

15-2056

United States Court of Appeals for the Fourth Circuit

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

**BRIEF FOR THE STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE,
MARYLAND, MASSACHUSETTS, NEW MEXICO, OREGON,
PENNSYLVANIA, RHODE ISLAND, VERMONT, AND VIRGINIA,
AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE*
IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL**

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INTEREST OF THE AMICI STATES

The amici States file this brief in support of G.G. See *infra* 35-37 (listing signatories); Fed. R. App. P. 29(a)(2).

The amici States strongly support the right of transgender people—individuals whose gender identity differs from their sex assigned at birth—to live with dignity, be free from discrimination, and have equal access to employment, housing, public accommodations, education, and other necessities. Discrimination against transgender people has no legitimate basis, and serves only to injure a group feared for being different. It harms transgender people at work, at school, and in other settings, causing tangible economic, emotional, and health consequences. The amici States accordingly have adopted policies protecting transgender people against discrimination.

The amici States' experience demonstrates that ensuring equality for transgender people—including by allowing them access to common restrooms consistent with their gender identity—benefits all, without threatening safety or privacy, or imposing significant costs.

The amici States also share a strong interest in seeing that Title IX is properly applied to protect transgender people from discrimination in

federally funded educational institutions. Defendant's policy violates Title IX by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. If entities receiving Title IX funds are allowed to discriminate in this way, transgender people will be denied equality in defendant's schools and in many other places. The amici States have important interests in ensuring that their transgender populations do not experience indignity and discrimination when they travel to other States.

QUESTION PRESENTED

Whether Gloucester County School Board's policy—which prohibits transgender boys and girls from using the restrooms used by other boys and girls—discriminates “on the basis of sex” in violation of Title IX of the Education Amendments of 1972, *see* 20 U.S.C. § 1681(a).

SUMMARY OF ARGUMENT

Discrimination based on gender identity causes significant harm to transgender people and the amici States. Policies promoting tolerance and inclusion of transgender people can reduce that harm. The experience of the amici States and of local governments around the country shows that such policies confer broad social benefits without compromising personal privacy or requiring significant public expenditures.

Title IX provides a crucial additional tool for ensuring equality by guaranteeing that transgender people can travel freely across State lines without fearing discrimination by educational institutions receiving federal funds. Contrary to the arguments of defendant and its amici, enforcing Title IX's mandate of gender equality in the circumstances of this case does not violate the Spending Clause of the Constitution, U.S. Const. art. I, § 8, cl. 1. The application of federal equality requirements to particular fact patterns inevitably raises questions, but the resolution of those questions does not impose new mandates on recipients of federal funds in violation of the Spending Clause where—as here—the text of the

statute itself, as informed by prior judicial decisions, is sufficient to resolve the issue.

ARGUMENT

POINT I

DISCRIMINATION AGAINST TRANSGENDER PEOPLE HARMS THE AMICI STATES AND THEIR RESIDENTS

Nearly 1.5 million people in the United States identify as transgender.¹ They serve our communities as members of the armed services, police officers, firefighters, doctors, scientists, engineers, professors, attorneys, and more.² Transgender people have been part of cultures worldwide “from antiquity until the present day,” and professional psychologists recognize that being transgender is natural

¹ Andrew R. Flores et al., How Many Adults Identify as Transgender in the United States? 3-4 (Williams Inst. June 2016) (internet). (For authorities available online, full URLs appear in the table of authorities.)

² Sources documenting transgender people in all of these roles are provided in the brief amicus curiae filed in this case in the Supreme Court by New York, Washington, sixteen other States, and the District of Columbia. Br. for the States of New York, et al. 4 nn.2-9 (internet).

and not any form of pathology.³ Being transgender does not in itself inhibit a person's ability to contribute to society.⁴

Unfortunately, transgender people often experience harsh discrimination that limits their ability to realize their potential. See *infra* 8-12. States accordingly began providing explicit civil-rights protections for transgender people nearly a quarter century ago. Today, twenty States and the District of Columbia offer such protections.⁵ At least six

³ Am. Psychol. Ass'n (APA), *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 1 (3rd ed. 2014) (internet); see also APA, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70 Am. Psychol. 832, 834 (2015).

⁴ See Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity*, Huffington Post (June 4, 2013) (internet) (“[T]he distress that accompanies gender dysphoria arises as a result of a culture that stigmatizes people who do not conform to gender norms[.]”).

⁵ **California:** Cal. Civ. Code § 51(b) (public accommodations); Cal. Educ. Code §§ 220, 221.5 (education and school restrooms); Cal. Gov't Code §§ 12926, 12940, 12946 (employment); *id.* § 12955 (housing); Cal. Penal Code § 422.76 (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* § 4603(b) (housing); Del. Code Ann. tit. 19, § 711

(employment). **Hawai‘i:** Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Maine:** Me. Rev. Stat. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov’t § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (schools); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Mass. Acts ch. 134 (2016)). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education). **Nevada:** Nev. Rev. Stat. § 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050, 651.070 (public accommodations). **New Jersey:** N.J. Stat. Ann. § 10:5-4 (public accommodations, employment, housing); *id.* § 10:5-5(rr) (definition); *id.* § 10:5-12 (employment). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13 (interpreting the N.Y. Exec. Law § 296 (Human Rights Law) definition of “sex” to include gender identity). **Oregon:** Or. Rev. Stat. § 174.100(7) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34a-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); Vt. Stat. Ann. tit. 9, § 4502 (public accommodations); *id.* § 4503 (housing); Vt. Stat. Ann. tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code § 28A.642.010 (schools); *id.* § 49.60.040(26) (definition); *id.* § 49.60.180 (employment);

more States bar gender-identity discrimination in state employment.⁶ And at least 225 local governments prohibit discrimination based on gender identity or expression.⁷ As the experience of these jurisdictions shows, policies ensuring equality for transgender people—including access to public facilities consistent with their gender identity—promote safe and inclusive communities, workplaces, and schools: a benefit to all.

id. § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

⁶ **Kentucky** (2008): Relating to Equal Employment Opportunities and Non-Discrimination in Employment, Exec. Order No. 2003-533. **Louisiana** (2016): Equal Opportunity and Non-Discrimination, Exec. Order No. JBE 2016-11. **Michigan** (2007): Equal Opportunity in State Employment, Exec. Dir. 2007-24 (internet). **Montana** (2016): Prohibiting Discrimination in State Employment and Contracts, Exec. Order No. 04-2016. **Pennsylvania** (2016): Equal Employment Opportunity, Exec. Order No. 2016-04. **Virginia** (2014): Equal Opportunity, Exec. Order No. 1.

⁷ Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (current as of Jan. 28, 2016) (internet).

A. Transgender People Face Pervasive and Harmful Discrimination.

The amici States’ “interests in the health and well-being of [their] residents extend beyond mere physical interests to economic and commercial interests,” and to an interest in “securing residents from the harmful effects of discrimination.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) (calling this interest “substantial”).

1. Discrimination at school

Transgender students experience levels of discrimination, violence, and harassment that are much higher than for non-transgender students.⁸ In the 2015 National Transgender Discrimination Survey (NTDS), the largest survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12

⁸ Joseph G. Kosciw, *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools* xxiii (Gay, Lesbian & Straight Educ. Network 2014) (internet); see also Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools* xi (Gay, Lesbian & Straight Educ. Network 2009) (internet).

reported experiencing harassment by students, teachers, or staff.⁹ More than half of transgender students (54%) reported verbal harassment, and more than a third reported suffering either a physical attack (24%) or sexual assault (13%).¹⁰ Another 2015 survey showed that three-fourths of transgender students felt unsafe at school because of their gender expression.¹¹

Such harassment inhibits transgender students' ability to learn, and implicates the amici States' core interest in educating their youth, *see, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (listing other supporting cases). Education advances more than the private interests of students: among other things, it prepares them to contribute to society socially, culturally, and economically. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁹ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat'l Ctr. for Transgender Equality 2016) (internet).

¹⁰ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132-34.

¹¹ Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, and Transgender Youth in Our Nation's Schools* 84-85 (Gay, Lesbian & Straight Educ. Network 2016) (internet).

The 2015 NTDS revealed that nearly twenty percent of transgender students left a K-12 school because the mistreatment was so severe.¹² In another national survey, 46% of transgender students reported missing at least one day of school in the preceding month because they felt unsafe or uncomfortable at school.¹³ The same survey found that 40% of students who experienced frequent verbal harassment because of their gender expression did not plan to continue on to college.¹⁴

2. Discrimination in the workplace

The 2011 NTDS found that transgender people report “[n]ear universal harassment on the job,” including verbal harassment, intrusive questions about surgical status, denial of access to restrooms, and physical and sexual assault.¹⁵ Nearly all of those surveyed (90%) had experienced “harassment or mistreatment on the job or [taken] actions to

¹² James et al., *2015 U.S. Transgender Survey, supra*, at 135.

¹³ Greytak et al., *Harsh Realities, supra*, at 14.

¹⁴ *Id.* at 27 fig. 16.

¹⁵ Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51, 56 (Nat’l Ctr. for Transgender Equality and Nat’l Gay & Lesbian Task Force 2011) (internet).

avoid it.”¹⁶ A majority of the survey respondents (57%) had delayed their gender transition and an even greater share (71%) felt compelled to hide their gender identity for some period of time.¹⁷

The stress of job-related discrimination and harassment causes transgender workers to change or quit jobs; experience poor job performance, absence, or tardiness; and suffer underemployment (working in a field or position for which they are overqualified).¹⁸ Rates of unemployment, poverty, and homelessness for transgender people far exceed those of the population as a whole.¹⁹ Such outcomes harm transgender people and also impair the economies and fisces of the amici States.²⁰

¹⁶ *Id.* at 51.

¹⁷ *Id.* at 63.

¹⁸ *Id.* at 55; 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) (internet).

¹⁹ James et al., *2015 U.S. Transgender Survey*, *supra*, at 140-45, 178.

²⁰ See Taylor N.T. Brown & Jody L. Herman, *The Cost of Employment Discrimination against Transgender Residents of Florida* (Williams Inst. 2015) (internet); Jody L. Herman, *The Cost of Employment and Housing Discrimination against Transgender Residents of New York* (Williams Inst. 2013) (internet); Crosby Burns et al., *Gay*

B. Gender-identity Harassment Presents Significant Health Risks.

Gender-identity harassment—including denial of access to appropriate restroom facilities—can have serious health consequences. Transgender people attempt suicide at a rate nine times that of the general population.²¹ Forty percent of respondents to the 2015 NTDS had attempted suicide, and twice that number (82%) had seriously thought about killing themselves.²² One recent study found that transgender people who had been denied access to bathroom facilities were approximately 40% more likely to have attempted suicide than were other transgender people.²³

Suicide is not the only health risk. For example, defendant's denial of appropriate restroom facilities to G.G. caused him to “hold it in” and

and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers (Ctr. for Am. Progress & AFSCME 2012) (internet).

²¹ James et al., *2015 U.S. Transgender Survey*, *supra*, at 114.

²² *Id.*

²³ Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 *J. of Homosexuality* 1378, 1388 tbl. 2 (2016) (internet).

refrain from drinking fluids to avoid needing to use a restroom at school; he consequently developed multiple urinary tract infections. JA32-33.

Research shows that G.G.'s experience is not unique. More than two-thirds (69.5%) of the transgender students surveyed in one study had avoided school restrooms because they felt unsafe or uncomfortable.²⁴ And 54% of respondents in another study of transgender people reported negative health effects from avoiding public restrooms, such as dehydration, kidney infections, and other kidney-related problems.²⁵

²⁴ Kosciw et al., *2015 National School Climate Survey*, *supra*, at 86.

²⁵ Herman, *Gendered Restrooms*, *supra*, at 75.

C. The Amici States' Experience Shows That Protecting Transgender People from Discrimination Yields Benefits Without Causing Privacy, Safety, or Cost Problems.

As noted above, 20 States and at least 225 localities provide civil-rights protections to transgender people—including policies allowing transgender people to use restrooms consistent with their gender identity. These provisions help ease the stigma transgender people often experience, with positive effects for their educational, work, and health outcomes. Such provisions achieve those ends without threatening individual safety or privacy, or imposing significant costs.

1. Allowing transgender students and employees to use restrooms consistent with their gender identity confers broad benefits.

Supportive educational environments increase success rates for transgender students. Data from one national survey show that more-frequently harassed transgender students had significantly lower grade-point averages than transgender students who were never, rarely, or sometimes harassed.²⁶

²⁶ Greytak et al., *Harsh Realities*, supra, at 27 fig. 15.

Policies allowing transgender students to live consistently with their gender identity also can reduce the health risks facing those students. California adopted protections against gender-identity discrimination in schools to address harms suffered by transgender students, including students not drinking and eating during the school day to avoid restroom use.²⁷ Clear Creek Independent School District in Houston allowed a transgender boy to use the boys' bathroom at school after learning he was trying to "hold it in' for the entire school day."²⁸

In the employment context, antidiscrimination protections benefit employees and employers alike. Last year, 68 companies, including some of the country's largest, submitted a brief supporting the United States' challenge to a state law mandating the discriminatory denial of bathroom access to transgender people.²⁹ As those companies explained, policies

²⁷ Cal. Assemb. Comm. on Educ., Report on Assemb. Bill No. 1266, at 5 (2013-2014 Reg. Sess.) (internet).

²⁸ Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Texas Trib., June 14, 2016 (internet).

²⁹ Amicus Curiae Br. by 68 Companies Opposed To H.B. 2 & in Support of Pl.'s Mot. for P.I., *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C. July 8, 2016), ECF No. 85-1.

protecting lesbian, gay, bisexual and transgender (LGBT) employees—such as policies allowing transgender employees to use restrooms consistent with their gender identity—offer tangible advantages for employee recruitment and retention.³⁰ Indeed, three-fourths of Fortune 500 companies, and 92% of U.S. companies surveyed by the Human Rights Campaign in 2016, explicitly protect employees from gender-identity discrimination.³¹ Such policies are attractive to workers: research demonstrates that LGBT and non-LGBT workers alike prefer to work in States and for companies with LGBT-supportive policies and laws.³²

Like the 68 companies in the United States’ lawsuit, the amici States are employers seeking to maximize employee health, productivity, and retention. And like those companies, the amici States have seen that when employees are able to express their gender identity at work, they

³⁰ *Id.* at 16.

³¹ *Id.* at 4.

³² *Id.* at 16.

can bring more to their jobs.³³ For example, when transgender workers can safely transition and have their gender identity respected, they experience increased job performance and satisfaction.³⁴

The ability to use work restrooms corresponding to one's gender identity plays a significant role in transgender employees' levels of job satisfaction, and consequent decisions to remain in their jobs. One survey of transgender employees who had *not* been forced to leave a job due to discrimination or harassment found that the overwhelming majority (86%) were able to use gender-appropriate restrooms.³⁵

All workers benefit from a workplace that is civil and free of harassment. And by protecting transgender employees from discrimination, public and private employers benefit from an economy that maximizes all workers' contributions.

³³ *See id.* at 6.

³⁴ Grant et al., *Injustice at Every Turn*, *supra*, at 3.

³⁵ *Id.* at 61.

2. Public safety concerns are unfounded.

In States allowing transgender students to use bathrooms corresponding to their gender identity, public schools have reported no instances of transgender students harassing others in restrooms or locker rooms.³⁶ Defendant's speculation that public safety will suffer if transgender people are treated fairly is thus unfounded, and contrary to the actual experience of States and localities where nondiscrimination is already the law.³⁷

For instance, a former County Sheriff noted that Washington State has protected gay and transgender people from discrimination for a

³⁶ Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan, Sept. 2016, at 20, 21 (internet).

³⁷ See, e.g., Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, Media Matters for Am. (June 3, 2015) (internet) (largest school districts in 12 States with gender-identity protection laws); Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for Am. (Mar. 20, 2014) (internet) (law enforcement officials, government employees, and advocates for sexual assault victims); Luke Brinker, *California School Officials Debunk Right-Wing Lies About Transgender Student Law*, Media Matters for Am. (Feb. 11, 2014) (internet) (six of California's largest school districts, including two that have had antidiscrimination policies for more than a decade).

decade “with no increase in public safety incidents as a result”; he emphasized “that indecent exposure, voyeurism, and sexual assault, are already illegal, and police use those laws to keep people safe.”³⁸ In 2013, the Los Angeles Unified School District—the second largest in the country, with more than 640,000 K-12 students—reported to the California Legislature that the district had “no issues, problems or lawsuits as a result of [a 2004] policy” requiring access for students to restrooms corresponding to their gender identity.³⁹ And the Massachusetts Chiefs of Police Association reported that allowing people to use public bathrooms consistent with their gender identity “improve[s] public safety.”⁴⁰ Meanwhile, in Texas, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those

³⁸ David Crary, *Debate over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib., May 10, 2016 (internet).

³⁹ Cal. Sen. Comm. on Educ., Bill Analysis: Assemb. Bill No. 1266, at 8 (2013-2014 Reg. Sess.) (internet); L.A. Unified Sch. Dist., District Information (internet).

⁴⁰ Letter from Chiefs William G. Brooks III & Bryan Kyes to Senator William N. Brownsberger & Representative John V. Fernandes (Oct. 1, 2015) (internet).

cities' policies allowing transgender people to use restrooms consistent with their gender identity.⁴¹

These accounts have been confirmed by organizations that provide services to sexual assault and domestic violence victims. In April 2016, nearly 325 sexual assault and domestic violence service providers—including 46 national organizations, and 277 state and local organizations (representing 44 States, the District of Columbia, Guam, and the Virgin Islands)—issued a statement rebutting claims that restricting transgender people's access to gender-specific facilities prevents sexual violence against women and children.⁴² The statement notes that a considerable number of municipalities and States have enacted nondiscrimination laws protecting transgender people's access to

⁴¹ *Texas Experts Debunk The Transgender "Bathroom Predator" Myth Ahead Of HERO Referendum*, Equality Matters (Oct. 15, 2015) (internet); see also, e.g., Fox News Sunday, Transcript: Gov. McCrory on Showdown over NC's Transgender Bathroom Law (May 8, 2016) (internet) (no known cases of people in North Carolina committing crimes in bathrooms under the cover of protections provided to transgender people).

⁴² *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community 1* (updated Apr. 29, 2016) (internet).

facilities consistent with their gender identity, and in some of those jurisdictions, these laws have been in place for decades.⁴³ Yet “[n]one of those jurisdictions have seen a rise in sexual violence or other public safety issues due to nondiscrimination laws.”⁴⁴ Simply put, “discriminating against transgender people does nothing to decrease the risk of sexual assault.”⁴⁵

Indeed, discriminatory restroom policies create, if anything, a needless risk of violence against transgender people, whose physical appearance diverges from their sex assigned at birth and who therefore are likely to be perceived as using the “wrong” restroom.⁴⁶

3. Privacy and cost concerns also are unfounded.

State experiences show that privacy and cost concerns are similarly unfounded. Calls for privacy are premised on the suggestion that

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 2.

⁴⁶ James et al., *2015 U.S. Transgender Survey*, *supra*, at 226-27; see also Matt Pearce, *What It's Like to Live Under North Carolina's Bathroom Law If You're Transgender*, L.A. Times, June 12, 2016 (internet).

students will see others' intimate body parts or have their intimate body parts seen by others. But that risk is not presented by ordinary restroom use. Nor is it particular to situations where transgender students use common restrooms: it arises whenever *any* group of students is present in a common facility. And in any event, concerns about the presence of others (whether or not transgender) can be addressed—and are being addressed—by increasing privacy options for all students, without singling out transgender people for differential treatment.

Employers and school districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. In Washington State, school districts provide “[a]ny student—transgender or not—who has a need or desire for increased privacy, regardless of the underlying reason,” with “access to an alternative restroom (e.g., staff restroom, health office restroom).”⁴⁷ This gives “students who may feel

⁴⁷ Wash. State Super. of Pub. Instruction, *Prohibiting Discrimination in Washington Public Schools* 30 (2012) (internet); see also Wash. State Human Rights Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-Segregated Facilities* 3 (Jan. 15, 2016) (internet) (businesses need not “make any [structural] changes” or

uncomfortable sharing the facility with the transgender student(s) the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”⁴⁸

Similar provisions apply to locker rooms. Students in Washington are allowed to participate in physical education and athletic activities “in a manner that is consistent with their gender identity.”⁴⁹ But rather than segregating transgender students, additional privacy is provided for any student who desires it, regardless of the underlying reason, by providing “a reasonable alternative changing area, such as the use of a private area (e.g., a nearby restroom stall with a door), or a separate changing schedule.”⁵⁰

“add additional facilities,” but “are encouraged to provide private areas for changing or showering whenever feasible” and “may wish to explore installing partitions or curtains for persons desiring privacy”).

⁴⁸ Wash. State Super., *Prohibiting Discrimination*, *supra*, at 30.

⁴⁹ *Id.*; Wash. Interscholastic Activities Ass’n, *2016-17 Official Handbook* § 18.15.0, at 31-32 (2016) (internet); *see also* Cal. Dep’t of Educ., *Frequently Asked Questions: Equal Opportunity & Access* (Jan. 18, 2017) (internet) (providing similar standards).

⁵⁰ Wash. State Super., *Prohibiting Discrimination*, *supra*, at 30-31; *see also* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 20 (2011) (internet) (providing similar standards).

At least ten other States and the District of Columbia offer similar guidance to help schools maximize privacy while complying with laws prohibiting gender-identity discrimination—for instance, by offering privacy curtains and separate restroom and changing spaces to all who desire them.⁵¹ None of these solutions requires remodeling or

⁵¹ **California:** Cal. Sch. Bds. Ass'n, Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities 2 (Mar. 2014) (internet). **Colorado:** Colo. Ass'n of Sch. Bds. et al., Guidance for Educators Working with Transgender and Gender Nonconforming Students 4 (n.d.) (internet). **Connecticut:** Conn. Safe Sch. Coal., Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 8 (Apr. 2012) (internet). **Iowa:** Iowa Dep't of Educ., Equality for Transgender Students (Feb. 2015) (internet). **Maryland:** Md. State Dep't of Educ., Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination 13-14 (Oct. 2015) (internet). **Massachusetts:** Mass. Dep't of Elem. & Secondary Educ., Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment 9-10 (n.d.) (internet). **New York:** N.Y. State Educ. Dep't, Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students 9-10 (July 2015) (internet). **Oregon:** Or. Dep't of Educ., Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students 10-11 (May 2016) (internet). **Rhode Island:** R.I. Dep't of Educ., Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students (June 2016) (internet). **Vermont:** Vt. Agency of Educ., Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students 6, 8-9 (Feb. 2017) (internet). **District of Columbia:** D.C. Pub.

restructuring restrooms, or otherwise investing in costly facility upgrades. As a spokeswoman for Houston’s Clear Creek Independent School District confirmed, that district, like many others, “ha[s] been successful in balancing the rights of all students without issue and offer[s] restrooms, showers and changing areas for students seeking privacy, regardless of their gender or gender identity.”⁵²

POINT II

TITLE IX IS A CRUCIAL SUPPLEMENT TO STATE AND LOCAL EFFORTS TO COMBAT GENDER-IDENTITY DISCRIMINATION

A. The Amici States Have a Strong Interest in Ensuring Uniform Protection for Transgender People Under Title IX.

Defendant’s policy requires transgender people to use facilities inconsistent with their gender identity, as perceived by themselves and others, thereby demeaning transgender people and subjecting them to hostile encounters with other users of those facilities. The effects of this policy—and others like it in jurisdictions around the country—will fall

Schs., Transgender and Gender-Nonconforming Policy Guidance 9 (June 2015) (internet).

⁵² Ura, *For Transgender Boy*, *supra*.

not only on transgender people who live in those jurisdictions, but on all who visit those jurisdictions.

The amici States' residents, including students who are transgender, may travel to such jurisdictions to study, or to participate in or watch sporting events or other competitions, performances, or exhibitions. They may wish to attend universities in such jurisdictions, especially institutions offering unique academic programs or scholarships. Our scholars may collaborate with researchers at universities in such jurisdictions or attend conferences at such universities. Our students and scholars may need to use distinctive laboratory or other facilities, or consult archives and other unique research materials. Trips to access such facilities and materials may be crucial to our residents' personal and professional fulfillment.

If allowed to stand, discriminatory policies like defendant's will make travel to other jurisdictions more difficult for residents of our States who are transgender or who do not conform to traditional sex stereotypes. Such policies may dissuade them from such travel altogether. Those residents thus will face barriers in their personal or professional lives that are not faced by other residents of our States—

precisely the sort of disparate treatment on the basis of gender identity that the amici States seek to prevent. Permitting such disparate treatment is inconsistent with important interests of the amici States and with Title IX.

B. Applying Title IX's Mandate of Gender Equality to the Circumstances of This Case Does Not Violate the Spending Clause.

There is no merit to defendant's argument—echoed by States appearing as defendant's amici in the Supreme Court⁵³—that interpreting Title IX to grant G.G. and other transgender students access to common restrooms consistent with their gender identity will impose a new condition on the receipt of federal funds in violation of the Spending Clause. Suppl. Br. of Gloucester County School Board 45-47. It is undisputed that Title IX lawfully requires recipients of federal funds to refrain from discrimination based on sex. The application of that principle to new facts and new discriminatory policies does not create a new mandate violating the rule that conditions on the receipt of federal

⁵³ Br. of Amici Curiae the State of West Virginia, et al. 28-35 (internet).

funds must be announced in advance, at a time when the recipient can decide whether to accept the funds.

The Supreme Court made clear decades ago that when Congress places conditions on the receipt of federal funds in the exercise of its Spending Clause power, it need not “specifically identif[y] and proscrib[e]” each and every condition in the relevant legislation. *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 665-66 (1985). Accordingly, clarifying the details of such conditions may be within the bounds of a statute itself and therefore permissible and appropriate. *See id.*

The Supreme Court has similarly recognized that where the scope of federal requirements is clarified through litigation, that circumstance alone does not compel a conclusion that recipients of federal funding lack the required notice of their potential liability for violating a federal command. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005) (school board had sufficient notice that Title IX prohibits intentional retaliation against individuals complaining about sex discrimination against third parties). Further judicial explication of existing federal requirements thus does not inherently violate the Spending Clause.

Indeed, the Supreme Court has long applied the broad antidiscriminatory commands of Title IX and comparable laws to particular discriminatory conduct without suggesting that it was imposing new obligations. For instance, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)—a watershed Title VII decision—the Court held for the first time that sex discrimination includes disparate treatment based on an employee’s failure to live up to gender stereotypes.⁵⁴ The gravamen of plaintiff’s claim was that her employer had impermissibly declined to promote her to partnership because of her nonconformity with stereotypes about female demeanor, speech, and dress. *Id.* at 235 (plurality op.).

The Court rejected the notion that refusing to promote plaintiff on these bases fell outside Title VII’s ban on gender discrimination. *Id.* at 251 (plurality op.); *see also id.* at 272-73 (O’Connor, J., concurring in the judgment). The Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they

⁵⁴ *See also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (looking to Title VII case law in evaluating Title IX sex-discrimination claim); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (same).

matched the stereotype associated with their group.” *Id.* at 251 (plurality op.). As the Court explained, “Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.” *Id.* (quotation marks omitted; emphasis added).

Price Waterhouse thus made clear that federal sex-discrimination laws cover more than just discrimination based on an individual’s biological status as “male” or “female”—and it did so without hinting that its application of Title VII to the distinct circumstances of that case created a new rule of conduct. Along similar lines, the Court in *Oncale v. Sundowner Offshore Services, Inc.*, applied Title VII in the novel context of male-on-male sexual harassment. 523 U.S. 75, 79-80 (1998). The Court expressly acknowledged that such harassment “was assuredly not the principal evil Congress was concerned with when it enacted Title VII.” *Id.* As the Court explained, however, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” *Id.*

Discrimination against transgender people is just such a comparable evil. As the courts of appeals have increasingly recognized,

disadvantaging someone because of gender nonconformity is equally impermissible whatever the cause of the nonconformity.⁵⁵

Defendant's policy subjects G.G. and other transgender students to just such discrimination. It needlessly denies transgender people a privilege most people take for granted—the ability to use a public

⁵⁵ See, e.g., *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (recognizing Title VII sex-discrimination claim based on sexual orientation, because being gay or lesbian “represents the ultimate case of failure to conform” to gender stereotypes); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (Equal Protection Clause’s prohibition of sex-based discrimination violated when transgender employee fired because of gender nonconformity); *Smith v. City of Salem*, 378 F.3d 566, 572, 574-75 (6th Cir. 2004) (Title VII barred discrimination against transgender woman for her “failure to conform to sex stereotypes concerning how a man should look and behave”); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (biological male dressed in feminine attire may have a viable claim under Equal Credit Opportunity Act when bank refused to provide him a loan); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (transgender people may state a claim under the Gender Motivated Violence Act); see also *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (dismissing employee’s claim alleging that transgender co-worker’s use of women’s restroom created hostile work environment); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (employer violated Title VII by refusing to hire transgender woman in response to her decision to transition); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. 02-cv-1531, 2004 WL 2008954, at *2-*3 (D. Ariz. June 3, 2004) (discriminating against a transgender person because the person’s anatomy and gender identity are not congruent is actionable sex discrimination under Title VII and Title IX).

restroom consistent with their lived experience of their gender. Transgender people are singled out and forced either to forgo restroom use or to choose between two other detrimental and demeaning options: using common restrooms corresponding to their sex assigned at birth or using single-use restrooms. The first option transgresses a core aspect of transgender people's identities, subjects them to potential harassment and violence, and violates medical treatment protocols (*see* JA13-14). The second option also may have stigmatizing effects—like “outing” individuals as transgender in settings where they could be exposed to danger or prefer to keep that information private⁵⁶—assuming that single-use restrooms are even available.

Such discrimination is not shielded from Title IX simply because Congress was focused principally on other types of sex-based disparate treatment in 1971; the Supreme Court made that clear in *Oncale*. Nor is such discrimination authorized by Title IX's implementing regulation permitting “separate toilet, locker room, and shower facilities on the basis of sex,” 34 C.F.R. § 106.33. Defendant wrongly asserts that the term

⁵⁶ As G.G. notes, transgender students often choose not to disclose that status to their classmates. *See* Suppl. Br. of Pl.-Appellant 45.

“on the basis of sex” unambiguously permits segregation of the enumerated facilities exclusively on the basis of “*biological sex*.” Br. of Appellee 32 (emphasis added). But neither Title IX nor its implementing regulations define “sex” in terms of biological sex—and present-day understandings of sex recognize that a person’s status as male or female is based on a variety of physiological and psychological traits that do not necessarily equate to external genitalia or the assignment of a particular sex at birth.⁵⁷ Title IX should not be read to ignore these developments.⁵⁸ Nor should its implementing regulations be interpreted in a manner that undermines the core antidiscrimination mandate of that statute.

⁵⁷ See APA, Guidelines for Psychological Practice, *supra*, at 834-35; Gender Identity Research & Educ. Soc’y, Gender Variance (Dysphoria) (Aug. 2008) (internet); see also Aruna Saraswat et al., *Evidence Supporting the Biological Nature of Gender Identity*, 21 Endocrine Practice 199 (2015) (internet) (concluding that available scientific evidence suggests that gender identity itself has a biological basis).

⁵⁸ Equally meritless is any attempt to rely on 20 U.S.C. § 1686’s provision allowing “separate living facilities for the different sexes.” That provision refers to living quarters (such as dormitories) rather than the types of facilities at issue in this case. See Br. of Pl.-Appellant 31-32 & n.9. In any event, Title IX and its regulations do not prescribe how the term “different sexes” should be applied to transgender students for purposes of § 1686. Any argument that that section unambiguously authorizes disparate treatment of students based exclusively on their “*biological sex*” accordingly fails.

At bottom, defendant's policy is a particular instance of gender-based discrimination that—although arising in new circumstances because of a new discriminatory policy imposed by defendant—nonetheless violates Title IX's clear, broad, and long-standing mandate of gender equality. Indeed, the Supreme Court has long made clear that governments may not adopt policies that serve only to express “negative attitudes, or fear” toward people viewed as “different.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). The present matter is a case in point: defendant's policy was adopted to stigmatize G.G. and other transgender students, rather than to promote legitimate state interests, such as promoting public safety or personal privacy (see *supra* 18-25). Defendant's assertion that it lacked notice that such a policy was impermissible rings hollow, and should be rejected.

CONCLUSION

This Court should reverse the decision below.

Dated: New York, New York
May 15, 2017

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Megan Murphy, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,460 words and complies with the Briefing Order filed in this Court on April 13, 2017.

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