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 Appeal from the United States District Court
for the Eastern District of Virginia, Newport News Division,
Civil No. 4:15-cv-54 (Doumar, J.)

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: /s/ Christina A. Swarns Date: May 15, 2017

Counsel for: NAACP Leg. Def. and Educ. Fd., Inc.

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INTEREST OF *AMICUS CURIAE* [1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit civil rights legal organization that has, for over 75 years, fought to enforce the United States Constitution's guarantees of equal protection and due process on behalf of victims of discrimination. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

Although focused primarily on vindicating constitutional rights on behalf of victims of racial discrimination, LDF has also successfully fought against discrimination on the basis of sex, *see, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1972), and discrimination in places of public accommodation, *see, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

[1] The parties consent to the filing of this brief. Pursuant to Fed. R. App. P. 29(c), no counsel for a party authored this brief in whole or in part, and no such counsel/party contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae*, its constituents/counsel contributed money that was intended to fund preparing or submitting the brief.

Moreover LDF has participated as *amicus curiae* in cases across the nation addressing the rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals, *see, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, 2016 WL 1645027 (Colo. Apr. 25, 2016); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016).

Having advocated for integration throughout the country and in numerous aspects of public life—including access to public restrooms—LDF now writes to highlight the ways in which one of the darkest chapters in our nation's history is at risk of repeating itself.

Amicus have a strong and enduring interest in advancing integration and ensuring that the protections of anti-discrimination laws apply with equal measure to every individual. and submit that their experience and knowledge will assist the Court in its resolution of the questions presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

One fundamental question lies at its core of this case: can state actors physically separate and restrict individuals in public places solely because they are perceived to be different based on unfounded fears and prejudices?[2]

Time and time again, courts have rightly said that the principle of equality under the law dictates that the answer to this question is no. Accordingly, it is unconstitutional for a state to physically separate people into different schools or bathrooms by their race, regardless of the quality of the respective facilities; to separate and prohibit people from enjoying the benefits of marital union because of race or sex; to separate and restrict people from neighborhoods based on race or disability; or to separate and exclude people from the workplace based on race or sex. The broad application of this principle is central to the enduring strength of liberty and equal protection.

Given the vital importance of equal access to public accommodations and *amicus*' long experience challenging discrimination against disfavored groups, *amicus* register three core points in this brief:

[2] Since this Court first considered G.G.'s appeal, the Department of Education has withdrawn the guidance documents on which this Court's earlier opinion relied, and the Supreme Court has remanded the case to this Court. *See Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017).

First, there is a lengthy and troubling history of state actors using public restrooms and similar shared spaces to sow division and instill subordination. Not so long ago, bathrooms nationwide were designated "Colored Only" and "Whites Only." A key lesson of that painful and ignoble era is that while private-space barriers like racially segregated bathrooms may have once seemed, to some, like minor inconveniences or insignificant sources of embarrassment, they were, instead, a source of profound indignity that inflicted deep and indelible harms on individuals of both races and society at large. This disreputable tradition of state and local governments enshrining fear or hostility toward a disfavored group of people into laws requiring their physical separation from others should encourage this Court to view with skepticism the rationales proffered by local officials here.

Second, state officials often justified physical separation in restroom facilities, swimming pools, and marriage by invoking unfounded fears about sexual contact and exploitation. The purported concerns about sexual predation currently used as a basis for excluding transgender students from school bathrooms uncomfortably echo those used to justify the separate bathrooms for racial minorities.

Third, certain physical-separation rules that were applied to African Americans were also justified as protectionist – *e.g.*, for the good of the African-American community and/or to protect African Americans from harm that may arise from others' feelings of discomfort. Eventually, these kinds of rules were rejected

by both the courts and society at large because they conflict with the foundational constitutional principle that government shall not distinguish between people based on sex, race, or other arbitrary, perceived differences.

The arguments offered to defend the discriminatory singling out of G.G. are painfully similar to those that courts deemed to be insufficient to justify discrimination based on race. The proposition that G.G. should go back to using the "separate bathroom," JA-142, parrots the functionalist logic that was discarded along with "separate but equal."

We must not repeat the mistakes of the past. The all-too-familiar claim that G.G.'s physical separation is justified by fears of sexual contact, predation, danger, and/or amorphous discomfort is both factually baseless and legally immaterial. Instead, the weight of precedent and the guarantee of equal protection inexorably support recognition of G.G.'s simple and indelible dignity by letting him use the boys' bathroom with his peers.

ARGUMENT

The Gloucester County School Board ("School Board") has adopted a policy of singling out and physically separating certain students it perceives to be different based on an essential characteristic of their person. Nearly all students can use the bathroom that is consistent with their gender identity as male or female, except for

transgender students like G.G. Those students are relegated to separate, individual bathrooms away from other students.

To justify such unabashed discrimination and differentiation among students of the same gender, the School Board and its supporters contend that allowing transgender students to use a bathroom consistent with their gender identity would endanger or violate the privacy of other students. Yet, no evidence supports the demonstrably false claim of danger and the Board's own actions undermine its purported concern for the privacy needs of non-transgender students vis-à-vis their transgender peers. At the same time that it excluded transgender students from the regular student bathrooms, the Board instituted changes *within* those bathrooms to improve general "privacy for *all* students", including adding or "expanding partitions between urinals in male restrooms[,] adding privacy strips to the doors of stalls in all restrooms", and constructing "single-stall, unisex restrooms" available to all students. JA-143. (emphasis added).

In short, like other physical-separation rules in this tradition, the School Board's invocations of safety and privacy concerns attempt to establish a patina of legitimacy, but close examination reveals that discomfort, fear, and hostility toward transgender students because of their gender identity is their true motivation. At the school board meeting prior to the adoption of this policy, "[m]any of the speakers displayed hostility to G.G., including by referring pointedly to him as a 'young

lady,'" "a 'freak,'" and someone "who thinks he is a 'dog' and wants to urinate on fire hydrants." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016). But neither discomfort nor hostility can justify disparate treatment by the state.

This brief shows the connections between this, and other, separate bathroom policies that were impermissibly motivated by fear, discomfort, and hostility, but publicly justified by purported needs for safety, order, and/or privacy. When assessing the School Board's claims, it is therefore important to consider the troubling history of physical-separation rules involving bathrooms, *infra* § I, how unfounded fears of sexual predation have often been used to justify discrimination, *infra* § II, and how courts have struck down physical-separation rules in these and other contexts, recognizing the discomfort and unsupported perceived fears that underlay them, *infra* § III.

I. THE PHYSICAL SEPARATION OF BATHROOMS BY RACE WAS CONTROVERSIAL AND HARMFUL.

The School Board asserts that this case is novel because it involves transgender students in restrooms.[3] But history reveals that the exclusion of

[3] In actuality, protections for transgender persons are not new, since they are covered by federal law prohibiting discrimination on the basis of sex, including gender stereotypes. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

transgender students from bathrooms relies on a time-tested tactic of seizing upon sensitivities regarding bathrooms to sow division and discord.

The archetypal example is the physical separation of bathrooms by race, a defining feature of the Jim Crow era. "Public washrooms and water fountains were rigidly demarcated to prevent contaminating contact with the same people who cooked the white South's meals, cleaned its houses, and tended its children." Richard Kluger, *Simple Justice* 86 (1975). Because the courts and the country now see such bathroom separation as invidious and unconstitutional, it is worth examining the history of those laws and the justifications advanced to support them.

Prior to the Civil Rights Act of 1964, laws specifically addressing the racial segregation of bathrooms were widespread. Typifying these rules was a Florida Board of Health provision stating that "'where colored persons are employed or accommodated' separate toilet and lavatory rooms must be provided." *Robinson v. Florida*, 378 U.S. 153, 156 (1964) (footnote omitted). Among other settings, some courthouses physically separated bathroom users based on race. In *Dawley v. City of Norfolk*, 260 F.2d 647 (4th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959), for example, a Black lawyer sought to enjoin a Virginia city from segregating state court bathrooms, but, the federal courts declined to intervene, observing simply that "[t]he matter was one which affected the internal operations of the court of the State." *Id.* Likewise, "[u]nder President [Woodrow] Wilson, the Federal Government began to

require segregation in Government buildings . . . [and] separate bathrooms." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 394 (1978).

In the 1950s, still more laws governing the use of bathrooms were enacted or reinforced in response to *Brown* and *Brown II*. For example, the same year that a group of southern politicians announced massive resistance to *Brown* in the "Southern Manifesto," legislators in Louisiana passed a series of bills intended to flout federal integration mandates, including by requiring segregation in bathrooms. Adam Fairclough, *Race and Democracy: The Civil Rights Struggle in Louisiana, 1915-1972*, 205 (2008). *See also* Katie Reilly, *'Little Rock Nine' Student: Transgender Bathroom Debate Is Part of Civil Rights Fight*, Time, May 13, 2016, http://time.com/4329931/transgender-bathroom-obama-law-debate-civil-rights/ (comparing personal experience of integrating school post-*Brown* in 1957 with that of transgender students today).

Through the 1960s, physical-separation rules in bathrooms not only persisted, they were often enforced by violence and sparked intense political conflict. For example, in 1961, a group of Freedom Riders embarked on a bus trip to commemorate the *Brown* decision, and faced beatings when they attempted to use whites-only restrooms and other segregated facilities in South Carolina. Birmingham's Commissioner of Public Safety, "Bull" Connor, stated that "if the Negros attempt to use the restroom in the [bus] depot, Klansman are to beat them in

the rest room and 'make them look like a bulldog got a hold of them'; then remove the clothing of the victim and carry the clothing away [and then arrest them for trying to leave the restroom while nude]." Raymond Arsenault, *Freedom Riders: 1961 and the Struggle for Racial Justice* 92 (2011). When the Freedom Riders reached Alabama, a mob attacked them so brutally that numerous people were hospitalized and the journey had to be cut short. Additionally, in 1966, in Tuskegee, Alabama, "a white gas station attendant shot and killed, Sammy Younge, Jr., a Black Navy veteran and member of [the Student Nonviolent Coordinating Committee], as he attempted to use a 'white' toilet." Nat'l Park Serv., U.S. Dep't of the Interior, *Civil Rights in America: Desegregation of Public Accommodations* 1, 79-80 (2004, rev. 2009).

These state laws requiring separate facilities visited an immeasurable indignity on Black Americans. *See e.g.*, Margot Lee Shetterly, *Hidden Figures: The American Dream and the Untold Story of the Black Women Mathematicians Who Helped Win the Space Race* 108 (2016) ("[T]o be confronted with the prejudice [of having no Colored bathrooms in the building] so blatantly, there in the temple to intellectual excellence and rational thought, by something as mundane, so ridiculous, so universal as having to go to the bathroom [was especially hurtful]"). Before excursions downtown, many Black parents instructed their children to use the

facilities at home and to avoid using segregated public facilities. *See, e.g.*, Vernon E. Jordan Jr., *Movies That Unite Us*, N.Y. Times, Feb. 19, 2017, at SR3.

Dr. Martin Luther King, Jr. recounted his experience with segregated bathrooms:

> [A]s soon as I walked up [into a restroom for white men, an African-American attendant] looked over at me and said: "The, the, the colored room is over there." I didn't say anything; I just stood there. But he came up and touched me, and said: 'You belong over there; that's where the colored room is." I said: "Are you speaking to me?" 'Yes, sir, yes, sir. You see, the colored room is over there.'" I said: "Well, I'm going to stay here."

Dr. Martin Luther King Jr., "Some Things We Must Do," Address Delivered at the Second Annual Institute on Nonviolence and Social Change at Holt Street Baptist Church (Dec. 5, 1957), http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/some_things_we_must_do_address_delivered_at_the_second_annual_institute_on_.1.html. In the adjoining passage, Dr. King explained why this sort of experience was so painful:

> Segregation not only makes for physical inconveniences, but it does something spiritually to an individual. It distorts the personality and injures the soul. Segregation gives the segregator a false sense of superiority, and it gives the segregated a false sense of inferiority. But in the midst of this, we must maintain a sense of dignity and self-respect.

Id. Consistent with Dr. King's observation, *amicus* LDF, in cases as far back as *Brown*, presented evidence demonstrating that racial segregation – including in restrooms – hurts both the Black and White community. *See* R.L. Carter, *The Effect*

of Segregation and the Consequences of Desegregation: A Social Science Statement, reprinted in 37 Minn. L. Rev. 427 (1953).

Some of the vestiges of segregated bathrooms persist to this day. *See*, *e.g.*, Barbara Maranzani, *9 Things You May Not Know About the Pentagon*, History.com, (Jan. 15, 2013), http://www.history.com/news/9-things-you-may-not-know-about-the-pentagon (Pentagon still has twice as many bathrooms as necessary because of segregation). These "vestiges of discrimination—although clearly not the most pressing problems facing Black citizens today—are a haunting reminder of an all too recent period of our Nation's history." *Rogers v. Lodge*, 458 U.S. 613, 632 n.1 (1982) (noting, almost two decades after the Civil Rights Act, that "faded paint over restroom doors [in a Georgia courthouse] does not entirely conceal the words 'colored' and 'white'").

The injuries arising from segregation remain hard to cure. Even today, "powerful racial stereotype[s]—that of Black men as 'violence prone,'" *Buck v. Davis*, 137 S. Ct. 759, 776 (2017), or that "African-American men want to rape white women," *Fulmore v. M & M Transp. Servs., Inc.*, 2014 WL 1691340, at *8 (S.D. Ind. Apr. 29, 2014), have a detrimental effect on the treatment of Black people. *See also Shorter v. Hartford Fin. Servs. Grp., Inc*., 2005 WL 3536122, at *4 (D. Conn. Dec. 6, 2005).

II. STATE OFFICIALS HAVE INVOKED FEARS ABOUT SEXUAL CONTACT AND PREDATION BASED ON ODIOUS STEREOTYPES TO JUSTIFY RACIAL SEGREGATION AS WELL AS CRIMINALIZATION OF LESBIAN AND GAY INDIVIDUALS.

Misplaced concerns about sexual contact and predation have long been a central dimension of the rationales proffered to justify rules and practices that physically separate people based on class, sex and race. Today, however, even in the intimate context of bathing facilities, these rationales and the separations they sought to justify are widely understood to reflect such impermissible bases for government action as discomfort, dislike and fear. In resolving G.G.'s case, this Court should consider the history of state officials' impermissible reliance on anxieties about sexual exploitation in the context of race-based separation of bathrooms, *infra* § II.A, swimming pools, *infra* § II.B, interracial marriage, *infra* § III.C, and other laws governing lesbian and gay individuals, *infra* § III.D.

A. Bathrooms

Speculation and stereotypes about sexual contact, and disease were long used to justify the racial segregation of bathrooms. A 1957 Arkansas newspaper advertisement featured the loaded question "[b]ecause of the high venereal disease rate among Negroes . . . [will] white children be forced to use the same rest room and toilet facilities. . . ?" 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. Soc'y 42, 52 (2003). Public flyers hawked "uncontested medical opinions" that "girls under 14 year of age are highly susceptible to disease if exposed to the germs through seats, towels, books, and gym clothes." *Id.* at 63-64. When President Franklin Roosevelt eliminated racial segregation in bathrooms, "white female government workers staged a mass protest, fretting that they might catch venereal diseases if forced to share toilets with black women." Nick Haslam, *How the psychology of public bathrooms explains the 'bathroom bills'*, Wash. Post, May 13, 2016, https://www.washingtonpost.com/posteverything/wp/2016/05/13/how-the-psychology-of-public-bathrooms-explains-the-bathroom-bills/?utm_term=.089d65aa02f6.

These beliefs, of course, had no basis in reality. For example, in the landmark case of *Turner v. Randolph*, 195 F. Supp. 677 (W.D. Tenn. 1961), Black residents of Tennessee, represented by Thurgood Marshall and others, challenged segregation in public libraries. The City of Memphis voluntarily integrated certain facilities, but "expressly reserved" the question of desegregating bathrooms and "introduced proof . . . that the incidence of venereal disease is much higher among Negroes . . . than among members of the white race." *Id.* at 678-80. But the court flatly rejected Memphis's argument and discarded the supporting testimony of state public health officials, finding that "no scientific or reliable data have been offered to demonstrate

that the joint use of toilet facilities . . . would constitute a serious danger to the public health, safety or welfare." *Id.* at 680.

Trepidations regarding contact and "contamination" in the small setting of a restroom were also often offered as justifications for segregating these facilities. *See, e.g.*, C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 Rutgers L. Rev. 409, 423 (2009) (discussing privacy, cleanliness and morality rationales for race-based bathroom rules). As one scholar observed, "[t]he point of maintaining racially segregated bathrooms . . . was to make sure that blacks would not contaminate bathrooms used by whites." Richard A. Wasserstrom, *Racism and Sexism, in Race and Racism* 319 (Bernard P. Boxill ed., 2001). Yet these arguments about unduly close contact in bathrooms were plainly pretextual—and vague assertions about discomfort or privacy could hardly justify facially disparate treatment on the basis of sex. *See, e.g., United States v. Virginia*, 518 US 515, 540-46 (1996).

B. Swimming Pools

Similar sexual fears were invoked in the closely related context of swimming pools. "Northern whites in general objected to black men having the opportunity to interact with white women at such intimate and erotic public spaces" and "feared that black men would act upon their supposedly untamed sexual desire for white women by touching them in the water and assaulting them with romantic advances."

Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* 124 (2007); *see generally* William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. Rev. L. & Soc. Change 583, 588 (2014) ("stereotypes about black cleanliness and black dangerousness—particularly the perceived threat of sexual violence to white women—and the stigma attached to commingling of the races in intimate settings such as swimming pools had produced in whites a deep and visceral aversion to sharing public swimming facilities with blacks.").

In the mid-1950s, the federal district court that upheld Maryland's racial separation of bathing facilities recognized these concerns, observing that "[t]he degree of racial feeling or prejudice in this State at this time is probably higher with respect to bathing, swimming and dancing than with any other interpersonal relations except direct sexual relations." *Lonesome v. Maxwell*, 123 F. Supp. 193, 202 (D. Md. 1954) (citation omitted), *rev'd sub nom.* 220 F.2d 386 (4th Cir. 1955), *aff'd per curiam*, 350 U.S. 877 (1955). While the state had allowed some interracial activities, swimming facilities and bath houses were deemed a step too far because they "are for all ages, and are practically unsupervised, except by young life guards." *Id.* at 203. The court acknowledged that the separation operated, for the Black plaintiffs, as a barrier to "social integration with white people." *Id.* at 204. The court concluded: "The natural thing in Maryland at this time—whether at private or public beaches or

pools—is for Negroes to desire and choose to swim with Negroes and whites with whites, and for the proprietors of the facilities—whether public or private—to provide separate bathhouses, beaches and pools for the two races." *Id.* at 205.

C. Interracial Marriage

In the Jim Crow era, the prospect of interracial marriage was long exploited as the ultimate fear and was closely intertwined with the maintenance of segregated schools and other shared spaces. Indeed, "a primary reason for segregated schooling was to foreclose the interracial intimacy that might be sparked in integrated classrooms." Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. Sch. L. Rev. 175, 176 (2014-2015).

Loving challenged the deep-rooted stereotypes and fears that underlay the separation and subordination of African Americans in marriage. When Mr. and Ms. Loving were sentenced for violating Virginia's "Racial Integrity Act," the trial judge proclaimed: "Almighty God created the races white, black, yellow, malay and red, and he placed them on *separate* continents . . . . The fact that he *separated* the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (emphasis added). Likewise, when the Virginia Supreme Court upheld the state ban, it relied primarily on an earlier decision, *Naim v. Naim*, which involved an Asian-American and white couple and held that states had a right to "preserve . . . racial integrity" and prevent a "mongrel breed of citizens," "the obliteration of racial

pride" and the "corruption of blood [that would] weaken or destroy the quality of its citizenship." 87 S.E.2d 749, 756 (Va.), *vacated*, 350 U.S. 891 (1955), *cited in Loving v. Virginia*, 147 S.E.2d 78, 80 (Va. 1966). Virginia defended its ban, *inter alia*, on the ground that "intermarriage constitutes a threat to society," and cited purportedly scientific evidence "that the crossing of distinct races is biologically undesirable and should be discouraged." *See* Br. of Appellee at *44, 48, *Loving*, Civ. No. 395, 1967 WL 113931 (Mar. 20, 1967). LDF pointed out that "laws against interracial marriage are among the last of such racial laws with any sort of claim to viability. [They] are the weakest, not the strongest, of the segregation laws." Br. of Amicus N.A.A.C.P. at *14, *Loving*, Civ. No. 395, 1967 WL 113929 (Feb. 20, 1967).

The Supreme Court struck down Virginia's law because it was "designed to maintain White Supremacy." *Loving*, 388 U.S. at 11. In so doing, the Court rejected Virginia's post-hoc and pretextual rationalizations for enshrining separate categories of marriages. *Id.* ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."). *Loving* refused to credit *Naim*'s pseudo-scientific theories about the social and genetic consequences of interracial sexual contact, casting them aside as nothing more than "an endorsement of the doctrine of White Supremacy." *Id.* at 7.

D. Lesbian and Gay Criminalization and Discrimination

Finally, concerns about sexual contact and predation were also used to justify the criminalization of gay and lesbian individuals and their physical exclusion from certain environments. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), for instance, Georgia argued that homosexuality "is marked by . . . a disproportionate involvement with adolescents and, indeed, a possible relationship to crimes of violence" as well as the "transmission of . . . diseases." Br. of Pet'r at *36-37, *Bowers*, No. 85-140, 1985 WL 667939 (Dec. 17, 1985). In *Lawrence v. Texas*, oral argument featured discussion of whether "a State could not prefer heterosexuals or homosexuals to teach Kindergarten . . . . [because of the justification that children would be harmed because they] might be induced . . . to follow the path to homosexuality." No. 02-102, 2003 WL 1702534 at *20-21 (Mar. 26, 2003). *See also Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children [or] as teachers in their children's schools"). *Compare* Br. of Pet'r at *37, 40, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-273, 2017 WL 65477 (Jan. 3, 2017) (arguing that some people may exploit transgender bathroom access for "less worthy reasons," which might create a "hostile environment" for sexual assault victims).

Likewise, rationales offered to support excluding openly gay and lesbian individuals from both military and civil service echoed fears of sexual predation. Though focused on bathing for cleanliness rather than for recreation (as in the race discrimination cases), arguments expressed the concern that "showering bodies would be subjected to unwanted sexual scrutiny." Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201, 227, 228 (2012). Decades earlier, the chair of the Civil Service Commission similarly rejected a request to end a ban on openly gay people from federal civil service jobs, pointing to the "apprehension" other employees would feel about sexual advances and assault and related concerns regarding "on-the-job use of the common toilet, shower and living facilities." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010) (citation omitted), *aff'd sub nom.*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.*, 133 S. Ct. 2652 (2013).

As the Supreme Court has made clear, dislike of or discomfort around gays and lesbians is not a legitimate justification for discrimination. *Romer*, 517 U.S. at 632-33. The Equal Protection Clause prohibits the government from discriminating against one group in order to accommodate the prejudices or discomfort of another. "The Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

All told, the articulated rationales offered for physically separating transgender students in this case are comparable in many respects to those that were used to justify racially segregated bathrooms and swimming pools or the criminalization or exclusion of gays and lesbians. This Court must treat the arguments today with similar skepticism.

III. COURTS HAVE STRUCK DOWN PHYSICAL-SEPARATION RULES THAT IMPERMISSIBLY SOUGHT TO PROTECT SOME INDIVIDUALS FROM PERCEIVED DANGERS OR DISCOMFORT WITH OTHERS.

Viewed more broadly, the bathroom-exclusion rule here fits within a troubling tradition of local and state governments justifying the physical separation of certain groups from others under the guise of providing protection or avoiding discomfort. By excluding a subset of people from a setting where they would otherwise be present, these rules have discriminated impermissibly and have been repudiated both by courts and society at large. This is true regarding recreational facilities, *infra* § III.A, workplaces, *infra* § III.B, and housing, *infra* § III.C.

A. Public Recreational Facilities

Local and state governments have imposed group-based restrictions on the use of recreational facilities—like public parks, golf courses, and baseball and football fields, among others—purportedly to avoid discomfort or protect the public.

For example, the city of New Orleans argued that the Supreme Court's rationale in *Brown*, should not extend to its rule excluding Black plaintiffs from the city's public golf course and park facilities. The city claimed that *Brown* was "based on psychological considerations not here applicable." *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122, 123 (5th Cir.), *aff'd*, 358 U.S. 54 (1958). The Supreme Court rejected the argument as "completely untenable." *Id.* Similarly, federal courts across the country rejected a number of related physical-separation rules in public recreational facilities. *See, e.g., Holley v. City of Portsmouth*, 150 F. Supp. 6 (E.D. Va. 1957) (extending a temporary injunction against a city law restricting African Americans' use of golf courses to one day per week).

Notably, the Court refused to accept the City of Memphis's claim that safety required delaying the integration of public parks. *Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963) (recounting the city's arguments about "promot[ing] the public peace by preventing race conflicts" and that "gradual desegregation on a facility-by-facility basis is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil"). Instead, the Court stated that "neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials." *Id.* at 536. This is especially important in the

context of the instant case, where the School Board identified concerns about safety of students, *Grimm*, 822 F.3d at 716, 723, but similarly offered no factual evidence whatsoever to support its position.

In addition, the Court in *Watson* observed, "there was no factual evidence to support the bare testimonial speculations that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand." 373 U.S. at 536-37. School officials here, charged already with responsibility for keeping bathrooms safe for their students, have not indicated, other than in a vague, nonfactual manner, that the inclusion of transgender students in the bathrooms that conform to those students' gender identity will unduly tax their ability to perform this function.

More broadly, arguments about danger to and discomfort of the public were also offered to justify segregation in public swimming facilities, in addition to the sexualized fears discussed above, *supra* § II. Baltimore and Maryland argued, for example, that "preservation of order within the parks" and the authorities' responsibility "to avoid any conflict which might arise from racial antipathies" justified their insistence on racial separation for use of these facilities. *Dawson v. Mayor of Baltimore City*, 220 F.2d 386, 387 (4th Cir. 1955). They also claimed that segregation of the parks offered "'the greatest good of the greatest number'" of both Black and white citizens, on the view that most individuals, regardless of race, "are

more relaxed and feel more at home among members of their own race than in a mixed group." *Lonesome*, 123 F. Supp. at 202; *see also id.* (expressing concern about "racial feeling" that would result from removing the physical-separation rules).

No matter how the rationale was couched, courts around the country rejected such physical-separation rules. *See, e.g.*, *Tate v. Dep't of Conservation & Dev.*, 133 F. Supp. 53 (E.D. Va. 1955), *aff'd*, 231 F.2d 615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956) (rejecting denial of access to state parks based on race even when conducted by private actors acting on a lease).

B. Workplaces

In the employment context, states and others previously sought to rely on protectionist rationales for physically separating or excluding particular groups of people from certain workspaces. These physical-separation rules have similarly come to be understood as fundamentally impermissible.

For example, the Supreme Court previously expressed skepticism toward, and ultimately rejected, a private employer's rule forbidding women of childbearing age from working in certain parts of its factories where men were permitted to work. *See Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). The interest—in protecting the health of women and the children they might have—had the patina of legitimacy. But by examining the rule in context, the Court recognized that the health and safety rationale could not explain the sex-based exclusion. *Id.* at 198 ("Despite

evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees."). The Court added, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." *id.* at 211.

A deeply divided Court grappled with a similar justification in *Goesaert v. Cleary*, 335 U.S. 464 (1948), involving a Michigan law that forbid women, other than wives and daughters of the male bar owner, from working as licensed bartenders. According to the Court, "Michigan evidently believe[d] that" this law and form of familial oversight "minimizes hazards that may confront a barmaid" *Id.* at 466. In particular, "bartending by women," the Court wrote, "may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures." *Id.*

While a majority at the time accepted that argument, the three dissenters were able to see through the state's purported interest in protecting women. Because female owners could not work in their own bars even if a man was always present, the "inevitable result of the classification belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women. . . ." *Goesaert*, 335 U.S. at 468 (Rutledge, J., dissenting). Roughly a quarter-century after *Goesaert*, the Seventh Circuit easily invalidated a Milwaukee

ordinance that imposed a similar physical-separation rule, prohibiting female employees from sitting at the bar or with male customers at tables. *See White v. Fleming*, 522 F.2d 730 (7th Cir. 1975).

In the instant case, the facial exclusion of students from bathrooms based on gender likewise amounts to an explicit and impermissible form of discrimination.

C. Residential Restrictions

While arising in somewhat different factual circumstances, the physical separation of homes and neighborhoods based on discomfort with a particular group of people also involves the same underlying principle and, therefore, presents troubling historical parallels.

For example, in *City of Cleburne v. Cleburne Living Center*, Texas refused to authorize a group home for people with intellectual disabilities under its zoning regulations on the grounds that it "feared that the students [from a nearby school] might harass the occupants of the [] home." 473 U.S. 432, 449 (1985). The City Council also noted concerns about the home's location on an old flood plain and "expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents." *Id.* at 449-50.

The Supreme Court, however, concluded that the safety concerns did not hold up and that these legitimate-sounding rationales were a stand-in for "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a

zoning proceeding." *Id.* at 448. *See also id.* at 449 (describing the permit denial as "based on [] vague, undifferentiated fears"). *See also Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (striking down an amendment to a city charter that allowed discrimination in home sales and rejecting the city's argument that the amendment should survive challenge because it involved "the delicate area of race relations.")

Additionally, the now widely-discredited decision of *Korematsu v. United States*, provides yet another illustration of neutral-sounding rationales offered to justify a physical-separation rule that rested on distrust of a subgroup of Americans. There, as is well known, the "twin dangers of espionage and sabotage" were invoked to support a rule requiring Japanese-Americans to be forced out of their residences and into internment camps. 323 U.S. 214, 217 (1944). Because those fears were baseless, Mr. Korematsu's conviction was ultimately vacated, Congress awarded reparations, there was an official apology by the President, and an extraordinary confession of error by the United States. *See, e.g.*, Neal Katyal, *Confession Of Error: The Solicitor General's Mistakes During The Japanese-American Internment Cases*, (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

CONCLUSION

Precedent makes clear that the government may not physically separate and restrict individuals only because they are perceived to be different. That is particularly true when the underlying justification is built upon concerns about discomfort and fears of sexual predation that have no factual support. As the historical record shows, state officials have used such rationales to sow division and effectuate subordination rather than to provide meaningful protection. Such shaky arguments are bound to fail, as has been repeatedly recognized in the contexts of racially segregated bathrooms, the criminalization and exclusion of lesbian and gay individuals, and the varied restrictions on African Americans, Asian Americans, women, people with intellectual disabilities and others in public facilities, workplaces, and residential zoning.

Against the backdrop of these decisions, the separation of bathrooms by race is now rightly seen for what it is: immoral, insidious, and unambiguously impermissible. Even while striving to overcome the enduring vestiges and latest iterations of prejudice, *Brown, Loving, Obergefell* and other illustrious precedents reaffirm that our nation has a vast capacity to progress: "[W]hat was once a 'natural' and 'self-evident' ordering [of constitutional principles of equality] later comes to be seen as an artificial and invidious constraint on human potential and freedom." *Cleburne*, 473 U.S. at 466 (Marshall, J., concurring). Indeed, not one of the crass,

stereotypical predictions about the dangers of racially integrating restrooms—or swimming pools or neighborhoods or beyond—have come to fruition.

Likewise here, concerns about dangers to non-transgender students from the presence of transgender students in the bathrooms are belied both by evidence that transgender students, including G.G., have been using bathrooms without harm to others, and the well documented harms of discrimination and violence against transgender youth. *See, e.g.*, U.S. Dep't of Health & Human Services, *LGBT Youth: Experiences With Violence*, (Nov. 12, 2014), https://www.cdc.gov/lgbthealth/youth.htm.

Today, our statutes and citizenry alike have a "continuing role in moving the Nation toward a more integrated society," *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015) (citation omitted), G.G.'s simple plea to be treated equally in the eyes of the law is an important step along that path.

For the foregoing reasons, this Court should rule in favor of G.G.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 15-2056 **Caption:** G.G. ex rel. Grimm v. Gloucester County School Board

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