No. 18-13592-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DREW ADAMS,
Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant.

On appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
Case No. 3:17-cv-00739-TJC-JBT

The Honorable Timothy J. Corrigan

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

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INTEREST OF *AMICI CURIAE*

The National Women's Law Center (NWLC) is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution, Title IX and other laws prohibiting sex discrimination. To that end, the Center has long sought to ensure that rights and opportunities are not restricted based on gender stereotypes and that all individuals enjoy the protection against such discrimination that is promised by federal law. The Center has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals. Descriptions of the other *amici* are included in an appendix to this brief. [1]

Defendant's Policy at issue in this matter, which bars Drew Adams, a transgender boy, from using the same restroom facilities as other boys (the "Restroom Policy" or "Policy"), discriminates based on sex and thus violates both the Constitution's Equal Protection Clause and Title IX as the federal district court correctly held. In fact, the Policy, and Defendant's arguments supporting it, relies on the very same discriminatory sex stereotyping that amici have combatted for decades—i.e., assumptions about what it means to be "male" or "female" that are used to justify discrimination against individuals that do not conform to those stereotypes. Accordingly, amici's perspective and experience as entities that have long been dedicated to addressing and preventing sex-based discrimination—including that against transgender individuals—may assist the Court in its resolution of this case.

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[1] Pursuant to Fed. R. App. P. 29, *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.

Amici also submit this brief in support of Drew Adams to refute Defendant's arguments that the Policy at issue here is justified because it allegedly protects the privacy or safety of non-transgender (or "cisgender") women and girls. NWLC and ____ additional *amicus* groups dedicated to women's rights and equality demonstrate herein that this Policy does not address actual harm, or credible fear of harm, to cisgender women and girls, and instead promotes sex-based discrimination and harms transgender students, who are at great risk for sexual violence.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the district court held that Defendant's Restroom Policy violates both the Constitution's Equal Protection Clause and Title IX, 20 U.S.C. § 1681. We submit this brief to refute Defendant's argument—which has been rejected by many courts—that the Constitution and Title IX protects only "biological women" (Appellant's Br. 39) – defined as those classified as female at birth based on anatomy. In fact, discrimination against transgender individuals for not abiding by stereotypes about what it means to be a boy or girl constitutes impermissible sex stereotyping and sex discrimination. This Court, along with other federal courts, have concluded that such discrimination is forbidden by the U.S. Constitution's Equal Protection Clause and such analysis applies equally to the scope of sex-discrimination prohibited by Title IX and the legally analogous Title VII. Federal courts recognize that under applicable federal laws, discrimination based on "sex" thus encompasses gender identity and that ultimately, rules governing workplaces and schools may not turn on reproductive anatomy. This interpretation of sex discrimination is also necessary to fulfill the purpose of Title IX, which Congress enacted with the broad goal of preventing sex-based discrimination in the educational environment.

As highlighted herein, both the record in this case and broader societal data make clear that transgender students are the ones harassed by exclusion from restrooms that correspond to their

gender identity and that they face high rates of sex-based harassment and injury including through exclusion from the appropriate restroom.

Allegedly protective concerns like those asserted by Defendant have long been asserted in defense of rules that kept women out of many jobs and racial minorities out of public facilities. Courts now approach such "protective" rules with the skepticism they deserve and strike them down. Moreover, the contention by Defendant that the discriminatory Restroom Policy is necessary to protect students, and particularly the privacy and safety of cisgender women and girls, is unavailing. As the district court noted, there is *no* evidence that use by transgender students of the restroom corresponding to their gender causes *any* injury to students.

In sum, Defendant's arguments, that transgender students must be excluded from bathrooms consistent with their gender-identity in order to protect cisgender women and girls is both based on unfounded fears and stereotypes and violates the Constitution's Equal Protection Clause and Title IX. Consequently, *amici* urge this Court to affirm the district court's decision: the evidence is clear that Drew Adams "poses no threat to the privacy or safety of any of his fellow students" and, "[w]hen it comes to his use of the bathroom, the law requires that he be treated like any other boy." Order, p. 3.

ARGUMENT

I. Title IX Prohibits Sex Discrimination Against Transgender Individuals.

Defendant argues that its Restroom Policy is not discrimination "on the basis of sex" within the meaning of Title IX because that policy simply takes account of real anatomical differences between men and women. Appellants' Br. 35, 43. But categorically hinging an individual's differential and adverse treatment on their physical anatomy at birth is inconsistent with Title IX. Such discrimination runs afoul of the statute's plain terms. And disparate treatment of that sort rests on a kind of sex stereotyping that violates both the Constitution and Title IX. As this Court has

recognized, "'the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'" *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (citation omitted) (applying Equal Protection Clause). *See also Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, 884 (11th Cir. 2016) (holding in Title VII context that "[s]ex discrimination includes discrimination against a transgender person for gender nonconformity"). [2]

A. Discrimination Against Transgender Individuals Is Inherently Discrimination On The Basis Of Sex.

Defendant's Restroom Policy denies Drew access to the common boys' restrooms simply as a consequence of his anatomy, or genital configuration. On the face of it, this discrimination against someone because he is transgender is "on the basis of sex" within the plain meaning of Title IX's terms: unquestionably, that discrimination 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) (citation omitted). Under such a policy, transgender people are treated differently because their gender identity and sex identified at birth no longer match. *See Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267, 285 (W.D.Penn. 2017) (finding equal protection violation where public school's restroom policy singled out transgender students as "the only students who are not allowed to use the common restrooms consistent with their gender identities").

Courts have concluded, thus, that discrimination based on transgender status in these circumstances is essentially the epitome of discrimination based on gender nonconformity, making differentiation based on transgender status discrimination based on sex for these purposes. Glenn

[2] Whether under the Constitution's Equal Protection Clause, Title IX, or Title VII, federal courts' analysis proceeds in similar fashion as to the scope of sex and how the prohibition of sex-based discrimination also prohibits discrimination against transgender individuals. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1047-51 (7th Cir. 2017). As such, the arguments provided herein are meant to inform both the Title IX and Equal Protection claims at issue in this matter.

v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011); *Bd. of Educ. of Highland S.D. v. U. S. Dept. of Educ*., No. 16-524, 208 F.Supp.3d 850, 872–75, 2016 WL 5372349, at *15–17 (S.D. Ohio Sept. 26, 2016), stay denied pending appeal, *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217 (6th Cir. 2016) ("Highland"); *Carcano v. McCrory*, No. 16-cv-236, 203 F.Supp.3d 615, 640 (M.D. N.C. Aug. 26, 2016).

Drew is excluded from the boys' restroom because Defendant insists on treating him as a girl; in this context, failure to extend Title IX's protection to a student who has undergone a gender transition on the theory that such differential treatment is not "on the basis of sex" would be ignoring "the statutory language itself." *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008).

Contrary to Defendant's argument, the Restroom Policy cannot be placed outside Title IX's language 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. Necessarily, then, discrimination "because of . . . sex" encompasses discrimination because of a *change* of sex. *Id*. (ellipses added by the court).

It therefore is not surprising that courts repeatedly have recognized that treating transgender persons adversely is sex discrimination. *Accord Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.") (*citing Glenn*, 663 F.3d at 1316 *and Chavez*, 641 Fed.Appx. at 884)); *See also Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214–15 (1st Cir. 2000) (Equal Credit Opportunity Act reaches transgender

person's sex stereotyping claim); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("a label, such as 'transsexual', is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity"); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act reaches sex discrimination experienced by transgender persons).

Similarly, in *EEOC v. R.G. and G.R. Harris Funeral Homes, Inc.*, for example, the Sixth Circuit deemed it "analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." 884 F.3d 560, 575 (6th Cir. 2018). The court acknowledged that although one's "biological sex does not dictate her transgender status," "discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be." *Id.* at 578. The court continued: "[A]n employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try." *Id.* at 576-77. Therefore, "discrimination on the basis of transgender and transitioning status violates Title VII." *Id.* at 574-75. Precisely the same reasoning applies here.

B. Discrimination Against Transgender Individuals Based On Nonconformity To Sex Stereotypes Constitutes Sex Discrimination.

Discrimination against transgender individuals for failure to conform to sex stereotypes is also a form of sex discrimination. *See, e.g.*, *Whitaker*, 858 F.3d at 1048; *Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F.Supp.3d 730, 745–46 (E.D.Va. 2018); *A.H. Handling v. Minersville Area Sch. Dist.*, 290 F.Supp.3d 321, 323–25, 326–32 (M.D.Pa. 2017) (denying school district's motion to

dismiss transgender student's Title IX and Equal Protection Claims based on school district's bathroom policy "dictating that children must use the bathroom corresponding to the sex listed on the student's birth certificate"); *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267, 295 (W.D.Pa. 2017); *Bd. of Educ. Of the Highland Sch. Dist. v. U.S. Dep't of Educ.*, 208 F.Supp.3d 850, 865, 869, 871 (S.D.Ohio 2016); *Cf. United States et al. v. Se. Okla. State Univ. et al.*, 2015 WL 4606079, at *2 (W.D.Okla. 2015) (holding in Title VII context that employer's treatment of transgender woman as if she were male instead of female is sex stereotype discrimination).

In reaching this conclusion, courts interpreting Title IX routinely draw from the settled interpretation of Title VII, which rejects the "insist[ence] that [individuals] match[] the stereotype associated with their group . . . ." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion). [3] As the Supreme Court has explained:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [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).

[3] Courts consistently look to Title VII case law when interpreting Title IX. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (interpreting discrimination under Title IX in accordance with earlier Title VII decision); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999). This Court recently affirmed that Title VII disparate treatment analysis is applicable in the Title IX context. *See GP by and through JP v. Lee Cnty. Sch. Bd.*, 737 Fed.Appx. 910, 918 n.5 (11th Cir. 2018) (*quoting Bowers v. Bd. of Regents of Univ. Sys. of Ga.*, 509 Fed.Appx. 906, 910 (11th Cir. 2013) ("We apply Title VII case law to assess Bowers's Title IX claim.")).

Discrimination against transgender individuals whose gender identity is different than their sex assigned at birth rests largely on just this sort of stereotyping—in the setting of this case, on the view that a transgender student like Drew is not a "real" boy because he does not conform to conventional understandings of maleness. In arguing to the contrary, Defendant insists that Drew is treated differently from other boys not "because of his failure to act in conformance with his sex" but because "[t]he unrefuted evidence is that [he] is structurally, biologically, and physically a female." Appellant's Br. 43. But that argument assumes away the problem: although the district court found as a fact that Drew "'consistently, persistently, and insistently' identifies as a boy," that "medical science says he is a boy," and that "the State of Florida says so" (slip op. 1-2), in Defendant's view Drew is not a boy—and therefore should not be treated as male—because Defendant does not expect a person with Drew's anatomy to act as a boy.

Courts—including this one—have consistently recognized this view to constitute sex discrimination in a range of contexts. As noted above, "'the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'" *Glenn*, 663 F.3d at 1316 (citation omitted). *See, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (under Title VII, condemning demotion of male transgender police officer for not "conform[ing] to sex stereotypes concerning how a man should look and behave"); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (under Equal Protection Clause and Title VII, 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"); *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 Gender Motivated Violence Act).

By the same token, the Supreme Court has long recognized that anti-discrimination rules like Title VII and Title IX are designed to ensure that reproductive anatomy does not determine an individual's role in society. 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 capacity to become pregnant in the future were not bases upon which to exclude them from factory work that might pose a risk to a fetus. *See also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (employers are prohibited from assuming that employees who have recently given birth will be too consumed by their parenting duties to make good workers); *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"); *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir. 1999) (employer may not conclude, without a doctor's judgment rooted in evidence, that a pregnant employee will be unable to manage the physical demands of pregnancy or delivery while fulfilling all job responsibilities); *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 435-36 (8th Cir. 1998) (same).

These decisions share an incontrovertible principle: A person's reproductive anatomy at birth does not support conclusory judgments about one's essential nature. This insight has significant implications for the issue here. As the district court noted, "[t]he school bathroom policy does not depend on something innately different between the bodies of boys and girls or what they do in the bathroom." Slip op. 48. And just as the social expectations following from the female employee's reproductive capacity could not support discriminatory treatment in *Johnson Controls*, in circumstances where the challenged rule rests on societal expectations, a transgender boy's anatomy at birth may not be used to exclude him from opportunities offered all other boys. *Cf. Roberts*

v. Clark Cnty. Sch. Dist., 215 F.Supp.3d 1001, 1015 (D.Nev. 2016) (employer's claim that discrimination is premised on transgender person's "genitalia, not his status as a transgender person [] is a distinction without a difference").

C. Protecting Transgender Students Is Required To Fulfill Title IX's Broad Goal Of Eradicating Discrimination Based On Gender In Educational Programs.

Against this background, Defendant is wrong in contending that Title IX was designed simply to "address discrimination plaguing biological women in education." Appellant's Br. 39). In fact, the statute—which uses both general and expansive language—had the broad purpose of eradicating *all* gender discrimination in educational programs.

The Supreme Court consistently has recognized the breadth of Title IX, and the corresponding need to interpret the statute expansively to effectuate its purpose. More than thirty years ago, 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. 512, 521 (1982); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("'Discrimination' 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."). Accordingly, Title IX's language "demonstrates breadth," and even in "situations not expressly anticipated by Congress" its provisions may not be narrowed judicially. *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)).

In introducing Title IX, Senator Birch Bayh, its principal sponsor,[4] presented a bold goal: The "impact of this amendment" was meant to be "far-reaching" (118 Cong. Rec. 5808 (1972)

[4] 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 526-27.

(statement of Sen. Bayh)), 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.

Of particular relevance here, Congress was specifically concerned with eradicating pernicious sex stereotyping in educational institutions. In 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." *Id*.[5]

Given this broad purpose, courts have long made clear, for example, that Title IX forbids sex-based discrimination against male, as well as female, plaintiffs. *E.g.*, *Carmichael v. Galbraith*, 574 F. App'x 286, 290 (5th Cir. 2014); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1182 (10th Cir. 2001). And courts have held specifically that harassment of male students based on their non-conformity to male stereotypes can constitute sex-based discrimination prohibited by Title IX. *E.g. Patterson v. Hudson Area Sch.*, 551 F.3d 438, 442 (6th Cir. 2009); *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011); *P.W. v. Fairport Cent. Sch. Dist.*, 927 F. Supp. 2d 76, 79, 85 (W.D.N.Y. 2013); *Pratt v. Indian River Cent. Sch.*

[5] As Defendant notes, Congress did not intend to eliminate use of separate restrooms by students of different sexes. *See* Appellant's Br. 35; *see also* 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh). But recognizing that Congress intended to allow use of separate restroom facilities by male and female students does not mandate *which* of those restrooms may be used by transgender students. Self-evidently, the suggestion that male transgender students should be treated as other boys does not, as Defendant contends, require finding "that more than two sexes were contemplated at the time Title IX was enacted." Appellant's Br. 41.

Dist., 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011); *Brimfield*, 552 F. Supp. 2d at 823; *Theno*, 394 F. Supp. 2d at 1305-06 (D. Kan. 2005); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 880 (N.D. Ohio 2003). See also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Title VII prohibits sex harassment of male employees by male employees).

Nothing then places transgender students outside the scope of these broad Title IX protections against sex-based discrimination. Additionally, despite Defendant's arguments regarding original legislative intent, (*see* Appellant's Br. 39-40), "statutory prohibitions often go beyond the principal evil [that prompted their enactment] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. 75, 79 (1998). As Justice Scalia wrote for a unanimous Court in *Oncale*, 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." *Id.* And here, discrimination against transgender students surely is directly comparable 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)).

II. Transgender Students Excluded From Restrooms That Match Their Gender Identity Face Both Physical And Emotional Harm.

There is compelling evidence, both in the record of this case and more broadly, that Title IX's bar on sex-based discrimination is needed to protect the privacy, health, and safety of

transgender students. Drew "testified that he feels alienated and humiliated, and it causes him anxiety and depression to walk past the boys' restroom on his way to a separate bathroom, knowing every other boy is permitted to use it but him. . . . [Drew] also thinks it sends a message to other students who see him use a 'special bathroom' that he is different, when all he wants is to fit in." Slip op. 27. Such exclusion may be physically harmful: Drew "monitors his fluid intake and he now uses the school bathroom only once or twice a day." *Id*. at 26.

Transgender students excluded from restrooms that correspond to their gender identity face both physical and emotional harms. Some simply avoid urinating while they are at school, leading to serious health risks including kidney damage and urinary tract infections. National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey 130-37 (Dec. 2016), available at https://perma.cc/M7MQ-ZQ52 ("NCTE Survey"). Exclusion from the proper restroom may also lead to severe mental distress, including risk of suicide. *See Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 2016 WL 5372349, at *14 (S.D. Ohio Sept. 26, 2016). *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (illicit segregation causes early isolation and "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

In addition, "[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 that transgender students face at school—violence that renders them in particular need of Title IX's protections against

sex-based harassment. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (recognizing that Title IX's prohibition on sex discrimination encompasses sex-based harassment).

This is a problem of substantial and disturbing proportions: transgender students face harassment and violence at far higher rates than do their cisgender peers. Confirming the results of earlier studies, authoritative data recently released by the U.S. Centers for Disease Control and Prevention show that 27% of U.S. transgender high school students feel unsafe at school or traveling to or from campus; that 35% are bullied at school; and that 35% attempt suicide. *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, Morbidity and Mortality Weekly Report (Jan. 25, 2019), available at https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm?s_cid=mm6803a3_w.

Other studies have reached similar conclusions. 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." NCTE Survey, at 2. Startlingly, 17% of respondents "experienced such severe mistreatment that they left a school as a result." *Id.* The statistics are especially disturbing for transgender women: over a fifth left a K-12 school because of harassment, and transgender girls were twice as likely as transgender boys to be sexually assaulted at school because of their gender identity. *Id.* at 133, 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.

The abuse continues after high school. According to a survey conducted by the American Association of Universities, nearly one in four transgender students experience sexual violence in

college—a higher rate of victimization than that experienced by cisgender college women. David Cantor et al., Westat, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* 10 (Sept. 21, 2015), *available at* https://perma.cc/ZY4T-F5LE. Congress designed Title IX to address problems of just this sort.

III. Arguments Regarding The Safety Of Cisgender, Specifically White Women, Historically Used To Justify Discrimination And Defend Exclusionary Policies, Are Now Rejected By Courts As Pretextual.

Defendant nevertheless maintains that its Restroom Policy—which unquestionably interferes with Drew's ability to obtain the benefits of a public education without sex discrimination—is justified because allowing transgender students to use restrooms corresponding with their gender identity "would violate the bodily privacy rights of students and risk their safety and welfare." Appellant's Br. 9. And although Defendant's brief to this Court articulates its protective goal in terms that encompass all cisgender students, Defendant's arguments before the district court focused mostly on the need to protect the privacy and safety of cisgender girls. *See* page xx, *infra*.

This argument that transgender students must be excluded from appropriate bathrooms in order to protect the safety of cisgender women and girls is based on unfounded fears and stereotypes and must be rejected. Protective rationales of just this sort—which, historically, have often been grounded on the very types of harmful stereotypes that civil rights laws are designed to overcome—have long been used to justify discriminatory rules. In this context, restrooms and other sex-segregated environments have been a particular focus of policies grounded on protective pretexts. Defendant's Restroom Policy falls squarely within this long and pernicious tradition. In its modern decisions, the Supreme Court has repeatedly, and correctly, rejected these pretextual justifications for disfavoring women and other targeted groups. This Court should do likewise.

A. Discriminatory Rules Ostensibly Designed To Protect Women Have Long Reflected Both Stereotype And Pretext.

In the nineteenth and earlier part of the twentieth centuries, laws that barred women from certain professions were frequently justified by their stated intent to protect women's health and welfare. In *Muller v. Oregon*, 208 U.S. 412 (1908), for example, the Supreme 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 those times, the Court at that time 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 by Craig v. Boren*, 429 U.S. 190 (1976).

In the development of rules ostensibly designed to protect women in the workplace, restrooms and similar sex-segregated environments played a central 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. But 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 an expression of woman-protective safety, sanitation, and modesty concerns, perhaps rooted in the 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, 593-94 (1977).

The impetus to protect women—as noted, particularly 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).

Sex-separation of restrooms also served to further entrench race segregation in these spaces. Even after *Brown*, States continued to assert protective purposes in support of the continued segregation of public restrooms, pointing, for example, to supposedly heightened rates of venereal disease among black communities. *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."). 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), *available at* http://www.slate.com/blogs/xx_factor/2017/

01/18/hidden_figures_is_a_powerful_statement_against_bathroom_discrimination.html.

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. For example, the City of Jackson, Mississippi, preferred to close its public swimming pools rather than desegregate them. *See Palmer v. Thompson*, 403 U.S. 217, 227 (1971) (finding no discriminatory effect in this action). *But see Lawrence v. Hancock*, 76 F. Supp. 1004, 1005-06 (S.D.W. Va. 1948); *City of St. Petersburg v. Alsup*, 238 F.2d 830, 830 (5th Cir. 1956).

In this respect, Defendant's Restroom Policy has much in common with the protective and discriminatory policies of the past. Although the policy purports to advance interests of privacy and safety in general terms, its rationale as spelled out to the district court is aimed at the protection of women: "'[W]hen a girl goes into a girls' restroom, she feels that she has the privacy to change clothes in there, to go to the bathroom, to refresh her makeup. They talk to other girls.'" Slip op. 20 (quoting Doc. 161, at Tr. 213. See *id.*at 20-21 ("a student may want privacy to undress or clean up a stain in her clothing"); *id*. ("allowing a transgender student to use a restroom that conformed to his or her gender identity could create opportunities for students 'with untoward intentions to do things they ought not to do'") (quoting Doc. 162, at Tr. 112-13); *id*. at 21 ("the School Board seeks to assure that members of the opposite sex are not in an unsupervised bathroom together, citing as an example the risks of danger posed to a female freshman student who might find herself alone in the restroom with an 18-year-old male student") (citing Doc. 162, Tr. at 69, 111, 115); *id*. ("under a relaxed policy, a student—a football player for example—could pose as being gender-fluid for the purpose of gaining access to the girls' restroom") (citing Doc. 161, at Tr. 213). It hardly needs extensive demonstration that this rationale (that a girl needs a private space to "refresh her makeup" and "talk to other girls") rests on stereotypes regarding who needs protection, and

from whom—stereotypes that, like racially discriminatory rules, exclude the disfavored class (here, transgender students) from public facilities.

B. The Supreme Court No Longer Accepts Allegedly Protective Rationales In Order To Justify Discrimination.

The Supreme Court has come to recognize that the rationale of protecting women does not justify the implementation of discriminatory laws, grounded on stereotypes and assumptions, that actually deny women opportunities. In *Frontiero v. Richardson*, the Court addressed these protective pretexts directly: "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." 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.

The Court has since made clear that exclusionary policies ostensibly designed to protect women or other groups often do not serve that purpose in reality—and instead operate principally to disadvantage those 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 for women, 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 have also recently rejected laws that use a pretextual interest in women's health and well-being to limit their reproductive choices. *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). For these reasons, this Court should reject Defendant's alleged safety and privacy arguments put forth to justify its discriminatory Policy.

IV. Defendant's Restroom Policy Does Not Advance Actual Safety or Privacy Interests for Cisgender Women and Girls.

Under anti-discrimination laws like Titles IX and VII, a rule that discriminates on the basis of sex may not rest on stereotypes and assumptions—the sort of rationales often offered in the past to support exclusionary rules that limited opportunity and the use of public facilities. Defendant's discriminatory Restroom Policy fails this test: For the reasons explained at length by Plaintiff and

detailed by the district court on the record here, the Policy at issue does not advance any real interest in safety or privacy. And looking beyond the record in this case, research has confirmed the unsurprising conclusion that safety and privacy concerns regarding the use of public restrooms by transgender individuals are wholly unsubstantiated: "[T]here 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. See 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).

The same analysis applies to Defendant's purported concern here including any concern regarding gender-fluid students.[6] Defendant's witness, Ms. Smith, claimed that the task force was concerned about students who identify as gender-fluid, suggesting this might allow a "football quarterback" to "come in and say I feel like a girl today and so I want to be able to use the girls' room." Doc. 161, 213:10-18; id. 214:1-4; id. 216:15-17; Doc. 162, 70:6-14.

First, it is inaccurate and absurd to suggest that either men or women do, or could, casually or dishonestly identify as transgender. As the district court found, and Defendant does not dispute, gender dysphoria is a diagnosable medical condition in which affected individuals "'consistently, persistently, and insistently' identif[y]" with the other biological sex and often can be addressed

[6] Arguments submitted by Defendant's amicus, the "Women's Liberation Front," align mostly with those presented by Defendant in its brief and should be rejected for the same reasons outlined here. Such arguments are both offensive and unsupported by factual evidence or federal law. Accordingly, the signatories to this brief wholeheartedly refuse a framework that pits the rights of cisgender women and girls against those of transgender individuals and instead find common cause in addressing sex discrimination through the protections of federal law.

medically, for example through, hormone therapy or surgery (slip op. 1-2, 5-10). As an example, Drew himself underwent significant reconstructive surgery. It is not credible that anyone would take such significant medical steps for the opportunity to "openly ogle" members the opposite sex in a locker room—and there is no evidence that anyone ever has done so, whether or not that person sought gender affirming medical services.

Second, Defendant, assumes that all that matters in classifying by gender is biological sex at birth, and that a transgender man like Drew therefore really is a woman. Necessarily, this argument denies that there is such a thing as being transgender. Yet, that contention simply disregards both medical science (see, e.g., slip op. 5-10) and the extensive body of court decisions according protection to transgender individuals under Titles IX and VIId as well as the U.S. Constitution's equal protection provisions, including this Court's decision in *Glenn*. The Restroom Policy, like other pretextual policies designed to perpetuate discriminatory rules based on sex or race, violates Title IX and as found by the district court, should be invalidated by this Court.

V. Conclusion

The district court's order should be affirmed.

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APPENDIX A

DESCRIPTION OF *AMICI CURIAE*