No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND THE NATIONAL LGBT BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENTS OF INTEREST[1]

Amici curiae are diverse organizations with an interest in ensuring that transgender individuals are free from official discrimination. Amici support an interpretation of Title IX of the Education Amendments of 1972 and its implementing regulations that safeguards the well-being and dignity of transgender students by treating all students consistent with their gender identity—without regard to whether the

[1] No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. Petitioner filed a blanket amicus consent letter; a consent letter from Respondent was submitted with this brief.

religious or moral beliefs of certain members of the community may be offended by a student's gender identity or actions in accordance therewith.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization committed to preserving the constitutional principle of religious freedom. Representing more than 125,000 members and supporters nationwide, Americans United works to protect the rights of individuals to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic governance.

Americans United has long fought to uphold the guarantees of the First Amendment and equal protection that prohibit the government from favoring, disfavoring, or punishing based merely on religious or moral disapprobation. Simultaneously, Americans United has worked to ensure that all people have the freedom to practice their faith, or not, according to the dictates of conscience, as long as their religious exercise does not harm third parties.

The *National LGBT Bar Association* ("LGBT Bar") is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of lesbian, gay, bisexual, and transgender ("LGBT") rights. The LGBT Bar and its members work to promote equality for all people regardless of sexual orientation or gender identity or expression, and serve in their roles as lawyers to fight discrimination against LGBT people where it continues to exist. The LGBT Bar vehemently supports Respondent in his fight for equal protection under the law.

INTRODUCTION AND SUMMARY OF ARGUMENT

G.G. is a student at a public high school. He wants to enjoy the same educational opportunities as any other student in the district, including being able to use restrooms that correspond with his gender identity. That is his right under Title IX.[2]

G.G.'s school initially agreed to let G.G. use the boys' restrooms. But the school began receiving complaints about G.G.'s use of the boys' restroom from parents and students. In response to these complaints, the Gloucester County School Board held *two* public meetings to debate G.G.'s restroom use—a distinction that no high-school student would relish. At those meetings, speakers urged the Board to change course on G.G.'s restroom use because of their moral and religious disapproval of transgender individuals. Ultimately, the Board passed a resolution prohibiting transgender students from using those restrooms that match their gender identity.

But using the restroom is an essential and ordinary part of life. If G.G. is singled out and prevented from using the restroom as his classmates do, he is also for practical purposes prevented from attending school in the same manner as they do. The Board's policy thus subjects G.G. to sex-stereotyping and

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[2] The Secretary of Education previously issued guidance acknowledging that schools must generally treat students consistent with their gender identity. That guidance was withdrawn on February 22, 2017. Schools are now required to "ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." Dear Colleague Letter, Civil Rights Div., U.S. Dep't of Justice & U.S. Dep't of Educ. (Feb. 22, 2017).

gender-identity discrimination that limits his ability to enjoy the educational opportunities guaranteed to him by Title IX.

To be sure, some people hold deeply entrenched moral and religious beliefs regarding traditional sex roles and transgender people. Some of them spoke at the Board's meetings; others have filed amicus briefs in this case. They are entitled to hold whatever views they wish; no court can dictate how a person should think. But this Court has never allowed such views to override federal antidiscrimination laws.

Quite the contrary. This Court's equal-protection decisions consistently prohibit federal, state, and local governmental actors from relying on moral or religious disapprobation to justify treating some classes of people differently from others. Hence, the Fourth Circuit appropriately gave no weight to morality- and religion-based objections to transgender individuals when it ruled that Title IX may be reasonably interpreted to require schools to treat transgender students consistent with their gender identity. Those objections cannot be used as an excuse to disregard Title IX or to justify ousting G.G. from the restrooms that he had been using without incident. This Court should therefore decline to countenance such class-based objections as a defense under Title IX. To do otherwise not only would erode critical federal antidiscrimination protections but also would be irreconcilable with this Court's settled understanding of equal-protection law. What is more, it would give rise to grave Establishment Clause concerns by codifying religious belief as official policy, thereby impermissibly imposing the burdens of objectors' religious views on innocent third parties.

G.G. simply wants to use restrooms that correspond with his gender identity. Title IX ensures that he may do so, regardless of the moral or religious disapprobation that some may direct his way.

ARGUMENT

I. MORAL AND RELIGIOUS DISAPPROVAL OF TRANSGENDER INDIVIDUALS PERVADES THIS DISPUTE.

Gender dysphoria—"the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender," Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (DSM-5) 451 (5th ed. 2013)—raises serious moral and theological questions for many people, including those whose beliefs about sex roles and gender identity are rooted in their faith. It is thus unsurprising that, when G.G., a seventeen-year-old transgender boy, sought to use the boys' restrooms at his public high school, some community members reacted based on their religious and moral beliefs, including by expressing disapproval of transgender people. Indeed, at least one amicus brief in this case asks this Court to uphold the Board's policy based on that same religion- and morality-based disapproval.

During his freshman year of high school, G.G. came out to his parents as a transgender male and was determined to have gender dysphoria. Pet. App. 108a, 147a. Consistent with his psychologist's advice and the recommended standard of care for transgender minors, G.G. began to live as a boy in all respects. He adopted a boy's name, referred to himself with male pronouns, and used public men's restrooms. Pet. App. 147a; C.A. App., ECF 14, at 9–10 ¶ 3; 13, ¶ 23.

G.G. also took steps to ensure that his needs as a transgender student were met at school. In August 2014, before he began his sophomore year, G.G. and his mother met with school administrators, informed them that he is a transgender male, and arranged with them to notify his teachers about his preferred name and pronouns. Pet. App. 108a, 148a. Initially, G.G. used the special restroom in the school nurse's office. Pet. App. 149a. But he soon found using the nurse's special restroom to be stigmatizing and demeaning—robbing him of his dignity. *Ibid.*; C.A. App. 15, ¶ 31. The nurse's office was also far from G.G.'s classrooms, making it difficult for him to use the special restroom and still get to class on time. Pet. App. 149a. Thus, G.G. asked for and received permission to use the regular boys' restrooms. *Ibid.*; C.A. App. 15, ¶ 31. The next day, however, the School Board "began receiving numerous complaints from parents and students." Pet. App. 144a.

The School Board responded by holding a public meeting in November 2014 at which community members were invited to comment on a proposed resolution to prohibit transgender students from using the school restrooms that match their gender identity. Pet. 6; Br. in Opp'n 6–7. The meeting immediately took on sharply moralistic and religious overtones. The first two speakers, who supported the proposed resolution, made a point to explain that they are pastors. Video: November 11, 2014 School Board Meeting, at 13:10–15:25, 15:30–17:20 (Gloucester County School Board 2014), https://tinyurl.com/zd69s3a. Another speaker read a Bible verse and suggested that people are born transgender because "sin has damaged everything";

the speaker argued that recognizing transgender rights reflects "morality creep." *Id.* at 53:35–55:00.

Some speakers countered by urging the Board not to consider community members' religious or moral opposition to transgender students when making its decision. G.G.'s mother highlighted that people with strong religious convictions were aligned on both sides of the issue. *Id.* at 27:35–33:45. Another speaker emphasized that he is Christian and believes, consistent with his faith, in the separation of church and state. *Id.* at 57:30–40. Two others urged the Board to put aside religious beliefs when voting on the resolution. *Id.* at 1:34:00–1:37:40, 1:38:15–1:39:10.

The Board entertained public comment on the proposed resolution at a second meeting. Once again, religion and morality emerged as themes. One speaker argued that recognizing transgender rights would violate "the laws of nature." Video: December 9, 2014 School Board Meeting, at 1:02:10–1:04:45 (Gloucester County School Board 2014), https://tinyurl.com/jgfcesf. Another declared that rejecting the proposed resolution would be immoral. *Id.* at 1:11:45–1:14:11. Still another emphasized that God created men and women, and then invoked the biblical passage, "wide is the way that leads to destruction." *Id.* at 1:18:10–1:20:40. And another said: "You do not have an unalienable right to choose your own sex; nature's God chose it for you. * * * Here, we have 1,000 students versus one freak. Who should accommodate whom?" *Id.* at 1:21:25–1:23:50.

As at the first public meeting, some speakers tried to combat these appeals to theology and morality. One emphasized that the issue before the Board did

not implicate morality. *Id.* at 1:10:10–1:11:35. Another urged the Board not to consider religion when rendering its decision because, "as far as the religion aspect goes, * * * there is a wall, a separation of church and state." *Id.* at 1:33:20–1:35:35.

After hours of these and other public comments, the Board voted 6–1 to adopt the proposed resolution, thereby restricting the use of the boys' and girls' facilities at Gloucester County schools to "the corresponding biological genders." Pet. App. 144a. Since then, G.G. has been unable to use the boys' restrooms, under threat of disciplinary consequences. *Id.* at 150a; C.A. App. 18, ¶ 45.

Such expressions of moral and religious disapproval have followed this dispute into the courtroom, including in briefs filed with this Court. For example, an amicus brief by former Alabama Supreme Court Chief Justice Roy Moore's Foundation for Moral Law urges this Court not to "sanction" the idea that "rejecting one's birth sex" is "morally" acceptable, Br. for Found. for Moral Law as Amicus Curiae Supporting Pet'r 6, citing both the "general discomfort of the public with behavior the American Psychiatric Association formerly termed the manifestation of a mental disorder," *id.* at 11, and God's commands as laid out in the Holy Bible, *id.* at 14–15. See also Br. for the Gen. Conference of the Seventh-Day Adventists & the Becket Fund for Religious Liberty as Amici Curiae Supporting Pet'r; Br. for Major Religious Orgs. as Amici Curiae Supporting Pet'r; Br. for Religious Colleges, Schools, and Educators as Amici Curiae Supporting Pet'r; Br. for Christian Educators Ass'n Int'l, et al. as Amici Curiae Supporting Pet'r.

II. MORAL AND RELIGIOUS OBJECTIONS TO TRANSGENDER INDIVIDUALS MAY NOT JUSTIFY GOVERNMENTAL DECISION-MAKING.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

When Title IX was signed into law more than forty years ago, its antidiscrimination mandates contravened the traditional religious and moral commitments of large segments of the public. Some people believed then (as some believe now) that disparate treatment of the sexes was not just the way things were, but indeed the way they *ought* to be. Cf. Alexandra Polyzoides Buek & Jeffrey H. Orleans, *Sex Discrimination – A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 Conn. L. Rev. 1, 1–3 (1973).

Congress did not, however, make the interpretation and enforcement of Title IX subservient to those widely held beliefs. Whether a governmental policy violates Title IX is a matter of statutory interpretation alone. And by its plain terms, Title IX does not permit secular schools that accept federal funds to exempt themselves from the Act's requirements based in whole or in part on moral or religious objections to compliance.[3] Nor could it. Invidious govern-

[3] Title IX exempts any "educational institution which is controlled by a religious organization" if compliance "would not be consistent with the religious tenets of such organization." 20

mental discrimination against a class is verboten under this Court's settled constitutional jurisprudence, including when that discrimination is based on moral or religious disapproval of the class.

A. Moral Disapproval of a Class Cannot Justify Discriminatory Treatment Under the Equal Protection Clause.

The government cannot discriminate against a class of individuals based on undifferentiated fear, generalized public unease, or even heartfelt moral disapproval. *Romer* v. *Evans*, 517 U.S. 620, 631–632 (1996); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528 (1973). In charting the fundamental elements at the heart of the Constitution's equal-protection guarantee, this Court has repeatedly invalidated governmental classifications that were defended based on animus toward a class. That is true whether the animus was expressed openly, *Moreno*, 413 U.S. at 534; as unsubstantiated fears or negative attitudes, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448–450 (1985); or as codifications of religious or moral disapproval, see *Romer*, 517 U.S. at 635–636. "[E]ven in [a] * * * case calling for the most deferential of standards," the Equal Protection Clause requires that "legislative classification[s] * * * bear[] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631–632. "[I]f * * * 'equal protection of the laws' means anything, it must * * * mean that a bare [] desire to harm a politically unpopular group cannot constitute

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U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). Gloucester High School is a public school.

a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

1. *Moreno* marked the Court's first express acknowledgement that animus toward a class is not a legitimate governmental interest. There, Congress had amended the Food Stamp Act of 1964 to withdraw benefits from households containing an individual unrelated to any other member of the household. The Act's legislative history revealed that the provision "was to prevent * * * 'hippies' * * * from participating in the food stamp program." 413 U.S. at 534. Relying on the equal-protection component of the Due Process Clause of the Fifth Amendment, the Court struck down the provision, explaining: "[A] purpose to discriminate against hippies cannot, in and of itself[,] * * * justify" congressional action. *Id.* at 534–535 (internal quotation marks omitted).

Eleven years later, in *Palmore* v. *Sidoti*, the Court reiterated that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. 429, 433 (1984). In reviewing a custody dispute, therefore, the Court had "little difficulty" concluding that the district court had erred in granting custody to a father based on the court's belief that the mother's mixed-race relationship would make the child "vulnerable to peer pressures" and "social stigmatization." *Id.* at 431, 433. Relying this time on the Equal Protection Clause of the Fourteenth Amendment, the Court held: "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice." *Ibid.* (internal quotation marks omitted).

A year later, in *Cleburne*, the Court made clear that *Palmore*'s prohibition against governmental

enforcement of private prejudices applies even when a case is decided under this Court's most deferential standard of review. *Cleburne* struck down an ordinance requiring a special permit for operating a group home for persons with mental disabilities. 473 U.S. at 435. The defendant city argued that the permit requirement was justified by, among other things, "negative attitude[s] of the majority of [nearby] property owners." *Id.* at 448. The city also contended that the elderly residents of the neighborhood would feel unsafe and that nearby junior-high-school students might harass occupants of a group home. *Id.* at 448–449. The Court rejected these arguments on rational-basis review, holding that "mere negative attitudes" and unsubstantiated public "fear[s]" are not a sufficient basis to condone official discrimination. *Id.* at 448.[4]

In *Romer*, the Court applied that same principle to matters of sexual orientation. *Romer* involved a Colorado state constitutional amendment prohibiting enactment or enforcement of antidiscrimination laws to protect the rights of gay, lesbian, and bisexual people. Colorado argued that the amendment was justified by "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality." *Romer*, 517 U.S. at 635. This Court declined to credit those asserted liberty interests. Echoing Justice Harlan's admonishment

[4] Cf. *O'Connor* v. *Donaldson*, 422 U.S. 563, 575–576 (1975) (a State may not "fence" away the harmlessly mentally ill "solely to save its citizens from exposure to those whose ways are different," based on "[m]ere public intolerance or animosity").

that the Constitution "neither knows nor tolerates classes among citizens," *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), the Court held that "classification * * * for its own sake" is not permitted by the Equal Protection Clause. *Romer*, 517 U.S. at 635.

In doing so, the Court noted that "laws singling out a certain class of citizens for * * * general hardships" give rise to "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 633–634. Hence, the Court held, that sort of "[c]lass legislation * * * [is] obnoxious to the prohibitions of the Fourteenth Amendment" absent a "sufficient factual context" that reveals an overriding and legitimate governmental interest that "justif[ies] the incidental disadvantages * * * impose[d] on" the affected persons—an interest that simply does not exist when government is codifying bare moral disapprobation toward a class of persons. *Id.* at 632, 634–635 (internal quotation marks omitted).

Similarly, in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), the Court invalidated the Defense of Marriage Act, which excluded same-sex married couples from the federal benefits and protections afforded to opposite-sex married couples.[5] *Id.* at 2693. While acknowledging that DOMA was intended "to promote an 'interest in protecting * * * traditional moral teachings,' " the Court declined to give weight to that moral disapproval of gay and lesbian people. *Ibid.* (quoting H.R. Rep. No. 104-664, at 16 (1996)). Instead, it held that DOMA

[5] See also *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015).

was unconstitutional because "no legitimate purpose overcomes [DOMA's] purpose and effect [of] disparag[ing] and * * * injur[ing] those whom [a] State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696; see also *id.* at 2693.

This long line of precedents underscores that governmental action cannot be justified by animus toward a class—whether by public officials or by members of the public whom the officials seek to satisfy or placate—because furthering that animus is never a legitimate governmental interest.[6]

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[6] The Court has also cast constitutional suspicion on governmental action based on moral disapproval of a class under the Due Process Clause. In *Lawrence* v. *Texas*, 538 U.S. 558 (2003), the Court explained that, as a matter of substantive due process, it is "abundantly clear" that laws cannot be justified by a historical tradition of moral disapproval of a class—however long-standing that tradition may be. *Id.* at 577 (internal quotation marks omitted). *Lawrence* struck down a Texas law criminalizing consensual intercourse by same-sex couples. The Court recognized that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 577–578 (internal quotation marks omitted). However deeply held these convictions may be, they have no place in making official policy, where "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." *Id.* at 571 (internal quotation marks omitted). "[N]either history nor tradition [can] save a law" grounded in a historical tradition of moral disapproval of a class. *Id.* at 577–578 (2003) (internal quotation marks omitted); see also *Windsor*, 133 S. Ct. at 2693 (concluding that DOMA violated "basic due process and equal protection principles"), *id.* at 2695 (a law whose "principal purpose and * * * necessary effect * * * are to demean" persons in a lawful marriage violates the Fifth Amendment). Given the clarity of its equal-protection jurisprudence, however, the Court need not consider substantive due process here.

2. Moral objections also have no proper part in a court's decision-making. A court may not act to accommodate the public's bare moral disapprobation of a class of people any more than policymakers may. See, *e.g.*, *Palmore*, 466 U.S. at 433–434 (trial court erred in basing a child-custody ruling on the notion that the child would face stigmatizing "pressures and stresses" if raised in a biracial household because of "private racial prejudice" within the community) (internal quotation marks omitted). Nor may a court "draw on [its] own views as to the morality, legitimacy, and usefulness" of particular conduct to assess the legality of restricting or limiting that conduct. *Ferguson* v. *Skrupa*, 372 U.S. 726, 728–729 (1963). On the contrary, it has long been recognized that courts ought not venture into "the realm of legislative value judgments." *Id.* at 729. Judges simply must not render decisions about governmental policies based on their own moral views. See *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 850 (1992) (court's role is "not to mandate [its] own moral code"); Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Res. L. Rev. 905, 906 (2016) (judges ought not "decide cases based on their own moral convictions").

3. The analysis does not change when the animus and moral disapprobation are grounded in religious belief.

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for [interracial] marriages." *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (quoting trial court). So declared the state

judge who sentenced the Lovings for violating Virginia's anti-miscegenation statute. Those sentiments about interracial couples were commonplace at the time; indeed, they were considered by many to be theological imperatives. Yet this Court had no difficulty concluding that there was "patently no legitimate overriding purpose" to justify enforcement, through governmental policy or court action, of widely held religious beliefs that ran contrary to federally mandated antidiscrimination principles. *Id.* at 11; cf. *Romer*, 517 U.S. at 635–636.

Similarly, religious objections do not warrant judicially created exemptions from antidiscrimination laws. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 602 n.28 (1983) (rejecting free-exercise defense of a university's discriminatory admissions practices that "were based on a genuine belief that the Bible forbids interracial dating and marriage"); *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (rejecting as "patently frivolous" the argument that requiring a restaurant to serve African-American patrons "constitute[d] an interference with the 'free exercise of the Defendant's religion,' " which included doctrines of racial superiority and inferiority).

4. To be sure, the Constitution does not bar individuals from holding private biases. See *Palmore*, 466 U.S. at 433.[7] These biases may be genuinely held and shaped by "deep convictions" or "religious beliefs" that reflect fundamental conceptions of right

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[7] See generally THE FEDERALIST No. 10 (Madison) ("[T]he CAUSES of faction cannot be removed," only their "EFFECTS" can be "control[led].") (emphasis in original).

and wrong. *Lawrence*, 539 U.S. at 571. But however deeply held such beliefs may be, government officials "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448.

It follows that neither the School Board here nor any court may give private biases direct or indirect effect—nor may the Secretary of Education in interpreting and enforcing Title IX. Cf. *Palmore*, 466 U.S. at 433. Hence, as a matter of law, the School Board may not defend its ban by arguing that it was merely deferring to public sensibilities and objections. Regardless of the level of judicial scrutiny applied, such moral and religious disapproval cannot justify a governmental classification.[8] See, *e.g.*, *Windsor*, 133 S. Ct. at 2693–696; *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) ("Moral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.") (citations omitted); *Cleburne*, 473 U.S. at 448. Disapproval of or discomfort with transgender students is no more a constitutionally cognizable justification for governmental discrimination than is "public unease" with the "physically unattractive or socially eccentric." *Donaldson*, 422 U.S. at 475; *Cleburne*, 473 U.S. at 448. This Court's jurisprudence, from *Loving* and *Moreno* to *Windsor* and *Obergefell*, forecloses the

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[8] Thus, as a prudential matter the Court need not determine what level of scrutiny applies to transgender individuals; basing a classification on religious or moral disapproval fails even the most deferential review. Cf. *Hooper* v. *Bernalillo Cty. Assessor*, 472 U.S. 612, 621–622 (1985).

government from giving credence to animus toward, or moral and religious disapproval of, transgender people.

5. It is appropriate for governmental actors, whether a school board or a court, to refrain from suggesting that moral and religious views against transgender students are relevant when interpreting Title IX's protections. The Fourth Circuit therefore correctly declined to engraft a moral or religious exception onto the Act's antidiscrimination mandate or otherwise to give weight to the moral and religious objections raised before the School Board. This Court should do the same.

B. Accepting Religious Objections to Transgender Individuals as a Valid Justification for Petitioner's Actions Would Raise Grave First Amendment Concerns.

As the wide array of amicus briefs from religious individuals and organizations in this case demonstrates, people of faith have many and varied beliefs about gender dysphoria and transgender individuals. All have the right to make their voices heard before governmental bodies, as the people in Gloucester County did at school-board meetings. But the First Amendment flatly forbids official preferences for some faiths over others. See, *e.g.*, *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968); *Larson* v. *Valente*, 456 U.S. 228, 244–246 (1982).

To the extent, therefore, that a governmental entity acts to ameliorate offense to the religious beliefs of some citizens at the expense of others, its actions raise serious First Amendment concerns in at least two respects. First, if official action was undertaken to cater to certain religious views, beliefs, or preferences, the act has an impermissible religious pur-

pose. And second, to the extent that government seeks to accommodate the religious beliefs and religious exercise of some persons by imposing the burdens and costs of that religious exercise on others, the action far exceeds what the Free Exercise Clause mandates or even allows—once again violating the Establishment Clause.

1. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates th[e] central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County.* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005). Hence, this Court has consistently required that governmental action must have a preeminently secular purpose. *Ibid.*

The public comments at the school-board meetings included passionate religious arguments for refusing to respect the gender identity of transgender students. Under these circumstances, were a governmental actor—whether a school board or a court—to consider "catering to community concerns" as potential justification for the policy, serious Establishment Clause questions would arise. For when the government acts to satisfy the religious preferences of a certain segment of constituents, over the objections of others, there is strong reason to conclude that the express religious purpose of the favored constituents should be imputed to the government. See, *e.g.*, *Epperson*, 393 U.S. at 107 (Arkansas law restricting the teaching of evolution could not constitutionally be justified as merely acceding to "the religious views of some of [Arkansas'] citizens" because "the state has no legitimate interest in protecting any or all religions from views distasteful to them.") (quoting

Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495, 505 (1952)).[9] The same is true under the Equal Protection Clause. See, *e.g.*, *Cleburne*, 473 U.S. at 448 ("[T]he City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic."); *Palmore*, 466 U.S. at 433.[10]

2. Additionally, when government acts to accommodate religious beliefs or practices, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" so as not to run afoul of the Establishment Clause. *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005).[11]

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[9] See also, *e.g.*, *Selman* v. *Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1329–1330, 1334–1335 (11th Cir. 2006) (remanding for clarification as to whether school board's adoption of warning stickers on biology textbooks was undertaken to satisfy constituents' religious objections to evolution); *Jager* v. *Douglas Cty. Sch. Dist.*, 862 F.2d 824, 829–830 (11th Cir. 1989) ("satisfy[ing] the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity" was not a permissible secular purpose for practice of holding prayers at high-school football games) (internal quotation marks omitted).

[10] See also, *e.g.*, *ACLU of N.J.* v. *Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 (3d Cir. 1996) ("An impermissible practice can not be transformed into a constitutionally acceptable one by putting a democratic process to an improper use.").

[11] See also, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring) (religious accommodation "would not detrimentally affect others who do not share petitioner's belief"); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (justifying religious accommodation in part because the effect on third parties like the women employed by Hobby Lobby "would be precisely zero"); *Estate of Thornton* v. *Caldor,*

If that is true when, as in *Cutter*, a governmental actor is asked merely to leave space for private religious observance, it must be all the more true when the government goes out of its way to adopt a particular religious viewpoint as official policy, compels everyone to act consistent with the favored religious beliefs, and thereby imposes costs and burdens on nonbeneficiaries.

Inc., 472 U.S. 703, 709–710 (1985) (striking down a statute guaranteeing employees the day off on the Sabbath day of their choosing in part because the statute "t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"); *Tex. Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 18 n.8 (1989) (striking down a sales-tax exemption for religious periodicals in part because it would "burden[] nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications"); *United States* v. *Lee*, 455 U.S. 252, 261 (1982) (rejecting an Amish employer's request for exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees"); *Braunfeld* v. *Brown*, 366 U.S. 599, 608–609 (1961) (refusing an exemption from Sunday-closing law for Orthodox Jews because it would have "provide[d] [the plaintiffs] with an economic advantage over their competitors who must remain closed on that day"); *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944) (denying an exemption from child-labor laws for distributing religious literature because parents are not free "to make martyrs of their children"); see also *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 630 (1943) (religious exemption from flag-salute requirement under the Free Speech Clause "does not bring [plaintiffs] into collision with rights asserted by any other individual"); cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80–81 (1977) (Title VII's reasonable-accommodation requirement does not authorize religious exemptions that would burden an employer or other employees).

Here, the School Board's policy consigns G.G. either to conform to sex stereotypes or to be sequestered in separate facilities. If the School Board were to invoke the religious beliefs and preferences of some members of the community to subject G.G. to that shame and humiliation—not to mention the discomfort and health risks of not using the restroom all day, or the penalty of missing class to get to and from the only restroom left open to him—the Establishment Clause concerns would be inescapable. And as the public comments to the Board amply demonstrate, relying on religious and moral views to make policy introduces into the public discourse the very divisiveness that the Establishment Clause was intended to prevent. See *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

Those concerns can and should be avoided here by doing as the Equal Protection Clause also requires: The Court should determine the questions of statutory and regulatory interpretation as the Fourth Circuit did, without giving weight to the religious and moral disapprobation toward transgender people that was raised in public comments to the School Board and now has been put before this Court.

* * *

This Court's constitutional jurisprudence prohibits the School Board from using moral and religious disapproval of a class to justify its restroom policy. Morality- and religion-based objections to transgender individuals must not inform federal, state, or local governments' interpretations and applications of the law. Moral and religious disapproval are also irrelevant to the questions of statutory and regulatory interpretation presented by this case. So the Court should not concern itself with any

consideration of such objections. Rather, the Court should affirm an interpretation of Title IX that properly safeguards transgender students against discriminatory treatment.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit should be affirmed.

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