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Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do

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Abstract

For most Americans, concerns related to students who identify as transgender are a new reality. The Obama Administration's response to this new reality was an unlawful attempt to force a one-size-fits-all policy on the entire nation rather than allow parents, teachers, and local schools the time, space, and flexibility to find solutions that would work best for everyone. The Trump Administration has taken the first steps to correct this. Instead of imposing a federal "gender identity" policy on the entire nation, all branches of government should respect federalism, local decision-making, and parental authority in education. The American people should be able to consider all of the relevant concerns and devise policies that can best serve all Americans. Congress should support such efforts, and the courts should respect them.

All across America, parents, teachers and local school districts have been having 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 found win-win solutions, such as the creation of single-occupancy restrooms and changing facilities for students who identify as transgender while retaining girls' and boys' rooms for biological girls and boys, but activists attacked these commonsense compromise policies as "transphobic."

Then, in May 2016, the Obama Administration announced that Title IX, a 1972 law prohibiting sex discrimination in federally funded schools, requires schools to allow students access to bathrooms, locker rooms, dormitory rooms, and hotel rooms for overnight field trips based entirely on the self-declared gender identities of their students.

Key Points

- Congress passed Title IX of the Education Amendments of 1972 to minimize sexism in primary and higher education and to ensure equal opportunities in education for women and girls.
- In recent years, bureaucrats have wrongly redefined "sex" in Title IX as "gender identity" to create special privileges for students who identify as transgender while ignoring the concerns of other students.
- Students, particularly women and girls, have valid concerns about privacy and safety in intimate spaces such as showers, locker rooms, bathrooms, and dormitories.
- Redefining "sex" as "gender identity" under Title IX raises concerns about the legal equality of women and subverts the original purpose of Title IX.
- Congress should specify that "sex" does not mean "gender identity"; states should work to protect women's privacy, safety, and equality; local schools should devise win-win solutions that respect the privacy and safety of all students; and courts should respect the democratic process.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3201**

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On August 21, 2016, Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas ruled that the Obama Administration's attempt to redefine sex under Title IX was unlawful and blocked the decree from going into effect. On February 22, 2017, the Trump Departments of Justice and Education formally rescinded the Obama-era "gender identity" guidance that had created the confusion.[1]

The federal court and the Trump Administration got it right. Congress, the courts, and the Trump Administration should continue to make clear that sex means objective biological sex, not subjective gender identity. Title IX was designed to address invidious sex-based discrimination and at the same time explicitly allowed single-sex intimate facilities. More recently a new question of "gender identity" has arisen, and the result has been a variety of federal attempts to force gender identity policies on our nation's schools, including the creation of a "Shame List" for religious schools seeking protection from this government overreach.

These new gender identity policies are unlawful. When Congress passed Title IX of the Education Amendments, no one thought that "sex" meant "gender identity." It did not mean it then, and it does not mean it now. Federal bureaucrats have unlawfully attempted to rewrite federal law. The term "sex" is not ambiguous and cannot be unilaterally redefined by executive branch agencies to mean "gender identity."

Redefining "sex" as "gender identity" is also bad policy. 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. 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.

The Trump Administration's Departments of Justice and Education should continue to reject the unlawful redefinition of "sex" from the Obama era; Congress should ratify this action 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 courts should respect the democratic process.

History of Title IX

Title IX of the Education Amendments of 1972 is a federal law that prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance."[2] At the time Title IX was passed, girls and women faced difficulties and discrimination in pursuing education, particularly higher education. The purpose of Title IX was to minimize or even eliminate sexism in both primary and higher education and to ensure equal opportunities in education for our nation's girls and women.

Introduced in Congress in 1972 by Senator Birch Bayh (D–IN) and signed into law by President Richard Nixon on June 23, 1972, Title IX ensured that federal dollars would be as available to programs for women as they were for men's programs in colleges, universities, and elementary and secondary schools. Title IX also applies to any educational or training program operated by a recipient of federal financial assistance. Because most schools receive federal funds of some sort, Title IX's influence is widespread:

> Virtually all school districts and colleges receive some form of federal money (the exceptions are private secondary schools and colleges that do not participate in federal student loan programs, such as Hillsdale College in Michigan). Thus, practically all scholastic and college sports are governed by Title IX.[3]

Implementation of Title IX has always allowed exemptions for religious schools. In the years between the implementation of Title IX and the Arcadia Resolution Agreement in 2013, 190 religious schools were granted exemptions. Among the schools receiving such exemptions were seminaries that trained only men for the Catholic priesthood; educational institutions "controlled, conducted, and operated by the Orthodox Jewish religion"; and Brigham Young University, a Latter Day Saints institution that maintained different dress codes for men

1. Ryan T. Anderson, "Trump Right to Fix Obama's Unlawful Transgender School Policy," The Daily Signal, February 22, 2017, http://dailysignal.com/2017/02/22/trump-right-to-fix-obamas-unlawful-transgender-school-policies/.
2. 20 U.S.C. § 1681, https://www.gpo.gov/fdsys/pkg/USCODE-2010-title20/pdf/USCODE-2010-title20-chap38.pdf (accessed March 1, 2017).
3. Welch Suggs, *A Place on the Team: The Triumph and Tragedy of Title IX* (Princeton, NJ: Princeton University Press, 2005), p. 5.

and women because "BYU believed that 'differences in dress and grooming of men and women are proper expressions of God-given differences in the sexes.'"[4]

Because most religious schools did not treat students or staff differently on the basis of sex, most of them did not file for exemptions to Title IX. According to Professor Kif Augustine-Adams:

> For years on end, [the U.S. Department of Education's Office for Civil Rights] had no new work on religious exemptions to Title IX. By 2012, it may have been easy to conclude that educational institutions' demand for religious exemption to Title IX had evaporated or at least been fulfilled through the exemptions OCR had already recognized.[5]

This would begin to change, however, in 2013 when the OCR used the government's redefinition of "sex" to threaten local school districts with funding revocations for having sex-specific facilities based on biology instead of gender identity.

Protecting Women Against Invidious Discrimination. In his remarks on the Senate floor during the debate on Title IX, Senator Bayh said that the intention behind the law was to create a "strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination" that existed at the time.[6] Bayh stated that:

> [Title IX was] an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice.[7]

Before passage of Title IX, sex discrimination in education was manifest in numerous ways. The editors of the *University of Pennsylvania Law Review* explain that Title IX was designed specifically to reduce explicit discrimination against women:

> The practices most obviously covered by Title IX involve overtly different treatment of male and female students. Some elementary schools forbid girls to join the safety patrol. Colleges and universities often prescribe earlier curfews for women than for men. Vocational interest tests have been color coded pink and blue with different career choices for women and men. All of these are examples of explicit discrimination based on sex, prohibited by Title IX.[8]

Title IX did more than protect students from this overt discrimination. It also ensured that female students, professors, and staff in schools receiving federal funding would be protected from discrimination in all aspects of the educational experience, but it is most often discussed because of its impact in allowing women to participate in athletic programs at all levels:

> At American colleges, more than two hundred thousand women are on varsity sports teams, up from a handful in 1971. More than 2.8 million girls were on high school teams in 2002. There were roughly 490,000 college athletes and 6.7 million high school athletes, so women comprise about 40 percent of the total on both levels.[9]

Affecting athletics, however, is only one portion of the scope of Title IX, which covers 10 areas: "access to higher education, career education, employment, math and science, standardized testing, athlet-

4. Kif Augustine-Adams, "Religious Exemptions to Title IX," undated, pp. 28 and 12, http://law.pepperdine.edu/nootbaar-institute/annual-conference/content/kif-augustine-adams.pdf (accessed March 1, 2017).
5. Ibid., p. 42.
6. Justia, "Title IX Legal Manual: Synopsis and Purpose of Title IX, Legislative History, and Regulations," https://www.justia.com/education/docs/title-ix-legal-manual/synopsis-of-purpose-of-title-ix.html (accessed February 24, 2017).
7. Courtney Emerson, "Hear Them Roar! Celebrating 44 Years of Title IX Law Barring Sex Discrimination," *New York Daily News*, June 23, 2016, http://www.nydailynews.com/life-style/celebrating-44-years-title-ix-law-barring-sex-discrimination-article-1.2684216 (accessed February 24, 2017).
8. Editors, "Implementing Title IX: The HEW Regulations," *University of Pennsylvania Law Review*, Vol. 124, Issue 3 (1976), p. 810, http://scholarship.law.upenn.edu/penn_law_review/vol124/iss3/5/ (accessed March 1, 2017).
9. Suggs, *A Place on the Team,* p. 2.

ics, education for pregnant and parenting students, learning environment, sexual harassment, and technology."[10]

Preserving Commonsense Single-Sex Policies Based on Biology. 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." Three years later, the Department of Health, Education, and Welfare's implementing regulations made clear that Title IX "permits separate but comparable toilet, locker room, and shower facilities on the basis of sex,"[11] thereby preserving sex-specific facilities while ensuring that women's facilities would not be inferior to men's and vice versa.

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.

This binary nature of sex is reflected explicitly in Title IX itself, which exempts "father-son" and "mother-daughter" school activities for students "of one sex" so long as the school provides "reasonably comparable activities for students of the other sex." Additionally, Title IX exempted scholarship awards from beauty pageants that took into account "personal appearance" and where participation was limited to "individuals of one sex only." In short, Congress protected women and men under the common, biologically based, binary understanding of a person's sex that prevailed when Title IX was passed and left no room for any other interpretation.

The Question of Gender Identity

Title IX was passed in 1972, and its implementing regulations were promulgated in 1975. They were meant to address sexism and promote the equality of girls and women. Many years later, a different question arose: How should schools accommodate students who identify as transgender? Schools created balanced solutions that were age-appropriate and nuanced given the type of institution: whether at the grade school level, the high school level, the university level, or the graduate school level. No one assumed that a one-size-fits-all rule 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 nuanced proposals. 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.

Schools facing this issue were sensitive to the 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.

The Current Redefinition of Sex in Title IX

In recent years, however, the original purpose of Title IX and the prior, localized way of dealing

10. National Women's Law Center, MARGARET Fund, "40th Anniversary of Title IX: The Next Generation," http://www.titleix.info/Resources/News-Articles/40th-Anniversary-of-Title-IX-The-Next-Generation.aspx (accessed March 1, 2017).
11. Editors, "Implementing Title IX: The HEW Regulations," p. 826.

with concerns of students who identify as transgender came under attack by the Obama Administration. Instead of being used to protect women from discrimination in education, Title IX was used by bureaucrats to force schools to create special privileges based on gender identity that could undermine the law's very purpose. This subversion of Title IX, largely pushed by the Department of Education's Office for Civil Rights, began in 2010 and has been furthered by lawsuits and guidance documents.

December 2010 "Dear Colleague" Letter. A December 26, 2010, "Dear Colleague" letter from the Office for Civil Rights provides one of the first examples of the Department of Education's intention to extend Title IX to include gender identity protections. Detailing how schools should react to harassment and bullying to remain in accordance with federal regulations, the OCR deftly expanded the definition of "sex" under Title IX to include gender identity:

> Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.
>
> Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex-discrimination prohibited under Title IX....[12]

While this applied only to bullying, it was the first step in redefining Title IX beyond its additional scope of protecting women and girls in education to include "LGBT status." This letter laid the groundwork for the later, more sweeping inclusion of gender identity under Title IX.

2013 Arcadia School District Resolution Agreement. In 2013, the U.S. Department of Education (DOE) and U.S. Department of Justice (DOJ) extended Title IX to cover gender identity in single-sex facilities. The Obama Administration forced a school district in California to allow students unfettered access to bathrooms and locker rooms on the basis of gender identity, not sex.

A student in the Arcadia School District sought access to sex-specific facilities at school and cabins at a school-sponsored science camp based on gender identity. The school district had provided the student with use of a private single-occupancy bathroom but allegedly did not allow the student access to the restroom or cabin designated for students of the opposite sex on a school field trip. The DOE's Office for Civil Rights and the DOJ's Civil Rights Division intervened. The result was a resolution agreement that for the first time included gender identity and gender expression as protected under Title IX's ban on sex discrimination:

> "Gender-based discrimination" is a form of sex discrimination, and refers to differential treatment or harassment of a student based on the student's sex, including gender identity, gender expression, and nonconformity with gender stereotypes, that result in the denial or limitation of education services, benefits, or opportunities. Conduct may constitute gender-based discrimination regardless of the actual or perceived sex, gender identity, or sexual orientation of the persons experiencing or engaging in the conduct.[13]

Because of the Arcadia agreement, the school district was required to provide the student with access to sex-specific facilities and activities according to the student's self-declared gender identity. The school district was also required to keep the student's birth name and biological sex confidential and not disclose the information to any district employees or other students without consent from the student's parents or the student.[14]

12. U.S. Department of Education, Office for Civil Rights, "Dear Colleague Letter: Harassment and Bullying," October 26, 2010, p. 8, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (accessed March 1, 2017).
13. U.S. Department of Education and U.S. Department of Justice, "Resolution Agreement Between Arcadia Unified School District and the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division," OCR Case Number 09-12-1020, DOJ Case Number 169-12C-70, July 24, 2013, p. 1, https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (accessed March 2, 2017).
14. Ibid., p. 3.

Beyond requiring the school district to modify its treatment of the student in question, the agreement also specified that:

> [The school district must] revise all of its policies, procedures, regulations, and related documents and materials...related to discrimination to a) specifically include gender-based discrimination as a form of discrimination based on sex, and b) state that gender-based discrimination includes discrimination based on a student's gender identity, gender expression, gender transition, transgender status, or gender nonconformity.[15]

The school district had to provide training to all district and school administrators regarding their responsibilities to prevent gender-based harassment and "best practices for creating a nondiscriminatory school environment for transgender students."[16]

Palatine District 211. In November 2015, Palatine School District 211 outside of Chicago, Illinois, received a report from the DOE's Office for Civil Rights threatening loss of funds under Title IX if it did not allow a male student who identified as female access to the girls' bathrooms and locker rooms.[17] Previously, the school had come up with arrangements that would seek to accommodate the student who identified as transgender while also balancing the privacy and safety concerns of the female students.

The school district went to considerable lengths to make the student comfortable, treating the student as a female in every way (including access to bathrooms and sports teams) except allowing access to the girls' locker rooms.[18] Even in this, the high school went to great lengths to accommodate the student, "at one point install[ing] a bank of lockers in a private bathroom and encourage[ing] the student to invite friends who were comfortable changing there to move their lockers. This was meant to avert Student A from being forced to change alone."[19]

These accommodations were nevertheless deemed discriminatory by the OCR. With a threatened loss of federal funding looming, the school district buckled to the OCR's demands and agreed to allow the student access to the girls' locker rooms in the Palatine School District. The resolution also required the schools to install "sufficient privacy curtains (privacy changing stations) within the girls' locker rooms to accommodate Student A and any students who wish to be assured of privacy while changing."[20]

But installing privacy curtains was not sufficient to address the concerns of high school girls who are now forced to share a locker room with an anatomical male. One 15-year-old girl spoke of her concerns:

> [I]t just doesn't feel right knowing someone with male anatomy is in the bathroom with me. I have nothing against Student A and would be her friend if I knew her better, but when it comes down to it, I don't feel right changing in the same room as a transgender student. The locker room is already filled with so much judgment, and I barely feel OK changing in front of my naturally born girl peers.[21]

15. Ibid., p. 4.
16. Ibid., p. 5.
17. Letter from Adele Rapport, Regional Director, U.S. Department of Education, Office for Civil Rights, to Daniel E. Cates, Superintendent, Township High School District 211, OCR Case No. 05-14-1055, November 2, 2015, http://www.chicagotribune.com/ct-doe-report-on-district-211-20151102-htmlstory.html (accessed February 27, 2017). Cited hereafter as Rapport Letter.
18. The school district even allowed the student who identified as transgender access to the girls' bathrooms and sports teams: "The Department of Education's investigation into alleged discrimination found that 'the district honored Student A's request to be treated as a female in all respects except her request to be provided access to the girls' locker rooms.' This included granting the transgender student 'unlimited' access to the girls' bathrooms and allowing the student to play on the girls' sports teams." Kelsey Harkness, "Why These High School Girls Don't Want a Transgender Student in Their Locker Room," The Daily Signal, December 21, 2015, http://dailysignal.com/2015/12/21/why-these-high-school-girls-dont-want-transgender-student-a-in-their-locker-room/.
19. Ibid.
20. U.S. Department of Education, "Agreement to Resolve Between Township High School District 211 and the U.S. Department of Education, Office for Civil Rights," OCR Case #05-14-1055, December 2, 2015, p. 2, https://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf (accessed February 24, 2017).
21. Harkness, "Why These High School Girls Don't Want a Transgender Student in Their Locker Room."

Moreover, the agreement did not say what would happen if Student A, a biological male who "wanted to be a girl like every other girl,"[22] chose not to use the curtains when changing. On May 4, 2016, a group of 51 families sued the school district to attempt to reverse the policy brought about by the resolution agreement.[23] In October 2016, an Illinois judge recommended denying an injunction in the case, which is still unresolved.[24]

Gloucester County Public School Board v. G.G. On June 11, 2015, a female student who identifies as male, G.G., sued the Gloucester County, Virginia, School Board because it would not allow G.G. access to the boys' restroom. The district had allowed such access until complaints by several families prompted it to implement a policy by which only biological girls could use the girls' room, only biological boys could use the boys' room, and any student could use one of three single-occupancy bathrooms, which the school built specifically to accommodate students who identify as transgender. This arrangement, which accommodated students who identify as transgender while also protecting the privacy rights of other students, was not good enough for G.G., who sued the school district for alleged unlawful sex discrimination on the basis of gender identity.

A district court ruled in favor of the school district, but on April 19, 2016, the U.S. Court of Appeals for the Fourth Circuit overturned that decision and ruled against the district.[25] In determining the meaning of sex discrimination under Title IX, the court held that it was bound to defer to an unpublished guidance letter from the OCR'S acting assistant deputy director, which specified that "sex" for Title IX purposes included "gender identity."

The school district appealed the decision, and on August 3, 2016, the U.S. Supreme Court issued a stay on the circuit court's opinion that halted implementation of the guidance for the upcoming school year. On October 28, 2016, the Supreme Court agreed to hear two of the questions being considered in the case: whether the DOE's guidance letter deserved controlling deference (known as *Auer* deference) and, regardless of deference, whether the word "sex" under Title IX and regulations allowing for sex-specific facilities actually encompass the DOE's "gender identity" theory. On February 22, 2017, the Trump Department of Education formally rescinded the Obama-era OCR's "gender identity" guidance,[26] and on March 6, 2017, the U.S. Supreme Court vacated the ruling by the circuit court and sent the case back to that court to be reconsidered in light of the recent Trump Administration action.

May 2016 "Dear Colleague" Letter. In May 2016, the Obama Departments of Justice and Education released a long joint guidance letter declaring that "both federal agencies treat a student's gender identity as the student's sex for purposes of enforcing Title IX." The letter directed schools to allow "students to participate in sex-segregated activities and access sex-segregated facilities consistent with their gender identity."[27] In other words, access to sports teams, bathrooms, locker rooms, dormitory rooms, and hotel rooms for field trips would have to be based on the self-declared gender identity of the students.

The Obama Administration explicitly rejected compromises such as single-occupancy facilities: "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." Similarly, with respect to campus housing or hotels for off-campus trips, "a school must allow transgender students to access housing consistent with their gender identity and

22. Rapport Letter, p. 3.
23. Kelsey Harkness, "51 Families Sue Over Illinois High School's Transgender Bathroom Policy," The Daily Signal, May 4, 2016, http://dailysignal.com/2016/05/04/50-families-sue-over-illinois-high-schools-transgender-bathroom-policy/.
24. Timothy Mclaughlin, "Illinois Judge Recommends Denial of Transgender-Access Injunction, Reuters, October 19, 2016, http://www.reuters.com/article/illinois-lgbt-idUSL1N1CP1X0 (accessed March 2, 2017).
25. *G.G. v. Gloucester County School Board*, United States Court of Appeals for the Fourth Circuit, No. 15-2056, April 19, 2016, http://www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf (accessed March 2, 2017).
26. Anderson, "Trump Right to Fix Obama's Unlawful Transgender School Policy."
27. News release, "U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students," U.S. Department of Justice, May 13, 2016, https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights (accessed February 24, 2017).

may not require transgender students to stay in single-occupancy accommodations."[28]

The "Dear Colleague" letter makes clear reference to the importance of privacy concerns, but the only privacy concerns it acknowledges are the concerns of students who identify as transgender: "protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity."[29] It gives short shrift to the privacy concerns of other students. The guidance states that "the desire to accommodate others' discomfort" is not a legitimate basis for schools' retaining sex-specific facilities even if they also provide private accommodations for transgender and other students.[30] The guidance does not allow schools to inform students (or their parents) whether they will have to share a bedroom or locker room with a student of the opposite biological sex. At most, it says that a school "may" (not must) "make individual-user options available to all students who voluntarily seek additional privacy" so long as students are allowed full access to the intimate facility of their choice based on their subjective gender identity.[31]

When it comes to athletics, the Obama directives are confusingly vague, telling schools that they may not "rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others' discomfort with transgender students."[32] Thus, both the specific teams on which a student athlete who identifies as transgender must be allowed to play and the sports in which the student must be allowed to participate are unclear, which would likely prompt many schools to make all of their athletic policies based on gender identity to avoid having to find out the boundaries through lawsuits.

In response to this letter, 24 states filed lawsuits against the Obama Administration.[33] On August 21, 2016, federal District Judge Reed O'Connor issued a nationwide injunction blocking enforcement of this gender identity mandate, holding that "[i]t cannot be disputed that the plain meaning of the term sex as used...following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth."[34] The Obama Department of Justice appealed this ruling on October 20, 2016, but on February 10, 2017, the new Trump Department of Justice withdrew that motion for a stay and cancelled the scheduled oral arguments.[35] On February 22, 2017, the Trump Departments of Justice and Education formally rescinded the "Dear Colleague" letter.[36]

Title IX "Shame List" and Religious Exemptions

In the past several years, another troubling development has arisen under Title IX: efforts to shame religious schools that have sought to preserve their religious identities through a waiver.

As they became aware of the major changes the Obama Administration was imposing through Title IX enforcement, numerous schools filed for religious exemptions. Religious exemptions from Title IX existed during the first implementation of Title IX in the 1970s, but in the years leading up to the

28. U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, "Dear Colleague Letter on Transgender Students," May 13, 2016, p. 4, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (accessed February 25, 2017).
29. Ibid.
30. Ibid., p. 2.
31. Ibid., p. 3.
32. Ibid.
33. Kelsey Harkness, "Minnesota Students and Parents File Lawsuit Against Obama's Bathroom Mandate," The Daily Signal, September 8, 2016, http://dailysignal.com/2016/09/08/minnesota-students-and-parents-file-lawsuit-against-obamas-bathroom-mandate/.
34. *State of Texas et al. v. United States of America et al.*, United States District Court for the Northern District of Texas, Wichita Falls Division, Civil Action No. 7:16-cv-00054-O, Preliminary Injunction Order, August 21, 2016, p. 31, https://apps.npr.org/documents/document.html?id=3032393-Injunction (accessed February 24, 2017).
35. *State of Texas, et al. v. United States of America, et al.*, United States Court of Appeals for the Fifth Circuit, No. 16-11534, Defendants-Appellants' Notice of Withdrawal of Motion for Partial Stay Pending Appeal and Joint Motion to Cancel Oral Argument, February 10, 2017, http://apps.washingtonpost.com/g/documents/politics/motion-to-withdraw-motion-for-stay/2329/ (accessed February 24, 2017).
36. Anderson, "Trump Right to Fix Obama's Unlawful Transgender School Policy."

Arcadia resolution agreement the number of claims had slowed to a trickle because few religious schools engaged in actions that the government considered discriminatory. In the aftermath of Arcadia, however, many schools rightly feared that their reasonable policies concerning intimate facilities and student conduct would be deemed discriminatory by the government. As a result, many religious schools requested exemptions from Title IX:

> After more than a decade with only two new exemption claims, OCR received 63 new claims in the two and a half years between July 2013 and January 2016, with additional new exemption claims likely. All but one of those 63 new claims—a claim Liberty University made formally at the OCR's request when a student complained regarding abortion—asserted the religious educational institutions' exemption from Title IX to allow it to discriminate based on gender where transgender, gender nonconforming, and in some cases gay individuals were involved.[37]

Since many religions teach that sex is objectively determined by genetics and physiology, these additional schools sought exemptions from Title IX so that they could continue to operate in accordance with their beliefs in the wake of Title IX's redefinition to include gender identity.

In December 2015, LGBT activist groups started attacking these religious schools. The Human Rights Campaign (HRC) published *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*,[38] charging that colleges and universities seeking exemptions from Title IX are "taking advantage of legal loopholes to enshrine their ability to discriminate on the basis of sexual orientation and gender identity."[39] The HRC called on the Department of Education to publish information about the schools requesting and receiving exemptions from Title IX because of religious beliefs. The department responded by posting the letters from schools requesting exemptions on the DOE website, bringing about a swift attack on religious schools that had requested exemptions.[40]

An organization named Campus Pride promptly published what it called a "Shame List" with the names of the religious colleges and universities that sought exemption from Title IX. The organization claimed that it published the list "for the purpose of calling out the harmful and shameful acts of religion-based prejudice and bigotry."[41] As part of this initiative against religious schools, Campus Pride, along with a long list of other LGBT organizations, wrote a letter to the National Collegiate Athletic Association encouraging the NCAA to disassociate from all religious campuses on the list.[42]

Unlawful Agency Redefinition of "Sex" as "Gender Identity"

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 exist outside of some esoteric psychological publications, and the word "gender" had been coined only recently in contradistinction to sex. The Obama Administration simply attempted to rewrite federal law as it wished the law had been written originally. To this day, the term "sex" is not ambiguous and therefore cannot legitimately be redefined by executive branch agencies to mean "gender identity."

37. Augustine-Adams, "Religious Exemptions to Title IX," p. 43.
38. Human Rights Campaign, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, December 18, 2015, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Title_IX_Exemptions_Report.pdf (accessed March 2, 2017).
39. Ibid., p. 5.
40. See Anugrah Kumar, "Education Dept. Releases 'Shame List' of Faith-Based Colleges Seeking Title IX Exemption from Transgender Rules," *The Christian Post*, April 30, 2016, http://www.christianpost.com/news/education-dept-releases-shame-list-faith-based-colleges-seeking-title-ix-exemption-163047/ (accessed March 2, 2017), and U.S. Department of Education, Office for Civil Rights, "Religious Exemptions Index 2009–2016: Archived Information," updated as of December 2016, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html (accessed March 2, 2017).
41. Campus Pride, "Shame List: The Absolute Worst Campuses for LGBTQ Youth," last updated August 4, 2016, https://www.campuspride.org/shamelist/ (accessed March 2, 2017).
42. Campus Pride, "Letter to the NCAA to Divest from All Religious Based Campuses Who Have Requested Discriminatory Title IX Waivers Against LGBTQ Youth," March 9, 2016, https://www.campuspride.org/shamelist/takeactionncaa/ (accessed March 2, 2017).

Moreover, neither the agency memo issued by an acting assistant deputy director in the *G.G.* case nor the 2016 Obama Administration DOE/DOJ "Dear Colleague" letter went through the appropriate rulemaking process under the Administrative Procedure Act (APA), which requires that regulations and binding agency guidance must be subject to public notice and comment before finalization. Because the Title IX memo and letter did not follow the APA rules, they should not be given any deference. They also should be rejected because they do not offer a plausible alternative interpretation of the unambiguous word "sex."

Federal courts agree that the meaning of the word "sex" is unambiguous. 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, Judge O'Connor stated that the reinterpretation of sex as gender identity was directly contrary to the original intent of the law as applied in its implementing regulations (34 C.F.R. § 106.33):

> [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 § 106.33.[43]

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 of the United States District Court for the Western District of Pennsylvania 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."[44] 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."[45]

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.[46]

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

43. *State of Texas et al. v. United States of America et al.*, Preliminary Injunction Order, p. 31. 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, https://www.law.cornell.edu/cfr/text/34/106.33 (accessed March 2, 2017).
44. *Seamus Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education et al.*, United States District Court for the Western District of Pennsylvania, Civil Action No. 3:13-213, Memorandum Opinion and Order, March 31, 2015, p. 26, http://cases.justia.com/federal/district-courts/pennsylvania/pawdce/3:2013cv00213/212325/43/0.pdf?ts=1427935122 (accessed February 25March 2, 2017).
45. Ibid., p. 23.
46. Ibid., pp. 29–30.

Judge Paul Niemeyer points to these same legal realities in his dissenting opinion in the Fourth Circuit case of *G.G. v. Gloucester County Public School Board*. 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"[47] 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.[48]

Judge Niemeyer points out that the majority opinion relies not on the actual text, history, or legal implementation of Title IX, but rather on a 2015 letter from the Department of Education's Office for Civil Rights: "The recent Office for Civil Rights letter, moreover, which is not law but which is the only authority on which the majority relies, states more than the majority acknowledges."[49] In fact, the OCR letter suggested that schools "offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities."[50]

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." "Gender," as it began to be used in the 1960s, was meant to draw attention to the differences between men and women that were specifically not biological. According to Dr. Stephen L. Ristvedt:

> [B]y the mid-1960s the word gender was adopted outside of sexual science by feminist writers to mean the "socially constructed" (vs. biologically determined) aspects of male-female differences, that is, the stereotypical psychological and behavioral characteristics presumably shaped by societal expectations.[51]

When Title IX was passed, gender was still considered something distinct from sex that would not be included in the definition of sex.[52]

In an amicus brief to the U.S. Supreme Court, former U.S. Secretary of Education William J. Bennett calls attention to the fact that at the time Title IX was enacted, sex as included in every major dictionary referred to biological anatomical characteristics, not gender identity:

> "Ordinarily, a word's usage accords with its dictionary definition,"...and the dictionaries recording the sense of the word "sex" around the time when Title IX was enacted uniformly indicate that the word was understood, then, the way it had *always* been understood: as refer-

47. *G.G. v. Gloucester County School Board*, United States Court of Appeals for the Fourth Circuit, No. 15-2056, April 19, 2016, p. 47, http://www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf (accessed March 2, 2017).
48. Ibid., p. 48.
49. Ibid. Underlining in original.
50. Ibid.
51. Stephen L. Ristvedt, "The Evolution of Gender," *JAMA Psychiatry*, Vol. 71, No. 1 (January 2014). p. 13, https://evomedicine.files.wordpress.com/2014/08/evolution-of-gender.pdf (accessed March 2, 2017).
52. Prominent writers on gender at the time considered it to be distinct from sex: "In her 1972 monograph *Sex, Gender, and Society* (which has been out of print for many years), British sociologist Ann Oakley argued that gender 'is a matter of culture: it refers to the social classification into "masculine" and "feminine."'... Defining sex as biological and gender as cultural, Oakley drew her conception of the sex/gender distinction directly from the work of psychoanalyst Robert Stoller (1968) and psychoendorcinologist [John] Money and his colleagues John Hampson and Joan Hampson (1955)." David A. Rubin, "'An Unnamed Blank That Craved a Name': A Genealogy of Intersex as Gender," *Signs*, Vol. 37, No. 4 (Summer 2012), p. 887, http://sites.middlebury.edu/soan191/files/2013/08/UnnamedBlankIntersex.pdf (accessed February 27, 2017).

> ring to the anatomical or physiological characteristics that constitute a person's sex, not his or her internal identification with one gender or the other.[53]

Bennett's brief makes the point that the term "transgender" did not gain general usage until the late 1980s, years after Title IX was passed.[54] According to the *Handbook of Sexual and Gender Identity Disorders*, the term "gender identity" came into use in the 1960s: "*Gender identity* was introduced into the profession lexicon by Hooker and Stoller almost simultaneously in the early 1960s."[55] None of these then-esoteric terms would have been included within the definition of sex at the time Title IX was enacted. In addition, Bennett argues, "if the Education Department's current revisionist understanding of the term 'sex' had been disclosed to Congress when Title IX was being debated in 1972, Congress would have taken care to expressly define the term in the statute to accord with the commonly understood anatomical meaning of the term."[56]

Other 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 and the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009.[57] 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 "discrimination" 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."[58] In implementing an executive order placing "gender identity" alongside and in addition to "sex," President Obama showed that, legally, he did not consider gender identity protections to be 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 (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.[59] Title VII of the Civil Rights Act of 1964 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 was there all along.

53. Brief of Amicus Curiae William J. Bennett in Support of Petitioner and Reversal, *Gloucester County School Board v. G.G.*, No. 16-273, Supreme Court of the United States, January 10, 2017, p. 6, http://www.scotusblog.com/wp-content/uploads/2017/01/16-273_amicus_pet_william_j_bennett.authcheckdam.pdf (accessed March 2, 2017). Emphasis in original.
54. Ibid., p. 10.
55. David L. Rowland and Luca Incrocci, eds., *Handbook of Sexual and Gender Identity Disorders* (Hoboken, NJ: John Wiley & Sons, 2008), p. 378.
56. Brief of Amicus Curiae William J. Bennett in Support of Petitioner and Reversal, p. 11.
57. S. 47, Violence Against Women Reauthorization Act of 2013, 113th Cong., 1st Sess., https://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf (accessed March 2, 2017); Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, 18 U.S. Code § 249, https://www.law.cornell.edu/uscode/text/18/249 (accessed March 2, 2017).
58. Executive Order 13672, "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity," July 21, 2014, *Federal Register*, Vol. 79, No. 141 (July 23, 2014), pp. 42971–42972, https://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf (accessed March 3, 2017).
59. Jerome Hunt, "A History of the Employment Non-Discrimination Act," Center for American Progress, July 19, 2011, https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/ (accessed March 2. 2017).

- The so-called Equality Act, 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.[60]

- The Student Non-Discrimination Act, 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.[61]

All of these bills establishing legal protections on the basis of gender identity have been rejected 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.

Sex-Specific vs. Gender Identity Discrimination

Even if one were to grant that in prohibiting discrimination on the basis of sex, Title IX also prohibits discrimination on the basis of gender identity, that would not change the outcome for school policies. The bathroom, locker room, and housing policies in question 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.

If someone is discriminating on the basis of X, it means that he or she takes X into account in deciding how to treat you. If someone takes X into consideration when it is irrelevant and only to oppress you, however, that is invidious discrimination.[62]

Racially segregated water fountains were one form of discrimination that took race into consideration—in a context in which 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—were rightly made unlawful.

Similarly, 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 feature (in this case, sex) into consideration precisely to treat women as less than men. As a result, such actions were rightly viewed as 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.

In this vein, 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

60. Ryan T. Anderson, "How the So-Called 'Equality Act' Threatens Religious Freedom," The Daily Signal, July 23, 2015, http://dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/.

61. Human Rights Campaign, "Student Non-Discrimination Act," last updated January 4, 2017, http://www.hrc.org/resources/student-non-discrimination-act (accessed March 2, 2017).

62. See Ryan T. Anderson, "How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom," Heritage Foundation *Backgrounder* No. 3194, February 13, 2017, http://www.heritage.org/marriage-and-family/report/how-think-about-sexual-orientation-and-gender-identity-sogi-policies-and, esp. "Definition of Key Terms: 'Discrimination.'"

TABLE 1

Access to Lockers and Showers Under Obama Administration Guidance

ACCESS TO GIRLS' LOCKERS AND SHOWERS

Sex	Gender Identity	Access
Female	Female	Allowed
Female	Male	Allowed
Male	Female	Allowed
Male	Male	Denied

ACCESS TO BOYS' LOCKERS AND SHOWERS

Sex	Gender Identity	Access
Male	Male	Allowed
Male	Female	Allowed
Female	Male	Allowed
Female	Female	Denied

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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 misplaced.

Not only is it misplaced, but the Obama Administration's view would *require* gender identity discrimination by schools. Under the Obama 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.

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

Redefining "Sex" as "Gender Identity" for Sex-Specific Intimate Facilities

The Obama Administration's transgender directives are bad policy for several reasons.

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. In her majority opinion for the Supreme Court forcing the Virginia Military Institute to become coeducational, Justice Ruth Bader Ginsburg wrote that it "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."[63]

Some critics had argued that the Equal Rights Amendment, a predecessor of Title IX that never became law, would have required unisex intimate facilities. In 1975, when Justice Ginsburg was a law professor at Columbia University, she wrote an op-ed article for *The Washington Post* explaining that a ban on sex discrimination would not require such a ridiculous outcome:

63. *United States v. Virginia et al.*, 518 U.S. 151, 550 n.19 (1996), https://supreme.justia.com/cases/federal/us/518/515/case.html (accessed March 2, 2017).

> 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.[64]

In other words, the Constitution required protection for the right of bodily privacy. Justice Ginsburg's colleague, Justice Anthony Kennedy, makes a related point that acknowledging biological differences is not the same as engaging in mere stereotyping:

> 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.[65]

Yet the 2016 Obama Administration DOE/DOJ "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.

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 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."[66]

Many courts have defended the bodily privacy rights of people in a variety of settings. 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. The court based its ruling on "society's undisputed approval of separate public restrooms for men and women based on privacy concerns."[67] As the State of North Carolina has explained, the DOJ's prison regulations follow this principle:

> For instance, those regulations tightly restrict "cross-gender" strip searches, pat-down searches, and visual body cavity searches, 28 C.F.R. § 115.15(c), 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." *Id.* § 115.15(d).[68]

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 Alliance Defending Freedom (ADF) explains this long-running American practice:

> 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. Massachu-

64. Eugene Volokh, "Prominent Feminist: Bans on Sex Discrimination 'Emphatically' Do Not 'Require Unisex Bathrooms,'" *The Washington Post*, 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/?utm_term=.62b7805d1b1e (accessed March 2, 2017), and Ruth Bader Ginsburg, "The Fear of the Equal Rights Amendment," *The Washington Post*, April 7, 1975, https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg (accessed March 2, 2017).
65. *Tuan Anh Nguyen and Joseph Boulias, Petitioners v. Immigration and Naturalization Service*, 533 U.S. 53, 18 (2001), https://www.law.cornell.edu/supct/pdf/99-2071P.ZO (accessed March 3, 2017).
66. Brief of *Amicus Curiae* Women's Liberation Front and Family Policy Alliance in Support of Petitioner, *Gloucester County School Board v. G.G.*, Supreme Court of the United States, No. 16-273, January 10, 2017, p. 6, www.scotusblog.com/wp-content/uploads/2017/01/16-273_amicus_pet_womens_liberation_front_and_family_policy_alliance.pdf (accessed March 2, 2017). Emphasis in original.
67. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).
68. Defendant's and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, *United States of America v. State of North Carolina et al.*, United States District Court, Middle District of North Carolina, Case No. 1:16-CV-00425-TDS-JEP, August 17, 2016, p. 68, http://files.eqcf.org/cases/116-cv-00425-149/ (accessed March 3, 2017). Cited hereafter as Defendant's and Intervenor-Defendants' Brief.

> setts 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.[69]

This concern is particularly heightened for minors, especially as children go through puberty and rightly desire bodily privacy. "Specifically," adds the 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."[70]

This 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," 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 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.[71]

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."[72] 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.[73]

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 middle school within the Charlotte-Mecklenburg School System. She is required to change clothes at school for curricular activities, which includes undressing in front

69. *Students and Parents for Privacy v. United States Department of Education; John B. King, Jr., United States Department of Justice; Loretta E. Lynch, and School Directors of Township High School District 211, County of Cook and State of Illinois*, United States District Court, Northern District of Illinois, Case No. 1:16-cv-04945, Verified Complaint for Injunctive and Declaratory Relief, May 4, 2016, p. 55, http://www.adfmedia.org/files/SPPcomplaint.pdf (accessed March 3, 2017).
70. Ibid., p. 56.
71. Brief of *Amicus Curiae* Safe Spaces for Women Supporting Neither Party, *Gloucester County School Board v. G.G.*, Supreme Court of the United States, No. 16-273, January 2017, p. 2, http://www.scotusblog.com/wp-content/uploads/2017/01/16-273-amicus-np-SSW.pdf (accessed March 3, 2017).
72. Ibid., p. 3.
73. Ibid., p. 2.

> 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 see a male undress in front of her.
>
> 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 to be subject to males undressing in front of her, once that policy goes back into effect, is deeply distressing to her.[74]

Consider also the declaration of S.H.:

> I previously attended a public middle school in Illinois.
>
> I am 14 years of age.
>
> 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.
>
> 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 undress for school. 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.[75]

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,

74. Defendant's and Intervenor-Defendants' Brief, "Exhibit O: Declaration of Y.K.," pp. 2–3.
75. Defendant's and Intervenor-Defendants' Brief, "Exhibit Q: Declaration of S.H.," pp. 1–3.

> 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.[76]

America has recognized in law that there is an interest in bodily privacy—not just for workers or students, but for prisoners as well—particularly in a state of undress. If this is true in the case of prisoners, who do give up certain rights upon incarceration, why would it not also be true for minor students, almost all of whom are subject to a law mandating their attendance at school?

Even some members of the political left seem to understand this. Maya Dillard Smith, former head of the American Civil Liberties Union of Georgia, resigned from her position with the ACLU after it came out on the wrong side of this issue:

> I have shared my personal experience of having taken my elementary school aged 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.[77]

As Jeannie Suk Gersen, a professor at Harvard Law School, has written in *The New Yorker*, "[t]he 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."[78]

The Obama gender identity guidelines ignore legitimate safety concerns. 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 policies to gain readier access to victims. Several experts have testified precisely about this problem, and recent history confirms their insights.

Kenneth V. Lanning, for example, is a veteran of 40 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 20 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.[79]

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."[80] As Lanning explains:

76. Brief of *Amicus Curiae* Safe Spaces for Women Supporting Neither Party, p. 14.
77. Jessica Chasmar, "Ga. ACLU Leader Resigns over Obama's Transgender Bathroom Directive," *The Washington Times*, June 2, 2016, http://www.washingtontimes.com/news/2016/jun/2/maya-dillard-smith-georgia-aclu-leader-resigns-ove/ (accessed March 3, 2017).
78. Jeannie Suk Gersen, "The Transgender Bathroom Debate and the Looming Title IX Crisis," *The New Yorker*, May 24, 2016, http://www.newyorker.com/news/news-desk/public-bathroom-regulations-could-create-a-title-ix-crisis (accessed March 3, 2017).
79. Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis for Professionals Investigating the Sexual Exploitation of Children*, 5th ed. (Alexandria, VA: National Center for Missing and Exploited Children, 2010), http://www.missingkids.com/en_US/publications/NC70.pdf (accessed March 8, 2017).
80. Defendant's and Intervenor-Defendants' Brief, "Exhibit M: Expert Declaration and Report of Kenneth V. Lanning," p. 12. 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." Defendant's and Intervenor-Defendants' Brief, "Exhibit N: Expert Opinion of Sheriff Tim Hutchison (Retired)," p. 8.

> [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 previously protected setting and a new defense for a wide variety of sexual victimization.[81]

Tim Hutchison, the retired sheriff of Knox County (which includes the City of Knoxville and the University of Tennessee), agrees. Drawing on more than 33 years of experience in law enforcement, he testifies to what every local law enforcement official knows: "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."[82] More specifically, "[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."[83]

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."[84] Additionally, "[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."[85] 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."[86]

Another problem with gender-identity policies is that they lack a clear and objective definition and standard of who belongs where. Lanning elaborates:

> [O]bjective standards are also important to effective law enforcement. Law enforcement officers and prosecutors will be 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 [gender identity] need not be corroborated in any way whatsoever.[87]

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, it 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*.[88]

81. Defendant's and Intervenor-Defendants' Brief, "Exhibit M: Expert Declaration and Report of Kenneth V. Lanning," p. 13.
82. Defendant's and Intervenor-Defendants' Brief, "Exhibit N: Expert Opinion of Sheriff Tim Hutchison (Retired)," pp. 6–7.
83. Ibid., p. 7.
84. Defendant's and Intervenor-Defendants' Brief, "Exhibit M: Expert Declaration and Report of Kenneth V. Lanning," p. 13.
85. Ibid., p. 15.
86. Defendant's and Intervenor-Defendants' Brief, "Exhibit N: Expert Opinion of Sheriff Tim Hutchison (Retired)," p. 7.
87. Defendant's and Intervenor-Defendants' Brief, "Exhibit M: Expert Declaration and Report of Kenneth V. Lanning," p. 18.
88. Ibid., p. 14. Emphasis in original.

This is particularly the case with children, who are already more likely not 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."[89] 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 they think that people will label them for making a report."[90] 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."[91]

Another disturbing question arises: "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?"[92] 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 53.[93]
- 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, her mother, and another woman.[94]
- In Washington State, a man used a women's locker room at a public swimming pool to undress in front of young girls who were changing for swim practice. When staff asked him to leave, the man claimed that "the law has changed and I have a right to be here."[95]
- 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, male students were found using their cell phone cameras to film women showering. These incidents prompted the University of Toronto to revise its new policy.[96]
- 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 like he was on a 'stripper pole,'" flashed his underwear while dancing, asked about a girl's bra size, and asked her to "trade body parts."[97]
- In Milwaukie, Oregon, Thomas Lee Benson was arrested for dressing as a woman to enter the women's locker room at an aquatic park. Benson had been convicted previously of sexual abuse,

89. Defendant's and Intervenor-Defendants' Brief, "Exhibit N: Expert Opinion of Sheriff Tim Hutchison (Retired)," p. 10.
90. Ibid.
91. Ibid.
92. Ibid., p. 12.
93. Sam Pazzano, "Predator Who Claimed to Be Transgender Declared Dangerous Offender," *Toronto Sun*, February 26, 2014, http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender (accessed March 3, 2017).
94. News4 Washington, "Man Dressed as Woman Spies into Mall Bathroom Stall in Virginia, Police Say," October 14, 2015, http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Spies-Into-Mall-Bathroom-Stall-in-Virginia-Police-Say-332934761.html (accessed March 3, 2017).
95. Mariana Barillas, "Man Allowed to Use Women's Locker Room at Swimming Pool Without Citing Gender Identity," The Daily Signal, February 23, 2016, http://dailysignal.com/2016/02/23/man-allowed-to-use-womens-locker-room-at-swimming-pool-without-citing-gender-identity/.
96. Jessica Chin, "University of Toronto Gender-Neutral Bathrooms Reduced After Voyeurism Reports," *Huffington Post*, October 6, 2015, http://www.huffingtonpost.ca/2015/10/06/u-of-t-bathrooms-voyeurism_n_8253970.html (accessed March 3, 2017).
97. Harkness, "Minnesota Students and Parents File Lawsuit Against Obama's Bathroom Mandate."

purchasing child pornography, and unlawful contact with a child.[98]

- In Olympia, Washington, a man, Taylor Buehler, wearing a wig and a bra was arrested for entering the women's bathroom at Everett Community College. He admitted under police questioning that "he was the suspect in an earlier voyeurism incident."[99]

Similar incidents have taken place in the United States at several Target stores since Target changed its policy in April 2016 to allow bathroom and fitting room access in accordance with gender identity, not 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 18-year-old girl changing into swimwear in a Target fitting room in Idaho.[100] 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."[101]

- 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.[102]

Some 130 examples of men charged with using bathroom, locker room, and shower access to target women for voyeurism and sexual assault are documented in the appendix to this paper.

The Obama gender identity guidelines provide no legal definition of "gender identity" or legal criteria for determining who is a "transgender" person. The Obama Administration's "Dear Colleague" letter states 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."[103] The Administration goes on to say that "[g]ender identity refers to an individual's internal sense of gender."[104]

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 identifying 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." 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."[105]

98. Rick Bella, "Cross-Dressing Sex Offender Released to Community Supervision," *The Oregonian*, May 3, 2012, http://www.oregonlive.com/milwaukie/index.ssf/2012/05/cross-dressing_sex_offender_re.html (accessed March 3, 2017).
99. KOMO News, "Controversy Swirls Around Local Transgender College Student," November 2, 2012, http://komonews.com/archive/controversy-swirls-around-local-transgender-college-student (accessed March 3, 2017).
100. Niraj Chokshi, "Transgender Woman Is Charged with Voyuerism at Target in Idaho," *The New York Times*, July 14, 2016, https://www.nytimes.com/2016/07/15/us/target-transgender-idaho-voyeurism.html?_r=1 (accessed March 3, 2017).
101. *State of Idaho v. Sean Patrick Smith*, District Court of the Seventh Judicial District, State of Idaho, County of Bonneville, Magaistrate [*sic*] Division, Case No. CR-16-8468, Affidavit of Probable Cause for Warrantless Arrest Under I.C.R. 5, July 12, 2016, p. 2, http://assets.eastidahonews.com/wp-content/uploads/2016/07/13132732/state-of-idaho-vs-smith-affadavit.pdf (accessed March 3, 2017).
102. Eyewitness News, "Man Seen Reaching Under Stall with Phone in Target Dressing Room in New Jersey," WABC TV, New York, September 12, 2016, http://abc7ny.com/news/man-seen-reaching-under-stall-with-phone-in-nj-target-dressing-room/1508431/ (accessed March 3, 2017).
103. News release, "U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students."
104. U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, "Dear Colleague Letter on Transgender Students," p. 1.
105. Defendant's and Intervenor-Defendants' Brief, "Exhibit M: Expert Declaration and Report of Kenneth V. Lanning," p. 17.

- 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."[106]

- The NCAA requires that a man who identifies as a woman can 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."[107]

Lanning concludes that "such objective standards are also important to effective law enforcement."[108] 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 that his "gender identity" was female to make successful prosecution difficult if not practically impossible.[109]

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

The Obama 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—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.[110]

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."[111] 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 existence—shaped since time immemorial by their unique and immutable biology—has been eliminated by Orwellian fiat.[112]

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

106. Ibid., p. 18.
107. Ibid., p. 17.
108. Ibid., p. 18.
109. Defendant's and Intervenor-Defendants' Brief, "Exhibit N: Expert Opinion of Sheriff Tim Hutchison (Retired)," p. 11.
110. Brief of *Amicus Curiae* Women's Liberation Front and Family Policy Alliance in Support of Petitioners, p. 1.
111. Ibid., p. 28. Emphasis in original.
112. Ibid., p. 18. Emphasis in original.

extend Title IX to cover men claiming to be women is a jaw-dropping act of administrative jujitsu."[113] The 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.[114]

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 differently. There are certain races for males, and certain races for females, and I believe it should stay that way.[115]

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, completing an undefeated wrestling season against other girls (who were not taking testosterone supplements).[116] 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."[117]

What Needs to Be Done

Title IX was enacted to ensure that girls and women would have equal opportunities in education. It prohibited any school that receives government funding from discriminating on the basis of sex, and it did this while recognizing privacy concerns and stating that living spaces could remain separate for the different sexes. Once Title IX was implemented, individual schools were able to find nuanced solutions to the concerns raised by students who identify as transgender.

But beginning with the 2010 "Dear Colleague" letter and culminating with the 2016 "Dear Colleague" letter, federal bureaucrats have extended 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. Religious schools have come under attack for filing for exemptions from Title IX so that they can continue to operate in accordance with their beliefs.

113. Brief of Amicus Curiae Women's Liberation Front in Support of Petitioner, *Gloucester County School Board v. G.G.*, Supreme Court of the United States, No. 16-273, September 2016, p. 2, www.scotusblog.com/wp-content/uploads/2016/09/16-273-cert-amicus-WLF.pdf (accessed February 25, 2017).
114. Ibid., p. 16.
115. Family Policy Alliance, "Ask Me First About Fairness: Tanner" YouTube video, August 2, 2016, https://www.youtube.com/watch?v=Jk_CKFkm8sI (accessed February 27, 2017), and Melody Wood, "The NBA's Transgender Bathroom Advocacy Could Point to End of Women's Sports," The Daily Signal, August 1, 2016, http://dailysignal.com/2016/08/01/the-nbas-transgender-bathroom-advocacy-could-point-to-end-of-womens-sports/.
116. Associated Press, "Transgender Boy Wins Texas Girls' Wrestling Title, *The New York Times*, February 25, 2017, https://www.nytimes.com/2017/02/25/sports/transgender-boys-matches-with-girls-leave-all-unsatisfied.html?_r=0 (accessed March 3, 2017).
117. Kaeley Triller Haver, "Biology Isn't Bigotry: Why Sex Matters in an Age of Gender Identity," remarks at The Heritage Foundation, Washington, D.C., February 16, 2017, http://www.heritage.org/gender/commentary/biology-isnt-bigotry-why-sex-matters-the-age-gender-identity.

What can be done to return Title IX to its original, laudable purpose of granting women equal opportunity?

First, the Department of Education should explicitly return to the intended meaning of "sex" in Title IX. While the Trump Administration's Department of Education should be praised for rescinding the bad Obama-era guidance, repealing guidance without a clear replacement gives bureaucrats and judges too much room for mischief. The DOE should issue clear guidance to state that "sex" in Title IX means biological sex, not gender identity. By doing so, the department could ensure the continued protection of women and girls in school bathrooms and locker rooms and on sports teams. Through this guidance, it could emphasize that accommodations for students who identify as transgender are encouraged while retaining the privacy rights of women and girls in the school system.

Second, Congress should ensure that Title IX will continue to protect girls and women. There are three actions that Congress can take to preserve Title IX's original intent.

- Congress could specify that "sex" does not mean "gender identity" in Title IX and civil rights law. Language included in H.R. 5812, the Civil Rights Uniformity Act, for example, introduced by Representative Pete Olson (R–TX) in 2016, would do exactly that.[118] The act clarifies that for the purpose of interpreting civil rights statutes, the term "sex" does not mean "gender identity." 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.

- 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. 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.

- 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.

Finally, the courts 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, Title IX can function once more to protect women and girls and ensure that they have equal access to educational programs and opportunities.

Conclusion

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

118. See H.R. 5812, Civil Rights Uniformity Act of 2016, 114th Cong., 2nd Sess., https://www.congress.gov/bill/114th-congress/house-bill/5812/text?format=txt (accessed March 13, 2017).

solutions that work best for everyone, the Obama Administration attempted to force a one-size-fits-all policy on the entire nation.

The Trump Administration has taken the first steps to correct this. While the Obama Administration attempted to rewrite law to impose a nationwide federal "gender identity" policy, the Trump Administration is respecting federalism, local decision-making, and parental authority in education. Congress and the courts should do the same.

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, the Trump Administration is allowing 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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APPENDIX TABLE 1

Individuals Charged with Sex Crimes in Intimate Facilities (Page 1 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
2017		
Indianapolis, IN	Convicted sex offender arrested again, accused of voyeurism	http://fox59.com/2017/02/13/convicted-sex-offender-arrested-again-accused-of-voyeurism/
Lincoln, RI	Man charged with putting camera in Target bathroom	http://wpri.com/2017/01/17/man-charged-with-putting-camera-in-target-bathroom/
Saanich, Canada	Saanich doctor admits trying to record staff in bathroom	http://www.timescolonist.com/news/local/saanich-doctor-admits-trying-to-record-staff-in-bathroom-1.6397650
Toronto, Canada	Toronto man faces 12 charges in voyeurism investigation	https://www.thestar.com/news/crime/2017/02/21/toronto-man-faces-12-charges-in-voyeurism-investigation.html
2016		
Aberdeen, MD	Peeping Tom reported at Aberdeen Goodwill store	http://www.baltimoresun.com/news/maryland/harford/aegis/ph-ag-peeping-tom-1104-20161104-story.html
Ammon, ID	Transgender woman is charged with voyeurism at Target in Idaho	https://www.nytimes.com/2016/07/15/us/target-transgender-idaho-voyeurism.html?_r=0
Athens, GA	Two students witness peeping Tom at Payne Hall	http://www.redandblack.com/athensnews/two-students-witness-peeping-tom-at-payne-hall/article_95b09dde-184c-11e6-b05e-77028d6f7e42.html
Baton Rouge, LA	Baton Rouge man accused of holding mirror under stall in woman's bathroom, deputies say	http://www.theadvocate.com/baton_rouge/news/crime_police/article_ec5b8732-4e77-5fc2-969f-1ecd06d9a4b3.html
Bismarck, ND	Deputy U.S. Marshal arrested for peeping in Bismarck Target dressing room faces 21 charges	http://www.kfyrtv.com/content/news/Deputy-US-Marshal-arrested-for-peeping-in-Bismarck-Target-dressing-room-faces-20-charges-389491532.html
Bournemouth, United Kingdom	Tattooist jailed for filming women in toilet and string of sexual assault and voyeurism charges	http://www.somersetlive.co.uk/tattooist-jailed-for-filming-women-in-toilet-and-string-of-sexual-assault-and-voyeurism-charges/story-29423035-detail/story.html
Bracknell, United Kingdom	Kaelon Jones admitted to filming women in the toilets at Bentalls from a disabled cubicle	http://www.bracknellnews.co.uk/news/14923541.Binfield_man_admits_to_voyeurism/
Buckeye, AZ	Christopher Santos arrest: Buckeye youth pastor arrested after recording girl in dressing room	http://www.abc15.com/news/region-west-valley/buckeye/church-employee-arrested-after-recording-young-girl-in-dressing-room
Bury, United Kingdom	Pervert Betfred manager used his phone to film female staff members on the toilet	http://www.manchestereveningnews.co.uk/news/greater-manchester-news/pervert-betfred-boss-used-phone-12232214
Byron Township, MI	Tanger Mall changing room peeping suspect arrested	http://woodtv.com/2016/03/08/man-allegedly-used-cellphone-to-watch-woman-in-changing-room/
Carlisle, United Kingdom	Carlisle man filmed woman in Asda changing room	http://www.cumbriacrack.com/2016/06/07/147700/
Castle Rock, CO	Former Reebok store employee allegedly peeped on women in changing rooms	http://denver.cbslocal.com/2016/04/18/former-reebok-store-employee-allegedly-videotaped-women-in-changing-rooms/

APPENDIX TABLE 1

Individuals Charged with Sex Crimes in Intimate Facilities (Page 2 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
Chesapeake, VA	Navy pilot accused of recording teen in Old Navy dressing room	http://wsav.com/2016/06/24/navy-pilot-accused-of-recording-teen-in-old-navy-dressing-room/
Chicago, IL	CPS teacher charged with hiding camera in bathroom had peeping Tom history	https://www.dnainfo.com/chicago/20160927/downtown/cps-teacher-charged-with-hiding-camera-bathroom-had-peeping-tom-history
Colfax, WA	Colfax man arrested for allegedly filming women in bathrooms	http://www.khq.com/story/31541886/colfax-man-arrested-for-allegedly-filming-women-in-bathrooms
Cornwall, United Kingdom	Peeping Tom spared jail after filming underage girls in Cornish leisure centre	http://www.cornwalllive.com/peeping-tom-spared-jail-filming-underage-girls/story-28707250-detail/story.html
Dunwoody, GA	Man charged with taking lewd photos of women at Macy's	http://www.ajc.com/news/crime--law/man-charged-with-taking-lewd-photos-women-macy/iMaG85m158o23y2bB1GozK/
Edmond, OK	Man with sexual abuse history arrested for filming under-age chid	http://guthrienewspage.com/2016/01/man-with-sexual-abuse-history-arrested-for-filming-under-age-child/
Fairfax, OH	Police: Ex-UC prof secretly filmed adults, kids at gym	http://www.cincinnati.com/story/news/crime/2016/11/04/police-man-secretly-film-adults-kids-cincinnati-sports-club/93322828/
Grants Pass, OR	Sex offender arrested after placing hidden camera in Grants Pass store dressing room, police say	http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/08/sex_offender_arrested_after_pl.html
Gravesend, United Kingdom	Police hunt man who photographed woman in Asda changing room	http://www.standard.co.uk/news/crime/police-hunt-man-who-photographed-woman-in-gravesend-asda-changing-room-a3358501.html
Halifax, Canada	N.S. police seize "camouflaged" camera, arrest doctor for allegedly filming staff in clinic's washroom	http://news.nationalpost.com/news/n-s-police-seize-camouflaged-camera-arrest-doctor-for-allegedly-filming-staff-in-clinics-washroom
Hamilton, NJ	Child-porn suspect allegedly hid camera	http://www.courierpostonline.com/story/news/crime/2016/04/06/teacher-among-16-facing-child-porn-charges-nj/82693716/
Hartfield, United Kingdom	Peeping Tom pervert secretly filmed hundreds of women in swimming pool changing rooms to satisfy his twisted lust	http://www.mirror.co.uk/news/uk-news/peeping-tom-pervert-secretly-filmed-7897266
Iowa City, IA	Update: UI police locate suspect videotaping in women's shower	http://www.kcrg.com/content/news/University-of-Iowa-Police-Investigate-Report-of-Man-Videotaping-in-Womens-Shower-368990061.html
Ireland	Man (56) charged with attempted voyeurism in Armagh leisure centre	http://www.irishnews.com/news/2016/11/23/news/man-charged-with-attempted-voyeurism-in-armagh-leisure-centre-797129/
Ireland	Radiologist spared jail following voyeurism trial	http://www.bbc.com/news/uk-northern-ireland-38849027
Lancaster County, PA	Man charged after 10-year-old girl finds him in women's restroom stall: police	http://www.pennlive.com/news/2016/04/man_charged_after_10-year-old.html

APPENDIX TABLE 1

Individuals Charged with Sex Crimes in Intimate Facilities (Page 3 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
Long Island, NY	Long Island dishwasher accused of placing cell phone camera in restaurant bathroom	http://abc7ny.com/news/li-dishwasher-accused-of-placing-cell-phone-camera-in-restaurant-bathroom/1440688/
Louisville, KY	Louisville man accused of voyeurism in women's restroom at Sullivan University	http://www.wdrb.com/story/31343333/louisville-man-accused-of-voyeurism-in-womens-restroom-at-sullivan-university
Lyndhurst, NJ	Ex-firefighter accused of videotaping girls in bathroom offered plea deal	http://www.nj.com/bergen/index.ssf/2016/03/ex-firefighter_accused_of_videotaping_girls_in_bat.html
Marshall County, AL	Former coach placed cameras in athletic rooms, bathrooms	http://www.newschannel10.com/story/31633258/former-coach-placed-cameras-in-athletic-rooms-bathroom
Martinsville, IN	Martinsville Chili's manager charged with voyeurism in hidden camera investigation	http://fox59.com/2016/02/25/martinsville-chilis-manager-charged-with-voyeurism-in-hidden-camera-investigation/
Maryville, TN	Alleged voyeur arrested over cameras in ladies restroom	http://www.thedailytimes.com/news/alleged-voyeur-arrested-over-cameras-in-ladies-restrooms/article_8b7c865a-5f12-5680-89fa-8d72adf04340.html
Mentor, OH	Man dressed as woman gropes girl at Mentor library, police say	http://www.cleveland.com/mentor/index.ssf/2016/06/man_dressed_as_woman_gropes_gi.html
Missoula, MT	Missoula man held for hiding and watching people use the bathroom—charged with felony	http://newstalkkgvo.com/missoula-man-held-for-hiding-and-watching-people-use-the-bathroom-charged-with-felony/
North Myrtle Beach, SC	Teen arrested for voyeurism after camera found in warehouse bathroom	http://www.wmbfnews.com/story/32383826/teen-arrested-for-voyeurism-after-camera-found-in-warehouse-bathroom
Norwich, United Kingdom	Ban for man who secretly filmed women at University of East Anglia	http://www.eveningnews24.co.uk/news/crime/ban_for_man_who_secretly_filmed_women_at_university_of_east_anglia_1_4791960
Oklahoma City, OK	Man accused of recording women at OKC mall	http://www.news9.com/story/33337766/man-accused-of-recording-women-at-okc-mall
Omaha, NE	Mother warns of "Peeping Tom" at Omaha mall	http://www.wowt.com/content/news/Mother-warns-of-Peeping-Tom-at-Omaha-mall--389822712.html
Ontario, Canada	Oshawa man charged after 14-year-old girl filmed in Pickering Town Centre mall change room	http://www.durhamregion.com/news-story/6556844-oshawa-man-charged-after-14-year-old-girl-filmed-in-pickering-town-centre-mall-change-room/
Ontario, Canada	Brantford man charged with voyeurism	http://www.chch.com/brantford-man-charged-with-adult-voyeurism/
Orange, CA	Fullerton man arrested on suspicion of filming people in a Chapman University bathroom	http://www.ocregister.com/articles/police-711282-ahn-university.html
Perrysburg, OH	Perrysburg Junior High student arrested, charged in connection to video-tape incident	http://nbc24.com/news/local/perrysburg-junior-high-student-arrested-charged-in-connection-to-video-tape-incident

APPENDIX TABLE 1

Individuals Charged with Sex Crimes in Intimate Facilities (Page 4 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
Port Hadlock, WA	Port Hadlock pizzeria hit by hidden-camera voyeurism	http://www.ptleader.com/news/port-hadlock-pizzeria-hit-by-hidden-camera-voyeurism/article_db852022-7f81-11e6-86d7-c78974de4e27.html
Redmond, WA	Defendant to be tried December 7 in Hartman pool voyeurism case	http://www.nwnews.com/index.php/local/news/13921-defendant-to-be-tried-december-7th-in-hartman-pool-voyeurism-case
Redwood City, CA	DA: Restaurant worker hid phone in trash to record women	http://www.ktvu.com/news/88553447-story
Rehoboth Beach, DE	Police seek man who took dressing room photo in Rehoboth	http://www.wgmd.com/police-seek-man-who-took-dressing-room-photo-in-rehoboth/
Revere, MA	Man pleads guilty to videotaping woman in Target dressing room	http://www.necn.com/news/new-england/Man-Pleads-Guilty-to-Videotaping-Women-in-Target-Bathroom-388263962.html
Ricksmanworth, United Kingdom	Three teenage girls spied on in changing room in William Penn Leisure Centre, Ricksmanworth	http://www.watfordobserver.co.uk/news/14272655.Three_teenage_girls_spied_on_in_changing_room/?ref=mr&lp=7
San Jose, CA	Campbell man, a teacher, arrested for secretly recording people inside bathroom	http://www.mercurynews.com/2016/04/13/campbell-man-a-teacher-arrested-for-secretly-recording-people-inside-bathroom/
Santa Barbara, CA	Santa Barbara man arrested after installing camera inside business bathroom	http://www.keyt.com/news/santa-barbara-county/santa-barbara-man-arrested-after-installing-camera-inside-business-bathroom/65539640
Seattle, WA	Just after NDO goes into effect man uses women's locker room at public pool	http://www.usatoday.com/story/news/nation-now/2016/02/17/transgender-rule-washington-state-man-undresses-locker-room/80501904/
Smyrna, TN	Police: Smyrna man recorded women in park bathroom	http://www.wsmv.com/story/31672625/police-smyrna-man-recorded-women-in-park-bathroom
Storrs, CT	UConn Police: Man facing 16 counts of voyeurism for secret recordings in law library rest room	http://patch.com/connecticut/mansfield/uconn-police-man-facing-16-counts-voyeurism-secret-recordings-law-library-rest
Sunrise, FL	Peeping Tom records woman undressing in Forever 21 fitting room, woman says	http://www.local10.com/news/peeping-tom-records-woman-undressing-in-forever-21-fitting-room-woman-says
Surrey, United Kingdom	Peeping Tom teaching assistant hid spy camera in staff toilets which took almost 300,000 images in the eight days before he was caught	http://www.dailymail.co.uk/news/article-3741249/Peeping-Tom-teaching-assistant-hid-spy-camera-staff-toilets-took-300-000-images-eight-days-caught.html
Tisbury, MA	Tisbury police arrest Maine man for filming in dressing room	http://www.mvtimes.com/2016/05/30/tisbury-police-arrest-maine-man-filming-dressing-room/
Toronto, Canada	Incidents of voyeurism return to University College	http://thevarsity.ca/2016/02/29/incidents-of-voyeurism-return-to-university-college/
Toronto, Canada	Man charged for change room voyeurism: cops	http://www.torontosun.com/2016/07/30/man-charged-for-change-room-voyeurism-cops

APPENDIX TABLE 1

Individuals Charged with Sex Crimes in Intimate Facilities (Page 5 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
Toronto, Canada	Voyeurism charges after video made in staff washroom	https://www.thestar.com/news/crime/2016/05/30/voyeurism-charges-after-video-made-in-staff-washroom.html
West Kendall, FL	La Perla manager accused of placing camera in women's bathroom: police	http://www.nbcmiami.com/news/local/Restaurant-Manager-Accused-of-Placing-Camera-in-Womens-Bathroom-Police-370834111.html
Wildon Manors, FL	Another victim comes forward in video voyeurism case against Wilton Manors man: Victim videotaped in bathroom 13 times, police say	http://www.local10.com/news/another-victim-comes-forward-in-video-voyeurism-case-against-wilton-manors-man
Ypsilanti Township, MI	Police seek man accused of putting camera in port-a-potty at orchard	http://www.mlive.com/news/ann-arbor/index.ssf/2016/09/police_seek_peeping_tom_who_pu.html
2015		
Abington, PA	Police: man recorded women changing in Abington Target	http://6abc.com/news/police-man-recorded-women-changing-in-target/587725/
Arlington, VA	Peeping Tom sought after videotaping woman in Marshalls fitting room in Arlington	http://wjla.com/news/crime/peeping-tom-sought-after-videotaping-woman-in-marshall-s-fitting-room-in-arlington-114646
Bellevue, WA	Police: Man in pink wig secretly filmed in women's restroom	http://q13fox.com/2015/06/04/police-man-in-pink-wig-secretly-filmed-in-womens-restroom/
Birmingham, United Kingdom	Man avoids immediate jail after admitting two charges of voyeurism	http://www.itv.com/news/central/2015-08-17/man-avoids-immediate-jail-after-admitting-two-charges-of-voyeurism/
Brea, CA	Man arrested after allegedly filming at least 7 people in Brea Starbucks bathroom	http://ktla.com/2015/08/18/man-arrested-after-allegedly-putting-hidden-camera-in-brea-starbucks-bathroom/
Brentwood, MO	Police: Peeping Tom caught filming women in Brentwood Target dressing rooms	http://www.kmov.com/story/29182491/peeping-tom-caught-filming-women-in-brentwood-target-dressing-rooms
California	Peeping Tom aboard Navy's USS John C. Stennis accused of recording female sailors inside ship's bathroom	http://www.nydailynews.com/news/national/sailor-accused-filming-woman-navy-ship-bathroom-article-1.2101432
Columbus, OH	Court: Man hid camera in bathroom of downtown Columbus business	http://www.ledger-enquirer.com/news/local/crime/article50248645.html
Destin, FL	Destin man charged with video voyeurism and battery	http://www.sheriff-okaloosa.org/news-releases/destin-man-charged-with-video-voyeurism-and-battery/
Edmonton, Canada	Man accused of recording video in Leduc change room	http://globalnews.ca/news/1769419/man-accused-of-recording-video-in-leduc-change-room/
Hanover Park, IL	Elgin man charged with taking pictures in Hanover Park health club bathroom	http://www.chicagotribune.com/news/local/breaking/ct-man-charged-with-taking-pictures-in-health-club-bathroom-20150606-story.html

APPENDIX TABLE 1

Individuals Charged with Sex Crimes in Intimate Facilities (Page 6 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
Iowa City, IA	Former IU employee to face trial for secretly taping people in bathroom	http://www.press-citizen.com/story/news/crime-and-courts/2015/07/16/former-ui-employee-face-trial-secretly-taping-people-bathroom/30260049/
King of Prussia, PA	Narberth man arrested for secretly filming women	http://www.philly.com/philly/news/20150303_Narberth_man_arrested_for_secretly_filming_Delco_women.html
La Habra, CA	Camera found in women's bathroom at Del Taco restaurant in La Habra	http://ktla.com/2015/08/05/camera-found-in-womens-bathroom-at-del-taco-restaurant-in-la-habra-reward-offered/
Lexington, KY	Former UK student charged with placing camera in campus bathroom	http://www.lex18.com/story/29902689/former-uk-student-charged-with-placing-camera-in-bathroom
Moorestown Township, NJ	N.J. man took pictures of woman in Old Navy changing room, police say	http://www.nj.com/burlington/index.ssf/2015/09/man_took_pictures_of_woman_in_changing_room_police.html
Ontario, Canada	Thames Valley District school board fires London teacher accused of secretly recording women in change room	http://www.lfpress.com/2015/05/01/thames-valley-district-school-board-fires-london-teacher-accused-of-secretly-recording-women-in-change-room
Orange County, CA	Man arrested after hidden camera found in a Starbucks restroom in Orange County	http://www.latimes.com/local/lanow/la-me-ln-hidden-camera-starbucks-restroom-20150818-story.html
Portland, OR	Goodwill store employee accused of taking pictures of customers	http://www.kristv.com/story/28312425/goodwill-store-employee-accused-of-taking-pictures-of-customers
San Diego, CA	Man who wore Barbie costume in bathroom assault sentenced	http://fox5sandiego.com/2015/03/27/man-who-wore-barbie-costume-in-bathroom-assault-sentenced/
Savage, MD	Rams Head president charged with videotaping women in Savage venue bathroom	http://www.baltimoresun.com/news/maryland/howard/laurel/bs-md-rams-head-arrest-20150223-story.html
Sentosa, Singapore	Cross-dressing man caught peeping at Sentosa beach club toilet	http://news.asiaone.com/news/singapore/cross-dressing-man-caught-peeping-sentosa-beach-club-toilet
Singapore	Police arrest man who cross-dressed to peep inside female toilet at ITE	http://www.straitstimes.com/singapore/police-arrest-man-who-cross-dressed-to-peep-inside-female-toilet-at-ite#3
Twinsburg, OH	Twinsburg pizzeria manager sentenced for recording teen employees using restroom	http://www.cleveland.com/akron/index.ssf/2015/11/twinsburg_pizzeria_manager_sen.html
Walnut Creek, CA	Man arrested for placing hidden camera in Walnut Creek Starbucks restroom	http://sanfrancisco.cbslocal.com/2015/04/16/jacob-turner-arrested-hidden-camera-walnut-creek-starbucks-restroom/
Wilmington, NC	NC business owner sentenced after pleading guilty to secret peeping	http://myfox8.com/2015/03/03/nc-business-owner-sentenced-after-pleading-guilty-to-secret-peeping/
Woodbridge, VA	Man dressed as woman arrested for spying into mall bathroom stall, police say	http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041.html

APPENDIX TABLE 1

Individuals Charged with Sex Crimes in Intimate Facilities (Page 7 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
2014		
Berkeley, CA	UC Berkeley student arrested for alleged peeping in residence hall showers	http://www.dailycal.org/2014/05/13/uc-berkeley-student-arrested-alleged-voyeurism-residence-hall-showers/
British Columbia, Canada	North Vancouver man arrested for allegedly filming women's washroom	http://www.nsnews.com/news/north-vancouver-man-arrested-for-allegedly-filming-women-s-washroom-1.1261328
Brooklyn, NY	Employee admits secretly filming women in Brooklyn Foot Locker restroom: cops	http://www.nydailynews.com/new-york/employee-filmed-ladies-restroom-b-klyn-foot-locker-article-1.1989057
Deptford Township, NJ	Man at Deptford Mall took photos of girl, 12, in dressing room, police say	http://www.nj.com/gloucester-county/index.ssf/2014/06/deptford_police_seek_suspect_who_had_camera_in_mall_dressing_room.html
Derby, United Kingdom	Derby peeping Tom jailed for spying on woman trying on bikinis in Asda store	http://www.derbytelegraph.co.uk/derby-peeping-tom-jailed-spying-woman-trying/story-22829192-detail/story.html
Front Royal, VA	Police probe local business owner in hidden camera investigation	http://www.your4state.com/news/news/police-probe-local-business-owner-in-hidden-camera-investigation
Kingsport, TN	Rogersville man in custody for photographing a juvenile in the dressing room of a Kingsport clothing store	https://kingsportpdblog.com/2014/09/18/kpd-e-news-release-rogersville-man-in-custody-for-photographing-a-juvenile-in-the-dressing-room-of-a-kingsport-clothing-store/
Kissimmee, FL	Loss prevention worker accused of taking video of girl using restroom	http://www.clickorlando.com/news/loss-prevention-worker-accused-of-taking-video-of-girl-using-restroom_20151107084852706
Louisville, KY	Louisville man accused of placing camera in public restroom	http://www.wdrb.com/story/25005704/louisville-man-accused-of-taking-nude-images-in-public-bathroom
Mercer County, OH	Co-owner accused of putting camera in business bathroom	http://wane.com/2014/08/28/mercer-county-co-owner-accused-of-putting-camera-in-business-bathroom/
Ontario, California	Ontario biz secretly filmed employees in bathroom	http://abc7.com/news/ontario-biz-secretly-filmed-employees-in-bathroom/245929/
Tampa, FL	Cops: Tampa executive filmed women using toilets and showering at his company	http://www.tampabay.com/news/publicsafety/crime/suspect-faces-123-video-voyeurism-counts-in-tampa-case/2171292
Toronto, Canada	Predator who claimed to be transgender declared dangerous offender	http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender
Tuscon, AZ	Ex-PTA president gets probation in voyeurism case	http://tucson.com/news/local/crime/ex-pta-president-gets-probation-in-voyeurism-case/article_262cd8a6-243e-5dc5-bf11-b4bd9ea5b0d0.html

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Individuals Charged with Sex Crimes in Intimate Facilities (Page 8 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
2013		
Adrian, MI	Cross-dressing Michigan man faces child pornography charge after FBI probe	http://www.clickondetroit.com/news/michigan/cross-dressing-michigan-man-faces-child-pornography-charge-after-fbi-probe
Falls Church, VA	Police make arrest in March cross dressing sexual assault case	https://fcnp.com/2013/05/04/police-make-arrest-in-march-cross-dressing-sexual-assault-case/
Halifax Township, PA	Man who portrayed himself as "cross dresser" arrested for alleged role in sexual assault, state police say	http://www.pennlive.com/midstate/index.ssf/2014/05/cross_dresser_sexual_assault_h.html
Lisbon, OH	Cross-dressing molester to spend at least 15 years in prison	http://www.reviewonline.com/news/police-courts/2013/08/crossdressing-molester-to-spend-at-least-15-years-in-prison/
Oklahoma City, OK	Homeless man wearing women's panties accused of assaulting young girl in OKC	http://www.news9.com/story/23443942/homeless-man-arrested-wearing-womens-panties-accused-of-assaulting-young-girl-in-okc-gas-station-bathroom
Palmdale, CA	Man disguised as woman recorded "hours" of mall restroom video	http://www.nbclosangeles.com/news/local/Secret-Recording-Store-Mall-Antelope-Valley-Palmdale-Restroom-207541101.html
Portland, OR	Portland cross-dresser accused of placing sexually explicit ad about little girl on Craigslist	http://www.oregonlive.com/portland/index.ssf/2013/08/portland_cross-dresser_accused.html
San Bernardino County, CA	Man dressed as woman tried to take pictures in dorm, police say	http://www.latimes.com/local/lanow/la-me-ln-man-allegedly-dressed-woman-20130624-story.html
Toronto, Canada	Man dressed as women nabbed for allegedly peering under bathroom stall *[sic]*	https://www.thestar.com/news/crime/2013/12/27/man_dressed_as_women_nabbed_for_allegedly_peering_under_bathroom_stall.html
2012		
Everett, WA	Police: Man in bra and wig found in women's bathroom	http://komonews.com/archive/police-man-in-bra-and-wig-found-in-womens-bathroom
Olympia, WA	College allows transgender man to expose himself to young girls	http://radio.foxnews.com/toddstarnes/top-stories/college-allows-transgender-man-to-expose-himself-to-young-girls.html
Thousand Oaks, CA	Man wearing skirt, fishnet stockings exposes himself to kids	http://losangeles.cbslocal.com/2012/12/07/man-wearing-skirt-fishnet-stockings-exposes-himself-to-kids/
2011		
La Mesa, CA	He just wanted to shake women's hands—as cross-dresser in restroom	http://patch.com/california/lamesa/he-just-wanted-to-shake-womens-handsas-cross-dresser-044fe69d34
Milwaukie, OR	Cross-dressing sex predator sentenced for Clackamas aquatic park crimes	http://www.oregonlive.com/oregon-city/index.ssf/2011/10/cross-dressing_sex_predator_se.html

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Individuals Charged with Sex Crimes in Intimate Facilities (Page 9 of 9)

LOCATION	INCIDENT HEADLINE	SOURCE
Sacramento, CA	Cross-dressing suspect arrested for raping woman	http://sacramento.cbslocal.com/2011/04/17/crossdressing-suspect-arrested-for-raping-woman/
2010		
Berkeley, CA	Cal locker room peeping Tom suspect arrested	http://sanfrancisco.cbslocal.com/2010/10/21/cal-locker-room-peeping-tom-suspect-arrested/
Boulder, CO	Boulder "peeping Tom" headed to prison	http://www.dailycamera.com/ci_14294909
Calhoun, GA	Cross-dressing man arrested for exposure at Walmart	http://www.ajc.com/news/local/cross-dressing-man-arrested-for-exposure-walmart/b0Ikm8U25R0oDFkN2LW66O/
Gwinnett County, GA	Police: Cross-dressing peeping Tom arrested again	http://www.wsbtv.com/news/police-cross-dressing-peeping-tom-arrested-again/241597604
2009		
Campbell, CA	San Jose sex offender wearing fake breasts, wig arrested for loitering in womens' restroom	http://www.mercurynews.com/2009/01/26/san-jose-sex-offender-wearing-fake-breasts-wig-arrested-for-loitering-in-womens-restroom/
Oklahoma City, OK	Police: Man wearing ladies' swim suit exposes himself	http://www.news9.com/story/11366771/police-man-wearing-ladies-swim-suit-exposes-himself
2008		
West Lafayette, IN	Purdue police investigate report of man taking photographs in women's restroom	https://news.uns.purdue.edu/x/2008a/080331PoliceVPA.html
2004		
Greensburg, PA	Cops: Locker room transvestite has cheerleader fantasy	http://www.freerepublic.com/focus/f-news/1212235/posts