUD Rule*, *supra* note 11.

is no clear understanding of what counts as “discrimination” on the basis of “gender identity.” This article explains that commonsense policies regarding bodily privacy and sound medicine are now simply being redefined as “discrimination”—just as “sex” is being redefined as “gender identity.”

This article closes with a roadmap on what needs to be done. In February 2017, the Trump administration took the first steps to reject the unlawful redefinition of “sex” from the Obama era.<sup>13</sup> Congress should ratify this action and prevent a future administration from undoing it by specifying that the word “sex” in our civil rights laws does not mean “gender identity” unless the people, through their elected representatives, explicitly say so. And the people should not say so: neither Congress nor the states should elevate “gender identity” to a protected class in our civil rights laws. Instead, they should let private institutions make their own policies, and they should specify that access to sex-specific facilities in public institutions is to be generally based on biology, but any individual uncomfortable with this should be given a reasonable accommodation. Meanwhile, the courts should respect the democratic process by refraining from imposing new meanings on existing antidiscrimination statutes.

#### I. PROMOTING GENDER IDEOLOGY AND PROLONGING GENDER DYSPHORIA

Gender identity policies are not simply about allowing citizens who identify as transgender to be free to live how they want to—they are policies meant to coerce the rest of us. In New York City, you can be fined up to \$250,000 if you intentionally “misgender” someone by using the wrong pronoun, even if the person requests you use politically charged pro-

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13. See Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEP’T JUST. & U.S. DEP’T EDUC. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/B78E-RFMR>] (rescinding the Dear Colleague Letter on Transgender Students); see also Ryan T. Anderson, *Trump Right to Fix Obama’s Unlawful Transgender School Policy*, DAILY SIGNAL (Feb. 22, 2017), <http://dailysignal.com/2017/02/22/trump-right-to-fix-obamas-unlawful-transgender-school-policies/> [<https://perma.cc/4FWF-P7VR>].

nouns such as “ze” and “hir”.<sup>14</sup> Indeed, a public school district in Oregon paid a teacher \$60,000 because colleagues declined to use the pronoun “they” to describe the teacher.<sup>15</sup> The teacher, Leo Soell, does “not identify as male or female but rather transmasculine and genderqueer, or androgynous.”<sup>16</sup> As UCLA Law Professor Eugene Volokh explains, “Soell wants people to call Soell ‘they,’ and submitted a complaint to the school district objecting (in part) that other schoolteachers engaged in ‘harassment’ by, among other things, ‘refusing to call me by my correct name and *gender* to me or *among themselves*.’”<sup>17</sup> Gender identity policies quickly become politically correct speech codes.

This tendency becomes even more insidious in an educational setting, where gender identity policies quickly acquire an element of indoctrination. That is, they become part of a larger program promoting gender ideology. And they run the risk of prolonging gender dysphoria in students who otherwise would have naturally come to accept and embrace their bodies. Let us take each of these claims in turn.

#### A. Gender Indoctrination at School

First, gender identity policies in our nation’s schools are not simply about respecting the dignity of students who identify as transgender. Instead, they are about forcing *all* students to embrace gender ideology. Policies disguised as “anti-bullying” programs are really anti-disagreement programs—no dissent on gender ideology will be tolerated. Consider a lawsuit filed against a public charter school in Minnesota, Nova Classical

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14. See Eugene Volokh, *You can be fined for not calling people ‘ze’ or ‘hir,’ if that’s the pronoun they demand that you use*, WASH. POST: VOLOKH CONSPIRACY (May 17, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/you-can-be-fined-for-not-calling-people-ze-or-hir-if-thats-the-pronoun-they-demand-that-you-use> [https://perma.cc/4LFC-E66N].

15. See Eugene Volokh, *Claims by transgender schoolteacher (who wants to be called ‘they’) yield \$60,000 settlement, agreement to create disciplinary rules regulating ‘pronoun usage,’* WASH. POST: VOLOKH CONSPIRACY (May 25, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/25/claims-by-transgender-schoolteacher-who-wants-to-be-called-they-yield-60000-settlement-agreement-to-create-disciplinary-rules-regulating-pronoun-usage> [https://perma.cc/USL9-VSHK].

16. *Id.*

17. *Id.* (emphasis added).

Academy. Parents of a five-year-old student sued the school because it was not accommodating enough of their “gender nonconforming” child.<sup>18</sup> Here’s how part of the complaint reads:

[W]e were told that the school was not willing to use effective materials like ‘I Am Jazz,’ would not ever conduct gender education, whether proactive or corrective, without first introducing delay and inviting or encouraging families to ‘opt out,’ and would not even—as a bare minimum—simply inform our child’s classmates of her preferred name and pronouns, without first delaying for days and inviting or encouraging families to ‘opt out’ of this information.<sup>19</sup>

*I Am Jazz* is a children’s book about Jazz Jennings, the star of a reality TV show on TLC that chronicles the life of Jennings, a biological male who came out as transgender as a toddler.<sup>20</sup> Because the school was not willing to impose this radical worldview on five-year-old kindergarteners without first notifying parents and allowing them to opt-out, it was sued. It is worth noting that the father of the five-year-old student at the center of the Minnesota lawsuit was “a PhD candidate in educational psychology at the University of Minnesota, where his research focuses on ‘the creation and implementation of gender inclusive policies and practices in K–12 public schools.’”<sup>21</sup>

As a result of the lawsuit, the school eventually caved. The journalist, Katherine Kersten, explains:

In January 2016, Nova’s board of directors approved a comprehensive, interim “gender inclusion” policy. The policy later became permanent. Under the new policy, a student can choose his or her own gender without medical approval. The school must work with transgender students to “create

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18. See Kelsey Harkness, *Nationally Ranked School Counters Complaint of Transgender Discrimination*, DAILY SIGNAL (May 2, 2016), <http://dailysignal.com/2016/05/02/nationally-ranked-school-counters-complaint-of-transgender-discrimination/> [https://perma.cc/84EL-Y5XZ].

19. *Id.*

20. See Jazz Jennings, *Jazz Jennings: When I First Knew I Was Transgender*, TIME (May 31, 2016), <http://time.com/4350574/jazz-jennings-transgender/> [https://perma.cc/U7M7-CXNC].

21. Katherine Kersten, *Transgender Conformity*, FIRST THINGS (Dec. 2016), <https://www.firstthings.com/article/2016/12/transgender-conformity> [https://perma.cc/K8S6-7A78].



a tailored gender transition plan.” Students are entitled to use the bathrooms, locker rooms, and overnight-trip sleeping facilities of the opposite sex. They also have a right to demand that others address them using their “preferred name” and pronouns.<sup>22</sup>

Of course, this “gender inclusion” policy goes well beyond sex-specific intimate facilities and pronouns: it would encompass an entire curriculum. For example, under this new policy, “[a]ll K–5 students would read a book called *My Princess Boy*, ‘which tells the story of a boy who expresses his true self by dressing up and enjoying traditional girl things.’”<sup>23</sup> Here is how Emily Zinos, a mother who ended up having to pull her child out of Nova, put it:

With sexual difference erased from all policy and practice at Nova, I had to face the prospect of my children sharing locker rooms with the opposite sex, learning bogus theories in science class about gender existing on a spectrum, and being punished for violations of “preferred” pronoun use. Up to this point, Nova had always taken its time in selecting curricula, at times writing its own textbooks. Now, unsubstantiated claims of bullying were used to pressure committees to approve materials and policies that were anti-scientific and that supplanted parental authority. This didn’t sound like the school I had signed up for—this was ideological indoctrination.<sup>24</sup>

In a follow-up essay, Zinos explains what is at stake with gender identity policies at schools:

[S]chools will teach children to accept an ideology that is predicated on the lie that biological sex plays second fiddle to a self-proclaimed, subjective gender identity, and that the sex of one’s body is mutable or even irrelevant. This isn’t just an idea that you can tuck away in a unit study or an anti-bullying presentation. It will inevitably find its way into every aspect of a school and make a deep impression on the developing minds of children. For example, girls, under the regressive mandates of anti-bullying and gender inclusion

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22. *Id.*

23. *Id.*

24. Emily Zinos, *Time for Parents to Resist Transgender Activism*, FIRST THINGS (Jan. 20, 2017), <https://www.firstthings.com/web-exclusives/2017/01/time-for-parents-to-resist-transgender-activism> [<https://perma.cc/W9RD-2UDA>].

policies, would have to agree to call boys in their locker room “girls,” effectively losing their rights to free speech and to privacy from males. And science—particularly biology—would die a quick death at the hands of a concept that necessarily eradicates observable facts about human sexuality. Gender ideology in the curriculum is a lie enshrined as truth.<sup>25</sup>

There will always be something taught about sex, gender, and gender identity in our nation’s schools. The questions are whether what is taught will be true or false, and whether it will respect parental authority or undermine it. And another question: whether it will help children or harm them. Zinos asks these questions to other parents:

Will we allow our young and vulnerable children to be fed a false anthropology rather than teaching them to speak the truth boldly? Will we consent to our children’s sterilization rather than patiently guiding them toward an appreciation of their bodies? Will we treat our children’s mental health issues with double mastectomies rather than demand that doctors provide a true remedy?<sup>26</sup>

#### B. *Prolonging Gender Dysphoria*

The first step in answering these questions correctly is to resist the efforts to indoctrinate our nation’s children. Here Zinos and the other parents at Nova who opposed gender ideology find support from medical experts. In an amicus brief to the Supreme Court of the United States, Drs. Paul McHugh, Paul Hruz, and Lawrence Mayer explain how gender identity policies in schools run the risk of prolonging gender dysphoria which may otherwise have naturally resolved itself. They write:

It is well-recognized, too, that repetition has some effect on the structure and function of a person’s brain. This phenomenon, known as *neuroplasticity*, means that a child who is encouraged to impersonate the opposite sex may be less likely to reverse course later in life. For instance, if a boy repeated-

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25. Emily Zinos, *Biology Isn’t Bigotry: Christians, Lesbians, and Radical Feminists Unite to Fight Gender Ideology*, PUBLIC DISCOURSE (Mar. 6, 2017), <http://www.thepublicdiscourse.com/2017/03/18894/> [https://perma.cc/2EYY-2Z4S].

26. *Id.*

ly behaves as a girl, his brain is likely to develop in such a way that eventual alignment with his biological sex is less likely to occur. Obviously then, some number of gender dysphoric children who would naturally come to peacefully accept their true sex are prevented from doing so by gender-affirming policies like those mandated by the Fourth Circuit.<sup>27</sup>

At issue in the case that was pending before the Supreme Court—before the Trump administration reversed President Obama’s policy that caused the lawsuit<sup>28</sup>—was a Fourth Circuit court ruling giving deference to an Obama administration interpretation of a regulation implementing Title IX to require schools to generally “treat transgender students consistent with their gender identity.”<sup>29</sup> But as Drs. McHugh, Hruz, and Mayer conclude, “policies such as those at issue in this lawsuit will cause some young adults who would have realigned with their true sex to instead attempt to change it through surgery.”<sup>30</sup>

In an expert declaration to a federal district court, Dr. Hruz elaborated:

Since the vast majority of pre-pubertal children with gender dysphoria (80–95%) will revert back to a gender identity consistent with their sex, forced societal cooperation with transgender identification carries the high risk of interfering with eventual desistance. With currently available data, it is not possible to accurately predict those individuals who will desist from those who will persist in transgender identity.<sup>31</sup>

In another expert declaration, he continues:

One might expect that such social affirmation measures would interfere with known rates of gender resolution. Any activity that encourages or perpetuates transgender persistence for those who would otherwise desist can cause signif-

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27. Brief of Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. as Amici Curiae supporting Petitioner at 16, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 15–2056 (2017), 2017 WL 219355, at \*16 (footnote and citation omitted) [hereinafter *McHugh Brief*].

28. See *Battle & Wheeler*, *supra* note 13.

29. See *G. G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

30. *McHugh Brief*, *supra* note 28, at 20. .

31. Rebuttal Expert Declaration of Paul W. Hruz, at 8–9, *United States v. North Carolina*, No. 1:16-cv-00425-TDS-JEP (M.D.N.C. Oct. 6, 2016).

ificant harm, including permanent sterility, to these persons. This is particularly concerning given that children are likely incapable of making informed consent to castrating treatments.<sup>32</sup>

Policies such as the one adopted by Nova run the risk of prolonging the struggles of transgender students rather than alleviating them.

## II. GENDER IDENTITY MANDATES ARE BAD POLICY

Even if one agreed entirely with the claims of transgender activists about the nature of gender identity, enacting their preferred public policies still does not follow—their preferred policies entirely ignore competing considerations. In this and the next two sections—on privacy, safety, and equality—I present arguments that need to be taken into account when crafting public policy for everyone, even if one agrees with gender ideology.<sup>33</sup> First up, privacy.

### A. Privacy

The Obama gender identity guidelines ignore legitimate privacy concerns. Sex-specific intimate facilities exist in the first place to provide a sufficient level of bodily privacy. This is something that people on both sides of the political spectrum once understood. Justice Ruth Bader Ginsburg, for example, in her majority opinion for the Supreme Court forcing the Virginia Military Institute to become coeducational, wrote that such a change “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”<sup>34</sup>

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32. Expert Declaration of Paul W. Hruz, Exhibit H, at 38, Defendants’ and Intervenor-Defendants’ Brief in Opposition to the United States’ Motion for Preliminary Injunction, *United States v. North Carolina*, No. 16-00425 (M.D.N.C. Aug. 17, 2016) [hereinafter *Hruz Expert Declaration*].

33. The next three sections draw on a report I co-authored with Melody Wood for The Heritage Foundation. See Ryan T. Anderson & Melody Wood, *Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do*, HERITAGE FOUND. (Mar. 23, 2017), <http://www.heritage.org/education/report/gender-identity-policies-schools-what-congress-the-courts-and-the-trump> [https://perma.cc/5LYG-PTY6].

34. *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).

Indeed, Justice Ginsburg has been consistent over the years in response to concerns about privacy. When some critics argued that the Equal Rights Amendment, a predecessor of Title IX that never became law, would have required unisex intimate facilities, Ginsburg pushed back. In 1975, when Justice Ginsburg was a law professor at Columbia University, she wrote an op-ed for the *Washington Post* explaining that a ban on sex discrimination would not require such an outcome: "Again, emphatically not so. Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle."<sup>35</sup> In other words, the Constitution requires protection for the right of bodily privacy, and equality claims do not override it.

Justice Ginsburg's colleague, Justice Anthony Kennedy, makes a related point that acknowledging biological differences is not the same as engaging in stereotyping, and thus not a violation of equality: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real."<sup>36</sup> We need to be clear on which sex differences are real and which are merely stereotypes. Labeling everything a stereotype or a social construct disserves everyone.

Many courts have defended the bodily privacy rights of people in a variety of settings.<sup>37</sup> The U.S. Court of Appeals for the

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35. Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21; see also Eugene Volokh, *Prominent Feminist: Bans on Sex Discrimination 'Emphatically' Do Not 'Require Unisex Restrooms'*, WASH. POST: VOLOKH CONSPIRACY (May 9, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms> [<https://perma.cc/P83L-VAQB>].

36. *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

37. The U.S. Court of Appeals for the Fourth Circuit, for example, has ruled that prisoners have a right to bodily privacy. With the exception of true emergencies, prisoners have a right not to be seen in a state of undress by guards of the opposite sex. See *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (affirming a judgment in favor of a female prisoner whose clothing was forcibly removed by male guards and noting that although individuals "in prison must surrender many rights of privacy," it remains true that "[m]ost people . . . have a special sense of

Fourth Circuit has iterated “society’s undisputed approval of separate public rest rooms for men and women based on privacy concerns.”<sup>38</sup> As the State of North Carolina has explained, the Department of Justice’s prison regulations follow this principle: “[T]hose regulations tightly restrict ‘cross-gender’ strip searches, pat-down searches, and visual body cavity searches, and also require policies that generally ‘enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia.’”<sup>39</sup>

Privacy is clearly a paramount concern. But the 2016 Obama Administration’s “Dear Colleague” letter instructs schools that they may not notify students (or their parents) about whether they will have to share a bedroom, shower, or locker room with a student of the opposite biological sex.<sup>40</sup> The Women’s Liberation Front (an organization from the left) and the Family Policy Alliance (an organization from the right) point out the double standard when it comes to whose privacy is being protected: “It is truly mind-boggling that informing women as to which men might have the ‘right’ to share a bedroom with them is an ‘invasion of privacy,’ but it is *not* an invasion of privacy to invite those men into women’s bedrooms in the first place.”<sup>41</sup>

It is entirely reasonable for people not to want to see the opposite sex in a state of undress, regardless of their gender identity. Likewise, it is entirely reasonable for people not to want to be seen in a state of undress by people of the opposite sex, regardless of their gender identity. The public interest law firm Alliance Defending Freedom (ADF) explains this long-running American practice:

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privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating”).

38. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).

39. Defendants’ and Intervenor-Defendants’ Brief in Opposition to the United States’ Motion for Preliminary Injunction at 68, *United States v. North Carolina*, No. 16-00425, (M.D.N.C. Aug. 17, 2016) (citations omitted) (quoting 28 C.F.R. § 115.15(c)–(d)).

40. See Lhamon & Gupta, *supra* note 5.

41. Brief of Women’s Liberation Front and Family Policy Alliance as Amici Curiae Supporting Petitioner at 6, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S.Ct. 1239 (2017) (No. 16-273), 2017 WL 192762 (emphasis in original) [hereinafter *WoLF & FPA Brief*].

In the late 1800s, as women began entering the workforce, the law developed to protect privacy by mandating that work place restrooms and changing rooms be separated by sex. Massachusetts adopted the first such law in 1887. By 1920, 43 of the (then) 48 states had similar laws protecting privacy by mandating sex-separated facilities in the workplace. Because of our national commitment to protect our citizens, and especially children, from the risk of being exposed to the anatomy of the opposite sex, as well as the risk of being seen by the opposite sex while attending to private, intimate needs, sex-separated restrooms and locker rooms are ubiquitous in public places.<sup>42</sup>

This concern is particularly heightened for minors, especially as children go through puberty and rightly desire bodily privacy. “Specifically,” adds ADF, “minors have a fundamental right to be free from State-compelled risk of exposure of their bodies, or their intimate activities, such as occur within restrooms and locker rooms, to the opposite biological sex.”<sup>43</sup>

Bodily privacy is also of particular concern to women who have been victims of sexual abuse. Seeing a naked male body, particularly the genital area, can function as a traumatic trigger. Whether the naked male body they suddenly see in front of them belongs to a man who identifies as a woman (and has not had surgery) or a man who identifies as a man (and has not had surgery) is of no moment to survivors of sexual abuse who are caught in that situation.

Safe Spaces for Women, a group that “provides survivors of sexual assault with care, support, understanding and advice,”<sup>44</sup> recently submitted an amicus brief to the Supreme Court explaining how gender identity policies can negatively affect such women:

Safe Spaces for Women has a strong interest in ensuring that the voices of women who have suffered sexual abuse are heeded when policies are made that may directly affect their

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42. Verified Complaint for Injunctive and Declaratory Relief at 55, *Students & Parents For Privacy v. U.S. Dep’t of Educ.*, No. 16-4945 (N.D. Ill. May 4, 2016), 2016 WL 2591322.

43. *Id.* at 56.

44. Brief of Safe Spaces for Women as Amicus Curiae in Support of Neither Party at 1, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-273 (2017), 2017 WL 74871, at \*1 [hereinafter *Safe Spaces for Women Brief*].

physical, emotional, and psychological well-being. This includes policies that require educational institutions covered by Title IX to admit to female showers, locker rooms, and restrooms biological males who identify as female. While Safe Spaces for Women bears no animus toward the transgendered community, it is deeply concerned that . . . survivors of sexual assault are likely to suffer psychological trauma as a result of encountering biological males—even those with entirely innocent intentions—in the traditional safe spaces of women’s showers, locker rooms, and bathrooms.<sup>45</sup>

The brief goes on to note that the Obama Administration issued its guidance “without giving those affected a voice in the process . . . improperly circumvent[ing] the notice and comment process when that process was needed most.”<sup>46</sup> As the brief further notes:

Women who have suffered sexual assault are especially sensitized to the risks posed to their physical and emotional wellbeing by allowing biological males to enter the traditional safe spaces of women’s showers, locker rooms, and restrooms. Moreover, these women are vulnerable to suffering emotional trauma as a result of encountering biological males in those spaces—including those with entirely innocent intentions.<sup>47</sup>

Several families have expressed similar concerns to the Supreme Court. Consider the declaration of Y.K., the parent of several minor children, including C.K.:

C.K. currently attends a middle school within the Charlotte-Mecklenburg School System. She is required to change clothes at school for curricular activities, which includes undressing in front of other students within a large open single-sex locker room.

She is not aware of any private single-stall changing facilities. But even if those were available, she would feel ostracized from the rest of her peers by being required to change away from the rest of the girls in order to avoid undressing in front of a male or seeing a male undress in front of her.

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45. *Id.* at 2.

46. *Id.* at 2–3.

47. *Id.* at 3.



She experiences anxiety, discomfort, and embarrassment at the thought of having to change in front of a boy or a man, and the fact that a male may profess a female gender identity does not reduce her anxiety. She also fears that some men may profess a female identity as a pretense to access the locker room where she is changing.

C.K. has been afraid and anxious about returning to school this year because of the school system's new policy regarding sex-specific restrooms, locker rooms, and changing facilities. Her anxiety has been slightly allayed because the new policy is currently on hold as a result of a recent Supreme Court ruling, but nonetheless the thought that she will have to undress in the presence of males, and be subject to males undressing in front of her, once that policy goes back into effect, is deeply distressing to her.<sup>48</sup>

Consider also the declaration of S.H., a fourteen-year-old who attended an Illinois public middle school:

My former public middle school feeds into a public high school which permits males into female restrooms, based upon whether they profess a female gender identity. The high school district adopted this policy a couple of years ago, without notifying the parents of this change. The school district also let one student have access to locker rooms formerly reserved for the opposite sex.

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The idea of permitting a person with male anatomy—regardless of whether he identifies as a girl—in girls' locker rooms, showers and changing areas, and restrooms makes me extremely uncomfortable and makes me feel unsafe as well.

Even the idea that a boy or man is allowed in those areas makes me anxious and fearful, regardless of whether I ever encounter them in any of those places.

I feel unsafe because I am concerned that a boy or man can access the girls' facilities by just professing a female identity, and that would allow them to take advantage of the school's policies in order to see me and my friends as we have to un-

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48. Declaration of Y.K., Exhibit O, at 2–3, Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, *United States v. North Carolina*, No. 16-00425 (M.D.N.C. Aug. 17, 2016).

dress for school classes. They could take pictures of us with their phones and then post them to the internet.

I would feel especially violated in the event that the school district's policy enabled a person with male genitalia, regardless of what gender that person professes, to see me partially or fully undressed. I also do not want to be exposed to male genitalia in any way while in facilities formerly designated for girls only.<sup>49</sup>

Finally, consider the testimony of J.S., recounted in the Safe Spaces for Women amicus brief:

In Washington state the Human Rights Commission passed a Washington Administrative Code allowing men who gender identify as female to enter women's locker rooms, spas, and restrooms. As a survivor of childhood molestation and rape, the passage of this law left me feeling vulnerable and exposed in areas [in which] I should be protected. I worked for many years to heal from the emotional, physical, and spiritual effects of the trauma inflicted by my childhood attacker. Depression, panic attacks, suicidal thoughts, Post Traumatic Stress Disorder, and physical phantom pains are a legacy of my past abuse.

I had been panic-attack free for over a decade when Washington's law went into effect. Now, using a public bathroom is very difficult and has led to many panic attacks. I have not entered a public women's locker room in over a year. Before Washington's law was passed, if I encountered a man in the woman's bathroom or locker room, management, staff, police and the general public would all have been there to protect my privacy and safety. This is no longer the case. To be in a position where I am left exposed, separate from others and no longer have a voice is the same position I was in as a child of eight.<sup>50</sup>

American law recognizes that an interest in bodily privacy exists—not just for workers or students, but for prisoners as well—particularly in an undressed state.<sup>51</sup> If this is true in the case of prisoners, who do give up certain rights upon incarceration—

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49. Declaration of S.H., Exhibit Q, at 1–3, Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, *United States v. North Carolina*, No. 16-00425 (M.D.N.C. Aug. 17, 2016).

50. *Safe Spaces for Women Brief*, *supra* note 45, at 15.

51. *See, e.g., Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981).

tion,<sup>52</sup> why would it not also be true for minor students, almost all of whom are subject to a law mandating their attendance at school?

Some members of the political left, even today, seem to understand this basic interest in privacy. Maya Dillard Smith, former head of the American Civil Liberties Union of Georgia, resigned from her position with the ACLU after it came out in support of transgender access to formerly single-sex spaces:

I have shared my personal experience of having taken my elementary school age[d] daughters into a women's restroom when shortly after three transgender young adults over six feet with deep voices entered . . . . My children were visibly frightened, concerned about their safety and left asking lots of questions for which I, like many parents, was ill-prepared to answer . . . . Despite additional learning I still have to do, I believe there are solutions that can provide accommodations for transgender people and balance the need to ensure women and girls are safe from those who might have malicious intent.<sup>53</sup>

As Professor Jeannie Suk Gersen of Harvard Law School has written in the *New Yorker*, "The discomfort that some people, some sexual-assault survivors, in particular, feel at the idea of being in rest rooms with people with male sex organs, whatever their gender, is not easy to brush aside as bigotry."<sup>54</sup>

### B. Safety

The Obama gender identity guidelines also ignore legitimate safety concerns. In addition to protecting privacy, sex-specific intimate facilities also exist to protect girls and women from male predators. The concern is not that people who identify as transgender will engage in inappropriate acts. Rather, the concern is that predators will abuse these new gender identity pol-

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52. *See id.*

53. Jessica Chasmar, *Ga. ACLU leader resigns over Obama's transgender bathroom directive*, WASH. TIMES (Jun. 2, 2016), <http://www.washingtontimes.com/news/2016/jun/2/maya-dillard-smith-georgia-aclu-leader-resigns-ove/> [<https://perma.cc/5HYF-RF95>].

54. Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, NEW YORKER (May 24, 2016), <http://www.newyorker.com/news/news-desk/public-bathroom-regulations-could-create-a-title-ix-crisis> [<https://perma.cc/423F-VUZH>].

icies to gain readier access to victims. Several experts have testified about precisely this problem, and recent events confirm their insights.

Consider the expert testimony of Kenneth V. Lanning, a veteran of forty years in law enforcement who specializes in preventing and solving sex crimes. A former FBI Supervisory Special Agent, he was assigned to the Behavioral Science Unit and the National Center for the Analysis of Violent Crime at the FBI Academy in Quantico for twenty years. Lanning has consulted on thousands of sex crimes and has published an essential book, *Child Molesters: A Behavioral Analysis*, now in its fifth edition.<sup>55</sup>

Lanning identifies the problem that “gender-identity based access policies” (GIBAPs) create for sex-specific intimate facilities: “the problem with potential sex offenses is not crimes by transgendered persons. The problem . . . is offenses by males who are not really transgendered but who would exploit the entirely subjective provisions of a GIBAP . . . to facilitate their sexual behavior or offenses.”<sup>56</sup> As Lanning explains:

[A]llowing a man, based only on his claim to be [a] transgendered woman, to have unlimited access to women’s rest rooms, locker rooms, changing rooms, showers, etc. will make it easier for the type of sex offense behavior previously described to happen to more women and children. Such access would create an additional risk for potential victims in a

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55. KENNETH V. LANNING, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR PROFESSIONALS INVESTIGATING THE SEXUAL EXPLOITATION OF CHILDREN* (5th ed. Nat’l Ctr. for Missing & Exploited Children 2010), [http://www.missingkids.com/en\\_US/publications/NC70.pdf](http://www.missingkids.com/en_US/publications/NC70.pdf) [<https://perma.cc/N7QA-XF4E>].

56. Expert Declaration and Report of Kenneth V. Lanning, Exhibit M, at 1, 12, Defendants’ and Intervenor-Defendants’ Brief in Opposition to the United States’ Motion for Preliminary Injunction, United States v. North Carolina, No. 16-00425 (M.D.N.C. Aug. 17, 2016) [hereinafter *Lanning Expert Declaration*].

Retired Sheriff Tim Hutchison agrees: “The risks of GIBAPs do not come from transgender use of public facilities that do not line up with birth certificates. Rather, non-transgender male sex offenders who prefer female victims will use GIBAPs to obtain better access to their victims for different types of sex crimes.” Expert Opinion of Sheriff Tim Hutchison (Retired), Exhibit N, at 8, Defendants’ and Intervenor-Defendants’ Brief in Opposition to the United States’ Motion for Preliminary Injunction, United States v. North Carolina, No. 16-00425 (M.D.N.C. Aug. 17, 2016) [hereinafter *Hutchison Expert Declaration*].

previously protected setting and a new defense for a wide variety of sexual victimization . . . .<sup>57</sup>

Tim Hutchison, the retired sheriff of Knox County, Tennessee, which includes the City of Knoxville and the University of Tennessee, agrees. Drawing on more than thirty-three years of experience in law enforcement, he testifies to what many local law enforcement officials know: “Public restrooms are crime attractors, and have long been well-known as areas in which offenders seek out victims in a planned and deliberate way.”<sup>58</sup> More specifically, Hutchison states that “[a]ccess policies to restrooms based on ‘gender identity’ create real and significant public safety and privacy risks, especially in women’s and children’s restrooms/dressing rooms. These incidents are already occurring.”<sup>59</sup>

Part of the problem is that many sex crimes depend on intent, which will be harder to prove with gender identity policies. Lanning explains that predators “will use the cover of gender-identity-based rules or conventions to engage in peeping, indecent exposure, and other offenses and behaviors.”<sup>60</sup> Additionally, Lanning argues that “[c]laims that existing laws are sufficient to address abuse of GIBAPs and similar social customs by male sex offenders are particularly weak, because the specific types of illegal conduct most likely to be encouraged by the policies are intent-based offenses.”<sup>61</sup> Hutchison notes that “[p]eople pushing for the adoption of GIBAPs are downplaying or dismissing serious and legitimate public safety concerns because they do not see (or maybe do not want to see) the problem.”<sup>62</sup>

Gender identity policies also lack a clear and objective definition and standard of who belongs where. Lanning elucidates the problems created by the subjectivity inherent in GIBAPs:

[O]bjective standards are also important to effective law enforcement. Law enforcement officers and prosecutors will be

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57. *Lanning Expert Declaration*, *supra* note 56, at 13.

58. *Hutchison Expert Declaration*, *supra* note 56, at 6–7.

59. *Id.* at 7.

60. *Lanning Expert Declaration*, *supra* note 56, at 13.

61. *Hutchison Expert Declaration*, *supra* note 56, at 15.

62. *Id.* at 7.

less likely to record, investigate, or charge indecent exposure or peeping offenses in a GIBAP environment, because there is no objective standard for determining whether someone born a male can lawfully be present in a women-only facility. It would be more difficult to prove lascivious intent when self-reported gender identity drives access rights, and easier to accuse law enforcement personnel of discrimination. This is made even more difficult when that self-reporting need not be corroborated in any way whatsoever.<sup>63</sup>

And just as fear of being accused of bigotry or discrimination can make law enforcement personnel less likely to investigate or enforce sex crime statutes, Lanning contends that the same fear can make women less likely to report certain forms of sexual misconduct, such as peeping and indecent exposure:

Under such policies, the very real victims of such conduct—women deliberately exposed to the male genitals of an exhibitionist, for example—would be forced to consider whether the exposure was merely the innocent or inadvertent act of a transgendered individual. Moreover, because GIBAPs and similar social conventions link facility access to self-reported gender *identity*, a victim may be unwilling to report an exhibitionist appearing to be a male for fear of being accused of bigotry or gender identity discrimination. As a result, reporting of public-facility sex crimes is likely to *decrease* as a result of GIBAPs and similar social conventions, even as the actual number of offenses *increases*.<sup>64</sup>

This danger is particularly acute with children, who are already less likely to report abuse. “With a GIBAP in effect,” explains Hutchison, “sex crimes would increase, but an even larger percentage of those crimes would go unreported. In fact, children often delay reporting of sexual abuse until adulthood.”<sup>65</sup> According to Hutchison, many women are likewise afraid to make reports of sex crimes: “The decrease in reporting would not just be because victims and bystanders would be less certain that a violation had occurred. Most women are already afraid to report suspected crime or suspicious activity if

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63. Lanning Expert Declaration, *supra* note 56, at 18.

64. *Id.* at 14 (emphasis in original).

65. Hutchison Expert Declaration, *supra* note 56, at 10.

they think that people will label them for making a report.”<sup>66</sup> Potential accusations of bigotry and transphobia could exacerbate this dangerous phenomenon. So although “it is good that society is becoming more accepting of different people,” Hutchison concludes, “the fear of being accused of bigotry creates a public safety risk.”<sup>67</sup>

Sheriff Hutchison illustrates the difficulties in the new conventions: “Is a biological male who displays his private parts to a woman while coming out of a women’s restroom stall a flasher or transgendered? What about the biological male whose eyes wander while in a women’s locker room?”<sup>68</sup>

Many women have already been victimized by men entering women’s spaces:

- In Toronto, a man posed as a transgender woman (“Jessica”) to sexually assault and criminally harass four women—including a deaf woman and a survivor of domestic violence—at two women’s shelters. Previously, he had preyed on other women and girls whose ages ranged from as young as five to as old as fifty-three.<sup>69</sup>
- In Virginia, a man presented as a woman in a long wig and pink shirt to enter a women’s restroom at a mall to take pictures of a five-year-old girl and her mother.<sup>70</sup>
- In Washington, a man used a women’s locker room at a public swimming pool, and when staff asked him to leave, the man claimed that “the law has

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66. *Id.*

67. *Id.*

68. *Id.* at 12.

69. See Sam Pazzano, *Predator who claimed to be transgender declared dangerous offender*, TORONTO SUN (Feb. 26, 2014), <http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender> [<https://perma.cc/KB2Z-GMKD>].

70. See *Man Dressed as Woman Spies into Mall Bathroom Stall in Virginia, Police Say*, NBC WASH. (Oct. 14, 2015), <http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Spies-Into-Mall-Bathroom-Stall-in-Virginia-Police-Say-332934761.html> [<https://perma.cc/Q2PE-96Q7>].

changed and I have a right to be here.”<sup>71</sup> He later returned while young girls were using the locker room to change for swim practice.<sup>72</sup>

- In Toronto, two separate occurrences of voyeurism took place on campus after the University of Toronto implemented a policy of gender-neutral bathrooms. In both cases, individuals used their cell phone cameras to film women showering, prompting the University of Toronto to revise its new policy.<sup>73</sup>
- In Minnesota, a biologically male high school student who identifies as female was allowed access to the girls’ locker rooms, where the student danced “in a sexually explicit manner—‘twerking,’ ‘grinding,’ and dancing like he was on a ‘stripper pole,’” and flashed his underwear while dancing.<sup>74</sup>
- In Milwaukie, Oregon, Thomas Lee Benson was arrested for dressing as a woman to enter the women’s locker room at an aquatic park, having been convicted previously of sexual abuse, purchasing child pornography, and unlawful contact with a child.<sup>75</sup>
- In Everett, Washington, a man wearing a wig and a bra was arrested for entering the women’s bathroom at Everett Community College and admitted

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71. Mariana Barillas, *Man Allowed to Use Women’s Locker Room at Swimming Pool Without Citing Gender Identity*, DAILY SIGNAL (Feb. 23, 2016), <http://dailysignal.com/2016/02/23/man-allowed-to-use-womens-locker-room-at-swimming-pool-without-citing-gender-identity/> [https://perma.cc/N2XL-6FHJ].

72. *See id.*

73. See Jessica Chin, *University of Toronto Gender-Neutral Bathrooms Reduced After Voyeurism Reports*, HUFFINGTON POST CANADA (Oct. 6, 2015), [http://www.huffingtonpost.ca/2015/10/06/u-of-t-bathrooms-voyeurism\\_n\\_8253970.html](http://www.huffingtonpost.ca/2015/10/06/u-of-t-bathrooms-voyeurism_n_8253970.html) [https://perma.cc/J2QH-NXRJ].

74. Kelsey Harkness, *Minnesota Students and Parents File Lawsuit Against Obama’s Bathroom Mandate*, DAILY SIGNAL (Sept. 8, 2016), <http://dailysignal.com/2016/09/08/minnesota-students-and-parents-file-lawsuit-against-obamas-bathroom-mandate/> [https://perma.cc/H58Q-7MW7].

75. See Rick Bella, *Cross-dressing sex offender released to community supervision*, OREGONIAN (May 3, 2012), [http://www.oregonlive.com/milwaukie/index.ssf/2012/05/cross-dressing\\_sex\\_offender\\_re.html](http://www.oregonlive.com/milwaukie/index.ssf/2012/05/cross-dressing_sex_offender_re.html) [https://perma.cc/E7J4-FSXQ].



under police questioning that “he was the suspect in an earlier voyeurism incident.”<sup>76</sup>

Similar incidents have taken place in the United States at several Target stores since the company announced, in April 2016, its policy of allowing bathroom and fitting room access in accordance with gender identity, rather than biological sex.

- In July 2016, Sean Patrick Smith, a biological man who identifies as a woman and was wearing a wig and dress, was charged with secretly recording an eighteen-year-old girl changing into swimwear in a Target fitting room in Idaho.<sup>77</sup> Although Smith claims that he is transgender, he admitted to police to having recorded women undressing in the past for the “same reason men go online to look at pornography.”<sup>78</sup>
- In September 2016, customers saw a man taking pictures of women changing in the stall next to him at a unisex Target dressing room in Brick, New Jersey.<sup>79</sup>

Melody Wood and I documented over 130 examples of men charged with using bathroom, locker room, and shower access to target women for voyeurism and sexual assault in a recent report we authored for The Heritage Foundation.<sup>80</sup> Intimate facilities are already places where woman can feel unsafe, so why remove essential safeguards?

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76. See *Police: Man in bra and wig found in women's bathroom*, KOMO NEWS (Mar. 15, 2012), <http://komonews.com/archive/police-man-in-bra-and-wig-found-in-womens-bathroom> [https://perma.cc/RV6S-3ZTY].

77. See Niraj Chokshi, *Transgender Woman Is Charged with Voyeurism at Target in Idaho*, N.Y. TIMES (Jul. 14, 2016), <https://www.nytimes.com/2016/07/15/us/target-transgender-idaho-voyeurism.html> [https://perma.cc/D654-JRRV].

78. Affidavit of Probable Cause for Warrantless Arrest Under I.C.R. 5 at 1–2, *Idaho v. Sean Patrick Smith*, Dist. Ct. of the Seventh Jud. Dist., State of Idaho, County of Bonneville, Magis. Div., Case No. CR-16-8468, <http://assets.eastidahonews.com/wp-content/uploads/2016/07/13132732/state-of-idaho-vs-smith-affadavit.pdf> [https://perma.cc/F6YH-Z5D7].

79. *Man seen reaching under stall with phone in Target dressing room in New Jersey*, WABC TV (Sept. 12, 2016), <http://abc7ny.com/news/man-seen-reaching-under-stall-with-phone-in-nj-target-dressing-room/1508431/> [https://perma.cc/LX8M-HUGJ].

80. See Anderson & Wood, *supra* note 34, at 25.

The safety risks created by gender identity policies are partly a result of the nebulous concept of gender identity. President Obama's gender identity guidelines provided no legal criteria for determining who is a "transgender" person.<sup>81</sup> Other institutions, including the U.S. Department of State, the Olympics, and the NCAA, require actual evidence for determining gender identity and deciding who shall be treated as transgender.

Lanning points out that "[t]he State Department requires a statement from an attending physician stating that he or she has a doctor/patient relationship with the subject, and stating that the subject has completed or is in process of appropriate clinical treatment for gender transition."<sup>82</sup> He adds that this "is very different from the subjective standard in . . . the Department of Justice/Education guidelines, which allow people to use female-only facilities based solely on their subjective 'internal sense' of gender identity."<sup>83</sup> The Olympics requires men who identify as women to "demonstrate that their testosterone level has been below a certain cutoff point for at least one year before their first competition."<sup>84</sup> The NCAA allows a man who identifies as a woman to compete on a women's team only "if the athlete obtains a doctor's certification of the subject's intention to transition to a woman, and that hormone therapy has actually begun."<sup>85</sup>

Lanning concludes that "[s]uch objective standards are also important to effective law enforcement."<sup>86</sup> Hutchison concurs:

If someone could enter a public facility based entirely upon their "internal sense of gender," then law enforcement personnel, bystanders, and potential victims would have to be able to read minds in order to determine whether a man entering a women's facility was really transgender or was instead there to commit a sex offense . . . [T]he non-transgender male sex offender would simply have to claim

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81. See *supra* notes 9–10.

82. *Lanning Expert Declaration*, *supra* note 56, at 17.

83. *Id.*

84. *Id.* at 17–18.

85. *Id.* at 17.

86. *Id.* at 18.

that his “gender identity” was female to make successful prosecution difficult if not practically impossible.<sup>87</sup>

In other words, objective definitions and standards are necessary for our laws to work.

### C. Equality

The Obama-era gender identity guidelines undermine the equality purposes of Title IX for girls and women. Many women worry that the original purpose of Title IX—working toward women’s equality in education—is in danger when “sex” is redefined to mean “gender identity.” This leads to harms in educational opportunity and in legal equality for biological girls and women.

In an amicus brief submitted to the Supreme Court, the Women’s Liberation Front (WoLF) and the Family Policy Alliance (FPA), while generally disparate politically, jointly acknowledge the dangers of redefining sex for women: “[R]edefining ‘sex’ to mean ‘gender identity’ is a truly fundamental shift in American law and society. It also strips women of their privacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women’s very existence.”<sup>88</sup>

WoLF and the FPA argue that redefining Title IX would particularly affect women’s educational access by allowing scholarships that were intended only for women to become available to biological men who identify as women. This undermines the original purpose of Title IX: “Congress enacted Title IX as a remedial statute for the benefit of women, and granting Title IX rights to men who claim they are women *necessarily violates* the rights Congress gave women in this law.”<sup>89</sup> In addition, allowing anyone who identifies as a woman to be considered a woman erases the very meaning of womanhood in law: “When the law requires that any man who wishes (for whatever reason) to be treated as a woman *is* a woman, then ‘woman’ (and ‘female’) lose all meaning. With the stroke of a pen, women’s

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87. *Hutchison Expert Declaration*, *supra* note 56, at 11.

88. *WoLF & FPA Brief*, *supra* note 42, at 1.

89. *Id.* at 28 (emphasis in original).

existence—shaped since time immemorial by their unique and immutable biology—has been eliminated by Orwellian fiat.”<sup>90</sup>

Another brief, filed on behalf of the Women’s Liberation Front (WoLF), highlights the strange development of Title IX protections. Originally intended to ensure educational rights for women, they are now being used to *deny* women privacy, safety, educational opportunity, and equality: “The idea that women and girls must surrender their rights and protections under Title IX—enacted specifically to secure women’s access to education—in order to extend Title IX to cover men claiming to be women is a jaw-dropping act of administrative jujitsu.”<sup>91</sup> WoLF stresses that this redefinition of sex is a way to erase the legal standing of women:

Redefining “sex” to mean “gender identity” means that the sex-class comprising women and girls now includes men, with all the physiological and social characteristics that come with being male (and vice-versa). Likewise, the agencies make little effort to keep up the pretense that “transgender” is a coherent descriptor; under their policy a transgender person is simply any person who claims to be so, and that person’s “sex” is whatever they say it is whenever they say it. By rendering men legally indistinguishable from women, the policy threatens to extinguish the very meaning (and independent legal existence) of women.<sup>92</sup>

There are concerns about athletic fairness for women and girls as well. If biological males play on women’s sports teams, they often have an advantage. In Alaska, high school girls have already lost medals in track competitions because of their inability to compete with a male who identifies as a girl. In a video put out by the Family Policy Alliance’s Ask Me First campaign, one of the girls who raced against this athlete talks about the unfair aspects of allowing biological males to compete in races against girls: “There was obviously one girl in each of those races who did not get to compete because of this athlete. It’s not fair scientifically—obviously male and female are made

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90. *Id.* at 18 (emphasis in original).

91. *Id.* at 2.

92. *Id.* at 16.

differently. There are certain races for males, and certain races for females, and I believe it should stay that way.”<sup>93</sup>

Girls are also on the losing end when students who identify as transgender taking hormones compete against them in sports. In February 2017, a biological girl taking testosterone as part of a “transition” process won the Texas state championship in girls’ wrestling, completing an undefeated season against other girls (who were not taking testosterone supplements).<sup>94</sup> Accommodations should be reached so that biological girls can compete on a level playing field instead of being forced to compete and lose against biological males or biological girls who are taking male hormones that can enhance their performance.

The words “girl” and “women” mean something, and in the words of rape survivor Kaeley Triller Haver, “When gender identity wins, women always lose.”<sup>95</sup>

### III. AGENCY REDEFINITION OF “SEX” AS “GENDER IDENTITY” IS UNLAWFUL

Frequently these “victories” for gender identity come through unlawful bureaucratic actions. Consider what took place in education and healthcare. The Obama administration simply attempted to rewrite a federal law as it wished the law had been written originally. In 1972, when Congress passed Title IX of the Education Amendments, no one thought that “sex” meant “gender identity.” The phrase “gender identity” did not even exist outside of some esoteric psychological publications, and the word “gender” had been coined only recently

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93. Family Policy Alliance, *Ask Me First About Fairness: Tanner*, YOUTUBE (Aug. 2, 2016), [https://www.youtube.com/watch?v=Jk\\_CKFm8sI](https://www.youtube.com/watch?v=Jk_CKFm8sI) [<https://perma.cc/5HNC-QNP2>]; see also Melody Wood, *The NBA’s Transgender Bathroom Advocacy Could Point to End of Women’s Sports*, DAILY SIGNAL (Aug. 1, 2016), <http://dailysignal.com/2016/08/01/the-nbas-transgender-bathroom-advocacy-could-point-to-end-of-womens-sports> [<https://perma.cc/L2GP-CHQC>].

94. See Associated Press, *Transgender Boy Wins Texas Girls’ Wrestling Title*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/sports/transgender-boys-matches-with-girls-leave-all-unsatisfied.html> [<https://perma.cc/YLE3-ZVK2>].

95. Ryan T. Anderson, *Biology Isn’t Bigotry: Why Sex Matters in an Age of Gender Identity*, Remarks at The Heritage Foundation (Feb. 16, 2017), <http://www.heritage.org/gender/commentary/biology-isnt-bigotry-why-sex-matters-the-age-gender-identity> [<https://perma.cc/T84H-HK4J>].

in contradistinction to sex. Yet the “Dear Colleague” letter and the HHS transgender mandate both entailed redefining “sex” as “gender identity.” Indeed, the healthcare law contained no antidiscrimination policy of its own; it simply incorporated Title IX’s language. So the debate over the meaning of “sex” in Title IX has implications not only for education but also for healthcare. Thankfully, contrary to what the Obama administration wished, the term “sex” is not ambiguous and therefore cannot legitimately be redefined by executive branch agencies to mean “gender identity.”<sup>96</sup>

Federal courts agree that the meaning of the word “sex” is not ambiguous. There was no ambiguity in the original text of Title IX, which was passed to prevent sex discrimination. At the time, the word “sex” was clearly used to refer to the biological and physiological differences between men and women. In his opinion on the “Dear Colleague” guidance, federal Judge Reed O’Connor stated that the reinterpretation of sex as gender identity was directly contrary to the original intent and meaning of the law as applied in its implementing regulations: “[I]t cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between men and women . . . [T]his was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of

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96. Neither the letter issued by an acting deputy assistant secretary in the Department of Education, *see* Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec’y for Policy, Office for Civil Rights, U.S. Dep’t of Educ., to Emily Prince, (Jan. 7, 2015), [http://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf) [<https://perma.cc/DW8E-RRRU>], nor the 2016 Obama Administration’s “Dear Colleague” letter, *see* Lhamon & Gupta, *supra* note 5, went through the appropriate rulemaking process under the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). The APA requires that binding agency regulations must be subject to public notice and comment before finalization. *See* 5 U.S.C. § 553. Because the Title IX guidance letters did not follow proper administrative procedure, courts should not give them deference. These letters are not even entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), because they do not offer a plausible alternative interpretation of the unambiguous word “sex.” *See also* Ed Whelan, *Fourth Circuit Inflicts Sex Change on Title IX—Part 2*, NAT’L REV.: BENCH MEMOS (Apr. 25, 2016, 4:18 PM), <http://www.nationalreview.com/bench-memos/434535/fourth-circuit-transgender-ruling> [<https://perma.cc/86NM-Y6TX>].

§ 106.33.”<sup>97</sup> The fact that the implementing regulations allowed separate toilet, locker room, and shower facilities for the different sexes shows that Title IX was to be implemented on the basis of biological sex and that it acknowledged legitimate differences between the sexes with respect to privacy concerns.

Judge Kim R. Gibson, another federal district judge, has similarly made clear that Title IX was never intended to include protections on the basis of gender identity: “Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute.”<sup>98</sup> In particular, his opinion in a case involving the University of Pittsburgh defends the right of schools that receive federal funding to establish bathroom and locker room policies on the basis of sex: “[T]he University’s policy of requiring students to use sex-segregated bathroom and locker room facilities based on students’ natal or birth sex, rather than their gender identity, does not violate Title IX’s prohibition of sex discrimination.”<sup>99</sup>

Significantly, Judge Gibson’s opinion also makes the case that only Congress, not the courts, can expand the scope of Title IX:

Title IX’s language does not provide a basis for a transgender status claim. On a plain reading of the statute, the term “on the basis of sex” in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex. The exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited.<sup>100</sup>

Judge Gibson’s reasoning is correct. Title IX was intended to prevent discrimination on the basis of sex, not on the basis of

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97. *Texas v. United States*, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016) (citing 34 C.F.R. § 106.33). Section 106.33 reads as follows: “Comparable facilities. A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

98. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

99. *Id.* at 672–73.

100. *Id.* at 676–77 (footnotes omitted) (citation omitted).

gender identity. Congress, not courts or federal agencies, has the ability to change the scope of Title IX, but until it does so, gender identity protections cannot be considered within the scope of Title IX.

Judge Paul Niemeyer points to these same legal realities in his dissenting opinion in the Fourth Circuit case of *G.G. ex rel. Grimm v. Gloucester County School Board*.<sup>101</sup> He notes that “the majority’s opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex,”<sup>102</sup> and further explains that:

This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes . . . . [S]chools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.<sup>103</sup>

Frequently these legal redefinitions of “sex” to mean “gender identity” claim the mantle of science in their defense, that modern science shows that sex *is* gender identity. On the contrary, sex is a biological reality based on an organism’s organization. Professor Hruz, in his expert declaration to a federal district court, elaborates:

The claims of proponents of transgenderism, which include opinions such as “Gender defines who one is at his/her core” and “Gender is the only true determinant of sex” must be viewed in their proper philosophical context. There is no scientific basis for redefining sex on the basis of a person’s psychological sense of “gender.” It is erroneous and poten-

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101. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 730 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *cert. granted*, 137 S. Ct. 369 (2016), *vacated*, 137 S. Ct. 1239 (2017).

102. *Id.* at 730.

103. *Id.* at 730–31.



tially damaging to equate these opinions as established medical fact.

The prevailing, constant and accurate designation of sex as a biological trait grounded in the inherent purpose of male and female anatomy and as manifested in the appearance of external genitalia at birth remains the proper scientific and medical standard. Redefinition of what is normal based upon pathologic variation is not established medical fact.<sup>104</sup>

Professor Hruz concludes: "With regard to public restrooms and other intimate facilities, there is no evidence to support social measures that promote or encourage gender transition as a medically necessary or effective treatment for gender dysphoria."<sup>105</sup> Science does not support the redefinition of sex.

History does not support the redefinition of sex, either. The history of the words "gender," "gender identity," and "transgender" shows that they are not the same as "sex." Each of these words was coined precisely in contradistinction to "sex."<sup>106</sup> Furthermore, more recent legislative and executive branch actions show that "sex" does not mean "gender identity." Congress and the executive branch know how to make policy on the basis of "gender identity" when they want to do so. Congress has specifically included "gender identity"—as distinct from "sex" and listed alongside "sex"—in two bills: the Violence Against Women Reauthorization Act of 2013<sup>107</sup> and the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009.<sup>108</sup> The distinct inclusion of both gender identity and sex protections shows that gender identity was never intended to fall within the definition of sex. If Congress had intended to include gender identity protections within the scope of Title IX, it could have specified their inclusion, but it did no such thing.

President Barack Obama similarly showed that he understood "sex" and "gender identity" to be different categories. In his executive order barring federal contractors from "discrimi-

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104. *Hruz Expert Declaration*, *supra* note 33, at 8.

105. *Id.* at 11.

106. *See* Anderson & Wood, *supra* note 34, at 11–12.

107. Pub. L. No. 113-4, 127 Stat. 54, 118–26 (to be codified in scattered sections of the U.S. Code).

108. 18 U.S.C. § 249 (2012).

nation" on the basis of "sexual orientation and gender identity," he replaced existing protections on the basis of "sex" with protections on the basis of "sex, sexual orientation, gender identity."<sup>109</sup> In implementing an executive order placing "gender identity" alongside and in addition to "sex," President Obama showed that he did not consider gender identity protections to be legally included in protections on the basis of sex. Thus, he added "gender identity" to "sex."

Congress also knows how to reject "gender identity" provisions and has done so dozens of times. For example:

- The Employment Non-Discrimination Act<sup>110</sup> (ENDA), which would prohibit employment discrimination both on the basis of sexual orientation and on the basis of gender identity, has been introduced in almost every Congress since 1994 but has never been enacted.<sup>111</sup> Title VII of the Civil Rights Act of 1964<sup>112</sup> already bans discrimination on the basis of sex in employment, which begs the question as to why Members of Congress would attempt to pass a law for over two decades if such protection were there all along;
- The so-called Equality Act,<sup>113</sup> which would go beyond ENDA and add "sexual orientation and gender identity" (SOGI) to more or less every federal law that protects on the basis of race, has likewise never been enacted by Congress;<sup>114</sup> and

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109. Exec. Order No. 13,672, 79 Fed. Reg. 42,971–72 (July 21, 2014), <https://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf> [<https://perma.cc/MB4N-YAXT>].

110. E.g., Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

111. See Jerome Hunt, *A History of the Employment Non-Discrimination Act: It's Past Time to Pass This Law*, CTR. AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/> [<https://perma.cc/3AYD-4SMP>].

112. 42 U.S.C. §§ 2000e–2(a) (2012).

113. H.R. 2282, 115th Cong. (2017).

114. See Ryan T. Anderson, *How So-Called "Equality Act" Threatens Religious Freedom*, DAILY SIGNAL (July 23, 2015), <http://dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/> [<https://perma.cc/S3K3-6X38>].

- The Student Non-Discrimination Act,<sup>115</sup> championed by the Human Rights Campaign, which would “prohibit public schools from discriminating against any student on the basis of actual or perceived sexual orientation and gender identity,” also has never become law.<sup>116</sup>

None of these bills attempting to establish legal protections on the basis of gender identity has been authorized by Congress. Agency redefinition of sex to include gender identity explicitly goes against congressional precedent, for Congress has been explicit as to when it does and does not intend to protect on the basis of gender identity. The burden is on transgender advocates to prove that statutory terms have always carried the meaning they prefer as opposed to its plain meaning, and they have failed.

#### IV. ENFORCING ORTHODOXY THROUGH ANTIDISCRIMINATION LAW

Another aspect of the problematic nature of gender identity policies is that they frequently take existing civil rights laws that protect on the basis of “race” and “sex” and add the phrase “gender identity.” But race and sex are different than gender identity, and there is no reason to think that laws intended to combat racism and sexism will work well if gender identity is simply added to them.

##### A. *Gender Identity Differs*

Gender identity antidiscrimination laws penalize many Americans who believe that we are created male and female. These laws use the government and the power of the law to send the message that traditional convictions about human nature are not only false, but also discriminatory and rooted in animus. Gender identity policies attempt to impose by force of law a system of orthodoxy with respect to human nature: that

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115. S. 439, 114th Cong. (2015); H.R. 846, 114th Cong. (2015).

116. *Student Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN (Nov. 6, 2017), <http://www.hrc.org/resources/student-non-discrimination-act> [<https://perma.cc/8UG4-BSEA>].

one can be male, female, neither, or some combination—regardless of biology.<sup>117</sup> These laws impose this orthodoxy by punishing dissent and treating as irrational, bigoted, and unjust the belief that men and women are biologically rooted.

Current gender identity laws lack the nuance and specificity necessary for cases they seek to address. They take the existing paradigm of public policy responses to racism and sexism and assume that this paradigm is appropriate for the policy needs of people who identify as transgender. This is misguided for both conceptual and practical reasons.

Conceptually, gender identity is unlike race and sex in important ways. Gender identity is not an objective, verifiable trait, but a subjective identity. Furthermore, unlike race and sex, gender identity is partly defined in terms of actions, and actions are subject to moral evaluation, while one's status in terms of race and sex is not. As a result, existing and proposed gender identity laws define "discrimination" much too broadly, penalizing people for simply seeking not to facilitate, support, or participate in actions—such as sex "reassignment" surgeries—that they reasonably deem to be unhelpful or immoral.<sup>118</sup>

Gender identity antidiscrimination laws are not about the freedom of people who identify as transgender to engage in certain actions, but about coercing and penalizing people who in good conscience cannot endorse those actions. These laws do this by coercing and penalizing people who act on an understanding of human sexuality that is at odds with the prevailing viewpoint that the government seeks to enforce. It is one thing for the government to allow or even endorse conduct that is

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117. See generally RYAN T. ANDERSON, *TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM* (2015).

118. People opposed to interracial marriage or racially integrated lunch counters could claim they were opposed to certain actions when blacks and whites did them together, but that stops the inquiry too soon. Why were they opposed? The reason they were against blacks and whites doing things together was an attitude of white supremacy that viewed and treated blacks as less intelligent, less skilled, and in some respects less human. They thus opposed blacks interacting with whites on an equal plane. One can and should hold that we are created male and female, with male and female created for each other, without holding any hostility toward people who identify as LGBT. See generally JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* (2017). For more on this, see *infra* Part IV.C.

immoral to many citizens, but it is quite another thing for government to force others to condone and facilitate it in violation of their convictions.

There is also a practical difference between proposals for gender identity antidiscrimination policies and policies prohibiting discrimination on the basis of race or sex. The nature and extent of gender identity discrimination in the United States today is unlike racism and sexism when antidiscrimination laws were enacted (and unlike racism and sexism even today). When the Civil Rights Act of 1964 was enacted, blacks were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social harms without justification, without market forces acting as a corrective, and with the tacit and often explicit backing of government.

Blacks were denied loans, kept out of decent homes, and denied job opportunities—except as servants, janitors, and manual laborers. These material harms both built on and fortified the social harms of a culture corrupted by views of white supremacy that treated blacks as less intelligent, less skilled, and in some respects less human. Making it harder for blacks and whites to mingle on equal terms was not just incidental: it was the whole point. Discrimination was so pervasive that the risks of lost economic opportunities or sullied reputation were acceptable to the many who engaged in it. Social and market forces, instead of punishing discrimination, rewarded it through the collusion of whites (with heavy assistance from the state). Given the irrelevance of race to almost any transaction, and given the flagrant racial animus of the time, no claims of benign motives are plausible. Resort to the law was therefore necessary.<sup>119</sup>

However, a similar legal push is not necessary today. There is no widespread cisgender supremacy akin to white supremacy. There is no widespread treatment of people who identify as transgender as second-class citizens akin to Jim Crow. There are no denials of the right to vote, no lynchings, no signs over

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119. Portions of this paragraph are adapted from JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 183–84 (2017).

water fountains saying “Trans” and “Cis.” This is not to deny that there has been historic bigotry against those who identify as transgender or that it has vanished. It exists and should be addressed appropriately so that everyone is treated with dignity and respect. As with other forms of mistreatment, our communities must fight it. But the remaining instances simply cannot be compared to the systematic material and social harms wrought by racism in the 1960s and earlier. Put another way, the legal response that was appropriate to remedy the legacy of slavery and Jim Crow is not appropriate for today’s challenges.

*B. What is “Discrimination”?*

The biggest problem with gender identity antidiscrimination policies is that they do not appropriately define what counts as discriminatory. To illustrate this, consider several different cases of putative “discrimination.” The law must be nuanced enough to capture the important differences in these cases.

*1. Invidious and Rightly Unlawful Discrimination*

Racially segregated water fountains were one form of discrimination that took race into consideration—in a context where it was completely irrelevant—and then treated blacks as second-class citizens precisely because they were black. The entire point was to classify on the basis of race in order to treat blacks as socially inferior. As a result, such actions were rightly described as invidious race-based discrimination, and—given the entrenched, widespread, state-facilitated nature of the problem—they were rightly made unlawful.

Likewise, throughout much of American history, girls and women were not afforded educational opportunities equal to those available to boys and men. This form of discrimination took sex into consideration and then treated girls and women poorly precisely because of their sex, barring them from education in certain subjects or at certain levels despite being otherwise qualified. As with invidious racial discrimination, such treatment took a characteristic (in this case, sex) into consideration precisely to treat women as less than men. The law rightly deemed such actions invidious sex-based discrimination, and—again, given the entrenched, widespread, and state-facilitated nature of the problem—Title IX of the Education Amendments

was enacted to ensure that girls and women received equal educational opportunities.

2. *Appropriate and Rightly Lawful Distinctions That are not Classified as Discrimination*

When Title IX was enacted in 1972 and its implementing regulations were promulgated in 1975, the law made clear that sex-specific housing, bathrooms, and locker rooms were not unlawful discrimination. Such policies take sex into consideration, but they do not treat women as inferior to men or men as inferior to women. They treat both sexes equally *because* they take sex into consideration (they “discriminate”—in the non-pejorative sense of “distinguish”—on the basis of sex) precisely in a way that matters: by appreciating the bodily sexual difference of men and women in things such as housing, bathroom, and locker room policy.<sup>120</sup>

Would we really be treating men and women equally in anything but an artificial way if we forced men and women, boys and girls, to undress in front of each other? Yet we certainly would be treating people unequally if access to intimate facilities were based on factors wholly unrelated to privacy, such as race. As a result, policymakers did not consider sex-specific

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120. During the debate on Title IX, there was concern that its enactment would mean the end of sex-specific educational programs and sex-specific intimate facilities like bathrooms, locker rooms, and showers. Because of this concern, Congress explicitly constructed Title IX to ensure that access to living facilities could take biology into account: Section 1686 states that “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.” 20 U.S.C. § 1686 (2012).

Three years later, the Department of Health, Education, and Welfare’s implementing regulations made clear that Title IX permits “separate toilet, locker room, and shower facilities on the basis of sex,” so long as such facilities are “comparable to such facilities provided for students of the other sex.” Comparable Facilities, 34 CFR § 106.33 (2016). The regulations thereby preserved sex-specific facilities while ensuring that women’s facilities would not be inferior to men’s and vice versa. See Comment, *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806, 826 (1976). Title IX was able to provide equal opportunities for women in education without violating their privacy. Its implementation over subsequent years shows that genuine differences between men and women could be acknowledged—in many sports, such as football and basketball, women do not compete on the same teams as men because of physical differences—while allowing women equivalent opportunities to participate in school and extracurricular activities.

intimate facilities as discriminatory in the first place, and laws explicitly reflected that commonsense understanding while rightly declaring racially segregated facilities to be unlawful. The lesson here is that not all distinctions in fact should be deemed unlawful discrimination.

3. *Distinctions That are not Discriminatory at All*

If sex-specific intimate facilities are an example of lawful, legitimate policies that take sex into consideration, pro-life medical practices are examples of policies that are legitimate and lawful because they do not take sex into consideration at all. That only women can get pregnant has no bearing whatsoever on the judgment of the conscientious doctor or nurse who refuses to kill the unborn. The insistence of LGBT activists that men actually can become pregnant highlights the point: pro-life medical personal refuse to do abortions on pregnant women *and* “pregnant men” (that is, women who identify as men).

Thus, we can identify three different types of cases:

1. Cases of invidious discrimination, in which an irrelevant factor is taken into consideration in order to treat people poorly based on that factor, as with racially segregated water fountains;
2. Cases of distinctions without unlawful discrimination, in which a factor is taken into consideration precisely because it is relevant to the underlying policy and people are not treated poorly, as with sex-specific intimate facilities; and
3. Cases with neither distinctions nor discrimination, in which a particular factor simply does not enter into consideration.<sup>121</sup>

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121. There is a fourth category of “discrimination”: nonmalicious oversight or neglect. Consider the type of discrimination the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012), is meant to combat. Before enactment of the Americans with Disabilities Act of 1990, many movie theaters, for example, did not have wheelchair ramps. This was the result of an oversight with respect to the needs of people with disabilities, not because of any hostility toward them. Because such oversights were so widespread and contributed to the exclusion of people with disabilities from full participation in society, Congress acted.



C. *Gender Identity Discrimination: Real and Imagined*

Purported gender identity discrimination presents similar problems. *The Washington Post* recently reported on a woman who was suing a Catholic hospital for declining to perform a sex reassignment procedure on her that entailed removing her healthy uterus. In that report, the *Post* captures the conflation of real and imaginary discrimination:

“What the rule says is if you provide a particular service to anybody, you can’t refuse to provide it to anyone,” said Sarah Warbelow, the legal director for the Human Rights Campaign. That means a transgender person who shows up at an emergency room with something as basic as a twisted ankle cannot be denied care, as sometimes happens, Warbelow said. That also means if a doctor provides breast reconstruction surgery or hormone therapy, those services cannot be denied to transgender patients seeking them for gender dysphoria, she said.<sup>122</sup>

The two examples given, however, differ in significant ways. A hospital that refuses to treat the twisted ankles of people who identify as transgender simply because they identify as transgender would be engaging in invidious discrimination, but a hospital that declines to remove the perfectly healthy uterus of a woman who identifies as a man is not engaging in “gender identity” discrimination at all. The gender identity of the patient plays no role in the decision-making process—just as pro-life physicians do not kill unborn babies, regardless of the sex or gender identity of the pregnant person, doctors do not remove healthy uteruses from *any* patients, regardless of how they identify themselves.<sup>123</sup>

As for the Human Rights Campaign spokesperson’s claim that emergency rooms “sometimes” refuse to treat the twisted ankles of transgender patients, there is no evidence—including

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122. Sandhya Somashekhar, *Catholic groups sue over Obama administration transgender requirement*, WASH. POST (Dec. 29, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/12/29/catholic-groups-sue-over-obama-administration-transgender-requirement> [<https://perma.cc/A39N-KDGN>].

123. See Ryan T. Anderson, *How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom*, HERITAGE FOUND. (Feb. 13, 2017), <http://www.heritage.org/marriage-and-family/report/how-think-about-sexual-orientation-and-gender-identity-sogi-policies-and> [<https://perma.cc/Y9YW-V7UZ>].

on HRC's website—that it or anything similar in fact happens. Furthermore, if indeed this “sometimes happens,” it seems reasonable to think that the media would focus so much attention on it that the hospital would reverse course within hours. It therefore seems highly unlikely that this alleged problem merits a governmental response.

Just as good healthcare does not discriminate on the basis of “gender identity,” so too do good policies on sex-specific facilities. The bathroom, locker room, and housing policies at stake in this debate do not discriminate on the basis of gender identity. They make reasonable—and explicitly lawful—distinctions based on sex. All biological males, regardless of their gender identity, may use the men's room, and all biological females, regardless of their gender identity, may use the women's room. These policies do not even consider “gender identity.” They classify on the basis of “sex” in a way that Title IX and its implementing regulations explicitly permit.

To discriminate on the basis of gender identity would be to say that students who identify with their biological sex can use the school water fountains, but students who identify as transgender cannot. That would be taking a student's transgender status into account where the factor has no relation to the issue at hand and would rightly be deemed discriminatory.

Nothing of the sort takes place when it comes to policies on bathrooms, locker rooms, showers, and sports teams. The gender identity of a student is not taken into account at all. The policy simply says that with respect to certain intimate facilities, entrance should be determined on the basis of anatomy, physiology, and biology. Bathroom, locker room, shower, and athletic team policies are based on objective external expressions of sex—biology, physiology, anatomy—and not on a subjective internal sense of gender.

In other words, it is not because some people wear suits and ties and others wear dresses that there are separate bathrooms and locker rooms for men and women. The existence of sex-specific intimate facilities is explained not by our internal sense of gender, but by our external manifestations of biology. The Obama administration's argument that this is gender identity discrimination is therefore misguided. Indeed, the Obama administration once knew as much. Recall our opening discussion

of the HUD emergency-shelter policy. Originally it banned discrimination on the basis of “gender identity” but recognized that access to shelters based on biology was not discrimination. It simultaneously said it was reasonable to have single-sex shelters (based on biology) while it attempted to eliminate unreasonable discrimination. Only in 2016 was it revised to embrace such a misguided understanding of discrimination.<sup>124</sup>

Not only is it misguided, but the Obama administration’s view would *require* gender identity discrimination in schools. Under President Obama’s view, gender identity overrules biology. Therefore, a school with students who are biologically male or female and who identify with their biological sex or with the opposite sex would have to grant and deny access to its showers and lockers according to Table 1.<sup>125</sup>

TABLE 1

### Access to Lockers and Showers Under Obama Administration Guidance

ACCESS TO <u>GIRLS'</u> LOCKERS AND SHOWERS			ACCESS TO <u>BOYS'</u> LOCKERS AND SHOWERS		
Sex	Gender Identity	Access	Sex	Gender Identity	Access
Female	Female	Allowed	Male	Male	Allowed
Female	Male	Allowed	Male	Female	Allowed
Male	Female	Allowed	Female	Male	Allowed
Male	Male	Denied	Female	Female	Denied

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The table illustrates that the only students who must be denied access are those who identify with their biological sex—that is, non-transgender students—which is a clear example of irrational gender identity discrimination under the Administration’s own logic.

124. See *HUD Rule*, *supra* note 11.

125. Ryan Anderson & Melody Wood, *Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do*, HERITAGE FOUND. (Mar. 23, 2017), <http://www.heritage.org/education/report/gender-identity-policies-schools-what-congress-the-courts-and-the-trump> [<https://perma.cc/XE2X-XSN8>].

## V. CONCLUSION

Our nation's civil rights laws that prohibit discrimination on the basis of sex, such as Title IX, were enacted to ensure that girls and women would have equal opportunities, particularly in education. But federal bureaucrats have undermined these civil rights laws by extending the scope of Title IX. Title IX has become a tool to force schools and programs receiving federal funding to allow biological boys in girls' restrooms, locker rooms, and sports teams. What can be done to return our civil rights laws to their original, laudable purpose of granting girls and women equal opportunity?

Congress should continue to refuse to elevate "gender identity" as a protected class in civil rights laws and it should prevent administrative agencies from doing the same. Congress should ensure that Title IX and other civil rights laws will continue to protect girls and women. There are three actions that Congress can take to preserve these civil rights laws.

First, Congress could specify that "sex" does not mean "gender identity" in civil rights law. Language included in the Civil Rights Uniformity Act of 2017,<sup>126</sup> for example, introduced by Representative Pete Olson (R-TX), would do exactly that. The act clarifies that for the purpose of interpreting civil rights statutes, the term "sex" does not mean "gender identity."<sup>127</sup> This would prevent current and future abuses of Title IX and other civil rights law and ensure that unelected bureaucrats and judges would not get to reshape policy affecting women and girls. Schools could continue to provide separate bathroom and locker room facilities and sports teams based on biological sex, not gender identity, and religious schools could continue to operate in accordance with their beliefs without having to fear agency action against them. At the same time, such legislation could leave the door open for reasonable accommodations of people who identify as transgender. Likewise, healthcare professionals and healthcare plans would not have to perform or cover sex reassignment procedures.

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126. H.R. 2796, 115th Cong. (2017).

127. *See id.*

Second, Congress could include language in a statute offering the same clarification but targeted to the specific federal laws that have already been abused, such as (among others) Title IX of the Education Amendments of 1972, Title VII of the Civil Rights Act of 1964, and section 1557 of the Affordable Care Act (the section that was reinterpreted to produce a transgender healthcare mandate). This would reiterate that when Congress referred to a person's "sex" in these laws, what the word referred to then is what it refers to now: biological reality, not gender identity. It would achieve in piecemeal fashion what the Civil Rights Uniformity Act would achieve in wholesale fashion.

Third, Congress, based on its power of the purse, could specify that the Departments of Education, Justice, and Health and Human Services, as well as the Equal Employment Opportunity Commission, may not use any funds to implement or enforce any new administrative gender identity directives or regulations against persons, institutions, schools, businesses, and governments that allegedly do not comply. Additionally, Congress could specify that these agencies may not revoke federal funding for any purported noncompliance with the Administration's gender identity directives.

The courts also have a role to play. They should not interpret "sex" to mean "gender identity" and should not usurp the authority of the representative branches of government to make policy in this area. In this way, the original purpose of Title IX and other laws banning sex discrimination can be restored. Instead of being used by unaccountable agencies and unelected judges to hold that schools cannot have separate restrooms and locker rooms based on biological sex or that healthcare plans and professionals have to support sex-reassignment therapies, prohibitions on sex discrimination can function once more to protect women and girls and ensure that they have equal access to healthcare and educational programs.

Finally, states and local governments have a role to play. They should not elevate gender identity as a protected class in their own civil rights and antidiscrimination statutes. They should, however, clarify how access to sex-specific facilities is to be governed. For example, while leaving private institutions free to establish their own policies, states and municipalities should clarify that access to sex-specific facilities in public insti-

tutions (such as schools) will primarily be based on biological sex, and that reasonable accommodations will be provided for anyone uncomfortable with such a policy.<sup>128</sup> By doing so, states and cities could respect the rights and ensure the continued protection of women and girls while also providing reasonable accommodations for any student who requests them, including those who identify as transgender.

Before the April 2015 prime-time interview with the celebrity then-known as Bruce Jenner, few Americans had ever had a conversation about transgender issues. Instead of encouraging such a conversation, however, and allowing parents, teachers, and local schools the time, space, and flexibility to find solutions that work best for everyone, the Obama Administration attempted to force a one-size-fits-all policy on the entire nation.

For most Americans, concerns related to students who identify as transgender are a new reality. Rather than follow the Obama Administration's rush to impose a top-down solution on the entire country, future administrations should respect federalism, local decision-making, and parental authority in education. The Trump administration's reversal of President Obama's policies is a welcome course adjustment in that direction. We should allow the American people to consider all relevant concerns and help to devise policies that will best serve all Americans. Congress should support such efforts, and the courts should respect them.

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128. For example, adults who have undergone sex reassignment therapies and changed the sex on their legal IDs could be allowed access to sex-specific facilities in accordance with their new legal sex.