

18-13592

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

**BRIEF FOR THE STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MAINE,
MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW
JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND,
VERMONT, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA, AS
AMICI CURIAE IN SUPPORT OF APPELLEE**

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the undersigned counsel for Amici Curiae States of New York, Washington, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia, provides the following Certificate of Interested Persons and Corporate Disclosure Statement.

1. The name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action, including subsidiaries, conglomerates, affiliates, parent corporations, publicly traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

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INTEREST OF THE AMICI STATES

The States of New York, Washington, California, Connecticut, Delaware, Hawai‘i, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia (the “amici States”) file this brief as amici curiae in support of plaintiff-appellee Drew Adams. *See* Fed. R. App. P. 29(a)(2).

Discrimination against transgender people—individuals whose gender identity differs from their sex assigned at birth—harms them 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. That experience demonstrates that ensuring transgender people have access to public facilities consistent with their gender identity—including access to common restrooms—benefits all, without compromising safety or privacy, or imposing significant costs.

The amici States also share a strong interest in seeing that federal law is properly applied to protect transgender people from discrimination, so that our transgender residents do not experience indignity and

discrimination when traveling to other States for work, educational, or recreational purposes. Defendant's policy violates federal statutory and constitutional protections enacted to prevent such invidious discrimination. It violates Title IX by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. Further, because the policy fails to advance any legitimate interest such as protecting public safety or personal privacy, its only function is to stigmatize a particular group, which violates equal protection.

QUESTION PRESENTED

Whether the defendant school board's policy prohibiting 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), and has the lone function of stigmatizing a particular group in violation of the Equal Protection Clause, *see* U.S. Const. amend. XIV, § 1.

SUMMARY OF ARGUMENT

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

Federal law provides a crucial additional tool for combatting discrimination by guaranteeing that transgender people can travel freely across state lines without facing discrimination. As this Court has recognized, disparate treatment of transgender people penalizes them for failing to conform to gender stereotypes and therefore constitutes discrimination on the basis of sex. *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Defendant's policy here is a case in point: it bars transgender students—and only transgender students—from using common restrooms consistent with their gender identity. The policy therefore violates Title IX's prohibition on sex discrimination. And because the policy fails to advance any legitimate purpose such as protecting safety or privacy, its sole function is to stigmatize a particular group, which violates equal protection.

ARGUMENT

POINT I

PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS WIDE SOCIETAL BENEFITS WITHOUT COMPROMISING THE PRIVACY OR SAFETY OF OTHERS

Nearly 1.5 million people in the United States—including approximately 150,000 teenagers¹—identify as transgender.² They serve our communities as police officers, firefighters, doctors, teachers, and more. Transgender people have been part of cultures worldwide “from antiquity until the present day,” and psychologists recognize that being transgender is natural and not any form of pathology.³ Being transgender does not in itself inhibit a person’s ability to contribute to society.

¹ Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States* 2 (Williams Inst. Jan. 2017) (internet). (For authorities available online, full URLs appear in the table of authorities.)

² Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* 3-4 (Williams Inst. June 2016) (internet).

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).

Unfortunately, transgender people often experience harsh discrimination that limits their ability to realize their potential. See *infra* 8-13. 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.⁴ At least six more

⁴ **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

States bar gender-identity discrimination in state employment.⁵ And at least 225 local governments prohibit discrimination based on gender

(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. Exec. Law § 291; 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:** R.I. Gen. Laws § 11-24-2 (public accommodations); R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 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); *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).

⁵ **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-

identity or expression.⁶ As the experience of these jurisdictions shows, policies ensuring equal access to public facilities for transgender people—including access to common restrooms consistent with their gender identity—promote safe and inclusive communities, workplaces, and schools: a benefit to all.

A. Transgender People Face Pervasive and Harmful Discrimination.

As the Supreme Court has recognized, “invidious discrimination in the distribution of publicly available goods, services, and other advantages cause[s] unique evils.” *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). Transgender people are often subject to such discrimination.

2016. **Pennsylvania** (2016): Equal Employment Opportunity, Exec. Order No. 2016-04. **Virginia** (2018): Equal Opportunity, Exec. Order No. 1.

⁶ Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (current as of Jan. 28, 2018) (internet).

1. Discrimination at school

Transgender students experience levels of discrimination, violence, and harassment that are much higher than for non-transgender students.⁷ 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 reported experiencing harassment by students, teachers, or staff.⁸ More than half of transgender students (54%) reported verbal harassment, almost a quarter reported suffering a physical attack (24%), and almost one in eight reported being sexually assaulted (13%).⁹ Another 2015 survey showed that three-fourths of transgender students felt unsafe at

⁷ 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).

⁸ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat'l Ctr. for Transgender Equality 2016) (internet).

⁹ *Id.* at 132-34.

school because of their gender expression.¹⁰ More than a third of transgender respondents to a survey of LGBT teenagers in late December 2016 and early January 2017 reported being bullied or harassed within the past thirty days.¹¹

Such harassment inhibits transgender students' ability to learn, to the detriment of the broader community. 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. Board of Educ.*, 347 U.S. 483, 493 (1954).

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

¹⁰ 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).

¹¹ Human Rights Campaign Found., *Human Rights Campaign Post-Election Survey of Youth* 8 (2017) (internet)

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

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

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).

¹⁶ *Id.* at 51.

¹⁷ *Id.* at 63.

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 fiscs of their States.²⁰

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 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).

B. Gender-Identity Harassment Presents Significant Health Risks.

Gender-identity harassment—including denial of access to appropriate restroom facilities—can have serious health consequences, including death. 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 A 2016 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, Adams testified that the defendant's denial of appropriate restroom facilities caused him to diminish his fluid intake, a practice that can cause urinary tract infections and dehydration. (Dist. Ct. Op. at 26 & n.28, ECF No. 192.)

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).

Research shows that Adams’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 kidney infections and other kidney-related problems.²⁵

C. The Amici States’ Experience Confirms That Protecting Transgender People from Discrimination Yields Broad Benefits Without Compromising Privacy or Safety, or Imposing Significant Costs.

As noted above, 20 States and at least 225 localities provide civil-rights protections to transgender people—including by requiring that transgender people be permitted 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 thus promote compelling interests

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

²⁵ Herman, *Gendered Restrooms*, *supra*, at 75; *see also Grimm v. Gloucester County Sch. Bd.*, 302 F. Supp. 3d 730, 738 (E.D. Va. 2018) (transgender boy suffered painful urinary tract infection after being denied access to boys’ restrooms at school).

in “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Roberts*, 468 U.S. at 626. And the provisions do so without threatening individual safety or privacy, or imposing significant costs.

1. Allowing transgender students and employees to use restrooms consistent with their gender identity produces important 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 other transgender students.²⁶

Policies protecting transgender students, including by allowing them to use common restrooms consistent 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

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

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. In 2016, 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 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

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.

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 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

³⁰ *Id.* at 16.

³¹ *Id.* at 4.

³² *Id.* at 16.

³³ *See id.* at 6.

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

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.

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 Indeed, the experience of school administrators in more than

³⁵ *Id.* at 61.

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

thirty States and the District of Columbia shows that public safety concerns are unfounded, as are concerns that students will pose as transgender simply to gain improper restroom access.³⁷ Defendant’s speculation that public safety will suffer if transgender people are treated fairly is thus contrary to the actual experience of States and localities where nondiscrimination is already the law.³⁸

For instance, a former County Sheriff noted that Washington State has protected gay and transgender people from discrimination for a decade “with no increase in public safety incidents as a result”; he

³⁷ Br. of Amici Curiae School Administrators from Thirty-One States and the District of Columbia in Supp. of Respondent at *14-16, *Gloucester County Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

³⁸ 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).

emphasized “that indecent exposure, voyeurism, and sexual assault, are already illegal, and police use those laws to keep people safe.”³⁹ 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” allowing students to use restrooms corresponding to their gender identity.⁴⁰ And the Massachusetts Chiefs of Police Association reported that allowing people to use public bathrooms consistent with their gender identity “improve[s] public safety.”⁴¹ Meanwhile, in Texas, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those cities’

³⁹ David Crary, *Debate over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib., May 10, 2016 (internet).

⁴⁰ 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).

⁴¹ Letter from Chiefs William G. Brooks III & Bryan Kyes to Senator William N. Brownsberger & Representative John V. Fernandes (Oct. 1, 2015) (internet).

policies allowing transgender people to use restrooms consistent with their gender identity.⁴²

These accounts have been confirmed by organizations that provide services to sexual assault and domestic violence victims. In April 2018, nearly 300 sexual assault and domestic violence service providers—including 38 national organizations, and 253 state and local organizations (representing 41 States, the District of Columbia, Guam, and the Virgin Islands)—issued a statement rebutting claims that preventing transgender people from accessing the gender-specific facilities of their choice prevents sexual violence against women and children.⁴³ The statement notes that a considerable number of municipalities and States have enacted nondiscrimination laws protecting

⁴² *Texas Experts Debunk the Transgender “Bathroom Predator” Myth Ahead Of HERO Referendum*, Media Matters for Am. (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).

⁴³ *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. 13, 2018) (internet).

transgender people’s access to facilities consistent with their gender identity, and in some of those jurisdictions, these laws have been in place for decades.⁴⁴ Yet “[n]one of those jurisdictions have seen a rise in sexual violence or other public safety issues due to nondiscrimination laws.”⁴⁵ Simply put, “discriminating against transgender people does nothing to decrease the risk of sexual assault.”⁴⁶

Indeed, discriminatory restroom policies create a needless risk of violence against transgender people, whose physical appearance may diverge from their sex assigned at birth and who therefore are likely to be perceived as using the “wrong” restroom.⁴⁷ (*See also* Dist. Ct. Op. at 28 n.30.)

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2.

⁴⁷ 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).

3. Nondiscriminatory restroom policies neither compromise personal privacy nor require significant expenditures.

State experiences show that nondiscriminatory policies have not generated serious privacy issues, nor imposed untoward costs on schools or employers. The risk that students will see others' intimate body parts, or have their intimate body parts seen by others, is not presented by ordinary restroom use. 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 stigmatizing 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).”⁴⁸ This gives all students with privacy concerns “the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”⁴⁹

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.”⁵⁰ 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

⁴⁸ 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 “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”).

⁴⁹ Wash. State Super., *Prohibiting Discrimination, supra*, at 30.

⁵⁰ *Id.*; Wash. Interscholastic Activities Ass’n, *2018-19 Official Handbook* § 18.15.0, at 32 (2018) (internet); see also Cal. Dep’t of Educ., *Frequently Asked Questions: Equal Opportunity & Access* (Jan. 18, 2017) (internet) (providing similar standards).

(e.g., a nearby restroom stall with a door), or a separate changing schedule.”⁵¹

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.⁵² None of these solutions requires remodeling or

⁵¹ 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).

⁵² **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*

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.”⁵³ The experience of school administrators in dozens of States across the country confirms that such policies can be implemented fairly, simply, and effectively.⁵⁴

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

⁵³ Ura, *For Transgender Boy*, *supra*.

⁵⁴ Br. of Amici Curiae School Administrators at *17-21, *Gloucester County Sch. Bd.*, 2017 WL 930055.

POINT II

TITLE IX AND THE EQUAL PROTECTION CLAUSE PROHIBIT THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

The district court correctly applied the precedents of the Supreme Court and this Court in holding that defendant's policy violates Title IX. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court made clear that the sex discrimination prohibited by Title VII and comparable laws includes disparate treatment based on a perceived deviation from gender stereotypes.⁵⁵ 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

⁵⁵ Courts routinely apply the principles from Title VII cases like *Price Waterhouse* to claims arising under Title IX. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992).

employer could evaluate employees by assuming or insisting that they 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).

In *Glenn v. Brumby*, this Court recognized that the same principles bar discrimination based on gender identity. *See* 663 F.3d at 1320 (upholding transgender state employee’s 42 U.S.C. § 1983 claim for violation of equal protection based on workplace gender-identity discrimination). This Court explained that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes,” and that “[t]here is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.” *Id.* at 1316. “Accordingly, discrimination against a transgender individual

because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Id.* at 1317.⁵⁶

Denying transgender students access to common restrooms consistent with their gender identity is a form of such discrimination and thus prohibited by Title IX. Defendant's policy needlessly denies Adams something most people take for granted: the ability to use a public restroom consistent with one's lived experience of one's gender. The policy singles out transgender students like Adams and forces them either to forgo restroom use or to choose between two other detrimental options: using common restrooms corresponding to their sex assigned at birth or using special single-user restrooms (i.e., those with no specific gender designation). 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* Dist. Ct. Op.

⁵⁶ Other circuits have similarly concluded that penalizing gender nonconformity is a form of sex discrimination. *See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

at 8). The second option may have stigmatizing effects—like “outing” individuals as transgender in settings where they could be exposed to danger or prefer to keep that information private—assuming that single-user restrooms are even available.⁵⁷

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 v. Sundowner Offshore Services, Inc.*, which 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.* at 79. Gender-identity discrimination is just such a comparable evil.

⁵⁷ The same concerns are not posed by the privacy-enhancing measures described above (see *supra* 22-24), which are available to all students who desire additional privacy. Such measures do not single out or stigmatize transgender students, and thus do not force students into the untenable choice presented by the kind of policy at issue here.

Such discrimination is not 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 "on the basis of sex" unambiguously permits segregation of the enumerated facilities exclusively on the basis of "*biological sex*." Initial Brief of Appellant ("App. Br.") at 35 (emphasis altered). 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.⁵⁸ Title IX should not be read to ignore these developments.⁵⁹ Nor should its implementing

⁵⁸ 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).

⁵⁹ Appellants misplace their reliance (Br. at 35) on 20 U.S.C. § 1686's authorization of "separate living facilities for the different sexes." That provision plainly does not apply to the bathroom facilities at issue in this case. In any event, Title IX and its regulations do not prescribe how the term "different sexes" should be applied to transgender

regulations be interpreted in a manner that undermines the core anti-discrimination mandate of that statute.

Other courts have recognized as much. In *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the Seventh Circuit upheld a grant of preliminary injunctive relief under Title IX where, as here, a school district denied a transgender boy access to the boys' restroom. *See* 858 F.3d 1034, 1049-50 (7th Cir. 2017). As that Court explained, “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Id.* at 1049. Such a policy also subjects transgender students to “different rules, sanctions, and treatment than non-transgender students, in violation of Title IX.” *Id.* at 1049-50.⁶⁰ The district court did not err in reaching the same conclusion here.

students for purposes of § 1686. Any argument that that section unambiguously authorizes disparate treatment of students based exclusively on their “*biological sex*” accordingly fails.

⁶⁰ *See also* *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 220-21 (6th Cir. 2016) (per curiam) (school board did not establish likelihood of success on appeal from preliminary injunction under Title IX requiring that transgender girl be allowed to use girls' restrooms); *cf.* *Doe v.*

There is no merit to defendant’s unpreserved argument that interpreting Title IX to grant Adams 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. App. Br. at 47-48. 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 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, the precise parameters of a condition need not be “specifically identified and proscribed” in the statute, *Bennett v. Kentucky Dep’t of Educ.*, 470 U.S. 656, 665-66 (1985), so long as Congress “unambiguously” imposed the condition in the first place, *Pennhurst*

Boyetown Area Sch. Dist., 897 F.3d 518, 536 (3d Cir. 2018) (observing that school board’s policy allowing transgender students to use restrooms consistent with their gender identity “avoids the issues that may otherwise have occurred under Title IX”).

State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Accordingly, a circumstance where the details of federal requirements are clarified through litigation is not necessarily an instance where recipients of federal funding lack the required notice of their potential liability for violating a federal command. *See 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).

That principle is applicable here. 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.

Finally, for similar reasons, defendant’s policy contravenes the Equal Protection Clause. The Supreme Court has long made clear that equal protection prohibits government 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 policy at issue here falls squarely into this category. As the district court noted, defendant’s policy “applies differently to transgender students” by barring them (and them alone) from using common restrooms consistent with their gender identity, and “class separation raises an ‘inevitable inference’ of animosity toward the affected class.” (Dist. Ct. Op. at 37 n.37 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996))). And as the district court also recognized, prohibiting transgender students from using common restrooms under the circumstances of this case fails to advance legitimate state interests, such as protecting public safety or personal privacy. (*Id.* at 39-44; see also *supra* 17-22.) Defendant’s policy instead serves only to stigmatize transgender students such as Adams by sending a message “that the school does not view him as a real boy.” (Dist. Ct. Op. at 45.) Such discrimination cannot withstand any level of equal protection scrutiny.

CONCLUSION

This Court should affirm the decision below.

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February 28, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, 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 6,428 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Will Sager

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 28th day of February, 2019. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

/s/ Andrew W. Amend