

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK and  
SARA ANN MAKENZIE,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF  
HEALTH SERVICES and  
LINDA SEEMEYER, in her official capacity  
as Secretary of the Wisconsin Department  
of Health Services,

Defendants.

Case No. 3:18-cv-00309-wmc  
Judge William Conley

**DECLARATION OF JOSEPH J. WARDENSKI, ESQ.**

I, Joseph J. Wardenski, declare as follows:

1. I am an attorney for Plaintiffs Cody Flack and Sara Ann Makenzie in the above-captioned case. I submit this declaration in connection with Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction.

2. Exhibit 1 to this Declaration is a true and correct copy of Amy Ellis Nutt, *Long shadow cast by psychiatrist on transgender issues finally recedes at Johns Hopkins*, Wash. Post, Apr. 5, 2017, available at [https://washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5\\_story.html](https://washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html) (accessed and printed on July 15, 2018).

3. Exhibit 2 to this Declaration is a true and correct copy of the Brief of 196 Members of Congress as Amicus Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G., vacated and remanded* (U.S. Mar. 6, 2017) (No. 16-273).

4. Exhibit 3 to this Declaration is a true and correct copy of a letter from 40 United States Senators to U.S. Secretary of Education John King, dated May 2, 2016.

5. Exhibit 4 to this Declaration is a true and correct copy of print-outs from the ForwardHealth website of the Wisconsin Department of Health Services of the current published maximum fee schedules for Mastectomy Simple Complete (Procedure Code 19303) and Breast Reconstruction (Procedure Code 19350) under Wisconsin Medicaid, which were searched, accessed, and printed on July 16, 2018 at the following hyperlink:

<https://www.forwardhealth.wi.gov/WIPortal/Subsystem/Publications/MaxFeeSearch.aspx>.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Dated: July 16, 2018

  
\_\_\_\_\_  
Joseph J. Warden

# **EXHIBIT**

**1**

# Long shadow cast by psychiatrist on transgender issues finally recedes at Johns Hopkins

 [washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5\\_story.html](https://www.washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html)  
By Amy Ellis Nutt

Health & Science

The Washington Post

Paul McHugh, the former chief of psychiatry at Johns Hopkins Hospital, helped to end Johns Hopkins's pathbreaking transgender surgery program nearly 40 years ago. (Courtesy of Johns Hopkins Medicine)

The Washington Post

Nearly four decades after he derailed a pioneering transgender program at Johns Hopkins Hospital with his views on "guilt-ridden homosexual men," psychiatrist Paul McHugh is seeing his institution come full circle with the resumption of gender-reassignment surgeries.

McHugh, the hospital's chief of psychiatry from 1975 to 2001, still believes that being transgender is largely a psychological problem, not a biological phenomenon. And with the title of university distinguished service professor at Johns Hopkins Medicine, he continues to wield enormous influence in certain circles and is quoted frequently on gender issues in conservative media.

"I'm not against transgender people," he said recently, stressing that he is "anxious they get the help they need." But such help should be psychiatric rather than surgical, he maintains.

Hopkins, however, is moving beyond McHugh. This summer, it will formally open a transgender health service and will resume, after a 38-year hiatus, an accompanying surgical program.

Once at the forefront of gender-identity science — and site of the nation's first "change-of-sex operations," as the headlines announced in 1966 — Hopkins abruptly halted those surgeries in 1979.

Johns Hopkins Hospital hopes to return to the forefront of transgender medicine with a new transgender health service formally opening this summer. (Bill O'Leary/The Washington Post) The main trigger was a study by Jon Meyer, who ran the hospital's Sexual Behaviors Consultation Unit. In the study, Meyer concluded that although "sex-change" surgery was "subjectively satisfying" for the small sample surveyed, the operations they underwent conferred "no objective advantage in terms of social rehabilitation."

"With these facts in hand," McHugh later wrote, "I concluded that Hopkins was fundamentally cooperating with a mental illness."

Two months later, its gender-identity clinic was shut down.

Many scientists subsequently challenged the methodology behind Meyer's study, as well as

his interpretation of the results, but in the decade that followed, other academic hospitals often cited the research when they discontinued their own transgender surgical programs.

The decision to restart operations initially was made public in July and then repeated in October on the health system's website in [a letter](#) titled "Johns Hopkins Medicine's Commitment to the LGBT Community." The letter stressed "strong and unambiguous" support of the LGBT community and made clear that when "individuals associated with Johns Hopkins exercise the right of expression, they do not speak on behalf of the institution."

At the same time, the letter emphasized a hallmark of American higher education: the freedom to express contrarian views. "Academic freedom is among our fundamental principles," it said, "essential to the self-correcting nature of scientific inquiry, and a privilege that we safeguard."

McHugh, many people assumed, was the unnamed impetus for both declarations.

Hopkins's shift not only reflects the public's far broader discussion about transgender rights and protections, but also the controversies that the discussion engenders. In February, the Trump administration [revoked federal guidelines](#) put in place under President Barack Obama that had directed public schools to allow transgender students to use restrooms matching their gender identity. And North Carolina passed its own restrictive "bathroom bill" for public spaces — legislation that drew such condemnation, especially from outside of the state, that lawmakers last week [voted to repeal](#) the law.

"Obviously there's a lot of apprehension and anxiety in the transgender community, because we don't know how health care is going to be impacted [by Trump's agenda], especially for transgender youth," said Paula Neira, clinical director of the new Hopkins program. "I think it shows that what we're doing is timely."

But as the plans for the transgender health service were coming together last fall, a 143-page report, titled "[Sexuality and Gender](#)," appeared in the *New Atlantis*, a science and technology magazine published by the Ethics and Public Policy Center, a conservative Christian think tank. It was authored by McHugh and Lawrence S. Mayer, a professor of statistics and biostatistics at Arizona State University and, at the time of the publication, a scholar in residence at Hopkins.

The pair contended that neither sexual orientation nor gender identity is biologically determined. Although the *New Atlantis* is a small publication, the report dismayed many in the Hopkins medical community and beyond. Those included [Dean Hamer](#), a scientist at the National Institutes of Health for several decades and one of the first researchers to identify a genetic link to homosexuality. Hamer termed some of the authors' statements "pure balderdash."

The paper gained traction with conservative media, however.

"People began citing the *New Atlantis* article as a reason to support legislation against transgender people," said Tonia Poteat, a Hopkins epidemiologist who is an expert on transgender issues.

The result: In October, Poteat and a half-dozen colleagues at the university's Bloomberg School of Public Health denounced the report, writing that it "mischaracterizes the current state of the science on sexuality and gender." More than 600 students, faculty members, interns, alumni and others at the medical school also signed a petition calling on the university and hospital to disavow the paper.

"These are dated, now-discredited theories," said Chris Beyrer, a professor at the public health school and part of the faculty group that denounced McHugh's stance.

In an interview from his home in Baltimore, where he still sees patients, McHugh explained that the "duty of all doctors who propose a treatment is to know the nature of the problem they propose to treat. The issue of transgender [people] is, the vast majority coming for surgery now don't have a biological reason but a psychosocial reason."

While McHugh successfully lobbied for more than 30 years to keep gender-reassignment surgery from becoming a Medicare benefit, he supports the operation for those born with an intersex condition, which means having a reproductive or sexual anatomy that doesn't fall into the typical definition of male or female.

Most recently his name was prominent on an amicus brief in opposition to the case of Virginia transgender student Gavin Grimm. The teen sued his school district to be allowed to use the bathroom of his gender identity — an issue that until last month was headed to the Supreme Court.

"People with abnormalities of development should be helped to find their place as they see it best," McHugh said. "But they are a tiny number of the transgender population seeking and being given treatment."

Those involved in Hopkins's transgender health services disagree with his positions. But the 85-year-old doctor, who still teaches an occasional course, says he bears no animus toward them. In fact, he appreciated a visit made last fall by W.P. Andrew Lee, the head of plastic and reconstructive surgery at Hopkins. Lee wanted to tell the former psychiatry chief that the hospital would be resuming gender-affirmation surgeries, as they are called these days.

The visit was "a professional courtesy," Lee said in an email to The Washington Post. He declined an interview request.

McHugh elaborated a bit on their conversation and how the two had disagreed: "When I said [surgery] reduced options, he said he was thinking about the people who were pleased about the treatment."

Their stalemate, the psychiatrist knew, wasn't going to affect the hospital's decision.

So far, the new transgender health service involves 25 to 30 professionals across a number of departments, including plastic surgery, urology, endocrinology, nursing and social work. The surgeries will take place at Hopkins Hospital and possibly at some of the system's satellite

centers.

Despite important gender research the university maintained over the years, it has ground to recover. The long break in its surgical program, coupled with McHugh's vocal positions on gay and transgender issues, caused Hopkins to lose standing within the LGBT community.

"It took an exceptionally long time," Beyrer said. "Too long."

Amy Ellis Nutt Amy Ellis Nutt covers neuroscience and mental health for The Washington Post. She won the Pulitzer Prize in feature writing in 2011 and previously worked at the Star-Ledger in Newark, NJ and Sports Illustrated. [Follow](#) [subscribe](#)

# **EXHIBIT**

**2**

No. 16-273

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IN THE  
**Supreme Court of the United States**

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GLOUCESTER COUNTY SCHOOL BOARD,

*Petitioner,*

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**BRIEF OF 196 MEMBERS OF CONGRESS AS  
*AMICI CURIAE* IN SUPPORT OF RESPONDENT**

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March 2, 2017

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A complete list of the 40 U.S. Senators and the 156 Members of the House of Representatives participating as *Amici* is provided in an appendix to this brief. Among them are:

SEN. CHARLES E. SCHUMER      REP. NANCY PELOSI  
*Senate Democratic Leader*      *House Democratic Leader*

SEN. AL FRANKEN      SEN. TAMMY BALDWIN  
*Lead Senate Amici on Brief*

REP. JARED POLIS  
*Lead House Amici on Brief*

SEN. PATTY MURRAY      REP. ROBERT C. "BOBBY" SCOTT  
*Ranking Member,*      *Ranking Member,*  
*Senate Committee on*      *House Committee*  
*Health, Education,*      *on Education and*  
*Labor and Pensions*      *the Workforce*

SEN. DIANNE FEINSTEIN      REP. JOHN CONYERS, JR.  
*Ranking Member,*      *Ranking Member,*  
*Senate Committee*      *House Committee*  
*on the Judiciary*      *on the Judiciary*

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### INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are 40 United States Senators and 156 members of the United States House of Representatives.<sup>2</sup> 152 are co-sponsors of the Student Non-Discrimination Act (“SNDA”),<sup>3</sup> S. 439, 114th Cong. (2015), which, if enacted, will ensure existing civil rights laws continue to protect lesbian, gay, bisexual and transgender (“LGBT”) children from discrimination and harassment in public schools.

Title IX was enacted to protect vulnerable students from discrimination on the basis of sex and guarantee that these at-risk students receive equal educational opportunities. Title IX’s prohibition on discrimination “on the basis of sex” encompasses discrimination on the basis of gender identity and sex stereotypes. It therefore does *not* allow a school to limit bathroom access based solely on birth-assigned sex or according to sex stereotypes,

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<sup>1</sup> Pursuant to Supreme Court Rule 37.3(a), *amici* certifies that Petitioner has given blanket consent to the filing of *amicus* briefs and Respondent has given written consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> A complete list of *amici* appears in the appendix to this brief.

<sup>3</sup> This brief cites to the Senate version of SNDA, but the House and Senate versions, H.R. 846 and S. 439, respectively, are virtually identical in substance.

including the stereotype that a student's gender identity should correspond to birth-assigned sex.

The lower courts have overwhelmingly adopted this correct interpretation of sex discrimination. However, a minority of lower federal courts and state and local governments have allowed schools to limit bathroom access based on sex stereotypes. This impermissibly harms LGBT students—a particularly vulnerable group of young people—and undermines the governing purpose of Title IX.

We firmly believe that Title IX's prohibition on sex discrimination *already* prohibits discrimination on the basis of gender identity. In fact, the authors of SNDA designed the legislation to bring clarity and stability to an area of law that has been inconsistently interpreted and enforced. As members of Congress, we are uniquely positioned to advise the Court on the meaning of draft and pending legislation. We also have an inherent interest in the proper interpretation of enacted laws and pending legislation, particularly when differing interpretations alternately vindicate or eliminate the rights of the constituents we represent. Different interpretations of Title IX have led to uncertainty for public school children and their families and left LGBT children underprotected from discrimination despite applicable federal law. We urge this Court to uphold the Fourth Circuit's decision and allow G.G. to use the boys' bathroom at his school, as is already required by federal statutory law and consistent with this Court's own precedent.

### SUMMARY OF ARGUMENT

The Fourth Circuit's judgment should be affirmed and G.G. should be permitted to use the boys' bathroom at his high school.

*First*, Title IX was designed to create and protect equal educational opportunities for students discriminated against on the basis of sex, who make up a particularly vulnerable and marginalized part of any student body. Respondent G.G. is a transgender boy subjected to discrimination by his school board solely because of his transgender status, and he has suffered psychologically and physically because the school board denies him access to the boys' bathroom. The school board's new bathroom policy inhibits G.G.'s academic achievement and social well-being at school. The policy fundamentally undermines Title IX's central purpose, and is thus impermissible under Title IX.

Indeed, even setting aside the Department of Education's or Department of Justice's now-withdrawn guidance, Title IX's prohibition on discrimination "on the basis of sex" encompasses discrimination on the basis of gender identity and sex stereotypes. This statutory interpretation is recognized and supported by this Court's precedent and lower court application of that precedent. Surely the stereotype that an individual's gender identity ought to correspond to that person's birth-assigned sex is the most basic form of impermissible sex-based discrimination.

*Second*, SNDA does nothing to change the proper interpretation of Title IX. This Court should

be wary, as it always has been, of relying on pending or abandoned legislation to interpret enacted statutes. But if this Court does look to SNDA to inform its understanding of Title IX, *amici*, as legislators, many of whom have co-sponsored SNDA, are uniquely able to advise the Court of SNDA's meaning and purpose. Despite decades-old case law interpreting civil rights statutes like Title IX to prohibit sex stereotyping, as well as congressional requests for and the subsequent adoption of proper agency guidance interpreting Title IX, discrimination against transgender students persists. SNDA's framework was therefore explicitly designed to operate in parallel with Title IX and reinforce what is already law—that transgender individuals in public schools are protected from discrimination.

## ARGUMENT

### **I. Petitioner's Policy Limiting Bathroom Access Based on Birth-Assigned Sex Discriminates Against Transgender Students and Violates Title IX.**

Title IX is designed to protect students from discrimination on the basis of sex. Transgender students are particularly susceptible to sex discrimination. By forbidding G.G. from using the boys' bathroom, the Gloucester County school board defies the animating purpose of Title IX and impermissibly discriminates on the basis of sex.

**A. Petitioner’s Policy Contravenes Title IX by Stigmatizing Vulnerable Students and Limiting Their Educational Opportunities.**

By prohibiting discrimination “on the basis of sex”, Title IX promotes equal educational opportunities for some of the most vulnerable, at-risk student body populations. *See* 20 U.S.C. § 1681 (2012). When transgender children are discriminated against by the very institutions charged with their care, development, and continued scholarship, they are robbed of the educational opportunities guaranteed by Title IX. As *amicus* Senator Murray has noted, “[w]hen kids do not feel safe at school, when they are relentlessly bullied because they are different, when they endure harassment simply because of who they are, we have failed to provide them with the educational opportunities they deserve.” 161 Cong. Rec. S5040 (daily ed. July 14, 2015) (statement of Senator Murray) (speaking in support of an amendment by Senator Franken to add SNDA to the Every Child Achieves Act).

The Gloucester County school board’s policy restricting Respondent G.G.’s bathroom use is thus fundamentally at odds with Title IX’s core goals. G.G. is a transgender boy in his senior year of high school who has been very publicly banned from the boys’ bathroom at school because of his transgender status. Compl. ¶¶ 38, 44. G.G. has identified as a

boy for as long as he can remember.<sup>4</sup> Compl. ¶¶ 16-17. When G.G. was in the ninth grade, a psychologist diagnosed G.G. with gender dysphoria and recommended that G.G. begin living “as a boy in all respects, including with respect to his use of the restroom”. Compl. ¶ 23. Therefore, just before his sophomore year, G.G. and his family informed school officials that G.G. was a transgender boy. Compl. ¶ 28. G.G. then used the boys’ bathroom at his school for seven weeks, without incident or complaint. Compl. ¶ 32.

However, when Gloucester County community members—some of whom did not even have school-age children—learned that G.G. was permitted to use the boys’ bathrooms at school, they launched a campaign to limit student bathroom access based on birth-assigned sex. Compl. ¶¶ 33-35. The policy at issue in this case was introduced at a school board meeting, where attendees specifically identified G.G. by name, singling him out as the board’s primary motivation for introducing the new policy. Compl. ¶¶ 37-38, 44. “G.G. was forced to identify himself to the entire community, including local press covering the meeting, as the transgender student whose restroom use was at issue.” Compl. ¶ 38. G.G. pleaded with the community to be left alone to live his life as a normal child, able to “use the restroom in peace” and explained that he “did not ask to be this

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<sup>4</sup> G.G.’s medical and psychological evaluations agree that G.G.’s sex is male and reject the assumption that birth-assigned sex is the only proper way to determine an individual’s sex. Compl. ¶¶ 21-26; Corrected Expert Decl. of Randi Etnner, Ph.D., JA34, JA41-42.

way . . . I'm just a human. I'm just a boy." Compl. ¶ 38.

Ultimately, the Gloucester County school board adopted a policy requiring transgender students to use either the sex-segregated bathrooms corresponding with their birth-assigned sex or to use "alternative" bathrooms specially provided for students with "gender identity issues". Compl. ¶¶ 34, 43. G.G. now correctly challenges this policy as a violation of Title IX. Compl. ¶ 6. Not only does it ban G.G. from the boys' bathroom, contrary to his psychologist's advice, but the policy and its humiliating implementation have understandably made G.G. afraid to use *any* bathroom at school, causing him to suffer from frequent and painful urinary tract infections. Compl. ¶¶ 5, 48-49. The "alternative" separate bathrooms only exacerbate the psychological and physical hardship G.G. grapples with as a transgender child. *Id.* They single out and stigmatize G.G., designating him as "other". *Id.*; Corrected Expert Decl. of Randi Ettner, Ph.D., JA34 ¶ 20 ("Restrooms, unlike other settings . . . categorize people according to gender. . . . To deny a transgender boy admission to such a facility, or to insist that one use a separate restroom, communicates that such a person is 'not male' but some undifferentiated 'other', interferes with the person's ability to consolidate identity and undermines the social-transition process.").

Unfortunately, these psychological and physical hardships are all too common for transgender children, who are routinely discriminated against in

their schools because of their transgender status. See S. 439 § 2(a)(1) (2015).<sup>5</sup> Students subjected to this kind of discrimination are more likely to perform poorly in school, more likely to miss days of school, more likely to drop out of school, and more likely to attempt suicide. *Id.* § 2(a)(4); see also, e.g., 161 Cong. Rec. S5040 (daily ed. July 14, 2015) (statement of Senator Murray) (recounting the story of Chandler, a ninth grader who was perceived to be gay and took his own life after “enduring endless bullying and tormenting at his school”). Bathroom policies like Petitioner’s intensify and institutionalize transgender discrimination and prevent transgender students like G.G. from taking advantage of the educational opportunities Title IX was enacted to protect. See H.R. Rep. No. 92-554 (1971), reprinted in 1972 U.S.C.C.A.N. 2462, 2511 (citing disparate opportunities afforded to women and men in education as an impetus for Title IX); 117 Cong. Rec. 30,155 (1971) (describing Title IX as memorializing the view of “education as the ultimate answer to our national problems of poverty, discrimination, and development”); see also *Tingley-Kelley v. Trustees of*

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<sup>5</sup> See also 161 Cong. Rec. S5044 (daily ed. July 14, 2015) (statement of Senator Durbin) (“85 percent of LGBT students reported harassment . . . these students didn’t perform well when they were subjected to this harassment.”); 161 Cong. Rec. S5044 (daily ed. July 14, 2015) (statement of Senator Leahy) (“Unfortunately, as many as 7 in 10 students who are, or are perceived to be, lesbian, gay, bisexual, or transgender have been bullied or harassed. But unlike other forms of harassment in our schools, bullying based on gender identity and sexual orientation is often overlooked.”); 161 Cong. Rec. S5046 (daily ed. July 14, 2015) (statement of Senator Franken) (“LGBT kids are facing an epidemic of bullying in our schools.”).

*the Univ. of Pa.*, 677 F. Supp. 2d 764, 780 n.14 (E.D. Pa. 2010) (“[T]he entire purpose of Title IX is to authorize interference in [educational institution] decisions that are based on discriminatory factors.”).

**B. Title IX’s Prohibition on Sex-Based Discrimination Encompasses Discrimination on the Basis of Gender Identity.**

Because the Gloucester County school board policy prevents G.G. from using the boys’ bathroom in accordance with G.G.’s gender identity, the policy violates Title IX. Discrimination “on the basis of sex” under Title IX encompasses discrimination on the basis of gender identity, sex stereotypes, gender nonconformity and transgender status. This interpretation is consistent with this Court’s own precedent and lower court application of that precedent.

A proper application of this Court’s line of Title VII cases interpreting sex-based discrimination logically requires protecting transgender students from discrimination under Title IX. The federal courts, including this Court, consistently look to Title VII case law to inform their interpretation of “sex” and sex-based discrimination under Title IX. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX.”); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) (“Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims.”);

*Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994) (“[C]ourts have interpreted Title IX by looking to . . . the caselaw interpreting Title VII.”).

There can be no question that “sex” under both Title VII and Title IX encompasses gender identity. It is this Court’s express preference to interpret Title VII’s prohibition on sex discrimination to appropriately include more than mere biological or physical differences between men and women. As Justice Scalia explained in *Oncale v. Sundowner Offshore Services, Inc.*, when this Court adopted an interpretation of sex discrimination that Congress may not have contemplated at the time of enactment, “statutory prohibitions often go beyond the principal evil [Congress was concerned with] to cover reasonably comparable evils.” 523 U.S. 75, 79 (1998).

Indeed, this Court held in *Price Waterhouse v. Hopkins* that Title VII’s protections were meant to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” and concluded sex stereotyping was impermissible under Title VII. 490 U.S. 228, 251 (1989) (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)). This Court admonished employers: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* This Court went on to find that an employer who rejected a woman for promotion because she was too “macho” and “aggressive” and failed to walk, talk or dress “femininely” had discriminated on the basis of sex stereotypes in violation of Title VII. *Id.* at 235, 251.

As *Price Waterhouse* made clear, Title VII not only bars discrimination based on birth-assigned sex, but also prohibits discrimination arising from an individual's failure to conform to "socially-constructed gender expectations". *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (citing *Price Waterhouse*, 490 U.S. at 240)).

Third, lower courts have overwhelmingly interpreted *Price Waterhouse* to mean that "sex" discrimination encompasses discrimination against transgender individuals or on the basis of gender identity. See *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (noting lower courts agree "with near-total uniformity" that *Price Waterhouse* explicitly rejected a definition of sex discrimination limited to "the biological differences between men and women" (citing *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)). Notably, in *Glenn*, the Eleventh Circuit reasoned that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination" because "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes". *Id.* at 1316-17 (emphasis added). And in *Schroer v. Billington*, District Court Judge Robertson highlighted the fallacy of excluding discrimination on the basis of transgender identity from Title VII by providing a useful analogy to religion: if an employee "is fired because she converts from Christianity to Judaism", it would constitute "a clear case of discrimination 'because of religion'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts' . . . . Discrimination 'because of religion'

easily encompasses discrimination because of a *change* of religion.” 577 F. Supp. 2d 293, 306 (D.D.C. 2008). Therefore, to discriminate against transgender individuals on the basis of gender identity or transition *is* to discriminate on the basis of sex. *See Glenn*, 663 F.3d at 1316-17.<sup>6</sup>

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<sup>6</sup> *See also Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith*, 378 F.3d at 572; *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk*, 204 F.3d at 1198-203 (holding that violence against transgender plaintiff for “her assumption of a feminine rather than a typically masculine appearance or demeanor” was “because of or on the basis of gender” under the Gender Motivated Violence Act); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (“[D]iscrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate . . . is literally discrimination ‘because of sex.’”); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388-JAD-PAL, 2016 WL 5843046, at \*9 (D. Nev. Oct. 4, 2016); *Finkle v. Howard Cty, Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by [Title VII]. . . .”); *Lopez v. River Oaks Imaging & Diagnostic Grp. Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (“The Court cannot ignore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an ‘effeminate’ male or ‘macho’ female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes.”); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173 at \*2 (W.D. Pa. Feb. 17, 2006); *Kastl v. Maricopa Cty. Comm. College Dist.*, No. 02-1531PHX-SRB, 2004 WL 2008954, at \*2-3 (D. Ariz. June 3, 2003), *aff’d* 325 F. App’x 492 (9th Cir. 2009) (“[N]either a woman with male genitalia nor a man with stereotypically female anatomy . . . may be deprived of a benefit or privilege of employment by reason of that nonconforming

For G.G. to use the boys' bathroom, this Court need only remain consistent with well-reasoned and accepted Title VII law and hold that the Gloucester County school board has engaged in impermissible discrimination on the basis of sex in violation of Title IX.<sup>7</sup> Petitioner's policy discriminates against G.G.

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trait."); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-cv-0375E(SC), 2003 WL 22757935 at \*4 (W.D.N.Y. Sept. 26, 2003).

<sup>7</sup> Not only does Petitioner's policy violate Title IX's main prohibition on sex discrimination, it also falls outside the scope of Title IX's living facilities provision, which provides in relevant part, "[n]otwithstanding anything to the contrary . . . nothing contained herein shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686 (2012). The living facilities provision allows schools to "maintain" "equal" or "comparable" separate facilities "for the different sexes", and the Department of Education implementing regulations merely require schools to keep those facilities in good repair and condition, without preferring one facility over another. *See, e.g.*, 34 C.F.R. §§ 106.32 (housing); 106.33 (toilet, locker room and shower facilities); 106.34 (access to schools); 106.35 (institutions of vocational education); 106.37 (financial assistance and provision of facilities); 106.41 (athletic facilities, equipment, supplies, and locker rooms) (2016); *see also Biediger v. Quinnipiac University*, 928 F. Supp. 2d 414, 436 (D. Conn 2013) (holding that Title IX implementing regulations require equal access to locker rooms, practice and competitive facilities and training facilities regardless of any economic justification). Nothing in the living facilities provision—or any other provision of Title IX—authorizes the school to perpetuate the idea that a transgender boy is not masculine enough to qualify as male, or that birth-assigned sex properly and exclusively defines an individual's "sex". These are impermissible sex stereotypes under *Price Waterhouse* and its progeny.

because his gender identity, one of the “properties or characteristics” that cause him to identify as a boy, is inconsistent with his birth-assigned sex. *Fabian*, 172 F. Supp. 3d at 526. Like Ms. Hopkins, the female employee in *Price Waterhouse* who was denied a promotion for not being “feminine” enough, 490 U.S. at 235, G.G. is caught “in an intolerable and impermissible catch 22”, *id.* at 251. The school board denies G.G. access to the boys’ bathroom because in its view he is not “masculine” enough, and his peers ostracize and ridicule him for using the girls’ bathroom because he is not “feminine” enough. Compl. ¶ 46; *cf.* Compl. ¶ 3 (noting G.G.’s teachers and peers accepted his presence in the boys’ bathroom). As a result, G.G. suffers from both psychological and physical trauma, which strips him of the academic and social opportunities afforded to his peers and contravenes Title IX. *See supra* Part I.B.1; S. 439 § 2(a)(3) (2015) (“[D]iscrimination at school has contributed to high rates of absenteeism, academic underachievement, dropping out, and adverse physical and mental health consequences

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To this point, Congressional *amici* in support of Petitioner misconstrue the legislative history on the purpose behind the living facilities provision as it relates to personal privacy. *See* Brief of Members of Congress as *Amici Curiae* in Support of Petitioner 6. Senator Bayh, the principal author of Title IX, did not propose a “differential treatment” amendment to protect personal privacy in all cases; rather, Senator Bayh thought it best to empower federal *agencies* to promulgate regulations “to permit differential treatment by sex only [in] very unusual cases where such treatment is absolutely necessary to the success of the program”. 118 Cong. Rec. 5807 (1972).

among LGBT youth.”).<sup>8</sup> The school board may not condition G.G.’s access to the boys’ bathroom on his ability to conform to a pre-determined model of masculinity, just as Price Waterhouse could not condition Ms. Hopkins’ promotion on her ability to conform to a pre-determined model of femininity. *See Price Waterhouse*, 490 U.S. at 235.

**II. The Student Non-Discrimination Act Should Not Change the Court’s Interpretation of Title IX Because the Act Clarifies and Stabilizes, Rather than Supplements, Title IX.**

**A. Multiple and Equally Plausible Inferences Can Be Drawn from Pending or Rejected Legislation.**

SNDA clarifies Title IX; it does not represent a congressional “rejection” of the idea that gender identity discrimination falls within the ambit of “sex” discrimination. *Cf.* Brief of Members of Congress as *Amici Curiae* in Support of Petitioner 6-7 (noting that “Congress knows how to’ statutorily protect gender identity ‘when it wants to’”, but failing to note that legislators may not feel compelled to act when case law already interprets the statute to prohibit

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<sup>8</sup> *See also* 161 Cong. Rec. S5046 (daily ed. July 14, 2015) (statement of Senator Franken) (“More than 30 percent [of LGBT students] report missing a day of school in the last month because they felt unsafe . . . . You cannot get a good education if you dread going to school.”).

this type of sex discrimination).<sup>9</sup> This Court has often warned against giving too much significance to abandoned or pending legislation in interpreting existing law:

[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction including the inference that the existing legislation already incorporated the offered change.

*Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 181 (2000); *Fair*

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<sup>9</sup> Congressional *amici* in support of Petitioner’s references to the 2009 Hate Crimes Prevention Act, 18 U.S.C. § 249(a)(2) (2012), and the 2013 reauthorization of the Violence Against Women Act, 42 U.S.C. § 13925(b)(13)(A) (2012), are misguided. That Congress included explicit references to “gender identity” in two individual pieces of legislation unrelated to Title IX or Title VII in 2009 and 2013—decades after Title IX was enacted and *Price Waterhouse* decided—is of no moment. It would be neither feasible nor efficient for Congress to update or amend every piece of legislation to incorporate the linguistic precision *amici* for Petitioner suggest. Legislators could furthermore view such amendments as unnecessary when the Supreme Court already appears to interpret the legislation correctly.

*Housing Authority of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012) (Kozinski, J.).

The fact that SNDA was introduced by Congress but has not yet become law should not change this Court's interpretation of Title IX. First, although SNDA has not yet passed the Senate, it did garner the support of a bipartisan majority of senators during a vote in the 114th Congress. 161 Cong. Rec. S5047 (daily ed. July 14, 2015).

Second, it would be aberrational to single out SNDA's introduction as evidence of congressional intent when there have been other attempts to create similar legislation with no effect on Title VII, and by extension Title IX, jurisprudence. For example, Congress introduced the Equality Act of 1974 to protect lesbians and gay men, women and unmarried individuals in employment and places of public accommodation. Equality Act of 1974, H.R. 14752, 93d Cong. (1974). However, there is no indication that courts inferred any congressional intent from the introduction of this legislation or its failure to pass. In fact, courts subsequently found that unmarried women *were* covered under Title VII even if this legislation would have protected marital status more explicitly. *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 389 (7th Cir. 1975) (describing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

Moreover, in *Price Waterhouse*, which "overruled by logic and language" circuit court cases like *Ulane*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000), this Court did not take into account legislative

history from the Equality Act of 1974 or a number of other legislative proposals from 1975 to 1982 that would have prohibited “discrimination based upon affectational or sexual orientation”. *Cf. Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 & n.11 (7th Cir. 1984) (citing failed legislative proposals from 1975 to 1982 to conclude that Title VII does *not* prohibit discrimination on the basis of sexual orientation). Instead, *Price Waterhouse’s* interpretation of “sex” discrimination was appropriately derived from plain meaning and simple logic. SNDA should likewise not discourage this Court from applying this proper interpretation of “sex” discrimination.

**B. *Amici*, As Legislators, Are Best Positioned To Advise the Court on How To Interpret SNDA and Its Relationship with Title IX.**

*Amici* wish to avoid further confusion in the courts over whether legislative measures to protect children from gender identity discrimination are an indication that such protections do not exist under current law. *See* 161 Cong. Rec. S5041 (daily ed. July 14, 2015) (statement of Senator Murray) (urging the adoption of SNDA to avoid “years of litigation about who is and who is not protected”). Indeed, *amici* believe that Title IX *already* protects transgender children. Yet decades after *Oncale* and *Price Waterhouse*, and despite overwhelming agreement among the federal courts that transgender individuals are protected from discrimination under those cases, Title IX remains inconsistently interpreted and enforced across the country. The SNDA framework was therefore

designed to operate in parallel with Title IX, to *ensure* transgender children are protected, explicitly, from discrimination in public schools. *See* S. 439 § 2(a)(6), (b)(1); *see also* 157 Cong. Rec. E2093 (daily ed. Nov. 18, 2011) (statement of Representative Jay Inslee) (noting that SNDA is needed “in order to *expressly* protect students from discrimination and harassment on the basis of sexual orientation and gender identity” (emphasis added)); House Committee on Education and the Workforce Markup on H.R. 5 (June 19, 2013), 2013 WL 3084182 (statement of Representative Jared Polis) (“Federal civil rights statutes . . . don’t yet *explicitly* include sexual orientation or gender identity.” (emphasis added)).

Even administrative guidance clarifying that Title IX protects transgender students—guidance prompted and supported by members of Congress—was not consistently followed. Just last year, 40 senators, many of whom are *amici*, wrote to the Department of Education requesting more specific guidance to “explain the scope of protection afforded to LGBT students under Title IX . . . and clarify that state laws requiring discrimination against LGBT students run afoul of Title IX”. Letter from 40 Senators to the Honorable John King (May 2, 2016) (on file with *amici*). The request acknowledged that the Department of Education and Department of Justice had already informally clarified “that Title IX’s prohibition on sex discrimination prohibits discrimination on the basis of gender identity”, as is “consistent with caselaw in the areas of employment discrimination”. *Id.* But in light of “ongoing legislative assaults on LGBT students, and

transgender students in particular”, the request stressed the need to more *explicitly* “protect our children and young people, and to help them flourish”. *Id.* When the Department of Education swiftly issued joint guidance with the Department of Justice to “ensure transgender students have access to public education in an environment free from discrimination”, 137 members of Congress, many of whom are *amici*, formally thanked both agencies. Letter from 137 Congresspeople to the Honorable Loretta E. Lynch and the Honorable John B. King, Jr. (June 3, 2016) (on file with *amici*). The members heralded the guidance as “a critical step to ensure we protect our students and ensure all students have access to equal educational opportunities”. *Id.* Indeed, almost 200 members of Congress collectively endorsed the joint guidance, recognizing that (1) *Price Waterhouse* and its progeny prohibit discrimination on the basis of gender identity and (2) this interpretation properly applies to Title IX. Nevertheless, many school districts throughout this country intentionally declined to follow the joint guidance.<sup>10</sup>

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<sup>10</sup> For example, in June 2016 the Kansas State Board of Education unanimously voted to refuse to comply with the Department of Justice’s directive to allow students to use bathrooms based on gender identity. *See* Emma Brown, *Kansas State Board of Education Votes to Ignore Obama’s Transgender Bathroom Directive*, Wash. Post, June 15, 2016, [https://www.washingtonpost.com/news/education/wp/2016/06/15/kansas-state-board-of-education-votes-to-ignore-obamas-transgender-bathroom-directive/?utm\\_term=.3922ef16f809](https://www.washingtonpost.com/news/education/wp/2016/06/15/kansas-state-board-of-education-votes-to-ignore-obamas-transgender-bathroom-directive/?utm_term=.3922ef16f809). A number of states have also enacted or attempted to enact similar legislation. *See, e.g.*, Joellen Kralik, “Bathroom Bill”

Thus, while Title IX already protects LGBT students from discrimination, this offers little comfort to LGBT students facing policies like Petitioner's in judicial districts that fail to properly apply *Price Waterhouse*. Indeed, despite Supreme Court precedent, there is a bullying epidemic in our schools motivated by institutionalized discrimination against transgender students.<sup>11</sup> As Senator Franken

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Legislative Tracking, Nat'l Conf. State Legis., <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> (last updated Feb. 23, 2017) (noting that between 2013 and 2016 "at least 24 states considered 'bathroom bills', or legislation that would restrict access to multiuser restrooms . . . on the basis of a definition of sex or gender consistent with sex assigned at birth" and that "North Carolina is the only state to enact this type of legislation"). Moreover, in the 2017 legislative session alone, legislators in 14 states have either prefiled or introduced legislation "that would restrict access to multiuser restrooms, locker rooms, and other sex-segregated facilities" on the basis of birth-assigned sex. *Id.*

<sup>11</sup> Unfortunately, as Senator Franken has noted and this case makes clear, not all schools fight to protect their LGBT students: "[W]hen a school acts to protect kids with disabilities from bullying but looks the other way when LGBT kids are harassed by their peers, that is discrimination. When school staff members participate in or encourage bullying of LGBT youth, that is discrimination." 157 Cong. Rec. S1557 (daily ed. March 10, 2011) (speaking on behalf of himself and Senators Harkin, Kerry, Murray, Klobuchar, Lautenberg, Bennet, Blumenthal, Udall, Mikulski, Leahy, Sanders, Bingaman, Whitehouse, Cardin, Boxer, Gillibrand, Menendez, Akaka, Schumer, Wyden, Begich, Casey, Cantwell, Shaheen, Reed, Coons and Brown of Ohio). Senator Franken concluded that "[t]his harassment deprives [children] of an equal education." *Id.* Indeed, one survey found that "nearly 60% of lesbian, gay, bisexual, and transgender students who did not expect to graduate from high school said that this expectation was due to

noted in his floor statement in support of his amendment to add SNDA to the Every Child Achieves Act, “Nearly 75 percent of LGBT students say they have been verbally harassed at school. More than 30 percent report missing a day of school in the last month because they felt unsafe.” 161 Cong. Rec. S5046 (daily ed. July 14, 2015) (statement of Senator Franken). This bullying and harassment has serious negative consequences. *See supra* Part I.A. As Senator Leahy pointed out in a floor speech supporting efforts to curb bullying and harassment of LGBT students after a gay student who was publicly shamed and tormented took his own life, “It has been well documented that students who are paralyzed by fear or bullying cannot effectively learn.” 158 Cong. Rec. S1928 (daily ed. March 21, 2012) (statement of Senator Leahy); *see also* 157 Cong. Rec. E459 (daily ed. Mar. 11, 2011) (statement of Representative Michael M. Honda) (“The hostile environment created by harassment and bullying not

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a hostile or unsupportive school environment, including hostile peers, unsupportive school staff, and gendered school practices that caused them constant discomfort”. Brief of the States of New York, Washington, California, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Oregon and Vermont and the District of Columbia as *Amici Curiae* in Support of the United States’ Motion for Preliminary Injunction, at \*17, *United States v. North Carolina*, 192 F. Supp. 3d 620 (M.D.N.C. 2016) (signed by *amicus* Senator Kamala Harris); *see also* Brief of States as *Amici Curiae* in Opposition to Plaintiffs’ Application for Preliminary Injunction, at \*19, *Texas v. United States*, No. 7:16-cv-00054, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016) (signed by *amicus* Senator Kamala Harris) (noting that transgender students who experience frequent harassment have lower GPAs on average).

only deprives students of the opportunity to receive a quality education, but also contributes to academic underachievement.”).

*Amici* believe SNDA is therefore an important complement to Title IX’s existing protections of LGBT children. SNDA is consistent with Title IX’s central purpose and, by expressly including “gender identity”, it would codify existing case law like *Oncale*, *Price Waterhouse*, *Glenn*, *Barnes*, *Smith*, *Rosa*, *Schwenck*, *Kastl*, *Schroer*, *Fabian*, *Roberts*, *Finkle*, *Lopez*, *Mitchell* and *Tronetti*. See *supra* Part I.B; see also Letter from 40 Senators to the Honorable John King (May 2, 2016). SNDA would further provide school administrators with certainty and predictability in fashioning school policies and make it easier for our educators to protect their students from unwanted discrimination—for the benefit of students and educational institutions alike. See 161 Cong. Rec. S5041 (daily ed. July 14, 2015) (statement of Senator Murray) (explaining that ordinarily “school leaders want to do the right thing and end bullying or harassment in their classrooms. . . . They want to make sure their school is safe for a particular group of students. They want to make sure students are not discriminated against simply because of who they are.”). Indeed, “41 percent of principals say they have programs designed to create a safe environment for LGBT students, but only 1/3 of principals say that LGBT students would feel safe at their school.” 158 Cong. Rec. E1090 (daily ed. June 20, 2012) (statement of Representative Reyes). SNDA would ensure that Title IX’s protections are fully enforceable and that LGBT students, their parents, and their teachers

have the tools necessary to guarantee they are educated in a safe and accepting environment.

Finally, SNDA's drafters specifically included a "no negative inference" provision to ensure nothing in SNDA "shall be construed to preempt, invalidate, or limit rights, remedies, procedures, or legal standards available to victims of discrimination or retaliation under any other Federal law or law of a State . . . including . . . [T]itle IX of the Education Amendments of 1972". S. 439 § 10(a).

Therefore, even if this Court looks to SNDA to inform its Title IX interpretation, it should view SNDA as simply reiterating, in more explicit language, what Title IX already tells us. Our public schools cannot discriminate against our children on the basis of gender identity.

**CONCLUSION**

For the foregoing reasons, we respectfully request that this Court affirm.

March 2, 2017

Respectfully submitted,

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## APPENDIX

### I. COMPLETE LIST OF *AMICI CURIAE*

#### A. United States Senators (40)

Tammy Baldwin	Tim Kaine
Michael F. Bennet	Amy Klobuchar
Richard Blumenthal	Patrick Leahy
Cory A. Booker	Edward J. Markey
Sherrod Brown	Robert Menendez
Maria Cantwell	Jeff Merkley
Benjamin L. Cardin	Christopher S. Murphy
Thomas R. Carper	Patty Murray
Robert P. Casey, Jr.	Gary C. Peters
Christopher A. Coons	Jack Reed
Catherine Cortez Masto	Bernard Sanders
Tammy Duckworth	Brian Schatz
Richard J. Durbin	Charles E. Schumer
Dianne Feinstein	Jeanne Shaheen
Al Franken	Jon Tester
Kirsten E. Gillibrand	Chris Van Hollen
Kamala D. Harris	Mark R. Warner
Maggie Hassan	Elizabeth Warren
Martin Heinrich	Sheldon Whitehouse
Mazie Hirono	Ron Wyden

#### B. Members of the United States House of Representatives (156)

Alma S. Adams	Donald S. Beyer, Jr.
Pete Aguilar	Earl Blumenauer
Nanette Barragán	Suzanne Bonamici
Karen Bass	Brendan F. Boyle
Ami Bera	Robert A. Brady

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Anthony Brown	Eliot L. Engel
Julia Brownley	Anna G. Eshoo
G.K. Butterfield	Adriano Espaillat
Michael E. Capuano	Elizabeth Esty
Salud Carbajal	Bill Foster
Tony Cárdenas	Lois Frankel
André Carson	Marcia L. Fudge
Matt Cartwright	Tulsi Gabbard
Kathy Castor	Ruben Gallego
Joaquin Castro	Josh Gottheimer
Judy Chu	Al Green
David Cicilline	Gene Green
Katherine Clark	Raúl M. Grijalva
Yvette D. Clarke	Luis V. Gutiérrez
Steve Cohen	Colleen Hanabusa
Gerald E. Connolly	Alcee L. Hastings
John Conyers, Jr.	Denny Heck
Jim Cooper	Brian Higgins
J. Luis Correa	Jim Himes
Joe Courtney	Michael M. Honda
Charlie Crist	Steny Hoyer
Joe Crowley	Jared Huffman
Elijah E. Cummings	Steve Israel
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Susan Davis	Hakeem Jeffries
Diana DeGette	Eddie Bernice Johnson
John K. Delaney	Henry C. "Hank" Johnson, Jr.
Rosa L. DeLauro	William R. Keating
Suzan DelBene	Joseph P. Kennedy, III
Val Demings	Ro Khanna
Mark DeSaulnier	Ruben J. Kihuen
Theodore E. Deutch	Dan Kildee
Debbie Dingell	Derek Kilmer
Mike Doyle	Raja Krishnamoorthi
Keith Ellison	

App. 3

Ann McLane Kuster	Scott H. Peters
James R. Langevin	Chellie Pingree
Brenda L. Lawrence	Mark Pocan
Barbara Lee	Jared Polis
Sheila Jackson Lee	David Price
Sander Levin	Mike Quigley
John Lewis	Jamie Raskin
Ted W. Lieu	Kathleen M. Rice
Zoe Lofgren	Lisa Blunt Rochester
Alan Lowenthal	Ileana Ros-Lehtinen
Nita Lowey	Lucille Roybal-Allard
Ben Ray Luján	Raul Ruiz
Michelle Lujan-Grisham	Tim Ryan
Stephen F. Lynch	Linda T. Sánchez
Carolyn B. Maloney	John Sarbanes
Sean Patrick Maloney	Jan Schakowsky
Doris Matsui	Adam Schiff
Betty McCollum	Bradley S. Schneider
A. Donald McEachin	Debbie Wasserman
James P. McGovern	Schultz
Gregory W. Meeks	Robert C. “Bobby” Scott
Grace Meng	José E. Serrano
Gwen Moore	Carol Shea-Porter
Seth Moulton	Brad Sherman
Patrick Murphy	Kyrsten Sinema
Jerrold Nadler	Louise Slaughter
Richard M. Nolan	Adam Smith
Donald Norcross	Darren Soto
Eleanor Holmes Norton	Jackie Speier
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Jimmy Panetta	Eric Swalwell
Bill Pascrell, Jr.	Mark Takano
Donald M. Payne, Jr.	Mike Thompson
Nancy Pelosi	Dina Titus
Ed Perlmutter	Paul Tonko

App. 4

Niki Tsongas  
Juan Vargas  
Nydia M. Velázquez  
Tim Walz

Bonnie Watson-Coleman  
Peter Welch  
Frederica Wilson  
John Yarmuth

# **EXHIBIT**

**3**

United States Senate  
WASHINGTON, DC 20510

May 2, 2016

The Honorable John King  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Dear Secretary King:

As senators committed to ensuring that *all* students—including lesbian, gay, bisexual, and transgender (LGBT) students—have access to a public education in an environment free from discrimination, we are writing to request that the Department of Education explain the scope of protections afforded to LGBT students under Title IX of the Education Amendments of 1972 (Title IX) and clarify that state laws requiring discrimination against LGBT students run afoul of Title IX and jeopardize states' and school districts' continued receipt of federal funding.

Title IX prohibits discrimination “on the basis of sex”<sup>1</sup> in any educational program or activity that receives federal funding—including public primary and secondary schools, public colleges and universities, and private schools and universities that accept student loans or federal funds. While Title IX is widely known for increasing women's and girls' participation in sports, this landmark civil rights law guards against sex discrimination in all aspects of educational opportunity, including harassment, housing, admissions and recruiting, and financial aid. Virtually all public schools and public and private colleges and universities in the country receive federal funding from the Department of Education and other federal agencies. Institutions that fall short of their obligations under Title IX risk the suspension or termination of federal funding.

Consistent with caselaw in the area of employment discrimination, both your Department and the Department of Justice (DOJ) have clarified that Title IX's prohibition on sex discrimination prohibits discrimination on the basis of gender identity. The Department of Education issued guidance clarifying that Title IX prohibits gender-based harassment of students,<sup>2</sup> including discrimination against transgender and gender non-conforming students,<sup>3</sup> and failure to respect transgender students' gender identity when operating single-sex classes.<sup>4</sup> Both DOJ and the Department of Education have applied this interpretation of Title IX to support transgender students challenging school policies banning them from using the restroom or locker room that

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<sup>1</sup> 20 U.S.C. § 1681.

<sup>2</sup> *Dear Colleague Letter: Harassment and Bullying*, U.S. Department Of Education, 8 (October 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>3</sup> *Questions and Answers on Title IX and Sexual Violence*, U.S. Department Of Education, 5 (April 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>4</sup> *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. Department Of Education, (December 25, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

corresponds with their gender identity.<sup>5</sup> DOJ explained that “[t]reating a student adversely because the sex assigned to him at birth does not match his gender identity is literally discrimination ‘on the basis of sex.’ . . . Prohibiting a transgender male student from using boys’ restrooms, when other non-transgender male students face no such restriction, deprives him not only of equal educational opportunity but also ‘of equal status, respect, and dignity.’”<sup>6</sup> Recently, the U.S. Court of Appeals for the Fourth Circuit agreed with the administration’s interpretation that Title IX protects the rights of transgender students to use sex segregated facilities that are consistent with their gender identity—a significant victory.<sup>7</sup> The Departments’ interpretation and enforcement of Title IX is consistent with courts’ and federal agencies’ interpretations of other sex discrimination statutes, including Title VII.

However, despite the important steps the federal government has taken to secure equality for transgender and gender non-conforming students, state legislators are pursuing policies that seek to halt this progress. North Carolina’s recent enactment of House Bill 2, a discriminatory measure that forbids transgender students appropriate access to bathrooms and locker rooms, provoked a swift backlash from business leaders, the National Basketball Association, the National Collegiate Athletic Association, and even the leading Republican candidate for president. Nonetheless, state legislators in Tennessee, Kansas, South Carolina, and Minnesota continued to push similar measures.

In the face of ongoing legislative assaults on LGBT students, and transgender students in particular, we remain concerned that the Department of Education has not yet further clarified that schools permitting discrimination against LGBT students to continue unabated risk losing their eligibility for federal funds. Although the Department of Education has stated that Title IX covers gender identity discrimination, including for single-sex classrooms and sexual harassment, it has not yet provided specific guidance to schools on how these protections apply in the myriad other circumstances experienced by transgender students in schools. Last week, the *New York Times* reported that the Department of Education has drafted guidance for school administrators on their obligations to LGBT students under Title IX.<sup>8</sup> We urge the Department to release that guidance now.

We strongly believe that it is our responsibility—not just as senators, but as adults—to protect our children and young people, and to help them flourish. We applaud and thank the Department of Education, as well as the Department of Justice, for sharing that goal, and for their commitment to equality and work in support of LGBT students. We respectfully request that the Department complete that work by issuing clear, comprehensive guidance.

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<sup>5</sup> See Brief for the United States as *Amici Curiae* Supporting Appellant, *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. Oct. 28, 2015); Statement of Interest of the United States, *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466-AC-DRG (E.D. Mich. Feb. 24, 2015); Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.

<sup>6</sup> Brief for the United States as *Amici Curiae* Supporting Appellant, *G.G. v. Gloucester County School Board*, No. 15-2056, 14 (4th Cir. Oct. 28, 2015) (internal citations omitted).

<sup>7</sup> *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. Apr. 19, 2016).

<sup>8</sup> Editorial, *Transgender Bathroom Hysteria, Cont’d.*, N.Y. TIMES, Apr. 18, 2016, at A20.

Sincerely,



AL FRANKEN  
United States Senator



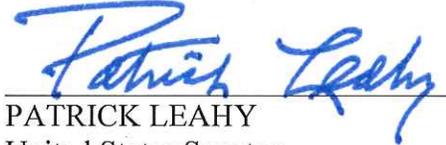
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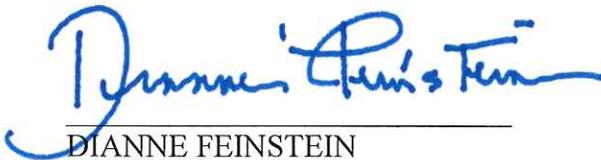
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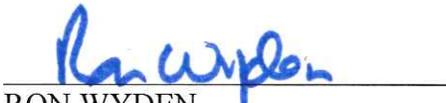
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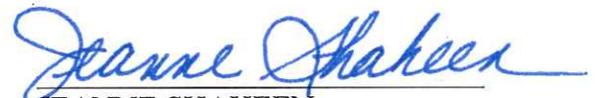
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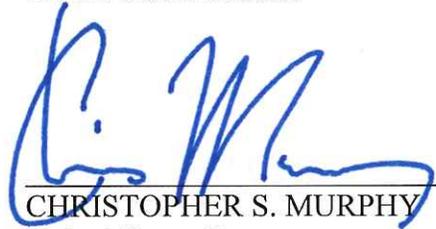
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United States Senator



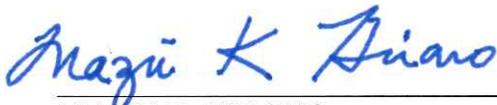
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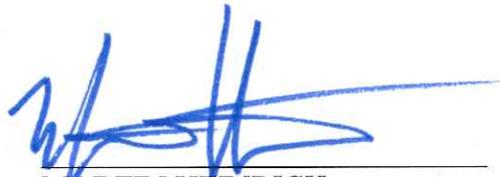
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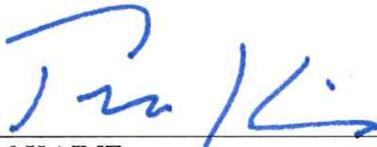
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# **EXHIBIT**

**4**



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Financial Payer      MEDICAID  
 Service Area        MEDICAL - MEDICAL SERVICES  
 Procedure Code      19303  
 Procedure Description MAST SIMPLE COMPLETE  
 Date of Service      07/16/2018  
 Benefit Group        Mastectomy Procedures

All policy information is not listed in the max fee schedules. Please refer to the appropriate provider handbook for applicable policy for each procedure code.

**Billing Rules**

- This section displays billing restrictions on the procedure code for the select service area.

Rendering Provider Type/Specialty	Modifiers	Place of Service	PA Always Required	Diagnosis Restriction	Benchmark/Core/Basic Indicator
09/000, 10/000, 31/000, 33/000		05, 06, 07, 08, 21, 22, 24, 50	Yes	Yes	Benchmark/Benchmark Dental/Core/Basic
09/000, 10/000, 31/000, 33/000		05, 06, 07, 08, 21, 22, 24, 50	No	Yes	Benchmark/Benchmark Dental/Core/Basic

**Max Fee Rates**

- This section displays the maximum allowable rate payable for the selected service area and procedure code.

Rendering Provider Type/Specialty	Modifiers	Rate	Age (Min/Max)	Rate Type	Benchmark/Core/Basic Indicator
excluding 10/100	50 is present	976.68	N/A	C30	Benchmark/Benchmark Dental/Core/Basic
10/100		586	N/A	PT1	Benchmark/Benchmark Dental/Core/Basic
10/100	50 is present	879.00	N/A	PT1	Benchmark/Benchmark Dental/Core/Basic
excluding 10/100		651.12	N/A	C30	Benchmark/Benchmark Dental/Core/Basic

## Restrictions

- This section displays specific limitations on the procedure code for the select service area.
- Not all restrictions are listed. Please refer to the appropriate provider handbook for applicable policy when billing this code.

Rendering Provider Type/Specialty	Modifiers	Description
No restrictions were found.		

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Financial Payer      MEDICAID  
 Service Area        MEDICAL - MEDICAL SERVICES  
 Procedure Code      19350  
 Procedure Description BREAST RECONSTRUCTION  
 Date of Service      07/16/2018  
 Benefit Group        Repair and/or Reconstruction

All policy information is not listed in the max fee schedules. Please refer to the appropriate provider handbook for applicable policy for each procedure code.

Billing Rules

- This section displays billing restrictions on the procedure code for the select service area.

Rendering Provider Type/Specialty	Modifiers	Place of Service	PA Always Required	Diagnosis Restriction	Benchmark/Core/Basic Indicator
01/000, 09/000, 10/000, 31/000, 33/000		01, 03, 04, 05, 06, 07, 08, 09, 11, 15, 19, 20, 21, 22, 23, 24, 25, 26, 31, 32, 33, 49, 50, 51, 54, 56, 57, 60, 61, 71, 72, 99	Yes	Yes	Benchmark/Benchmark Dental/Core/Basic
01/000, 09/000, 10/000, 31/000, 33/000		01, 03, 04, 05, 06, 07, 08, 09, 11, 15, 19, 20, 21, 22, 23, 24, 25, 26, 31, 32, 33, 49, 50, 51, 54, 56, 57, 60, 61, 71, 72, 99	No	Yes	Benchmark/Benchmark Dental/Core/Basic

Max Fee Rates

- This section displays the maximum allowable rate payable for the selected service area and procedure code.

Rendering Provider Type/Specialty	Modifiers	Rate	Age (Min/Max)	Rate Type	Benchmark/Core/Basic Indicator
excluding 10/100	50 is present	561.86	N/A	C30	Benchmark/Benchmark Dental/Core/Basic
10/100		337.11	N/A	PT1	Benchmark/Benchmark Dental/Core/Basic
10/100	50 is present	505.66	N/A	PT1	Benchmark/Benchmark Dental/Core/Basic
excluding 10/100		374.57	N/A	C30	Benchmark/Benchmark Dental/Core/Basic

Restrictions

- This section displays specific limitations on the procedure code for the select service area.
- Not all restrictions are listed. Please refer to the appropriate provider handbook for applicable policy when billing this code.

Rendering Provider Type/Specialty	Modifiers	Description
No restrictions were found.		

- [Rules](#) for this service code.
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