

No. 16-273

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**In the Supreme Court of the United States**

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GLOUCESTER COUNTY SCHOOL BOARD,

*Petitioner,*

v.

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

*Respondent.*

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

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**BRIEF OF *AMICI CURIAE* NATIONAL  
WOMEN'S LAW CENTER, *ET AL.*,  
IN SUPPORT OF RESPONDENT**

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	iv
INTEREST OF AMICI CURIAE .....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	3
I. Discrimination Against Transgender Individuals Is Sex Discrimination. ....	3
A. Discrimination against transgender individuals for their nonconformity to sex stereotypes constitutes sex discrimination.....	3
B. Discrimination against transgender individuals because they are transgender is inherent- ly discrimination “on the basis of sex.” .....	8
C. Reproductive anatomy does not determine identity or social role. ....	10
II. Protecting Transgender Students Is Necessary To Fulfill Title IX’s Goal Of Eradicating Discrimination Based On Gender In Educational Programs. ....	12
A. Congress intended Title IX to be a comprehensive prohibition on all forms of sex discrimination in education. ....	13
1. Congress designed Title IX to en- act a broad, comprehensive effort against all forms of sex discrimi- nation in all aspects of education. ....	13

**TABLE OF CONTENTS—continued**

	<b>Page</b>
2. In enacting Title IX, Congress was particularly concerned with eradicating sex stereotyping.....	17
B. Transgender students suffer from sex-based harassment and thus have a great need for Title IX’s protections.....	19
III. Arguments Regarding The Vulnerability Of Women Have Historically Been Used To Justify Discrimination And Defend Exclusionary Policies, And Courts Have Routinely Rejected Such Arguments Over the Last Several Decades.....	20
A. Discriminatory rules ostensibly designed to protect women have long reflected both stereotype and pretext. ....	21
1. Discriminatory rules with protective pretexts have historically been imposed in a variety of contexts. ....	21
2. Restrooms, and similarly intimate environments, have been a particular focus of these discriminatory rules.....	23
B. The Court has routinely rejected these protective rationales for gender discrimination over the last several decades. ....	26

**TABLE OF CONTENTS—continued**

	<b>Page</b>
C. Petitioner’s Restroom Policy rests on a protective pretext and does not hold up to a probing factual inquiry. ....	28
1. Petitioner’s Restroom Policy does not advance legitimate purposes. ....	29
2. Policies that exclude transgender students from sex-segregated restrooms injure those students. ....	31
CONCLUSION .....	34

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Barnes v. City of Cincinnati</i> , 401 F.3d 729 (6th Cir. 2005).....	8
<i>Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.</i> , No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016).....	32
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	21
<i>Bucklen v. Rensselaer Polytechnic Inst.</i> , 166 F. Supp. 2d 721 (N.D.N.Y. 2001).....	6
<i>Cannon v. Univ. of Chicago</i> , 441 U.S. 677 (1979).....	14
<i>City of St. Petersburg v. Alsup</i> , 238 F.2d 830 (5th Cir. 1956).....	26
<i>Cleveland Bd. Of Educ. v. LaFleur</i> , 414 U.S. 632 (1974).....	11
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	22
<i>Deneen v. Nw. Airlines, Inc.</i> , 132 F.3d 431 (8th Cir. 1998).....	11
<i>Doe v. Brimfield Grade School</i> , 552 F. Supp. 2d 816 (C.D. Ill. 2008) .....	5

## TABLE OF AUTHORITIES—continued

	Page(s)
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977).....	27
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972).....	12
<i>Fabian v. Hosp. of Cent. Conn.</i> , 172 F. Supp. 3d 509 (D. Conn. 2016).....	9
<i>Food &amp; Drug Admin. v. Brown &amp; Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	16, 22, 23, 24
<i>Franklin v. Gwinnett Cty. Pub. Sch.</i> , 503 U.S. 60 (1992).....	19
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	26
<i>Gen. Dynamics Land Sys., Inc. v. Cline</i> , 540 U.S. 581 (2004).....	14
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011).....	8
<i>Goesaert v. Cleary</i> , 335 U.S. 464 (1948).....	22
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006).....	17

## TABLE OF AUTHORITIES—continued

	Page(s)
<i>Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.</i> , 245 F.3d 1172 (10th Cir. 2001).....	6
<i>Hall v. Nalco Co.</i> , 534 F.3d 644 (7th Cir. 2008).....	11
<i>Higgins v. New Balance Athletic Shoe, Inc.</i> , 194 F.3d 252 (1st Cir. 1999) .....	4
<i>Int’l Union, United Auto., Aerospace &amp; Agric. Implement Workers v. Johnson Controls, Inc.</i> , 499 U.S. 187 (1991).....	<i>passim</i>
<i>Jackson v. Birmingham Bd. of Educ.</i> , 544 U.S. 167 (2005).....	16
<i>Kocak v. Cmty. Health Partners of Ohio, Inc.</i> , 400 F.3d 466 (6th Cir. 2005).....	10
<i>Lawrence v. Hancock</i> , 76 F. Supp. 1004 (S.D.W. Va. 1948).....	26
<i>Lewis v. Heartland Inns of Am., L.L.C.</i> , 591 F.3d 1033 (8th Cir. 2010).....	4
<i>Maldonado v. U.S. Bank</i> , 186 F.3d 759 (7th Cir. 1999).....	11
<i>Montgomery v. Indep. Sch. Dist. No. 709</i> , 109 F. Supp. 2d 1081 (D. Minn. 2000) .....	6, 7

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>Muller v. Oregon</i> , 208 U.S. 412 (1908).....	21, 22, 27
<i>N. Haven Bd. of Ed. v. Bell</i> 456 U.S. 512 (1982).....	12, 13, 14, 16
<i>Nevada Dep’t of Human Res. v. Hibbs</i> , 538 U.S. 721 (2003).....	4
<i>Nichols v. Azteca Rest. Enter., Inc.</i> , 256 F.3d 864 (9th Cir. 2001).....	4
<i>Olmstead v. L.C. ex rel. Zimring</i> , 527 U.S. 581 (1999).....	5
<i>Oncale v. Sundowner Offshore Servs., Inc.</i> , 523 U.S. 75 (1998).....	17
<i>Pa. Dep’t of Corr. v. Yeskey</i> , 524 U.S. 206 (1998).....	17
<i>Palmer v. Thompson</i> , 403 U.S. 217 (1971).....	25
<i>Phillips v. Martin Marietta Corp.</i> , 400 U.S. 542 (1971).....	11
<i>Planned Parenthood of Se. Pa. v. Casey</i> , 505 U.S. 833 (1992).....	12



## TABLE OF AUTHORITIES—continued

	Page(s)
<i>Planned Parenthood of Wis., Inc. v. Schimel</i> , 806 F.3d 908 (7th Cir. 2015), cert. denied, 136 S. Ct. 2545 (2016).....	28
<i>Pratt v. Indian River Cent. Sch. Dist.</i> , 803 F. Supp. 2d 135 (N.D.N.Y. 2011).....	6
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	3, 4
<i>Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.</i> , 296 F. Supp. 2d 869 (N.D. Ohio 2003) .....	6
<i>Schroer v. Billington</i> , 577 F. Supp. 2d 293 (D.D.C. 2008).....	9
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000).....	8
<i>Sedima, S.P.R.L. v. Imrex Co.</i> , 473 U.S. 479 (1985).....	17
<i>Seiwert v. Spencer-Owen Cmty. Sch. Corp.</i> , 497 F. Supp. 2d 942 (S.D. Ind. 2007) .....	6
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004).....	8
<i>Tennessee Valley Auth. v. Hill</i> , 437 U.S. 153 (1978).....	16

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>Theno v. Tonganoxie Unified Sch. Dist.</i> No. 464, 394 F. Supp. 2d 1299 (D. Kan. 2005) .....	5
<i>Turner v. Randolph</i> , 195 F. Supp. 677 (W.D. Tenn. 1961) .....	25
<i>Ulane v. E. Airlines, Inc.</i> , 581 F. Supp. 821 (N.D. Ill. 1983), rev'd, 742 F.2d 1081 (7th Cir. 1984).....	9
<i>Whole Woman's Health v. Hellerstedt</i> , 136 S. Ct. 2292 (2016).....	28, 29
<i>Wolfe v. Fayetteville, Ark. Sch. Dist.</i> , 648 F.3d 860 (8th Cir. 2011).....	5
 <b>STATUTES</b>	
42 U.S.C. § 2000e(k) .....	27
887 Mass. Acts 668 ch. 103 § 2 .....	24
Act of May 25, 1887, ch. 462 § 13, 1887 N.Y. Laws 575 .....	24
1919 N.D. Laws, ch. 174, 317.....	24
1893 Pa. Laws, no. 244, 276.....	24
1913 S.D. Sess. Laws, ch. 240, 332.....	24
 <b>MISCELLANEOUS</b>	
117 Cong. Rec. 30,404 (1971).....	13

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
117 Cong. Rec. 30,406 (1971) .....	14
117 Cong. Rec. 30,407 (1971) .....	14, 15
118 Cong. Rec. 5803 (1972) .....	15
118 Cong. Rec. 5804 (1972) .....	13, 18
118 Cong. Rec. 5807 (1972) .....	15
118 Cong. Rec. 5808 (1972) .....	13, 15
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	24
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	30
Ari Bloomekatz, <i>Transgender Student Allegedly Attacked by Boys in School Bathroom</i> , L.A. Times (Mar. 4, 2014), <a href="http://articles.latimes.com/2014/mar/04/local/la-me-ln-transgender-student-attack-bathroom-20140304">http://articles.latimes.com/2014/mar/04/local/la-me-ln-transgender-student-attack-bathroom-20140304</a> .....	
	33

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	<b>Page(s)</b>
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<i>Discrimination Against Women: Hearings Before the H. Special Subcomm. on Educ. of the Comm. on Educ. and Labor on Section 805 of H.R. 16098</i> , 91st Cong., 2d Sess. 439 (1970) .....	13
Diana Elkind, <i>The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection</i> , 9 U. Pa. J. Const. L 895 (2007) .....	31
Phoebe Godfrey, <i>Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High</i> , 62 Ark. Hist. Q. 42 (2003) .....	25

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Jody L. Herman, <i>Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives</i> , 19 J. Pub. Mgmt. & Soc. Pol’y 65 (2013) .....	32
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Terry S. Kogan, <i>Transsexuals in Public Bathrooms: Law, Cultural Geography and Etsitty v. Utah Transit Authority</i> , 18 Temp. Pol. & Civ. Rts. L. Rev. 673 (2009) .....	33

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Serena Mayeri, <i>The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse</i> , 18 Yale J.L. & Human. 187 (2006) .....	22
Rachel E. Moffitt, <i>Keeping the John Open to Jane: How California’s Bathroom Bill Brings Transgender Rights Out of the Water Closet</i> , 16 Geo. J. Gender & L. 475 (2015) .....	30
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Deborah L. Rhode, <i>The “No-Problem” Problem: Feminist Challenges and Cultural Change</i> , 100 Yale L.J. 1731 (1991) .....	24
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Richard A. Wasserstrom, <i>Racism, Sexism, and Preferential Treatment: An Approach to the Topics</i> , 24 UCLA L. Rev., 581 (1977) .....	24

## INTEREST OF *AMICI CURIAE*

The National Women’s Law Center is a nonprofit legal organization that is dedicated to the advancement and protection of women’s legal rights and the expansion of women’s opportunities. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. The Center has participated in numerous cases involving gender discrimination before this Court and the courts of appeals. Descriptions of the other *amici* are included in an appendix to this brief.

*Amici* submit this brief because the policy at issue—which bars a transgender boy from using the same restroom facilities as other boys—rests on the same sort of discriminatory stereotyping that historically has been used to justify discrimination against women in schools and the workplace. Accordingly, *amici*’s perspective and experience in addressing such issues may assist the Court in resolving this case.<sup>1</sup>

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Title IX rests, in substantial part, on the rejection of gender stereotypes—that is, on rejection of

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<sup>1</sup> Pursuant to this Court’s rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief; petitioner submitted a blanket consent to the filing of *amicus* briefs, while respondent’s consent has been submitted to the Clerk.



the insistence that an individual's behavior and appearance must match the stereotype associated with his or her gender. That is precisely the sort of stereotyping that underlies the policy challenged in this case: Petitioner's requirement that G.G. use a separate restroom facility from the other boys ("the Restroom Policy") is based on a discriminatory stereotype about what it means to be male. Petitioner claims the Restroom Policy is valid under Title IX because Title IX protects only against discrimination based on an individual's sex identified at birth. But that is not so.

The Restroom Policy relegates transgender students to a separate facility, while permitting all other students to use facilities that correspond to their gender identity. This differential treatment is a form of sex discrimination. It is well established that statutory references to "sex" encompass more than a person's sex assigned at birth. Courts have firmly rejected rules governing workplaces and schools that turn on reproductive anatomy. And forbidding this form of discrimination against transgender students is necessary to fulfill the purpose of Title IX, which Congress enacted with the broad goal of eradicating gender discrimination in educational programs.

Against this background, petitioner's contention that it adopted its restrictive policy to protect students', and particularly cisgender<sup>2</sup> women students',

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<sup>2</sup> A cisgender person is someone whose gender identity aligns with their sex identified at birth. A transgender person is someone whose gender identity does not align with their sex identified at birth. Gender identity is one's internal, deeply held sense of belonging to a particular gender.

privacy interests is unavailing. That sort of protective pretext has historically been advanced to justify discriminatory policies, and is grounded in the very sorts of harmful stereotypes that civil rights laws are designed to overcome. Such pretexts, for example, have long been asserted in defense of rules that kept women out of certain jobs and racial minorities out of public facilities. In the last several decades, however, the courts have approached such “protective” rules with the skepticism they deserve, and have struck them down. The same probing review—and outcome—is warranted here.

## ARGUMENT

### I. **Discrimination Against Transgender Individuals Is Sex Discrimination.**

#### A. **Discrimination against transgender individuals for their nonconformity to sex stereotypes constitutes sex discrimination.**

Petitioner argues that its Restroom Policy reflects the anatomical differences between men and women (Pet. Br. 25), and therefore is not sex discrimination. As discussed below, however, pinning an individual’s sex (or gender) only to their sex identified at birth is a prohibited form of sex discrimination.

It is settled that rules prohibiting discrimination on the basis of “sex” are premised, in substantial part, on rejection of the “insist[ence] that [individuals] match[] the stereotype associated with their group \* \* \* .” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion). As the Court has explained:

[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.

*Ibid.* (internal quotation marks and citation omitted); see also *id.* at 272-73 (O'Connor, J., concurring in the judgment); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-37 (2003) (holding that sex stereotypes about family caregiving roles justified prophylactic legislation under Congress's Fourteenth Amendment, Section 5 authority); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041-1042 (8th Cir. 2010) (finding that employee offered sufficient evidence that she was discriminated against for her "tomboyish" appearance and other deviations from sex stereotypes in violation of Title VII); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) (finding that harassment of male employee based on his failure to conform to sex stereotypes was "because of sex" for purposes of Title VII claim); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.") (internal citations omitted).

Like courts addressing Title VII claims, courts addressing Title IX claims treat sex stereotyping of men and women as a form of sex discrimination.<sup>3</sup> For example, in an oft-cited Title IX case where a male student who wore an earring, had long hair, and quit the football team was harassed by classmates with homophobic slurs and violence, the court upheld a jury verdict against the school district. The court found sufficient evidence to support the conclusion that the harassment was motivated by the plaintiff's perceived "failure to conform to stereotypical gender expectations." *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1304-1306 (D. Kan. 2005). Specifically, the court pointed to evidence that "plaintiff did not conform to his peers' stereotypical expectations concerning how a teenage boy should act" and classmates harassed him "in an effort to debase and derogate his masculinity." *Id.* at 1307.

Similarly, in *Doe v. Brimfield Grade School*, the court permitted a male student's Title IX claim against his school district to proceed where he alleged that, in response to his reports of harassment, administrators urged him to "stop acting like a little girl." 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008). The court reasoned that the school had allowed the harassment to "continue based on the stereotypical perception that John was 'not man enough.'" *Ibid.*; see also *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011) (holding that male student plaintiff "was legally required to show the harasser

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<sup>3</sup> Courts frequently look to Title VII case law when interpreting Title IX. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999).

\* \* \* was motivated by either [the plaintiff's] gender or failure to conform with gender stereotypes"); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011) (holding that a school had a responsibility to address a male student's reports that he had been called names like "pussy," "sissy," and "girl," and was mocked with effeminate gestures); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (recognizing peer-to-peer name-calling like "faggot" and "gay" as sex-based harassment triggering schools' Title IX responsibilities to respond); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 880 (N.D. Ohio 2003) (same); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) (concluding that plaintiff stated a cognizable Title IX claim "by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes").<sup>4</sup>

The U.S. Department of Justice and U.S. Department of Education's Office for Civil Rights, re-

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<sup>4</sup> The prevalence of successful sex stereotyping claims brought by male plaintiffs under Title IX refutes the contention of petitioner's *amici* Women's Liberation Front and Family Policy Alliance's that Title IX is meant to benefit women alone. Br. Women's Liberation Front and Family Policy Alliance at 14; see also *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1182 (10th Cir. 2001) (finding that proffered evidence raised questions of fact regarding school's alleged discrimination against male nursing students); *Bucklen v. Rensselaer Polytechnic Inst.*, 166 F. Supp. 2d 721, 726 (N.D.N.Y. 2001) (finding male plaintiff's allegations that the school denied him academic accommodations available to a female classmates in violation of Title IX sufficient to survive school's motion to dismiss).

sponsible for administrative enforcement of Title IX, also interpret Title IX's broad prohibition on sex discrimination to encompass harassment of boys and girls based on sex stereotypes. At the conclusion of a joint investigation by the agencies into Minnesota's Anoka-Hennepin School District, the two agencies entered into a consent decree with the school district to address long-standing harassment of both boys and girls who did not conform to gender stereotypes. Letter from Debbie Osgood, Dir., Office for Civil Rights, U.S. Dep't of Educ., to Dennis Carlson, Superintendent, Anoka-Hennepin Sch. Dist. 3 (Mar. 15, 2012). According to the Office for Civil Rights, "[f]emale students reported being called 'manly,' 'guy,' or 'he-she'; male students reported being called 'girl,' and 'gay boy,' and being told, 'you're a guy, act like it.'" *Ibid.*

Discrimination against transgender individuals rests in large part on just this sort of stereotyping—the view that a transgender student like G.G. is not a “real” boy because he does not conform to stereotypes about what it means to be male. Title IX would not permit a school to force a cisgender boy who identifies as male, but does not conform to stereotypes of masculinity, to use a separate restroom. Such a rule would be struck down under Title IX for relying on impermissible sex stereotyping. Similarly, the Restroom Policy in this case violates Title IX because it is premised on stereotypical expectations of what it means to be a boy; in petitioner's view, G.G. is both perceived as “not male enough” or not a “real” boy—and therefore should not be treated as male—but also as acting “too male” for his sex identified at birth. In both circumstances, a student is singled out and excluded because his gender expression and his sex

identified at birth are not in accord with social expectations.

Courts consistently have recognized discrimination against transgender people as impermissible sex stereotyping. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (“[A] government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender \* \* \* employee because of his or her gender non-conformity.”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (condemning demotion of male transgender police officer for not “conform[ing] to sex stereotypes concerning how a man should look and behave” as violative of Title VII); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (condemning suspension of a transgender firefighter “based on [her] failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance” as violative of the Equal Protection Clause and Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (discrimination against “anatomical male[] whose outward behavior and inward identity did not meet social definitions of masculinity” is actionable sex discrimination under Title VII). This case falls squarely within that tradition.

**B. Discrimination against transgender individuals because they *are* transgender is inherently discrimination “on the basis of sex.”**

Petitioner’s Restroom Policy constitutes discrimination based on transgender status because respondent is denied access to the common boys’ restrooms while other boys are not. On the face of it, this discrimination against someone because he is

transgender is “related to sex or ha[ving] something to do with sex.” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (quoting *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 822 (N.D. Ill. 1983), rev’d, 742 F.2d 1081 (7th Cir. 1984)). Under such a policy, transgender people are treated differently because their gender identity and sex identified at birth no longer match. Accordingly, not extending Title IX’s protection to a student who has undergone a gender transition would be “blind \* \* \* to the statutory language itself.” *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008).

Petitioner’s discriminatory Restroom Policy cannot be saved on the theory that it is not specifically directed at disfavoring women or men as a group. As the court in *Schroer v. Billington* explained:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion.

577 F. Supp. 2d at 306. By analogy, discrimination “because of . . . sex” encompasses discrimination because of a change of sex. *Ibid.* (ellipses added by the court); see also *Fabian*, 172 F. Supp. 3d at 527 (holding that anti-transgender discrimination is prohibited by Title VII, in part based on *Schroer* analogy).



### C. Reproductive anatomy does not determine identity or social role.

By the same token, the Court has long recognized that, under anti-discrimination rules like Title VII and Title IX, reproductive anatomy does not determine an individual's role in society. Cf. Pet. Br. 29, 32 (defining sex as primarily determined by reproductive capacity). This principle is fundamental to sex equality.

In *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991), for example, the Court held that employees' pregnancies or capacities to become pregnant in the future were not valid bases upon which to exclude them from factory work that might pose a risk to a fetus. See also *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (applicant "cannot be refused employment on the basis of her potential pregnancy"). In doing so, the Court made clear that the social meaning ascribed to reproductive anatomy—in the case of *Johnson Controls*, that people with childbearing capacity are unfit for certain types of traditionally masculine work—is not a permissible basis for discrimination. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan. L. Rev.* 261, 281 (1992) ("As history amply demonstrates, claims about women's bodies can in fact express judgments about women's roles."). As the Court explained, the employer in question was wrong to assume that people who *could* become pregnant necessarily *would* become pregnant, treating every person with a womb as first and foremost a future mother rather than a worker: "It is no more appropriate for the courts than

it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role." *Johnson Controls*, 499 U.S. at 211.

Similarly, the insight that anatomy will carry different meaning for different people underlies broader pregnancy discrimination jurisprudence beyond the specific questions at issue in *Johnson Controls*. People manage the impact of childbearing and childrearing on the rest of their lives in different ways. This Court thus has noted that it is impermissible to ignore these individual distinctions and rely instead on sweeping stereotypes. For example, employers are prohibited from assuming that employees who have recently given birth will be too consumed by their parenting duties to make good workers. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). Nor may an employer conclude, without a doctor's judgment rooted in evidence, that a pregnant employee will be unable to manage the physical demands of pregnancy while fulfilling all job responsibilities. *E.g.*, *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632, 644 (1974); *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir. 1999); *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 435-36 (8th Cir. 1998). On the other side of the coin, a woman's *lack* of childbearing capacity is not a valid basis upon which to discriminate. *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

These cases share an incontrovertible principle: Reproductive organs are not determinative of who a person is. To the contrary, free decisions about reproductive anatomy and capacity are, in large part, how we create ourselves; they are among "the most intimate and personal choices a person may make in

a lifetime, choices central to personal dignity and autonomy.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (affirming fundamental importance of “the decision whether to bear or beget a child”). Just like the worker in the Johnson Controls factory, young transgender people must be free to shape their own destinies and decide the meaning of their own bodies.

## **II. Protecting Transgender Students Is Necessary To Fulfill Title IX’s Goal Of Eradicating Discrimination Based On Gender In Educational Programs.**

Title IX’s text and fundamental purpose compel a broad reading of the statute that invalidates petitioner’s Restroom Policy. The statute—which uses general and expansive language—was passed with the broad purpose of eradicating gender discrimination in educational programs. The Court’s long-standing recognition of this broad purpose (*e.g.*, *N. Haven Bd. of Ed. v. Bell* 456 U.S. 512, 521 (1982)) rests on the expressed goals of its drafters and principal sponsors. They regarded the statute as a comprehensive effort to combat discriminatory stereotypes and sex-based obstacles, which harm both cisgender and transgender students, thus ensuring that all students are afforded the full opportunity to realize the benefits of education.

**A. Congress intended Title IX to be a comprehensive prohibition on all forms of sex discrimination in all aspects of education.**

1. *Congress designed Title IX to enact a broad, comprehensive effort against all forms of sex discrimination in education.*

Title IX was intended to serve as a part of the larger effort to eradicate gender discrimination in society writ large. In introducing Title IX, Senator Birch Bayh, its principal sponsor, presented a bold goal: the drafters intended the “impact of this amendment” to be “far-reaching” (118 Cong. Rec. 5808 (1972) (statement of Sen. Bayh)),<sup>5</sup> as it was “designed to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education” (*id.* at 5804). According to Senator Bayh, Title IX was designed as “a strong and comprehensive measure \* \* \* to provide women with solid legal protection from the persistent, pernicious discrimination which [was] serving to perpetuate second-class citizenship for American women.” *Id.* at 5804.

In introducing Title IX’s predecessor bill, Senator Bayh represented it as a “forward step \* \* \* in protecting equal rights for all Americans.” 117 Cong. Rec. 30,404 (1971) (statement of Sen. Bayh); see also *Discrimination Against Women: Hearings Before the H. Special Subcomm. on Educ. of the Comm. on Educ. and Labor on Section 805 of H.R. 16098*, 91st Cong., 2d Sess. 439 (1970) [1970 Hearings] (state-

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<sup>5</sup> The Court has noted that “Senator Bayh’s remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.” *N. Haven Bd. of Educ.*, 456 U.S. at 526-527.

ment of Daisy K. Shaw, Dir. of Educ. & Vocational Guidance of N.Y.C.) (stating that the ultimate goal of the measures is “an open society, one which offers equal opportunity and freedom of choice to all”).<sup>6</sup>

Translating this broad goal into the educational context, Senator Bayh premised Title IX’s precursor bill on the principle that “educational opportunity should not be based on sex” (117 Cong. Rec. 30,406 (1971) (statement of Sen. Bayh)), and represented its purpose as ensuring “equal access for women and men students to the educational process and the extracurricular activities in a school \* \* \*.” *Id.* at 30,407. Similarly, in introducing Title IX, Senator Bayh stated as its goal:

[T]he essential guarantees of equal opportunity in education for men and women \* \* \* an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.

118 Cong. Rec. 5808 (1972) (statement of Sen. Bayh). Representative Edith Green, who introduced the bill that ultimately became Title IX in the House of Rep-

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<sup>6</sup> The 1970 Hearings involved a bill introduced in the House of Representatives by Representative Edith Green that sought to add “sex” to Title VI of the Civil Rights Act of 1964. They provide relevant legislative history because, as the Court has recognized, Title IX grew out of these hearings. *N. Haven Bd. of Educ.*, 456 U.S. at 523 n.13. The hearings were “repeatedly \* \* \* relied upon in both Houses during the subsequent debates on Title IX” and they made it “clear that education institutions were the primary focus of complaints concerning sex discrimination.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 n.16 (1979).

representatives, envisioned the same goal, acknowledging that sex discrimination constitutes “psychological warfare” against individuals regardless of gender, and expressing her support for the measures adopted in Title IX as “necessary to insure equal rights, equal opportunities, and equal status for human beings of both sexes.” 1970 Hearings at 269 (statement of Rep. Green).

In line with this broad purpose, Title IX was intended to address discrimination in all forms. In introducing the statutory language, Senator Bayh stated that it was meant to combat “sex discrimination” in “all facets of education.” 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh). Demonstrating this breadth, Senator Bayh specifically mentioned discrimination in “admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales” (*id.* at 5803), as well as “discrimination [in] available services or studies within an institution” (*id.* at 5812); he also specifically left the statute’s reach open-ended, noting generally that Title IX extended to discrimination “in related areas.” *Id.* at 3935.<sup>7</sup>

This Court has long recognized Congress’s broad purpose in enacting Title IX and the courts’ corresponding need to interpret the statute expansively to

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<sup>7</sup> Congress, it is true, did not intend to eliminate separate restroom facilities for men and women. See generally 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh). That separate facilities may be provided for each gender, however, says nothing about whether transgender students may be forced by an educational institution to act in accord with the sex assigned at their birth.

effectuate that purpose. More than thirty years ago, for example, in *North Haven Board of Education v. Bell*, the Court recognized that to “give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.” 456 U.S. at 521. In 2005, the Court noted that “[d]iscrimination’ is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).<sup>8</sup> The expansive language used by Congress in Title IX therefore invites courts to apply the anti-discrimination laws to circumstances beyond the factual circumstances before the legislators at the time of enactment—like discrimination against transgender individuals.

To be sure, Congress did not specifically have transgender students in mind in enacting Title IX. See Pet. Br. 32-33. But as the Court has observed in analogous circumstances, “whether the Congress that enacted” Title IX “specifically intended the Act to cover” transgender students “is not determinative.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000); see also *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978) (“It is not for [the Court] to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.”).

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<sup>8</sup> See also *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 597-98 (2004) (“[r]ace’ and ‘sex’ are general terms that in every day usage require modifiers to indicate any relatively narrow application” and the Court does “not commonly understand ‘race’ to refer only to the black race, or ‘sex’ to refer only to the female”).

In *Oncale v. Sundowner Offshore Servs., Inc.*, for example, Justice Scalia wrote for a unanimous Court that “statutory prohibitions often go beyond the principal evil 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.” 523 U.S. 75, 79 (1998). As a result, even though “[m]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” the broad language of Title VII extended to that “reasonably comparable evil.” *Ibid.* see also *Gonzales v. Oregon*, 546 U.S. 243, 288 (2006) (Scalia, J., dissenting) (“We have repeatedly observed that Congress often passes statutes that sweep more broadly than the main problem they were designed to address.”). Discrimination against transgender students is a “reasonably comparable evil” to the forms of sex discrimination discussed by Congress at the time of Title IX’s passage, and thus is covered by the statute’s sweeping language. “[T]he fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

2. *In enacting Title IX, Congress was particularly concerned with eradicating sex stereotyping.*

In addition to establishing the broad purpose of Title IX, Congress was specifically concerned with eradicating pernicious sex stereotyping in education. When introducing Title IX, Senator Bayh expressly recognized that sex discrimination in education is based on “stereotyped notions,” like that of “women



as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again.” 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh). Title IX was therefore necessary to “change [these] operating assumptions” so as to combat the “vicious and reinforcing pattern of discrimination” based on these “myths.” *Ibid.*

The recognition of stereotypes as a core problem motivating sex discrimination in education also permeated the 1970 Hearings that led to the adoption of Title IX. Numerous individuals testified to the harmfulness of stereotypes—in particular, those regarding gender roles—in perpetuating inequality. *See, e.g.*, 1970 Hearings at 7 (statement of Myra Ruth Harmon, President, Nat’l Fed’n of Bus. & Prof’l Women’s Clubs, Inc.) (discussing “certain sex role concepts which continue to mold our society,” including in “educational institutions”); *id.* at 135 (statement of Wilma Scott Heide, Comm’r, Pa. Human Rel. Comm’n) (discussing danger of sex role stereotyping); *id.* at 436 (statement of Daisy K. Shaw, Dir. of Educ. & Vocational Guidance of N.Y.C.) (discussing how “perceptions of sex roles develop” very early in life, and what is needed to end sex discrimination is “thoroughgoing reappraisal of the education and guidance of our youth to determine what factors in our own methods of child rearing and schooling are contributing to this tragic and senseless underutilization of American women”); *id.* at 662 (statement of Frankie M. Freeman, Comm’r, U.S. Comm’n on Civil Rights) (“Because of outmoded customs and attitudes, women are denied a genuinely equal opportunity to realize their full individual potential \* \* \*.”); *id.* at 364 (statement of Pauli Murray, Pro-

fessor, Brandeis Univ.) (discussing importance of treating each person as an individual, and not according to a group).

**B. Transgender students suffer from sex-based harassment and thus have a great need for Title IX’s protections.**

Transgender students face the problems that motivated the enactment of Title IX in especially acute ways: they are harassed and victimized on the basis of their gender identities at shockingly high rates. A survey conducted by the National Center for Transgender Equality found that “[t]he majority of respondents who were out or perceived as transgender while in school (K–12) experienced some form of mistreatment, including being verbally harassed (54%), physically attacked (24%), and sexually assaulted (13%) *because they were transgender.*” National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey 2* (Dec. 2016), available at <https://perma.cc/M7MQ-ZQ52> (“NCTE Survey”) (emphasis added). Moreover, transgender girls were twice as likely as transgender boys to be sexually assaulted at school because of their gender identity. *Id.* at 133.

Startlingly, seventeen percent of transgender respondents “experienced such severe mistreatment that they left a school as a result.” *Id.* at 2. The statistics are even more disturbing for transgender women: over a fifth left a K-12 school because of harassment. *Id.* at 135. Respondents who did not complete high school were more than twice as likely to have attempted suicide as the overall sample. *Id.* at 113.

This Court has long recognized that Title IX protects students from harassment based on their sex. *E.g.*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992). Because Title IX’s reference to “sex” includes sex stereotyping, the statute’s rules and remedies regarding sex-based harassment apply to harassment of transgender students targeted because they are transgender. Such protections are crucially needed to ensure that transgender students are able to enjoy their civil rights to learn and thrive free from such discrimination.

**III. Arguments Regarding The Vulnerability Of Women Have Historically Been Used To Justify Discrimination And Defend Exclusionary Policies, And Courts Routinely Have Rejected Such Arguments Over the Last Several Decades.**

Against this background, petitioner maintains that its Restroom Policy—which the record shows interferes with respondent’s ability to obtain the benefits of a public education—was adopted with the goal of “provid[ing] a safe learning environment for all students and \* \* \* protect[ing] the privacy of all students.” Pet. Br. 12.

This argument is meritless. Protective pretexts have long been used to justify discriminatory policies, and are grounded on the very sorts of harmful stereotypes that civil rights laws were designed to overcome. In particular, restrooms and other sex-segregated environments have been a special focus of policies grounded on protective pretexts. The Restroom Policy falls squarely within this long tradition. This Court has repeatedly, and correctly, rejected these pretextual justifications for disfavoring women and other disadvantaged groups.

**A. Discriminatory rules ostensibly designed to protect women have long reflected both stereotype and pretext.**

Historically, law and policymakers have offered the pretext of protecting women as an excuse to discriminate against women and other disfavored groups. In the employment context, states routinely passed laws that barred women from certain professions with the ostensible aim of protecting their health and welfare. And after *Brown v. Board of Education*, 347 U.S. 483 (1954), states frequently justified policies that perpetuated racial segregation on the ground that such restrictions were necessary to protect women. Restrooms and similar sex-segregated environments were a particular focus of these discriminatory rules. A review of this history shows some striking parallels to the rationales offered in support of petitioner's Restroom Policy here, providing further grounds for rejecting the policy.

*1. Discriminatory rules with protective pretexts have historically been imposed in a variety of contexts.*

The pretext of protecting women has historically been used not only to exclude women from the workplace and educational opportunities, but also to further a segregationist agenda.

In the nineteenth and earlier part of the twentieth centuries, laws that barred women from certain professions were frequently justified by their ostensible intent to protect women's health and welfare. In *Muller v. Oregon*, 208 U.S. 412 (1908), for example, the Court famously held that the State had a valid and over-riding interest in women-protective laws because "continuance for a long time on her feet at

work \* \* \* tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care \* \* \*.” *Id.* at 421. In tune with the times, the Court accepted this rationale, concluding that “some legislation to protect [women] seems necessary to secure a real equality of right.” *Id.* at 422. Laws based on this sort of protective rationale continued to be enacted, and affirmed, over the next fifty years. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (finding law’s justification—“that the oversight assured through ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight”—was “entertainable”), disapproved of by *Craig v. Boren*, 429 U.S. 190 (1976).

The impetus to protect women—specifically, white women—similarly served as justification for segregationist policies, many of which were rooted in anti-miscegenation sentiment. See generally Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. Davis L. Rev. 1321, 1348 (2006) (“With regards to white women, racial segregation operated as a paternalistic restriction on their liberties. It sought to ‘protect’ white women from ‘succumbing’ to their sexual desires for black men.”). For example, schools forced to integrate racially after *Brown* started to consider sex-segregated schooling to avoid interracial interactions between the sexes. See generally Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 Yale J.L. & Human. 187, 192-93 (2006) (“But in the post-*Brown* era, sex-segregated schooling became salient in a different way: as a palliative for white

Southern fears that racially mixed schools would lead down a slippery slope toward interracial marriage and social equality.”).

2. *Restrooms, and similarly intimate environments, have been a particular focus of these discriminatory rules.*

In both the employment and education contexts, restrooms and similar sex-segregated environments played a special role. The first laws separating restrooms according to sex were part of a nationwide practice of protecting women in the workplace, where they were seen as especially vulnerable. And after *Brown*, states tried to validate the continued segregation of public restrooms by pointing to supposedly heightened rates of venereal disease among black communities.

As increasing numbers of women entered the workforce, the perceived need for sex-specific restrooms—and the lack of restrooms open to women—posed a real and substantial impediment to women’s employment:

Throughout the late nineteenth and early twentieth centuries, the absence of adequate lavatory facilities appeared as an insurmountable obstacle to gender integration. Institutions including the Yale Medical School, the Princeton graduate program, the Brooklyn and Bronx bar associations, prominent Wall Street law firms, and various all-male clubs were unable to circumvent this obstacle for significant periods. As one law firm partner explained to a female applicant during the 1930’s, much as his firm would like to hire her, the logistical difficulties were

simply too great; she couldn't use the attorney's bathroom, she couldn't be relegated to the secretaries' bathroom, and the firm couldn't afford to build a new one. Variations of the same theme continue to appear as justifications for all-male associations. As Washington Metropolitan Club officials regretfully reported, "Much as we love the girls, we just don't have the lavatory facilities to take care of them."

Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731, 1782-83 (1991) (footnote omitted).

At this time, states declared it within their traditional powers to regulate health and safety through laws that separated restrooms by gender, usually adding such restrictions to new or existing protective legislation. See, e.g., Act of May 25, 1887, ch. 462 § 13, 1887 N.Y. Laws 575; 1893 Pa. Laws, no. 244, 276; 1919 N.D. Laws, ch. 174, 317; 1913 S.D. Sess. Laws, ch. 240, 332; 887 Mass. Acts 668 ch. 103 § 2; see also Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 Mich. J. Gender & L. 1, 15-16 (2007). Scholars have seen these restroom laws largely as rooted in the outdated and misogynistic idea that women were "especially vulnerable when they ventured into the public realm." *Id.* at 54; see also Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. Contemp. Legal Issues 1, 4-7 (1998); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev., 581, 593-594 (1977).

Sex-separation of restrooms also served to further entrench race segregation in these spaces. Even

after *Brown*, states continued to invoke protective purposes to legitimate the continued segregation of public restrooms. See, e.g., *Turner v. Randolph*, 195 F. Supp. 677, 679-80 (W.D. Tenn. 1961) (“In an apparent effort to support the ordinance as a reasonable and valid exercise of the police power, the defendants introduced proof at the hearing showing that the incidence of venereal disease is much higher among Negroes in Memphis and Shelby County than among members of the white race.”). Desegregated restrooms were framed as a public health threat, particularly for girls in school. See, e.g., Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 Ark. Hist. Q. 42, 64 (2003) (“If the black girls were allowed into white schools, it was believed they would infect white girls [with venereal diseases], making them both ill and sexually corrupt. White daughters in this case needed to be protected from the sexualized presence of the black girls.”).<sup>9</sup>

This attitude extended to other public facilities as well, and it became particularly difficult to desegregate public spaces where people’s bodies were likely to come into direct contact. Time-worn rationales about disease and modesty served to enable discrimination. For example, the City of Jackson, Mississippi, preferred to close its public swimming pools rather than desegregate them. See *Palmer v. Thomp-*

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<sup>9</sup> The very real impact of such restroom restrictions is dramatized in the recent film *Hidden Figures*. See Christina Cauterucci, *Hidden Figures Is a Powerful Statement Against Bathroom Discrimination*, Slate (Jan. 18, 2017), [http://www.slate.com/blogs/xx\\_factor/2017/01/18/hidden\\_figures\\_is\\_a\\_powerful\\_statement\\_against\\_bathroom\\_discrimination.html](http://www.slate.com/blogs/xx_factor/2017/01/18/hidden_figures_is_a_powerful_statement_against_bathroom_discrimination.html).



*son*, 403 U.S. 217, 227 (1971) (finding no discriminatory effect in this action). Cf. *Lawrence v. Hancock*, 76 F. Supp. 1004, 1005-06 (S.D.W. Va. 1948) (enjoining municipality from refusing non-white residents access to a public pool); *City of St. Petersburg v. Alsup*, 238 F.2d 830, 830 (5th Cir. 1956) (same).

In this respect, petitioner’s Restroom Policy resembles race segregation laws: it uses the pretext of protecting the “right kind” of women—cisgender women under the Restroom Policy, like the white women ostensibly protected by segregation laws—from others deemed undesirable or polluting. These rules rely on stereotypes of who is a “good” woman deserving of protection, and who must be excluded.

**B. The Court has routinely rejected these protective rationales for gender discrimination over the last several decades.**

In more recent times, this Court has closely scrutinized exclusionary laws that rest on the rationale of protecting women. “Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). The Court in *Frontiero* held that such “gross, stereotyped distinctions between the sexes” are insupportable as a basis for public policy. *Id.* at 685.

Subsequently, the Court has made clear that exclusionary policies purportedly designed to protect women or other groups often do not serve that purpose in reality—and instead operate principally to disadvantage the disfavored groups. In *Johnson Controls*, for example, the Court addressed an employer’s

self-described “fetal-protection policy” that excluded “fertile female employee[s] from certain jobs” because of an expressed “concern for the health of the fetus.” 499 U.S. at 190. Noting that the effect of the rule was the blanket exclusion of women from those jobs, the Court found the employer’s policy to be both discriminatory against women (see *id.* at 197-200) and inconsistent with Title VII because it was unrelated to “job-related skills and aptitudes.” *Id.* at 201; see also *id.* at 205 (Title VII is crafted “to protect female workers from being treated differently from other employees simply because of their capacity to bear children”). Given the manifest purpose of Title VII to achieve equal opportunities irrespective of gender, the employer’s “professed moral and ethical concerns about the welfare of the next generation” did not justify disparate treatment. *Id.* at 206.

Notably, in reaching this conclusion, the Court harked back to its decision in *Mueller*, observing that “[c]oncern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities.” 499 U.S. at 211. But pointing to Title VII and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), the Court held that “[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role.” 499 U.S. at 211. See also *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (“In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.”).

Courts, including this one, have also recently rejected laws that use a pretextual interest in women's health and well-being to limit their reproductive choice. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (holding that abortion laws justified as protections for women's health and safety violated women's liberty when the burdens they imposed outweighed their benefits); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920 (7th Cir. 2015) (holding that the right to abortion could not be abridged "on the basis of spurious contentions regarding women's health," especially when the health-justified abridgement would actually harm women), cert. denied, 136 S. Ct. 2545 (2016).

**C. Petitioner's Restroom Policy rests on a protective pretext and does not hold up to a probing factual inquiry.**

Petitioner's brief has very little to say in defense of its stated rationale for adopting the Restroom Policy: it contents itself with repeating that it seeks "to protect the privacy of all students." Pet. Br. 12. But this is a rationale that doubtless could have been offered, in nearly identical terms, to justify many now-discredited, and unlawful, policies that discriminated based on gender or race.

And here, too, the justification fails. Petitioner's privacy concerns are speculative and not grounded in fact. Moreover, petitioner manifestly is not concerned with the well-being of all students: it has failed to appropriately account for the privacy and health interests of G.G. and other transgender students. In reality, the only effect of petitioner's resolution is to exclude and discriminate.

1. *Petitioner's Restroom Policy does not advance legitimate purposes.*

For the reasons discussed above, the articulation of a protective or otherwise benign purpose cannot shield discriminatory laws or policies from searching review to determine whether those laws or policies actually serve the stated purpose. To the contrary, the Court has subjected such rules to a probing factual inquiry that rejects inflammatory but false rationales upon which policy-makers may rely. See, e.g., *Whole Woman's Health*, 136 S. Ct. at 2301, 2309-2318 (invalidating on constitutional grounds a law ostensibly designed to “to decrease health risk for abortion patients with critical complications,” after Court closely reviewed actual impact of the legislation and concluded that the asserted abortion-related health complications were not present); *Johnson Controls*, 499 U.S. at 207 (in holding “fetal-protection” policy unlawful under Title VII, the Court noted that Johnson Controls had not adequately shown that “substantially all women would be unable to perform safely and efficiently the duties of the job involved”) (citation omitted).

Indeed, it is the Court's responsibility to engage in such a searching, fact-based review and strike down laws that invent a problem to “solve” as a mask for discrimination. This approach would reveal that petitioner's Restroom Policy is not actually protective of women or schoolchildren. Instead, it stigmatizes transgender students, putting their safety and health at risk without justification.

To begin with, petitioner has failed to show how students' safety and privacy would be at risk by allowing G.G. to use the boys' restrooms. The reality is that G.G. used those restrooms for seven weeks

without incident in 2014. Complaint at 32, *G.G. v. Gloucester Cty. Sch. Bd.*, 2015 WL 4086446 (E.D. Va) (No. 4:15cv54). Additionally, as G.G. informed the district court, in every other public space he uses the male restroom without incident. *Id.* at 25. Indeed, a 2016 report from Human Rights Watch found that “there is no evidence that allowing transgender students to choose bathroom or locker room facilities that correspond to their gender identity puts other students at risk.” *Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools*, Human Rights Watch (Sept. 13, 2016), [www.hrw.org/report/2016/09/13/shutout/restrictions-bathroom-and-locker-room-access-transgender-youth-us-schools](http://www.hrw.org/report/2016/09/13/shutout/restrictions-bathroom-and-locker-room-access-transgender-youth-us-schools). Hypothetical privacy concerns that lack any basis in fact are not enough to justify discrimination.

Unsurprisingly, more general research has confirmed that privacy and safety concerns regarding the use of public restrooms by transgender individuals are wholly unsubstantiated. Advocates have long pointed to the lack of data to support these concerns. Marcie Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, *Mic Network Inc.* (Apr. 2, 2015), <https://mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms#.2hV1Q0VSX> (“[t]here are zero reported cases of this happening”); Rachel E. Moffitt, *Keeping the John Open to Jane: How California’s Bathroom Bill Brings Transgender Rights Out of the Water Closet*, 16 *Geo. J. Gender & L.* 475, 500 (2015). On the other hand, individuals who want to enter bathrooms for invidious reasons are not deterred by the sign on the door—meaning that it is a fiction to suggest that conforming use of restrooms to gender identity will sud-

denly open restroom doors to predators. See, e.g., Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. Pa. J. Const. L 895, 925 n.170 (2007).

2. *Policies that exclude transgender students from sex-segregated restrooms injure those students.*

In addition, petitioner has failed to properly account for G.G.'s own privacy and health concerns. G.G. informed the district court that "girls and women who encountered G.G. in female restrooms would react negatively because they perceived G.G. to be a boy"; "in eighth and ninth grade, girls would tell him 'this is the girls' room' and \* \* \* tell him to leave." Complaint at 46, *G.G. v. Gloucester*, 2015 WL 4086446. Yet the school's insistence that G.G. use a single-stall unisex bathroom stigmatizes G.G., sending a message to his classmates that he is aberrant and dangerous. *Id.* at 48. Exclusion from the boys' restroom thus "inflicts severe and persistent emotional and social harms on G.G." *Id.* at 50. It also is physically harmful; G.G. has developed urinary tract infections from holding his urine so as to avoid using the restroom. *Id.* at 49. These health concerns are only exacerbated by the school's insistence that G.G. use the unisex bathroom, which G.G. finds stigmatizing because he is the only one that does use it. *Id.* at 48.

G.G.'s experiences are consistent with those of transgender students across the country. Research indicates that many transgender students excluded from the restrooms that correspond to their gender identity simply avoid urinating while they are at

school, leading to serious health risks including kidney damage and urinary tract infections like those experienced by G.G. NCTE Survey at 130-37 (citing Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 75 (2013)). Indeed, The U.S. Transgender Survey reports that thirty-one percent of 27,715 transgender *adult* respondents have avoided drinking or eating to avoid using the restroom; eight percent of them had a kidney or urinary tract infection, or other kidney-related medical issues, from avoiding use of restrooms during the year leading up to the survey period. National Center for Transgender Equality, 2015 U.S. Transgender Survey (July 2016), <http://www.ustranssurvey.org/preliminary-findings/>. Exclusion from the proper restroom may lead to severe mental distress and a risk of suicide. *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at \*14 (S.D. Ohio Sept. 26, 2016).

Moreover, “[w]hen schools require transgender girls to use the men’s room or force transgender boys to use the women’s room, they put them at risk of physical, verbal, or sexual assault from other students or adults.” Human Rights Watch, *supra*, <https://www.hrw.org/report/2016/09/13/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us-schools>. This increased danger compounds the already high risk of violence at the hands of classmates and teachers that transgender students face at school.

Transgender people are commonly stereotyped as “mentally ill, and less worthy of dignity and respect.” Terry S. Kogan, *Transsexuals in Public Bathrooms:*

*Law, Cultural Geography and Etsitty v. Utah Transit Authority*, 18 Temp. Pol. & Civ. Rts. L. Rev. 673 (2009). Therefore, they face high risk of physical, verbal, and sexual assault from other adults or students in sex-segregated settings such as a restroom or a locker room. The U.S. Transgender Survey reports that twelve percent of 27,715 transgender *adult* respondents have been harassed, attacked, or sexually assaulted in a restroom in the last year. National Center for Transgender Equality, 2015 U.S. Transgender Survey (July 2016), <http://www.ustranssurvey.org/preliminary-findings/>.

In a school setting, because teachers often do not monitor restrooms and locker rooms, students are exposed to an even greater risk of harassment and bullying. See Human Rights Watch, *supra*, <https://www.hrw.org/report/2016/09/13/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us-schools>. Forcing transgender girls to use the men's room and forcing transgender boys to use the women's room have *actually* led to incidents of harassment, assault, and bullying from other students and adults. See *ibid.*; see also Ari Bloomekatz, *Transgender Student Allegedly Attacked by Boys in School Bathroom*, L.A. Times (Mar. 4, 2014), <http://articles.latimes.com/2014/mar/04/local/la-me-ln-transgender-student-attack-bathroom-20140304>; Matt Hennie, *Trans Students Attacked as 'Perverts' in North Georgia*, Project Q (May 13, 2016), [http://www.projectq.us/atlanta/trans\\_students\\_attacked\\_as\\_perverts\\_in\\_north\\_georgia](http://www.projectq.us/atlanta/trans_students_attacked_as_perverts_in_north_georgia). In sum, the stigmatizing practice of bathroom exclusion does not stop violence, but rather causes it.

For these reasons, and those explained at length by respondent, petitioner's Restroom Policy does not



hold up to factual scrutiny. The challenged policy's only real purpose and effect is to discriminate against transgender students like G.G. Historically, flimsy protective rationales of the sort offered here by petitioner have been used to curtail disfavored groups' access to public facilities. In modern times, the Court has consistently seen through these pretexts and held that they cannot stand. It should do so again here. The Court should reject petitioner's arguments, which find company in a long and dishonorable tradition of civil rights abuses.

### **CONCLUSION**

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted.

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## **APPENDIX**

**DESCRIPTIONS OF THE *AMICI CURIAE*****A Better Balance: The Work & Family Legal Center**

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ discrimination—including bathroom access rights for transgender people—through its national LGBTQ Work-Family project. A Better Balance is committed to ensuring the health, safety, and security of all LGBTQ individuals and families.

**American Association of University Women**

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who had defied society's conventions by earning college degrees. Since then it has worked to increase women's access to education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with its member-adopted Public Policy Program, AAUW supports equitable educational climates free of harassment, bullying, and sexual assault, and vigorous enforcement of Title IX and all other civil rights laws pertaining to education.

**California Women’s Law Center**

California Women’s Law Center (“CWLC”) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC’s issue priorities include gender discrimination, reproductive justice, violence against women, and women’s health. CWLC places particular emphasis on eliminating all forms of gender discrimination on school campuses, including discrimination based on sexual orientation and sexual identity. CWLC remains committed to supporting equal rights for transgender folks, and to eradicating invidious discrimination in all forms.

**Center for Reproductive Rights**

The Center for Reproductive Rights is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the U.S., the Center’s work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), in which the U.S. Supreme Court reaffirmed the constitutional right to access legal abortion. As a rights-based organization, the Center has a vital interest in protecting individuals endeavoring to exercise their fundamental rights free from restrictions based on gender stereotypes.

**Education Law Center-PA**

The Education Law Center-PA is a non-profit legal advocacy organization dedicated to ensuring access to quality public education for all children in Pennsylvania. For over 40 years, ELC has advocated on behalf of the most at-risk students -- children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English language learners, LGBTQ students, and children experiencing homelessness. Our priority areas include ensuring all students have equal access to the services and programs they need to succeed, and addressing systemic inequalities that lead to disparate educational outcomes based on race, gender, sexual orientation and gender identity, disability status, and other categories.

**End Rape on Campus (EROC)**

End Rape On Campus (EROC) is a national non-profit organization committed to ending campus sexual violence through directly supporting survivors and their communities, preventing violence through education, and reforming policies on the campus, local, state, and federal levels. EROC is survivor-centered and survivor-led, and regularly assists sexual assault survivors, including students who identify as transgender and gender non-conforming, in filing federal Title IX complaints with the U.S. Department Education's Office for Civil Rights when their rights are violated.

EROC is also dedicated to cultivating safe and respectful educational environments prior to college. To this end, we led a successful legislative effort in Virginia to institute healthy relationship education in high schools in 2016.

Transgender students, particularly transgender girls and women, are disproportionately targeted for sexual assault, discrimination, and violence in school. As an organization that envisions educational experiences free from violence, EROC advocates for the full protection and enforcement of Title IX rights for all students, including students of all genders, gender identities, and gender expressions.

### **Futures Without Violence**

Futures Without Violence (FUTURES) is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. Futures Without Violence mobilizes concerned individuals, children's groups, the justice system, allied professionals, women's rights, civil rights, and other social justice organizations to join the campaign to end violence through public education/prevention campaigns, public policy reform, model training, advocacy programs, and organizing.

FUTURES joins with other non-profit public interest groups in an amicus curiae brief to the U.S. Supreme Court in Gloucester County School Board v. G.G. because FUTURES has an interest in preserving Title IX protections that safeguard against gender-based discrimination. FUTURES has worked with colleges and universities around the nation to assist educational entities to enhance responses to sex discrimination in the school and to prevent discrimination based on gender at all levels of the educational system.

## **Harvard Law Gender Violence Policy Workshop**

The Harvard Law Gender Violence Program engages students in academic study and policy work to combat campus sexual assault, domestic violence, and other forms of gender-based harassment and discrimination. Diane Rosenfeld, Director of the Gender Violence Program and Lecturer on Law, is a preeminent scholar, Title IX expert, and public speaker who engages in Title IX reform through legal policy advising, training, and education around the world. She has successfully represented a number of sexual assault survivors in lawsuits against their universities. The students in the Gender Violence Policy Workshop work on a number of campus sexual assault and domestic violence prevention efforts. The Program supports the right of all transgender students to be treated equally, with dignity and respect, by their school boards.

### **If/When/How**

If/When/How is a national nonprofit that trains, networks, and mobilizes law students and legal professionals to work within and beyond the legal system to champion reproductive justice. If/When/How believes that reproductive justice will exist when all people have the ability to decide if, when, and how to create and sustain families with dignity, free from discrimination, coercion, or violence. Achieving reproductive justice requires a critical transformation of the legal system, from an institution that often perpetuates oppression to one that realizes justice.

### **Know Your IX**

Know Your IX is a non-profit organization dedicated to ending sexual and gender violence against



students. Run by students and young alumni who are themselves survivors, Know Your IX provides legal education, resources, guidance, trainings, and other support for students across the country. The organization also conducts policy advocacy to ensure young people can learn free from sexual abuse. Transgender students are at startling high risk of experiencing sexual harassment and violence in school. For this reason, Know Your IX advocates to ensure transgender students are fully protected by Title IX and empowered to stand up for their rights.

**Legal Aid at Work (formerly Legal Aid Society – Employment Law Center)**

Legal Aid at Work (formerly Legal Aid Society – Employment Law Center) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women and girls, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972 as well as Title VII of the Civil Rights Act of 1964. LAAW has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, see, e.g., *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an amicus curiae capacity. See, e.g., *U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Con-*

*trols*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). LAAW's interest in preserving the protections afforded to employees and students by this country's antidiscrimination laws is longstanding.

### **National Council of Jewish Women**

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws, policies, programs, and services that protect every child from abuse, neglect, exploitation, bullying, and violence and provide equal rights for individuals and couples of any and all sexual orientation, gender identity, and gender expression." Consistent with our Principles and Resolutions, NCJW joins this brief.

### **National Organization for Women (NOW) Foundation**

The National Organization for Women (NOW) Foundation is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal education opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization dedicated to eradicating sex-based discrimina-

tion, NOW Foundation is opposed to the use of sex-stereotypes for discriminating against transgender persons.

### **National Women's Political Caucus**

The National Women's Political Caucus is a pro-choice, multi-partisan grassroots organization, dedicated to increasing women's participation in the political process by recruiting, training and electing pro-choice women candidates. NWPC works to eliminate all forms of gender discrimination, including discrimination based on sexual orientation and gender identity. We remain committed to supporting equal rights for the transgender community, so that their voices may be amplified, securing their health, safety, and equality.

### **New Voices for Reproductive Justice**

New Voices for Reproductive Justice is a grassroots Human Rights organization for women of color, led by and about women of color, with offices in Pennsylvania and Ohio. New Voices' mission is to build a social change movement dedicated to the health and well-being of Black women and girls. New Voices defines Reproductive Justice as the human right of all women and people to control their bodies, sexuality, gender and gender identity, work and reproduction - as well as how they form families. For the last thirteen years, New Voices has served over 75,000 women of color through leadership development, community organizing, public policy advocacy, culture change, civic engagement, grassroots activism and political education. In 2015, New Voices founded the Lorde-Baldwin Leadership Institute, a leadership development program for queer and transgender people of color to define the needs of the

broader LGBTQIA+ community in the Greater Pittsburgh Region. In 2009, New Voices was a vocal policy advocate for the passage of the Allegheny County Non-Discrimination ordinance that would protect the civil rights of LGBTQIA+ residents in housing, employment and public accommodations. New Voices advocated for passage of a statewide non-discrimination bill in 2014 that would amend the Pennsylvania Human Relations Act to expand protection from discrimination to sexual orientation and gender identity or expression. New Voices worked with the City of Pittsburgh to re-establish the Mayor's Advisory Council on LGBTQIA+ Affairs beginning in 2015, and the council was re-launched in January 2017. New Voices currently serves on Pittsburgh's Affirmatively Furthering Fair Housing Task Force Gender and Sexual Orientation Subcommittee, a convening of advocates and city officials seeking to identify and redress barriers to affordable housing in Pittsburgh for LGBTQIA+ individuals.

### **Public Justice**

Public Justice is a national public interest law firm that pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. Public Justice has long worked to secure educational equity for students through lawsuits designed to enforce their rights under the Constitution and anti-discrimination laws. For example, Public Justice has represented students seeking gender equity in interscholastic and intercollegiate sports, as well as students who were denied equal educational opportunities because of gender-based harassment or sexual violence suffered at school.

## **Stop Sexual Assault in Schools**

SSAIS is a nonpartisan, nonprofit organization dedicated to proactively addressing the issue of sexual harassment and discrimination that impacts K-12 students and schools. SSAIS provides students, schools, and other organizations with resources so that the right to an equal education is not compromised by sexual harassment, sexual assault, and gender discrimination. SSAIS has provided legal assistance to students and their families, assistance to students and their families handling media inquiry, and has developed educational tools such as instructional videos to educate students and their families about their Title IX rights. Transgender students are at high risk for sexual victimization, and that risk is exacerbated by discriminatory school policies that stigmatize transgender students.

## **SurvJustice**

SurvJustice, Inc. (“SurvJustice”) is a national not-for-profit organization that increases the prospect of justice for survivors by holding both perpetrators and enablers of sexual violence accountable. SurvJustice does this by providing effective legal assistance to survivors that enforce their rights in campus, criminal and civil systems of justice. SurvJustice also provides policy advocacy and institutional training to changemakers working within their communities to better prevent and address sexual violence. By working on these fronts, SurvJustice aims to decrease the prevalence of sexual violence throughout the country.

SurvJustice has an interest in this case because a significant portion of our clientele are transgender and gender non-conforming students. These students

are often singled out for sexual violence and harassment in educational settings

### **The National Crittenton Foundation**

TNCF was founded in 1883 and its mission is to advance the health, economic security and civic engagement of girls and young women impacted by violence, adversity and trauma. Our twenty-six agencies provide services in 31 states and the District of Columbia supporting more than 135,000 girls and young women a year. As such, we represent thousands of marginalized young women across the country, some of who identify as transgender. The court's decision in this case has the potential to directly impact the young people we support in many ways, and we believe extensive experience in identifying and addressing discrimination rooted in sexism and in the denial of civil rights based on the unwillingness of systems and institutions to accept the expressed gender identity of girls and boys

### **Women's Law Project**

The Women's Law Project is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. Since 1974, WLP has engaged in high-impact litigation, public policy advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented amici curiae in *Prowel v. Wise Business Forms*, 579 F.3d 285 (3d Cir. 2009), to ensure full enforcement of Title VII's protection against sex discrimination in the workplace for a litigant who suffered harassment based on gender stereotyping. WLP was also instrumental in pas-

sage of the Allegheny County Human Relations Ordinance, which prohibits discrimination in employment, public accommodations, and housing based on sex, gender identity, and gender expression. From 2012 to 2016, WLP represented Rainbow Alliance, an LGBTQA-student group, in litigation filed under Pittsburgh's Fair Practices Ordinance challenging the University of Pittsburgh's gendered facilities policies. WLP currently serves on the Pennsylvania Department of Health's Transgender Health Workgroup, a convening of Pennsylvania advocates and government officials seeking to improve access to comprehensive health care for transgender and gender nonconforming people.

### **Women's Sports Foundation**

The Women's Sports Foundation (WSF) is a non-profit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and to creating an educated public that supports gender equity in sports. The WSF distributes grants and scholarships to female athletes and girls' sports programs, answers hundreds of inquiries per year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of girls and women in sports.