No. 15-2056

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

G.G. BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Plaintiff-Appellant.

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellee,

On Appeal from the United States District Court
for the Eastern District of Virginia, No. 4:15-cv-00054
Before the Honorable Robert G. Doumar

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT G.G. SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") respectfully submits this brief as amicus curiae in support of plaintiff-appellee G.G. The ABA urges the Court to recognize that discrimination in school facilities against students because they are transgender is discrimination "on the basis of sex" in violation of Title IX. As the ABA has long maintained, discrimination in education is particularly pernicious because it threatens to exclude young Americans from not only the educational, but also the professional, civic, and social fabric of this country.

The ABA is one of the Nation's largest voluntary professional membership organizations, and the leading national membership organization for the legal profession. The ABA's more than 400,000 members practice in all 50 states, the District of Columbia, and the territories, and include attorneys in private firms, corporations, non-profit organizations, and government agencies. They also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this amicus brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

The ABA has been a leading champion of eliminating sex discrimination in our society to ensure that all individuals—regardless of their sex, gender, or sexual orientation—can fully participate in the public sphere, including the legal profession, judicial system, and political, business, and social institutions. Immediately upon the enactment of Title IX, the ABA's House of Delegates passed a resolution advocating the "prompt, vigorous, and effective implementation and enforcement of Title IX of the Education Amendments Act of 1972" to combat sex discrimination and to promote "equal educational opportunity without regard to sex, to the full extent of the powers granted in the statute." ABA, *Proceedings of the 1975 Annual Meeting of the House of Delegates*, 100 Ann. Rep. ABA 642, 710, 1091-1092.[3] And in 1994, the ABA adopted a policy requiring law schools to maintain equality of opportunity in legal education and employment by forbidding discrimination on the basis of sex or sexual orientation. ABA Resolution 106A (1994).

Particularly relevant here, in 2006, the ABA enacted a resolution opposing discrimination against transgender individuals in public places. ABA Resolution 122B (2006). The resolution "urge[d] federal, state, local, and territorial governments to enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression, in employment, housing and public accom-

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[3] Only recommendations that are presented to and adopted by the ABA's House of Delegates become ABA policy. Policies adopted before 1988 are available from the ABA, and those dated after 1988 are available on the ABA website.

modations." *Id.* at 1. The report noted that "the balance between a covered entity's interest in continuing its customary policies and practices and a protected person's legitimate interest in equal treatment may tip in favor of adjusting policies or practices to serve the nondiscrimination principle." *Id.* at 3.

In 2007, the ABA created a Commission on Sexual Orientation and Gender Identity and amended its Association Goal IX to include promoting "full and equal participation in the legal profession" by persons "of differing sexual orientations and gender identities." ABA Resolution 115 (2007). The report recommending the amendment to Goal IX stressed that, despite recent advancements, discrimination against transgender people persists, including in the legal profession, with surveys conducted by bar associations showing continuing hostility to individuals with gender identities that do not conform to stereotypes and social expectations. *Id.* at 3-5. The report also cited studies concluding that attorneys were paid differently and given limited access to law firm partnerships because of their gender identity. *Id.* at 3.

The ABA has also been a leading voice in nearly every landmark discrimination case involving sex, sexual orientation, gender identity, or education in the Supreme Court over the past two decades. The ABA filed amicus briefs in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Christian*

Legal Society v. Martinez, 561 U.S. 661 (2011); *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *Romer v. Evans*, 517 U.S. 620 (1996).

The ABA's work reflects its recognition that discrimination and exclusion are harmful to all of our Nation's social institutions, and in particular to the legal profession. Diversity and inclusion are essential to public confidence in the bench and bar, and to the reality and perception that our legal institutions are fair to all. Without equal educational opportunities, the foundation necessary for a diverse and inclusive bar and bench erodes. Thus, the ABA has a strong interest in seeing that the issues in this case are resolved in a manner that promotes equal treatment of transgender persons to ensure the full participation by all in educational, and consequently civic and professional, settings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX arose out of Congressional concern that discrimination in schools was having a corrosive effect on the educational prospects of students relegated to second-class treatment because of their gender. Accordingly, Title IX was intended to root out both practices that explicitly deny educational opportunities to students based on their sex, and practices that deter students from participating in the school community by subjecting them to harassment, stigma, or other impediments

on the basis of their sex. Consistent with Congress's expansive purpose, and recognizing the grave and long-lasting harm that discrimination can wreak on children, the Supreme Court has construed Title IX broadly, barring any practice that, on the basis of sex, denies students equal access to educational opportunities. *See, e.g.*, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

The Gloucester County School Board's exclusionary bathroom policy—though presented as a neutral measure that sorts students based on their sex as assigned at birth—in fact singles out G.G. and other transgender students for special treatment simply because they are transgender. This is discrimination on the basis of sex, and it denies G.G. the equality of educational opportunity Title IX was meant to secure. The School Board's policy presents him with two unacceptable alternatives: Though recognized by the Commonwealth of Virginia as a boy, he may use the girls' bathroom, which is as untenable for him as for any boy, or he may use a single-occupancy bathroom in the nurse's office that other students do not use. In either case, G.G. will be separated from the rest of the boys at his school and singled out for stigma—making it more difficult for him to attend classes and participate in the social fabric of the school community.

Rather than choose between two bad options, G.G. has avoided using the bathroom at school and, consequently, contracted multiple urinary tract infections.

JA-19. Policies like the School Board's also effectively exclude transgender students from an essential school facility: bathrooms that virtually all other students of their gender use. Because of these consequences, among others, studies demonstrate that transgender students who are excluded from bathrooms that align with their gender identities are likelier to attempt suicide or to have impaired academic performance and aspirations. This kind of harm, imposed on transgender students because of sex-related stereotypes, is exactly what Congress intended Title IX to eradicate.

Reading Title IX to prohibit the School Board's discriminatory bathroom policy is consonant with the values expressed in decades of anti-discrimination jurisprudence. The Supreme Court has long held that discrimination unravels the fabric of American society by excluding people from participating in public life, and offends our shared commitment to individual dignity by classifying people based on their race, sex, or other group markers. The Supreme Court has found particularly troubling discrimination that occurs in educational institutions. Discrimination that abridges students' access to educational opportunity robs students of the means to provide a better life for themselves and their communities, and also undermines the values that animate our public education system. Transgender students subjected to discriminatory treatment are less likely to succeed academically. Their peers, in turn, are robbed of an opportunity to learn to look beyond stereo-

types and to treat those who express their gender differently with tolerance and respect.

These consequences follow transgender students and their classmates into their professional lives, including the legal profession. Transgender students who suffer academically are less likely to pursue a legal education, depriving the bar of voices capable of speaking on behalf of those marginalized for their gender. Moreover, their classmates who have become lawyers are left less able to empathize with, and to provide effective representation for, their transgender or gender-nonconforming clients. To preserve educational, professional, and social opportunities for transgender students, it is important that this Court recognize that the Gloucester's policy of discrimination violates Title IX.

ARGUMENT

I. DISCRIMINATION AGAINST TRANSGENDER STUDENTS VIOLATES OUR NATIONAL COMMITMENT TO PROVIDING EQUAL ACCESS TO EDUCATIONAL OPPORTUNITIES AND FULL PARTICIPATION IN PUBLIC LIFE

Title IX reflects a longstanding national commitment to eliminating sex discrimination in education and promoting individual development and professional achievement. The Supreme Court has consistently interpreted the statute to further those goals, which inform the proper resolution of this case. Gloucester's policy of barring transgender students from the bathrooms assigned to their gender is discrimination on the basis of sex because it treats transgender students differently

based on stereotypical notions of how a person's gender identity and presentation ought to conform to his or her sex assigned at birth. When transgender students are denied access to the full complement of school services and facilities, on equal footing with their peers, they are discriminated against in education on the basis of sex in violation of Title IX. That discrimination not only impairs their rights to educational opportunity, but also gravely threatens their ability to participate fully as adults in the professional, social, and civic life of the country.

The Supreme Court's anti-discrimination jurisprudence has long stood against such invidious forms of exclusion. The Court has recognized that both the Equal Protection Clause of the Fourteenth Amendment and federal anti-discrimination statutes have as a primary purpose the guarantee of "equal participation in [the] civic life" of the community. *Holland v. Illinois*, 493 U.S. 474, 489 (1990) (Kennedy, J., concurring). Courts have also recognized that federal anti-discrimination statutes reflect a national commitment to rooting out historical prejudices and stigmatizing stereotypes that impede full participation in public life by requiring that all persons be treated on the basis of their individual qualities, not based on pre-conceived notions connected to race, sex, and other characteristics that have historically led to invidious discrimination.

Gloucester's policy is contrary to these fundamental principles.

A. Title IX Promotes Equality In Education To Foster Full Participation In The Civic Life Of The Community And To Uproot Stigmatizing, Sex-Based Stereotypes

Title IX provides that "[n]o person … 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).

The push for Title IX grew out of a 1970 hearing on sex discrimination in education held by the House Special Subcommittee on Education. *See Discrimination Against Women: Hearings on § 805 of H.R. 16098 Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Labor*, 91st Cong. (1970). Members of the U.S. Commission on Civil Rights testified to the persistence of sex discrimination and how it deprives individuals of "genuinely equal opportunity" to realize "full individual potential" and to "ma[ke] the[] maximum possible contribution to improving the quality of life in this Nation." *Id.* at 662. The President's Task Force on Women's Rights and Responsibilities, whose report was entered into the Congressional Record, likewise concluded that sex discrimination was fundamentally "one of the most damaging injustices" because it "contribut[es] to a second class self image." 117 Cong. Rec. 30,406 (1971).

Senator Birch Bayh, sponsor of the legislation that would eventually be enacted as Title IX, recognized the persistence of "corrosive and unjustified discrim-

ination" in the "American educational system." 118 Cong. Rec. 5,803 (1972). He focused on the link between unequal educational opportunities and discrimination in the professional world: "The field of education is just one of many areas where differential treatment … has been documented but because education provides access to jobs and financial security, discrimination here is doubly destructive." 118 Cong. Rec. at 5,806-5,807.

Consistent with the statute's broad purpose, the Supreme Court has liberally construed Title IX's anti-discrimination mandate. Early on, the Court recognized that the statute prohibits outright refusal to admit a student to an educational program on the basis of sex. *See Cannon v. University of Chicago*, 441 U.S. 677, 680 (1979). Shortly thereafter, the Court concluded that, even though the statute "does not expressly include … employees [in] its scope, … employment discrimination comes within the prohibition of Title IX." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982). As the Court explained, "[t]here is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." *Id.* at 522 (alteration and quotation marks omitted).

Similarly, the Supreme Court has recognized that school practices that have the *effect* of deterring students from attending school or fully participating in school life may constitute unlawful discrimination on the basis of sex. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Mon-*

roe County Board of Education, 526 U.S. 629 (1999), the Court concluded that sexual harassment by teachers or students may amount to unlawful discrimination if not stopped by school administrators. In reaching this conclusion, the Court paid attention to the detrimental psychological and pedagogical effects that sexual harassment can have on students, leading students to forsake or abandon their studies. *See Davis*, 526 U.S. at 634 (documenting how the victim of harassment was "unable to concentrate on her studies" and had written a suicide note); *Gebser*, 524 U.S. at 292.

The Supreme Court's expansive approach to evaluating discrimination under Title IX faithfully implements the statute's broad purpose of eliminating gender-based barriers to full participation in public life—whether they be explicit sex-based classifications or practices rooted in unexamined assumptions about how men and women should behave. And it also reflects the Court's recognition that "stigmatizing injury often caused by … discrimination … [is] no doubt … one of the most serious consequences of discriminatory government action." *Allen v. Wright*, 468 U.S. 737, 755 (1984). Where, as here, a school adopts an official policy that causes a "stigmatizing injury," *id.*, thereby limiting a student's access to the educational opportunities provided to others, it effects profound harms—harms that Title IX was intended to prevent.

B. School Policies That Prevent Transgender Students From Accessing Facilities Consistent With Their Gender Identity Constitute Sex Discrimination In Violation Of Title IX

Discrimination against transgender students because they are transgender violates Title IX because it treats students differently based on an inherently sex-based characteristic and relies on stereotypical assumptions based on their birth sex. Gloucester's policy does just that—it forbids transgender boys from using the same bathroom as other boys because doing so conflicts with preconceived or stereotypical notions of how a person identified as female at birth should identify and behave. Gloucester's practice, therefore, discriminates based on sex stereotypes—a type of discrimination that the Supreme Court has long recognized is unlawful. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality op.) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group[.]"), *superseded by statute on other grounds*, 105 Stat. 1075 (1991).

The record in this case reveals that a major motivating factor for Gloucester's bathroom policy was a desire to treat G.G. as though his gender corresponded to his birth-assigned sex. At meetings soliciting comments on the proposal, community members repeatedly and pointedly referred to G.G. as a "girl" or a "young lady." JA-16; JA-18. They speculated that permitting G.G. to use the boys' bathroom would lead to sexual assault. JA-16. And they surmised that absent this pol-

icy, non-transgender male students would masquerade as females to gain access to the girls' restroom. JA-16.

Gloucester's policy—which, notably, reflected an about-face from prior practice under which G.G. used the boys' bathroom without incident—reflects and gives effect to stereotyped views about students who do not express a gender identity in conformance with their birth-assigned sex. And it is rooted in the expectation that students' gender identities will conform to their birth-assigned sex—a "stereotypical notion[]" that "deprives persons of their individual dignity." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). The commenters presumed, for example, that all who are identified as female at birth must have a female gender identity, and that birth-assigned male students are inclined to act in a sexually predatory manner. These reductive beliefs "ratify and reinforce prejudicial views" about transgender students. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994). Preventing transgender students from using bathrooms based on their gender identity thus indulges overbroad generalizations about how adolescents assigned at birth to one sex pose either a danger or temptation to those assigned to the other sex. And that violates the Supreme Court's unwavering principle that "[s]tate actors controlling gates to opportunity … may not exclude qualified individuals based on 'fixed notions concerning … males and females.'" *United States v. Virginia*, 518 U.S. 515, 541 (1996).

Moreover, this stereotyping imposes a stigma on transgender students—made plain by the facts of this case. *J.E.B.*, 511 U.S. at 139 n.11. As a boy who both identifies as male and displays outwardly male characteristics like facial hair, G.G. would suffer stigma if he used the girl's bathroom, just as would any other boy. Indeed, G.G. reports that female-identifying students are uncomfortable with his presence in the female restroom. G.G. feels similarly stigmatized if he is required to use a bathroom not otherwise used by his fellow students, such as the one in the nurse's office. The requirement that G.G.—solely because he is transgender—use a restroom not customarily used by any other student is a profound statement of his exclusion from the school community. *Cf. McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 640-643 (1950) (requirement that black university students sit in a designated row of seats in the classrooms, use separate desks in the library, and eat at special tables in the cafeteria constituted impermissible racial discrimination).

The cumulative effect of sex-based stereotyping and stigmatization resulting from Gloucester's policy profoundly harms transgender students, in many cases leading them to reduce or abandon their participation in school life. A comprehensive study of the school experiences of transgender and non-gender-conforming youth in Wisconsin revealed that the majority of students and parents reported that "gender neutral bathrooms … were not available, or available, yet inconvenient,

making navigation of their daily life in school even more challenging." *See* Gattis & McKinnon, *School Experiences of Transgender & Gender Non-Conforming Students in Wisconsin, Madison* 9 (2015). The study found that it was common for children in these circumstances to forgo using the restroom altogether. *Id.* G.G. is one such student. He experienced distress from using bathrooms that did not reflect his male identity, and stigma when he attempted to use a unisex restroom that "set[] him apart from his peers." JA-19. Consequently, G.G. avoided using school bathrooms altogether and developed multiple urinary tract infections. *Id.*

Such physical harms are only one manifestation of the injuries that discriminatory policies wreak on transgender school-age children. These students also suffer psychological harm from institutionally-sanctioned discrimination and stigma. JA-18-19. Forty-seven percent of transgender students reported skipping school at least once in the past month because they felt unsafe. Dep't of Psychology, UCLA, *Transgender Students & School*. The Wisconsin study of transgender school-aged youth concluded that these students were "more than five times more likely to have attempted suicide" than their peers. *See* Gattis & McKinnon, *supra*, at 4. Conversely, those transgender students who are not stigmatized and are included fully in the school community enjoy improved educational outcomes. *See* Greytak et al., Gay, Lesbian & Straight Educ. Network, *Harsh Realities: The Experiences of Transgender Youth in our Nation's Schools* (2009). Indeed, a recent

study documented how mere access to gender-appropriate bathrooms increases transgender students' general sense of safety in the school environment, self-esteem, and academic performance. *See* Wernick et al., *Gender Identity Disparities in Bathroom Safety & Wellbeing Among High School Students*, J. Youth & Adolescence (forthcoming 2017) (manuscript at 14-15) (on file with amicus). These studies confirm that Gloucester's bathroom policy creates the exact "second class self image" in transgender students that Title IX was enacted to eradicate. 117 Cong. Rec. at 30,406.

A policy requiring transgender students to use bathrooms corresponding to their birth-assigned sex inevitably discourages those students from fully participating in school life—indeed, from attending school at all, when attendance comes at the cost of physical pain and stigmatization. Such a policy is impermissible discrimination because it is an "overt, physical deprivation of access to school resources," or, at the least, a policy that "successfully prevent[s] … students from using a particular school resource." *Davis*, 526 U.S. at 650-651. And this inevitably has downstream effects: Excluding transgender students from educational opportunities will reduce their participation in the professional world and the greater community, further undermining the objectives of Title IX. *See* 118 Cong. Rec. at 5,806-5,807.

It may be true that Congress did not have discrimination against transgender students in mind when it passed Title IX. But even if that was "assuredly not the principal evil Congress was concerned with when it enacted Title [IX] … statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77, 79-80 (1998). Because Title IX prohibits discrimination on the basis of sex, that prohibition "must extend to [sex-based] harassment of any kind that meets the statutory requirements." *Id.*

C. The Supreme Court Has Long Recognized The Importance Of Rooting Out Discrimination That Excludes Full Participation In The Civic Life Of This Country

Applying Title IX to prevent sex-based discrimination against transgender students is also consonant with the larger body of anti-discrimination jurisprudence.

The Supreme Court has long recognized that both the Equal Protection Clause of the Fourteenth Amendment and federal anti-discrimination statutes have as a primary purpose the guarantee of "equal participation in [the] civic life" of the community. *Holland*, 493 U.S. at 489 (Kennedy, J., concurring); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) ("The Equal Protection

Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community."); *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (Congress enacted Title II of the Civil Rights Act in response to evidence that discrimination discourages targeted groups from traveling, living, and working in areas where such practices occur).

The Supreme Court has expressed particular concern about excluding people from the social web of our Nation in cases involving discrimination in public education. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). The Court has explained that "education has a fundamental role in maintaining the fabric of our society," and stands out from other government services because of "the importance of education in maintaining our basic institutions." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Schools "prepar[e] … individuals for participation as citizens." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Laws that prevent certain students from obtaining an education, therefore, not only exclude those students from the school community, but also deny those students the tools needed to become fully contributing members of the larger community. Because of the special role of education, our Nation bears "significant social costs" when students are denied access to education, and thereby "denied the means to absorb the values and skills upon which our social order rests." *Plyler*, 457 U.S. at 221; *see also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[E]ducation is necessary to prepare citizens to

participate effectively and intelligently in our open political system if we are to preserve freedom and independence.").

In *Virginia*, for example, the Supreme Court stressed the deleterious effect of historical attitudes toward women in education that had resulted in fewer opportunities being offered to women. 518 U.S. at 534-546; *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729-731 (1982) (state's "policy of excluding males [from state-supported nursing school] tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"). As the Court emphasized, "[s]tate actors controlling gates to opportunity … may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" *Virginia*, 518 U.S. at 541.

Finally, the Supreme Court has been attentive to the harmful effects that discrimination has on the individual, as well as the individual's opportunity to contribute to society at large. When individuals are classified and treated based on assumptions about their race, sex, or other irrelevant markers, the Court has found that they are deprived of their "individual dignity" and autonomy. *Roberts*, 468 U.S. at 625 ("[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities."). When governmental actors act in reliance on racial or gender stereotypes, "they ratify and

reinforce prejudicial views of the relative abilities" of the groups, *J.E.B.*, 511 U.S. at 140, creating a "stigma or dishonor" that denies the equal protection of the law, *Powers v. Ohio*, 499 U.S. 400, 410 (1991). *See also J.E.B.*, 511 U.S. at 139 n.11 ("[S]tate actors [must] look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.").

These fundamental principles of anti-discrimination law are entirely consistent with interpreting Title IX to guarantee transgender students the right to use the bathroom corresponding to their gender identity. That interpretation frees transgender students from differential treatment and stereotypes that would deny them equal access to educational opportunities, and thus gives them an equal opportunity to participate in the civic life of the community.

II. Equal Access For Transgender People To Educational Opportunities Is Critical To Expanding Access To Professional Life And Helping The Legal Profession Better Serve The Community

The deleterious effects of exclusion in schools follow both transgender and non-transgender students into their adult lives, and harm as well the broader society in which they live. Moreover, these effects hamper the legal profession in its efforts to provide empathetic representation to clients from all backgrounds and render justice that accounts for the full breadth of the community's experiences.

A. The Supreme Court's Jurisprudence Emphasizes The Role Of An Inclusive Educational Community In Improving Educational And Professional Outcomes For All Students And In Making The Legal System More Effective

The Supreme Court has long recognized that fostering inclusiveness and diversity are signal achievements of our Nation's public schools, and that our Nation has a strong commitment to ensuring that all students enjoy the educational benefits that follow from interacting with classmates of varied experiences. In the context of race-conscious admission programs at public universities, for instance, the Court noted that bringing together students from disparate backgrounds and with different experiences fosters a "robust exchange of ideas [and] exposure to differing cultures." *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198, 2211 (2016). By encouraging such exchange, schools may directly "promote[] learning outcomes." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Ensuring that all students are included in the school community can also teach students valuable lessons about tolerance and respect. Racially integrated classrooms, for example, "promote[] cross-racial understanding, help[] to break down racial stereotypes, and enable[] students to better understand persons of different races." *Fisher*, 136 S. Ct. at 2210 (quoting *Grutter*, 539 U.S. at 330). Stated more generally, students who are exposed to those with different experiences are more likely to appreciate and respect those differences and to gain an understanding about which differences matter—and which do not.

Just as the Supreme Court has recognized the role of schools in exposing students to diversity and teaching inclusion, it has long emphasized the role of schools in strengthening the fabric of civil society. In the Establishment Clause context, Justice Frankfurter observed that public schools are "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring); *see also id.* at 231 (calling schools "at once the symbol of our democracy and the most pervasive means for promoting our common destiny"). In the decades since, the Court has emphasized, repeatedly and emphatically, that schools are the crucible in which good citizenship and common identity are forged. *See, e.g.*, *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 241-242 (1963) ("[T]he public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.") (Brennan, J., concurring); *Ambach*, 441 U.S. at 76; *Plyler*, 457 U.S. at 221; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring) ("The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."). Threaded together with the Court's emphasis on the benefits of diversity

and inclusion, this line of jurisprudence sends a clear message: The school system remains our most powerful tool both for teaching respect for others' differences and for teaching that the embrace of differences is what gives our Nation its singular identity.

Just as the Supreme Court has underscored the importance of diversity and inclusion within the schoolhouse, so too has it observed that the benefits of diversity and inclusion in schools do not end when a student's formal education does. Rather, the lessons learned at a formative age play a critical role in students' ability to succeed as they navigate adulthood. Specifically, the Court has observed that "student body diversity … better prepares students for an increasingly diverse workforce and society." *Fisher*, 136 S. Ct. at 2210 (quoting *Grutter*, 539 U.S. at 330). "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330; *see also id.* at 331 (emphasizing importance of diversity at military academies and within officer corps).

Of particular interest to the ABA, the benefits of diversity and inclusion in education are apparent in the context of the legal profession. Lawyers serve as zealous advocates for a wide variety of clients. Policies that promote inclusion in education—from the elementary level through law school—ensure that the legal

profession is open to all and improve the ability of lawyers to understand and serve the interests of those with different experiences. *See Grutter*, 539 U.S. at 332 ("[L]aw schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.'" (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950))). Similarly, inclusive policies can help students belonging to otherwise marginalized groups set their academic sights higher, thus improving the flow through the educational pipeline to the legal profession. *See* Rhode & Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners & General Counsel*, 83 Fordham L. Rev. 2483, 2492-2493 (2015) (noting that increasing intake of diverse groups of law students improves diversity in the legal profession).

Diversity among members of the legal profession improves the ability of the profession to serve its clients. A bar that draws from a broad cross-section of the community "is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members … are all cast from the same mold." Justice Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U. L. Rev. 189, 190 (2003); *see also* ABA Presidential Initiative Comm'n on Diversity, *Diversity in the Legal Profession: The Next Steps* 5 (2010) ("[A] diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.").

The same holds true for the judiciary; an inclusive bench both signals to younger lawyers (and would-be lawyers) that the profession is open to all and improves the ability of all judges to understand litigants whose experiences may not mirror their own. *See, e.g.*, Chen, *The Judiciary, Diversity, & Justice for All*, 91 Calif. L. Rev. 1109, 1117 (2003); Weinberg & Nielsen, *Examining Empathy: Discrimination, Experience, & Judicial Decisionmaking*, 85 S. Cal. L. Rev. 313, 347-348 (2012). Indeed, several members of the Supreme Court have commented on the value that the diverse backgrounds of its Justices have brought to the Court's decisions. Writing about Justice Marshall, Justice O'Connor said that

> Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective.… Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Justice Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992). Similarly, during his confirmation hearings, Justice Alito noted that his experiences as the son of immigrants have helped to shape how he understands cases in which plaintiffs allege discrimination based on their ethnic background, religion, gender, or disability. *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006).

The path from inclusive school policies leads to a visibly open and effective justice system. Students whose identities are embraced at school are more likely to succeed there and to move on to higher education, *see supra* pp. 14-15, and those who see respect modeled are more likely to act with respect themselves. When these people join the bar (or the bench), they then are better equipped to see past stereotypes and to understand how clients' experiences shape their legal needs.

B. The Harm Caused By Excluding Transgender Students In Educational Programs Runs Counter To Decades Of The Supreme Court's Jurisprudence On The Role Of Public Schools In Society

The lessons for this case from the Supreme Court's decades of equality jurisprudence are clear: Excluding transgender students from the full scope of the school community harms both those students and their classmates by undercutting the mission of the school system and by hindering students as they enter the workforce. The harm to transgender students is discussed in more detail above, *see supra* pp. 12-16, but it bears repeating that exclusion and division of those students from other members of the student body impair their education—in terms of their academic achievement, educational aspirations, and sense of safety at school. That exclusion harms the entire school community as well. Rather than reaping the benefits of diversity and inclusion, students are deprived of the full expression of their peers' points of view and of the opportunity to break down stereotypes. And, counter to the mission of schools as a critical force in teaching tolerance, under-

standing, and respect, the public differential treatment of certain students based on gender stereotyping can serve to reinforce prejudices inconsistent with our Nation's commitment to equality.

These negative effects only compound over time, entrenching disadvantages faced by transgender people in the workplace and depriving non-transgender people of the skills they need to successfully navigate diverse workplace relationships. Just as racial diversity enables workers to bridge cultural gaps, so too does inclusion of openly transgender people allow workers to better understand transgender and gender-nonconforming people that they encounter in their professional lives.

This holds true in the legal profession as well. Transgender students who are not fully included in their school communities are less likely to pursue post-secondary education, including law school, *see* Greytak et al., *supra*, at 26-27, depriving the legal profession of a critical voice capable of speaking up for those marginalized for their gender. Similarly, other attorneys will be less exposed to—and thus less understanding of—transgender or gender-nonconforming people and the issues they face, leaving them less equipped to represent clients facing these problems or to fully understand the impact of the claims these clients ask them to pursue.

The need for empathic representation is particularly strong in the transgender community, as many transgender people have experienced discrimina-

tion and, in turn, expect hostility from the legal system (and even from their lawyers). *See* Transgender Law Ctr., *Tips for Lawyers Working with Transgender Clients & Coworkers* (2016) (noting that transgender clients "are not fundamentally different from non-transgender clients" but that their experiences with discrimination—possibly leading to "war[iness] about opening up to a lawyer"—can be a barrier to effective representation, even where the representation is not about the client's transgender status); National Ctr. for Lesbian Rights, *Tips for Legal Advocates Working with Lesbian, Gay, Bisexual, & Transgender Clients* (2013) ("Often, LGBT people will assume that a lawyer's office is unfriendly to LGBT people until he or she receives a clear indication otherwise."). But by fostering understanding and respect for transgender and gender-nonconforming people from an early age, schools can ensure that the legal system is better prepared to handle the needs of these clients—both through the inclusion of more transgender people in law schools and the broader profession and through the fostering of a bar better able to see past stereotypes.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 6,496 words.

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May 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court on May 15, 2017 by using the appellate CM/ECF system. All counsel of record in this case are registered CM/ECF users and will be served by the CM/ECF system.

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