No. 15-2056

IN THE

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 Remand from the Supreme Court of the United States (No. 16-273)

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1:

1. Amicus curiae Americans United for Separation of Church and State has no parent company, and no publicly held company holds an interest in amicus.

2. None of the other organizations joining this brief as amici curiae has a parent company, and no publicly held company holds more than a ten percent interest in any of those organizations.

3. In addition, no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation within the meaning of Local Rule 26.1(a)(2)(C).

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STATEMENT 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 religious or moral beliefs of certain members of the community may be offended by a student's gender identity or actions in accordance therewith. The appendix to this brief contains a full statement of interest for each of the amici, whose names are listed below.

- Americans United for Separation of Church and State
- Anti-Defamation League
- Bend the Arc: A Jewish Partnership for Justice
- Central Conference of American Rabbis
- Hadassah
- Keshet

[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 toward the brief. All parties have consented to the filing of this brief as required under Federal Rule of Appellate Procedure 29(a)(2).

- National LGBT Bar Association
- Reconstructionist Rabbinical Association
- Union for Reform Judaism
- Women of Reform Judaism

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 school 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 him use the boys' restrooms. When the school began receiving 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 restrooms corresponding to their gender identity.

But using the restroom is an essential and ordinary part of life. Because G.G. is singled out and prevented from using the restroom as his classmates do, he is

[2] The Secretary of Education previously issued guidance acknowledging that schools must generally treat students consistent with their gender identity. On February 22, 2017, while this case was pending before the Supreme Court, that guidance was withdrawn. Under the new guidance issued by the Departments of Education and Justice, schools are still 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). In light of the withdrawal of the previous guidance, the Supreme Court vacated the judgment of this Court and remanded for further consideration.

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 gender-identity discrimination that limit 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, either in this Court or in the Supreme Court. They are entitled to hold whatever views they wish; no court can dictate how a person should think. But neither this Court nor the Supreme Court has ever allowed such views to override federal antidiscrimination laws or to play any role in their interpretation.

Indeed, the Supreme 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, this Court in its prior opinion 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. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720–724 & n.11 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

Those objections cannot be used as an excuse to disregard Title IX or to justify barring G.G. from the restrooms that he had been using without incident. On remand, this Court should once again decline to countenance such class-based objections. To do otherwise not only would erode critical federal antidiscrimination protections, but also would be irreconcilable with the Supreme Court's settled equal-protection law. What's more, it would give rise to grave Establishment Clause concerns by codifying religious belief as official school-district policy, thereby impermissibly imposing the burdens of objectors' religious views on innocent third parties.

G.G. simply wants to use the 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 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., then a fifteen-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. Indeed,

such religious- and morality-based reactions—as expressed by various amici—have continued throughout this litigation.

During his freshman year of high school, G.G. came out to his parents as a transgender male. J.A. 9. 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. J.A. 13–14.

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. J.A. 9–10. G.G. initially used the special restroom in the school nurse's office. J.A. 15. But he soon found using the nurse's restroom to be stigmatizing and demeaning—robbing him of his dignity. J.A. 10, 15. The nurse's office was also far from G.G.'s classrooms, making it difficult for him to use the restroom and still get to class on time. J.A. 15. G.G. thus asked for and received permission to use the regular boys' restrooms. *Id.* The next day, however, the Board "began receiving numerous complaints from parents and students." J.A. 159.

The 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 school restrooms corresponding to their gender identity. J.A. 15. 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 voiced the view 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 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 also entertained public comment on the proposed resolution at a second meeting, at which religion and morality once again 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 argued against these appeals to theology and moralism. 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 use of the boys' and girls' facili-

ties at Gloucester County schools to "the corresponding biological genders." J.A. 18. Since then, G.G. has been unable to use the boys' restrooms, under threat of disciplinary consequences. J.A. 32.

The expressions of moral and religious disapproval have followed this dispute into the courtroom, including in briefs filed in this Court and, previously, in the Supreme Court. For example, an amicus brief filed in this case, by the Foundation for Moral Law—of which former Alabama Supreme Court Chief Justice Roy Moore serves as President Emeritus—urged 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 Appellee at 5, citing both the "general discomfort of the public with behavior the American Psychiatric Association formerly termed the manifestation of a mental disorder," *id.* at 9, and God's commands as laid out in the Bible, *id.* at 12–13. Similarly, an amicus brief previously filed before the Supreme Court by various religious organizations asserted that "[d]enying the intrinsic connection between physiology and gender runs counter to the religious conviction that gender is God-given and immutable." Br. for Major Religious Orgs. as Amici Curiae Supporting Pet'r, Gloucester Cty. Sch. Bd. v. G.G., No. 16-273 at 29 (U.S. Jan. 10, 2017). And another amicus brief described the since-withdrawn guidance of the Secretary of Education as "impos[ing] immo-

rality into schools by promoting conduct (selecting a 'gender identity') contrary to biological and Biblical teachings." Br. for Christian Educators Ass'n Int'l, et al. as Amici Curiae Supporting Pet'r, Gloucester Cty. Sch. Bd. v. G.G., No. 16-273 at 17 (U.S. Jan. 10, 2017); *see also* Br. for Gen. Conference of Seventh-Day Adventists & Becket Fund for Religious Liberty as Amici Curiae Supporting Pet'r, Gloucester Cty. Sch. Bd. v. G.G., No. 16-273 (U.S. Jan. 10, 2017); Br. for Religious Colleges, Schools, and Educators as Amici Curiae Supporting Pet'r, Gloucester County School Bd. v. G.G., No. 16-273 (U.S. Jan. 10, 2017).

II. MORAL AND RELIGIOUS OBJECTIONS TO TRANSGENDER INDIVIDUALS CANNOT 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 the way they ought to be. *Cf.* Alexandra Polyzoides Buek & Jeffrey H. Orleans, *Sex Dis-*

crimination—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. And by its plain terms, Title IX does not permit public schools to exempt themselves from the Act's requirements—even when school officials have moral or religious objections to compliance.[3] Nor could it. The Supreme Court's longstanding, settled constitutional jurisprudence strictly prohibits justification of disparate treatment on the basis of moral or religious disapproval of a class.

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

The government may not 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, the Supreme Court has repeatedly

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

invalidated governmental classifications that were 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 a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

1. *Moreno* marked the Supreme 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 Supreme 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, 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. Applying the Equal Protection Clause, 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." *Id.* (internal quotation marks omitted).

A year later, in *Cleburne*, the Supreme Court made clear that *Palmore*'s prohibition against governmental enforcement of private prejudices applies even when a case is decided under the Court's most deferential standard of review. *Cleburne* struck down an ordinance requiring special permits for operating group homes 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 elderly residents would feel unsafe and 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]" cannot justify official discrimination. *Id.* at 448; *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").

In *Romer*, the Supreme 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. The Court declined to credit those asserted liberty interests. Echoing Justice Harlan's admonition 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. Instead, "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, "[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 the 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 Supreme 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.[4] *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. *Id.* (quoting H.R. Rep. No. 104-664, at 16 (1996)). Instead, it held that DOMA was unconstitutional because "no legitimate purpose overcomes [DOMA's] purpose and effect [of]

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

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 government 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.[5]

2. Moral objections also have no proper part in courts' decision-making. Courts may not act to accommodate the public's bare moral disapprobation of a

[5] The Supreme 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 the Supreme Court's equal-protection jurisprudence, however, this Court need not consider substantive due process here.

class of people any more than policymakers may. *See, e.g.*, *Palmore*, 466 U.S. at 433–434 (trial court erred in basing child-custody ruling on notion that child would face stigmatizing "pressures and stresses" if raised in biracial household because of "private racial prejudice" within community) (internal quotation marks omitted). Nor may courts "draw on [their] 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 the Supreme 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.

Nor do religious objections warrant judicially created exemptions from anti-discrimination laws. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 602 n.28 (1983) (rejecting free-exercise defense of 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 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.[6] *See Palmore*, 466 U.S. at 433. These views may be genuinely held and shaped by "deep convictions" or "religious beliefs" that reflect fundamental conceptions of right and wrong. *Lawrence*, 539 U.S. at 571. But however deeply held the 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.[7]

It follows that neither the Board here nor the courts may give private biases direct or indirect effect. *Cf. Palmore*, 466 U.S. at 433. Hence, as a matter of law, the Board may not defend its bathroom ban by arguing that it was merely deferring to public sensibilities and objections. Moral and religious disapproval cannot justify this classification. *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 [even] rational basis review under the Equal Protection Clause.") (citations omitted);

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

[7] 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).

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. The Supreme Court's jurisprudence, from *Loving* and *Moreno* to *Windsor* and *Obergefell*, forecloses giving credence to animus toward, or moral and religious disapproval of, transgender people.

* * *

Governmental actors, whether school boards or courts, must refrain from treating moral and religious views against transgender students as relevant when interpreting Title IX's protections. In its prior review of this case, this Court 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 Board. The Court should stay the course on remand.

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 filed in this case—both in this Court and in the Supreme Court—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 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 the rights 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 purpose. And second, to the extent that the 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 and instead violates 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 Cty. v. ACLU of Ky.*, 545 U.S. 844, 860

(2005). Hence, the Supreme Court has consistently required that governmental action must have a preeminently secular purpose. *Id.*

The public comments at the 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. That is because, 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 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)).[8] The same is

[8] *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

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.[9]

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).[10]

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for practice of holding prayers at high-school football games) (internal quotation marks omitted).

[9] *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.").

[10] *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) (religious accommodation was permissible because detrimental effect on third parties "would be precisely zero"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–710 (1985) (striking down statute guaranteeing employees day off on Sabbath day of their choosing in part because 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 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 Amish employer's request for exemption from paying social-security taxes, which would "operate[ ] to

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.

Here, the Board's policy consigns G.G. either to conform to sex stereotypes or to be sequestered in separate facilities. If the 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

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impose the employer's religious faith on the employees"); *Braunfeld v. Brown*, 366 U.S. 599, 608–609 (1961) (refusing exemption from Sunday-closing law for Orthodox Jews because it would have "provide[d] [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 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 under Free Speech Clause from flag-salute requirement "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).

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 interpretation without giving weight to the religious and moral disapprobation toward transgender people that was raised in public comments to the Board and now has been put before this Court.

* * *

The Supreme Court's constitutional jurisprudence prohibits the Board from using moral or 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 interpretation presented by this case. So the Court should not concern itself with any consideration of such objections. Rather, this Court should adopt an interpretation of Title IX that properly safeguards transgender students against discriminatory treatment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX
STATEMENTS OF INTEREST OF AMICI CURIAE

Americans United for Separation of Church and State ("Americans United") 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 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 ***Anti-Defamation League*** ("ADL") was founded in 1913 to combat anti-Semitism and other forms of prejudice, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil rights organizations. As part of its commitment to protecting the civil rights of all persons, ADL has filed amicus briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws. ADL has a substantial interest in this case. At issue are core

questions about equality and constitutional rights. And the justifications offered by Appellee and Appellee's amici—if embraced by this Court—would invite government-sanctioned prejudice of the strain that ADL has long fought.

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the basis of gender identity.

Keshet, a national organization working for full LGBTQ equality and inclusion in Jewish life, stands in strong support of Appellant. As an organization that is inspired by the Jewish value of B'tzelem Elohim, the notion that every human is created in God's image, Keshet is deeply opposed to discrimination against transgender students. If this Court reverses its initial decision, it will allow the Board to discriminate against trans students and effectively segregate them from their peers. Keshet condemns any discrimination against transgender and non-binary students, and all LGBTQ young people, and asserts a faith perspective of welcome and inclusion.

The ***National LGBT Bar Association*** ("LGBT Bar") is a nonpartisan, membership-based professional association of lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of lesbian, gay, bisexual, and transgender 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. The LGBT Bar vehemently supports Appellant in his fight for equal protection under the law.

The ***Reconstructionist Rabbinical Association*** is a 501(c)(3) organization that serves as the professional association of 340 Reconstructionist rabbis and the

rabbinic voice of the Reconstructionist movement and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality. As a part of the Reconstructionist movement, we have recently released a comprehensive statement on the advocacy for and inclusion of people who are transgender, non-binary, and gender-nonconforming.

The ***Union for Reform Judaism***, whose 900 congregations across North America includes 1.8 million Reform Jews, the ***Central Conference of American Rabbis (CCAR)***, whose membership includes more than 2000 Reform rabbis, and ***Women of Reform Judaism***, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, are committed to ensuring equality for all of God's children, regardless of sexual orientation or gender identity.

As Jews, we are taught in the very beginning of the Torah that God created humans B'tselem Elohim, in the Divine Image, and therefore the diversity of creation represents the vastness of the Eternal (Genesis 1:27). We oppose discrimination against all individuals for the stamp of the Divine is present in each and every human being.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,495 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Catherine E. Stetson
Catherine E. Stetson

May 15, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May, 2017, the foregoing Amici Curiae Brief for Americans United for Separation of Church and State and Other Organizations was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Catherine E. Stetson
Catherine E. Stetson

May 15, 2017