

No. 16-273

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

GLOUCESTER COUNTY SCHOOL BOARD,
PETITIONER

v.

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

*ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT*

**BRIEF OF *AMICUS CURIAE* DAVID BOYLE
IN SUPPORT OF NEITHER PARTY**

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, “Amicus”),¹ is respectfully filing this Brief in Support of Neither Party. He has written the Court before about gender issues, e.g., in *Zubik v. Burwell et al.*, 578 U.S. ____ (2016), and about messages considered overly provocative and socially threatening, e.g., re *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) (Confederate license plates). So he writes the Court today about, *inter alia*, issues of gender, and feeling threatened, present in the instant case.

This brief, as with others in the case, may be “mooted” if the Department of Education under the incoming President issues a new ruling about transgenders in bathrooms. Moreover, there is the recent “bombshell”, revealed in Petitioner’s merits brief, that Respondent G.G. recently had his birth certificate changed to male, *see id.* at 11 n.5. So this may be one of those cases where the Court says, “What are we doing here?” and vanishes from the scene.

But Amicus does not surely know that that is going to happen; the Court might, say, use the rationale of “capable of repetition, but evading review” and decide the case anyway. So Amicus now writes the Court, so as not to risk “missing the bus” re the discussion of transgender-bathroom issues.

¹ No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37. Blanket permission by Petitioner to write briefs is filed with the Court, and Respondent has written Amicus a letter of permission.

SUMMARY OF ARGUMENT

Amicus offers one solution, with illustrations, that lets transgender persons (“transgenders”) and non-transgender persons (“cisgenders”), in either single or plural bathrooms, all have a relatively safe space including members of their chosen gender(s), just in case the Court determines that transgenders must be allowed to use a bathroom matching their chosen gender.

Auer v. Robbins, 519 U.S. 452 (1997), deserves at most mending, and maybe very minor mending, instead of ending or keelhauling.

Though transgenderism poses society some daunting challenges, that way of life may be here to stay; and non-transgendered people should show civility and humanity to transgenders—and vice versa.

Both sides in this case could go further in showing respect and understanding of each other’s situations.

One’s gender may be more about one’s genitalia than what one’s birth certificate says.

Unisex bathrooms are popular with some transgenders, and are thus not necessarily an insult to transgenders.

Too, unisex bathrooms are useful to many people, such as a mother who needs to take her son to the bathroom.

Gendered bathrooms have uses, including as traditional social spaces, so that not all bathrooms need be unisex.

The story of former ACLU director Maya Dillard Smith shows that not only those from conservative backgrounds have concerns about the safety of their daughters in transgender bathrooms.

Although abuse can also take place in traditional bathrooms, transgender bathrooms may pose special additional dangers.

Transgenders often suffer disproportionately, and the Court should try to show humanity towards them.

Unlike the “free choice” in same-sex marriage, with its consenting adult partners, cisgenders, including children arguably too young to consent, may not want to consent to having transgenders, including those with opposite-sex genitalia, share intimate space with them.

Lee v. Tam (808 F.3d 1321 (Fed. Cir. 2015), *cert. granted*, 137 S. Ct. 30 (Sep. 29, 2016), 85 U.S.L.W. 3137 (No. 15-1293)), concerning the trademarking of racial slurs, reminds us that people are hurt by hurtful actions or expressions, and that the Court, while preserving freedom—everyone’s freedom—may also consider how to alleviate needless hurt, which disturbs American harmony.

ARGUMENT

I. A SOLUTION WHICH MAY ALLOW TRANSGENDERS AND EVERYONE ELSE

A SAFE SPACE IN A BATHROOM

Since an amicus brief is a public educational, or even public entertainment (!), experience, sometimes it is good to start with some of the “innovative” material, to keep people awake.

...A key problem in the instant case is the *prima facie* “zero-sum” nature of allowing transgenders in bathrooms of their choice: either, a) transgenders are excluded from the bathroom of their chosen gender, and those persons may feel discriminated against and humiliated; or, b) transgenders are allowed into the bathroom of their chosen gender, but the cisgender people there may feel embarrassment, loss of privacy, disorientation, etc. So what can one do, caught between Scylla and Charybdis?

Otherwise put: if (“and only if”) the Court somehow determines that transgenders must be allowed to use bathrooms corresponding to their chosen gender, is there still a way to safeguard the privacy of people who don’t want someone with the “private parts” of the other gender using their bathroom?

Following is one possible way to cut the Gordian knot, listing six different kinds of bathrooms that could be built at any one site, to allow everyone a place to go:

Matrix of Possible Female, Male, and Non-Gender/Transgender Bathrooms on Axes of Singular/Plural Use and Non-Gender/Transgender Compatibility/Incompatibility

<i>Female</i>	<i>De-gendered</i>	<i>Male</i>
1. “Traditional” female bathroom not open to persons with male private parts	3. One-person non-gender or transgender bathroom	5. “Traditional” male bathroom not open to persons with female private parts
2. Female bathroom open to transgender females with male private parts	4. Multi-person non-gender or transgender bathroom	6. Male bathroom open to transgender males with female private parts

The six cells in the Matrix above allow traditional bathrooms for female and male cisgendered people, cells 1 and 5. There is also the by-now-somewhat-traditional single-person non-gendered bathroom, cell 3, which can of course be used for transgender people.

What Amicus is adding to those familiar bathrooms, is cells 2, 4, and 6. Cells 2 and 6 are transgender-friendly bathrooms for female and male respectively, which would be used by transgender people—including those with the genitalia associated with people of the “opposite” gender—, and by cisgender people who are not uncomfortable with transgender or opposite-sex-genitalia-bearing people. And cell 4 is like cell 2, but would accommodate multiple people, as do regular single-sex bathrooms.

So, everyone would have somewhere to go. Those wanting to be alone would be accommodated (cell 3),

as would those wanting a “normal” plural bathroom experience (the other cells). Transgenders would have a bathroom of their chosen gender to go to (cells 2 and 6), although there would also be another bathroom for that gender, not accessible to transgenders (cells 1 and 3). (Or at least not accessible to transgenders who still have the private parts of the opposite gender.)

If there are complaints that a transgender student is thus barred from certain restrooms, but cisgenders aren't; then cisgenders can be told that they are barred from using the transgender bathroom if they have a negative attitude towards transgenders. E.g., the school can declare that those who either have a hostile intent toward transgenders, or who are scared by transgenders, are not permitted to use the transgender bathroom, for safety's sake.

Alternatively, two extra bathrooms could be built, female and male, for transgenders only and excluding cisgenders; but those bathrooms might be lonely and get little use.

The modes of nonaccessibility just mentioned are meant to provide a private place for 1) those who are threatened by people with the other gender's set of private parts using the same bathroom as the cisgender people are using, and 2) transgenders. On that note of “privacy and safe space”, here is the matrix above, but from a “safety” point of view:

Matrix of Possible Female, Male, and Non-Gender/Transgender Bathrooms on Axes of Safe Space and Previously Mentioned Factors

<i>Female</i>	<i>De-gendered</i>	<i>Male</i>
1. Safe space for females who fear sexual assault by men, or don't want to see male private parts	3. Safe space for anybody (except those requiring a plural, i.e., multiperson bathroom)	5. Safe space for males who fear sexual assault by women, or don't want to see female private parts
2. Safe space for transgender females who want a female bathroom	4. Safe space for those preferring a plural, non-gender or transgender bathroom	6. Safe space for transgender males who want a male bathroom

While the above solution might not satisfy everybody (e.g., people who demand that every bathroom everywhere be non-gendered and accessible to anyone), it may satisfy those who still want gendered bathrooms, but who recognize that both cisgender and transgender people want a safe space.

Is the solution practical? In terms of cost, it might entail building roughly twice as many bathrooms as there are now. This could be included in any cost-benefit equation related to whether transgender bathrooms are constitutionally mandatory.

Then again, there might be ways to avoid building a huge number of new bathrooms. For example, imagine that Jamie Farr High School has four bathrooms, two female and two male. Then, without building any new bathrooms, the school

could simply repurpose one female and one male bathroom into being transgender-friendly bathrooms, and keep the remainder as “traditional” bathrooms. Students may have to walk somewhat longer to get to the bathroom of their choice, of course, if two bathrooms are changed, rather than building four new bathrooms. (If non-gendered bathrooms are also built, that would naturally cost extra.)

Some transgenders might complain that under the plan above, there is still a bathroom of their chosen gender that is denied to them. But that may be the price for giving everyone a safe space. Transgenders will still be able to use *a* bathroom, *some* bathroom, of their chosen gender; and given social trends, there may be more and more cisgender people who are willing to share that bathroom with them over time.

However, those cisgender people uncomfortable with private parts of the opposite gender will have a safe space. And some of those cisgender people will be uncomfortable because they have been raped, sexually assaulted, harassed, flashed, or otherwise mistreated by people with private parts of the other gender. (*See, e.g.*, Br. of *Amicus Curiae* Safe Spaces for Women Supporting Neither Party (detailing instances of women who feel threatened by transgender women using their restroom).) Or because they fear that that type of behavior might happen to them. Their fears and sensitivities deserve great respect.

(Amicus has done some domestic violence work in the past, e.g., counseling domestic violence victims or helping them get restraining orders against an

abusive partner, and helping to raise money for women's shelters. So Amicus takes very seriously the stresses and concerns that the women in the Safe Spaces brief, *supra*, feel.)

There are many cisgender people, in turn, who will be enraged that there is any kind of transgender bathroom allowed at all under this plan: many people still think transgender behavior is perverse, un-Biblical, psychotic, etc. But having at least *some* kind of transgender bathroom available may be the price for giving everyone a safe space. (Then again, this is all if the Court forces bathrooms to accept transgenders. If not, the matrices above may have less use. ...Amicus is not endorsing transgender behavior or supporting Respondent's position, except maybe in the very broad sense that Respondent is a human being who deserves respect.)

Amicus sees a false dilemma in the notion that "Either you let transgenders use their chosen gender's bathroom, or not: and someone has to lose." But the six-bathroom matrix solution given above largely avoids that "zero-sum game" or "Hobson's choice". Even those who think every bathroom should be non-gendered, would have some non-gendered bathrooms to use, per the matrices.

(From the world of set theory or logical analysis, we can see that it is fallacious to assume that just because " $A \rightarrow B$ ", "If transgenders are given a bathroom, it must be a plural-occupancy female or male bathroom", that therefore " $B \rightarrow A$ ", "Each and every plural-occupancy female or male bathroom must be a transgender bathroom." That error is sometimes called "affirming the consequent" or the

“fallacy of the converse”. There can be various kinds of plural-occupancy female or male bathrooms, not all of them transgender, though some may be.)

If people want to find creative solutions that accommodate everyone or nearly everyone, the two matrices above might be a template or near-template for efforts in that direction. But if people just want to “fight for their own side” and ignore the sensibilities and pains of the other side, they should not be surprised if ugliness and misery result. The Court should avoid abetting ugliness and misery when reasonably possible.

II. AUER DESERVES NEITHER OVERTURNING OR GUTTING

Moving from one “ideal solution” to some more prosaic and procedural material: Amicus thanks the Court for not considering the provocative question of whether the doctrine of *Auer*, *supra* at 2, should be retained or not. *Auer* is imperfect, like most things; but destroying or even gutting it is needless. Amicus believes that there can be too much deference given to federal agencies; but there can be too little deference, too.

And people right-of-center might have ample cause to regret *Auer* being overturned or gutted, at some point. What if, for example, there is a school board that wants to give transgenders unlimited access to bathrooms of their choice, even though most of the student body is visibly horrified by that prospect? and the Department of Education, in riposte, offers a guideline, in a letter, which says that all schools must offer a “safe space” bathroom

into which transgenders, especially those with private parts of the opposite gender, must not intrude?

Would Petitioner be happy about *Auer* being overturned then, if the federal government were the last line of defense for traditional bathrooms? Possibly not. So, weakening the federal Government is not a panacea for everything.

In the instant case, it is possible, say, that there was not enough notice-and-comment, or such, *vis-à-vis* the Ferg-Cadima letter of January 7, 2015. But that alone should not mean that *Auer* as a whole should be defenestrated or filleted, just because the Government's power putatively went too far in this particular case.

III. THE FUTURE OF TRANSGENDERISM IN AMERICA: VALLEYS AND PEAKS

One reason that some Americans may not endorse transgender bathrooms is that the “nightmare scenario” might occur some day: e.g., a sleazy 40-year-old man puts on a dress, goes into a women's bathroom, and brutally rapes and kills a 9-year-old girl. Then those who endorsed transgender bathrooms would be put in the position of having facilitated that terrible killing, arguably.

Of course, such a horrible event might not ever happen—but how can you know it won't?

Regardless of the chance of disaster, though, transgenderism seems to be on the rise these days. And, without making a prediction, it may well be around for a long time.

That being said, still, many people of older generations may, when they think of transgenders, envision some crazy guy like Jamie Farr’s “Klinger”, a corporal in the CBS Korean-War situation comedy *M*A*S*H* (20th Century Fox Television, 1972-1983), who, *see id. passim*, was trying to get a “Section 8” discharge for mental illness from the military by wearing women’s clothes all the time. (Klinger may have been more of a *transvestite* than an actual transgender, but not everyone can tell the difference.)

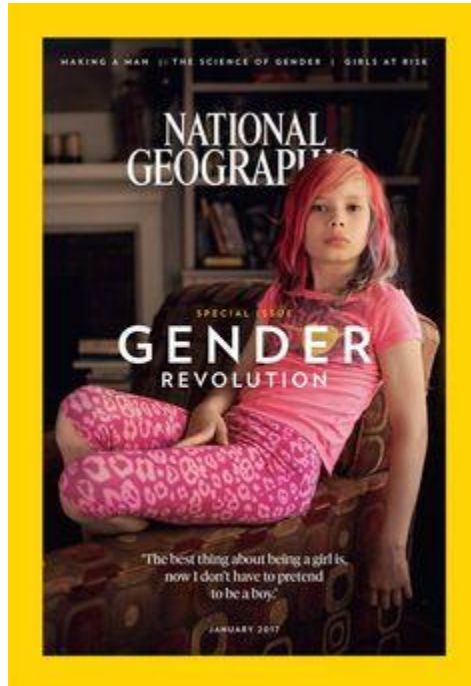


(*Henry zipping up Klinger*, courtesy of maniacmike1, M*A*S*H, Pinterest, <https://s-media-cache-ak0.pinimg.com/236x/40/d6/4d/40d64d6631166276a1e044679d4d64a4.jpg>.)

While he wasn’t a threatening figure, he was pretty wacky, so that if Klinger is your image of a transgender person, you may not have much respect for transgenders. Someone wearing fruit on his head, *id.*, may not command much respect.

Recently, though, the image of transgenders has changed; *see, e.g.*, the January 2017 National

Geographic cover, featuring 9-year-old transgender girl Avery Jackson, looking somewhat more respectable or sane than Klinger:



(Courtesy of National Geographic and *Transgender*, Pinterest, <https://www.pinterest.com/pin/353743745703491667/>) Of course, your average transgender may look like neither Avery Jackson nor Klinger; but the change in portrayal over time adds up to a lot. There is a media and societal headwind against those who want to disrespect, or abuse, transgenders.

And, how long are the President-elect and his party going to hold the White House? Some people may be crowing and chortling that with the incoming

Administration, transgender and “LGBTQ” rights in general are doomed. But what about the long term?

For example, four years from now, we may have a President-elect to the left of Fidel Castro, at least on gender issues. In the long term, how well will the idea of keeping transgenders out of the bathroom of their choice survive? Thus, if transgenders eventually win a legal right to enter a bathroom of their chosen gender, Amicus has offered, in Section I, *supra*, a sort of “détente” whereby everyone can at least claim to have a safe space for herself or himself, and endless conflict is avoided.

(Amicus is not endorsing transgenderism at all, he shall repeat. Amicus is concerned, for example, that a very young person may think he or she is really of the other gender and needs to have his whatsit cut off or surgically altered by a doctor. Is it possible that some kids who have had various amputations or alterations early on, may come to regret those changes, likely irreversible changes, later on? Some persons may want to “jump on the transgender bandwagon”, but just because something is become popular in the mass media, that doesn’t mean that there are no problematic aspects to it.)

Maybe one day gender dysphoria will be curable, and there will be a way to make everybody comfortable with the body they were born in. *See, e.g., U.S. Conf. of Cath. Bishops, USCCB Chairmen Respond to Administration’s New Guidance Letter on Title IX Application, USCCB.org, May 16, 2016, <http://www.usccb.org/news/2016/16-056.cfm>, on the “basic understanding of human formation so well*

expressed by Pope Francis: that ‘the young need to be helped to accept their own body as it was created’”, *id.* (citation omitted)

This acceptance of one’s birth body would save resources: e.g., people would not need surgery to “transition” to a different gender or sex, so the surgeons would have more time to treat other people with medical needs. (Thought for the day: “Never have surgery unless you really need it.”) But for the time being, gender dysphoria and transgenderism still exist, and show no signs of disappearing soon. So, hatred towards transgenders, or even just incivility towards them, is an especially poor idea.

Obviously, then, civility towards transgenders, and reciprocally from them to the rest of us, seems a wise idea. Not all of us may ever agree on every issue, but meanness can be avoided, hopefully.

(Not everyone has figured this out yet, sadly enough; one camp, or the extreme of it, thinks transgenders are satanic perverts who should be rounded up and burned at the stake; the extreme of the other camp thinks that anyone who gets in the way of what any transgender does or wants, is automatically a Bible-thumping Nazi who should be humiliated and thrown out of modern society. But maybe there is common ground in the middle, without anyone losing her/his integrity or autonomy.)

**IV. PETITIONER AND RESPONDENT
SHOULD BOTH SHOW RESPECT
TO EVERYONE INVOLVED IN
THIS DELICATE QUESTION**

On that note: there may be a certain lack of respect from each side towards the other side in the instant case. America has an adversarial system of justice, but even within that, there is room for respecting the other side's sensibilities.

For example, the pre-certiorari amici brief of 8,914 Students et al. in Support of Petitioner has various good points (e.g., its list of parents and some students who are uncomfortable with transgenders in female or male bathrooms), but it twice uses a term, "bohemian", to describe transgenderism. ("These courts have recognized that the constitutional right of bodily privacy is defined by reasonable expectations, not the bohemian leanings of a few", *id.* at 3; "Third, the scope of bodily privacy rights is not determined by the most bohemian members of society", *id.* at 21.)

That label, "bohemian", sounds as if every transgender is just some rotten, beret-wearing, absinthe-swilling troublemaker visiting from the Left Bank of Paris to make trouble for Decent God-Fearing Americans. But, *inter alia*, transgenders may have genuine and painful mental problems (gender dysphoria, etc.), which do not deserve the disrespect of being called a "bohemian lifestyle". Wounded people may deserve compassion, not needless insult.

On the other side, Respondent, from what Amicus can see, may not fully understand the pain he may be causing fellow students who are not eager to see opposite-sex genitalia in a bathroom setting.

Exposing one's genitals is a traditional way to harass or abuse people, as we know; *see, e.g.,* Allegra

Hobbs, *Ex-Raw Food Chef With 10-Year History of Subway Masturbation Pleads Guilty*, DNAINfo, Nov. 30, 2016, 5:38 p.m., <https://www.dnainfo.com/new-york/20161130/east-village/dan-hoyt-pleads-guilty-harassment-subway-masturbation> (perverted cook exposes self on train or train platform).

Most transgenders are probably not going to lower themselves to the level of some flotsam “playing with himself” on the A Train. But some might; and there is still plenty of danger from *unintended*, accidental exposure. (The Court is usually not happy if protesters shout and disrupt Court proceedings; how about if someone came and exposed his/her private parts to the Court, even accidentally? If the Court would be offended, cisgenders have a right to be offended too.)

Otherwise put: while G.G. is doubtless a fine person in many ways and is not a “flasher” or “exhibitionist”, that does not mean that other transgenders might not be. And even if they didn’t mean to “flash” anyone, they might do so accidentally.

The whole point of a bathroom, practically, is to take your clothes off and perform certain private functions. To believe that there will never be a “wardrobe malfunction”, or that no one will ever forget to lock her/his stall door and it then swings open accidentally, is straining at the impossible. Three little letters we probably all know, “XYZ”, i.e., “Examine your zipper”, show the pervasive attitude in our culture about the importance of keeping oneself covered, and the likelihood of people

accidentally *not* examining their zipper, so that an uncomfortable or even obscene situation could result.

...And even if the school board may have added some visual blinders of sorts in the boys' bathroom, to make visual voyeurism harder: is that truly enough to protect people's privacy? Without making this brief X-rated: there may be various sounds, smells, objects, etc. that can also violate privacy or propriety, or let people know that there is someone whose body is of the other gender using their bathroom. Sight is not the only sense.

Also, the practice of "sexting", especially "teen" or "preteen" sexting, has come under fire in recent years, as it should: the idea of anyone, especially underage people, showing pornographic or quasi-pornographic images to other people over the Internet is horrific. But as vile as those images are, they are mere images; seeing the real thing may be even worse. Therefore, how someone can be horrified about sexting and then in the next breath say that they can't understand why anyone could be offended by a transgender using his/her bathroom of choice when the transgender's genitalia don't correspond to that bathroom's gender? That makes no sense.

Similarly, many Americans, especially those left-of-center, were not too enthused about hearing our President-elect once say that if around women, he would "grab them by the p----" (female genitalia). See, e.g., Esme Cribb, *Trump Caught On Hot Mic In 2005: 'Grab Them By The P***y' (VIDEO)*, Talking Points Memo ("TPM"), Oct. 7, 2016, 4:39 p.m., <https://talkingpointsmemo.com/livewire/trump-lewd-comments-women-2005-hot-mic>. If they are right to

be disgusted—and indeed they are—, is it so strange that people using a bathroom might also fear, if not rape or other assault, at least the unwanted sight of genitalia of the other sex?

Respondent claims that “When I used the boys’ restrooms, I never encountered any problems from other students.” Corrected Decl. of G.G., para. 20 (June 3, 2015), from Pet’r Pet. for a Writ of Cert., App. 149a. But sometimes people don’t tell you that you are offending them; they may use private channels to let other people know about the offense—and apparently they did let the Gloucester school board know. That is why we are here.

V. SHADES OF TRANSGENDER: OR, BIRTH CERTIFICATES VERSUS BODY PARTS—WHAT DENOTES GENDER?

But what is a “boy”, anyway? —One issue in considering what constitutes “real gender” is how much a birth certificate comports with a person’s body parts. Here are two extreme scenarios:

1. Jane Blow, born Joe Blow, was born as a hermaphrodite but the parents felt “he” would be better off as a male on his birth certificate. However, soon after the certificate was issued, he suffered an accident which necessitated removing his male private parts, so that only female ones were left. However, the parents had bureaucratic trouble getting the certificate changed, so that despite living as a female all her life, Jane is still “male” on her birth certificate.

2. Fred Blatz, a male 45-year-old drifter and miscreant, found a compliant county clerk to give him/her a birth certificate calling Fred “female”, due to Fred’s claimed “newly found female gender identity”, in which Fred does not truly believe, although he invented the excuse in order to change his birth certificate. Fred still has male genitalia and is looking forward to causing havoc and doing a little voyeurism by using “her” birth-certificate “female identity” to access female bathrooms, and, Fred hopes, female locker rooms and other facilities.

To a common-sense point of view, Amicus believes, Jane is the more real female, and Fred is the more real male, despite their birth certificates saying the opposite. Amicus hopes the Court understands this common-sense line of reasoning, and considers it while making its decisions.

Although this brief is not recommending government genital inspections of people before entering a bathroom (!), there may be something to keeping the traditional prohibitions on allowing someone with opposite-sex private parts to enter a restroom, regardless of what their birth certificate says. (Again, G.G.’s birth certificate apparently says “male” now, but he apparently still has female private parts.)

There may have to be self-policing by people using bathrooms, instead of aggressive government policing, but still, that may work in the vast majority of cases. (And even if police don’t haul off someone using the wrong bathroom, sometimes the people in the bathroom have their own informal methods of “enforcement”...)

**VI. UNISEX BATHROOM STALLS
ARE NOT OFFENSIVE TO ALL
TRANSGENDER PEOPLE**

Amicus takes seriously that G.G. does not enjoy using unisex single-stall bathrooms. It is his right to feel offended, if he wants. Still, many people use them without being offended. Amicus believes he himself has used them in the past, if the men's room happened to be full or inaccessible. So, Amicus is not insulting G.G.'s opinion, but merely saying that that opinion may misconstrue reality in some way, if Respondent thinks the Petitioner was trying to insult him by building single-sex bathrooms.

In fact, sometimes transgenders have *demand*ed single-sex bathrooms. *See, e.g.*, Jillian Kay Melchior, *UMass Trans-Activist Students Host 'Sh*t In' in Admin Building*, Heat Street, 12:59 p.m., Nov. 15, 2016, <http://heatst.com/culture-wars/umass-trans-activist-students-host-sht-in-in-admin-building/>,

Students have organized a “sh*t in” at the University of Massachusetts Amherst this week, camping out in the toilet stalls of the administration building to protest the lack of gender-neutral bathrooms

Gender Liberation UMass, the student group behind the event, issued three demands to administrators: quick implementation of more gender-neutral bathrooms

Id. So, unisex bathrooms are not necessarily anathema to transgenders.

(In Massachusetts, there may be freedom for transgenders to use gendered bathrooms too. But, once again, the story *supra* shows us that transgenders do have some use for unisex bathrooms. One might even ask why Respondent has been resisting them, and not, say, fought for use of the boys' room *and also* fought for unisex bathrooms like the Amherst activists. Does this failure to fight for unisex bathrooms discredit him as a hardcore transgender activist; or rather, does it show that we all have our limits, and none of us should be too self-righteous, when a lot of the issues at hand are controversial and still need a great deal of dialogue and goodwill??)

**VII. NON-TRANSGENDER GENDER-
ANOMALOUS BATHROOM SITUATIONS
SUCH AS A MOTHER ESCORTING HER
DOWN-SYNDROME SON INTO A BATHROOM**

Another reason that unisex bathrooms are useful, even necessary, is that besides transgender situations, there are plenty of other situations that might require, or be helped by, such a bathroom.

Imagine, for example, a mother with a severely developmentally-disabled 10-year-old son with Down syndrome, who needs his mother to accompany him to the bathroom. The lad is old enough so that his presence in a women's bathroom might be frightening to the women or girls there. And his mother's presence in a men's bathroom might be disturbing to the men or boys there. It is possible, then, that the mother and son have a right, even a constitutional right through whatever means (e.g.,

Fourteenth Amendment), to have a non-gendered bathroom available to them.

So, “non-transgender gender-anomalous bathroom situations” like the Down-syndrome scenario *supra*, help support both the need for more unisex bathrooms, and the idea that such bathrooms may not always stigmatize transgenders.

(As for unisex bathrooms re cisgenders: some folk say that the cisgenders at Gloucester could simply use the unisex stalls themselves if they don’t like G.G. in their bathroom. But is it appropriate for one transgender student to use a bathroom and thus drives out potentially many other students, permanently? Possibly not. Arguably, a more rational point of view would be “greatest good for the greatest number”, e.g., not forcing the many to be the ones who have to use a unisex bathroom.)

**VIII. WHY IT MAY BE WISE TO KEEP
GENDERED BATHROOMS RATHER THAN
HAVING ONLY UNISEX BATHROOMS; OR,
BATHROOMS AS HISTORICALLY USEFUL
SOCIAL SPACES AND REFUGES FOR
PEOPLE OF ONE GENDER OR THE OTHER**

But unisex bathrooms are not enough. —Amicus is not going to present “A Social History of the American Bathroom”, but it is safe to say that many people are not ready to discard gendered bathrooms altogether. And some advocates do want that latter result; *see, e.g.,* Nico Lang, *Why All Public Bathrooms Should Be Gender Neutral: It’s time for lawmakers and business owners to realize that gendered restrooms just don’t work.*, The Daily Beast,

Apr. 17, 2016, 10:00 p.m., <http://www.thedailybeast.com/articles/2016/04/18/why-all-public-bathrooms-should-be-gender-neutral.html>.

Female and male restrooms serve not only as restrooms, but also as social gathering places, say, to exchange gossip, powder one's nose, or sometimes slightly more nefarious activities. *See, e.g.*, Klymaxx, *Meeting in the Ladies Room* (on the Klymaxx album *Meeting in the Ladies Room* (Constellation/MCA 1984)), available at https://www.youtube.com/watch?v=_odTIZaoLCA; Brownsville Station, *Smokin' in the Boy's [sic] Room* (Rhino/Atlantic 1973), available at <https://www.youtube.com/watch?v=Q9zWw0Ru28w>.

Many people enjoy having a gender and expressing it. *See, e.g.*, Oscar Hammerstein II & Richard Rodgers, *I Enjoy Being a Girl*, from the musical *Flower Drum Song* (1958) (based on C.Y. Lee's novel *Flower Drum Song* (1957)). To de-gender part of Americans' social experience against their will might be an unpleasant and undeserved experience.

A dangerous experience, even; *see* Charles Campbell, *University Of Toronto Switched To Unisex Bathrooms But Had To Make A Change*, *Western Journalism*, Apr. 27, 2016, 12:04 p.m., <http://www.westernjournalism.com/university-of-toronto-switched-to-unisex-bathrooms-but-had-to-make-a-change/>,

The Canadian college had been experimenting with unisex bathrooms but decided to change its policy after

two separate incidents of voyeurism. On Sept. 15 and 19 of last year, two male students were caught holding cellphones over female shower stalls and recording women as they bathed.

Melinda Scott, the university's dean of students, responded to the events immediately: "Given the serious nature of these incidents and the impact on directly affected students, we made the decision to specifically designate some washrooms in Whitney Hall for those who identify as men and those who identify as women."

Id.

Amicus does not mind the idea of safe spaces for transgressors. But if a particular "safe space" for them *creates an unsafe space for others*, that is a problem. An old saying goes, "Your freedom ends where my nose begins"; and in transgender bathrooms, there may be some much more controversial body parts involved than just the nose.

IX. MAYA DILLARD SMITH'S FIGHT FOR HER DAUGHTERS AND OTHER WOMEN, AND ALSO FOR ACCOMMODATING TRANSGENDERS

Even people from highly liberal-leaning backgrounds wonder if some provisions for transgressors go too far and end up hurting other people. *See, e.g., Yezmin Villarreal, ACLU Director Quits, Says Trans Rights Threaten Women's Safety, The Advocate, June 2, 2016, 6:55 p.m., <http://www>.*

advocate.com/transgender/2016/6/02/aclu-director-quits-says-trans-rights-threaten-womens-safety-video, quoted at length because of its great value,

Maya Dillard Smith, the interim director of the Georgia chapter of the American Civil Liberties Union, has resigned from her position because she does not support the organization's fight for the right of transgender people to use the bathroom that corresponds with their gender identity.

Smith reportedly said the ACLU is advocating for trans rights at the expense of safety for women and children. [T]he former director called the ACLU a special interest organization that "promotes not all, but certain progressive rights. In that way, it is a special interest organization not unlike the conservative right, which creates a hierarchy of rights based on who is funding the organization's lobbying activities [sic]."

....

Smith claimed that transgender rights have "intersectionality with other competing rights, particularly the implications for women's rights." She said that when her young daughters shared a bathroom with transgender women, it made her worry the children would be harmed. "I have shared my personal experience of having taken my elementary school age daughters into a

women's restroom when shortly after three transgender young adults over six feet with deep voices entered," she wrote in the statement.

She went on to say that her "children were visibly frightened, concerned about their safety and left asking lots of questions for which I, like many parents, was ill-prepared to answer."

The former Georgia ACLU director said she believes that there must be a "solution" that balances the needs of women and transgender people in public accom[m]odations "Despite additional learning I still have to do, I believe there are solutions that . . . can provide accommodations for transgender people and balance the need to ensure women and girls are safe from those who might have malicious intent."

In an interview with Atlanta TV station WXIA, Smith argued that cisgender (nontrans) women should not have to share bathrooms with trans women because it could be "[t]raumatic." "If we have all-gender restrooms which will accommodate trans folks, what do we do about women who are the survivors of rape, for whom it would be traumatic to share a public restroom where you take down your

underwear, and there'd be men in the bathroom," she said.

....

Smith has launched a website called Finding Middle Ground that features a video of a young girl talking about "boys in the girls' bathroom." "There's some boys who feel like they're girls on the inside and there's some boys that are just perverts," says the young girl in the ad. A caption appears on the screen after she speaks that reads "How do we keep our [l]ittle girls safe and prevent transgender discrimination?"

Id. As a former ACLU director, Smith is probably not a flaming right-wing fanatic. (She is also African-American, and thus is probably not a Klan member or neo-Confederate either.) She tells a compelling story, *see id.*, about wanting to protect her daughters and other women, but also wanting to show respect to transgenders.

Amicus himself has thought now and then, even before hearing Smith's story, about writing a book called "Rights Space", concerning, as Smith says *supra*, how certain rights may interfere with other rights, so that not all the rights can have full, untrammelled play at once. Smith's thoughtful contributions and call for more dialogue about these issues may inspire us all to think about the often delicate interplay of everyone's rights, not just one group's rights.

X. ON THE ARGUMENT THAT "WELL, PEOPLE GET ABUSED IN TRADITIONAL

BATHROOMS TOO, SO WHY OPPOSE TRANSGENDER BATHROOMS?"

Some may argue that since abuse or promiscuity could happen even in a traditional bathroom, we should not worry about transgender bathrooms. True, “funny things” sometimes happen in regular bathrooms. The late George Michael (RIP), while a brilliant musician with Wham! and then solo, made some not-so-brilliant bathroom decisions; *see, e.g., Ari Bendersky, George Michael Busted In Bathroom, Rolling Stone, Apr. 9, 1998, <http://www.rollingstone.com/music/news/george-michael-busted-in-bathroom-19980409>,*

Area residents complained to police about seeing lewd behavior in the bathroom at Will Rogers Park, which is located in one of Beverly Hills’ most exclusive neighborhoods. A four-person undercover team responded to the complaints and found Michael -- alone in the bathroom -- engaging in a lewd act[.]

Id. While Michael was “alone”, *id.*, there could’ve been someone else there in the men’s room—and some people did come in and were offended by his lewdness, *see id.* So, the traditional bathroom is not always a safe space.

But, that is not the only issue. ...Critics of transgender bathrooms note that a creepy 40-year-old man could use a bathroom and abuse an innocent 12-year-old girl there. Of course, a critic on the other side could rejoin that even in traditional bathrooms,

a creepy 40-year-old man could abuse an innocent 12-year-old *boy*. However, that argument overlooks that opposite-sex abuse adds the extra danger of unwanted pregnancy that is absent in cases of same-sex abuse, as heinous as that latter form of abuse is.

Moreover, there is sometimes a physical-strength differential between men and women that favors men, especially upper-body strength of adult men compared to adult women. Amicus is not trying to stereotype here, but statistically, there is often that strength difference.

(Amicus is perfectly happy to see women breaking out of many stereotyped gender roles, as shown in fiction by Carrie Fisher (RIP) playing the feisty “Princess Leia”, or the *Peanuts* comic strip’s tomboyish and rough Peppermint Patty (on whom more later). But: “The truth is that the two sexes are not fungible”, *Ballard v. United States*, 329 U.S. 187, 193 (1946) (Douglas, J.)

Many women and girls, then, and not just those in the “Safe Spaces for Women” amicus brief *supra* at 7, fear transgenders using their bathrooms. The Court should not mock or ignore those females’ unease and apprehension about the proposed “new order” of generalized transgender bathroom usage.

XI. MANY TRANSGENDERS SUFFER, AND HAVE SUFFERED, HORRIBLY

Amicus, by the way, is quite aware that life is often very difficult for transgender people. There is a high rate of suicide, mental illness, etc. Some people have even left transgender status because of the horrors they encountered, such as Walt Heyer, a

former transgender. See Walt Heyer Ministries (2016), <http://waltheyer.com/>, for part of his story.

Respondent G.G., in particular, has suffered, he says, from urinary tract infections because of the situation in the instant case. Amicus is sorry that G.G. has suffered. G.G. is a vulnerable child who deserves a careful listen, and also whatever kindness and generosity are proper.

So, however the Court decides, Amicus hopes that it is done in a way that treats transgenders as human beings instead of just a bunch of “bohemians” or “monsters”.

...There are rumors that a certain Member of the Court, whoever it would be, once dressed up as Patty or Peppermint Patty from the *Peanuts* comic strip while in a high school skit. (That does not make that honored Member into a transgender, of course; but, just saying.) After that experience—albeit an experience which was just a one-time episode of fun—, who on the Court would want to be unfair or cruel to transgenders? As the Nazarene said, “Do unto others as you would have them do unto you.” (*Matthew* 7:12, *Luke* 6:31)

XII. GAY MARRIAGE IS CONTRACTUAL AND BETWEEN ADULTS, BUT TRANSGENDER CHILDREN USING THEIR NEW GENDER’S BATHROOM IS NON-CONTRACTUAL, IF THE OTHER CHILDREN THERE HAVE NOT CONSENTED

Another factor of importance is the distinction between the instant case and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In *Obergefell*, one crucial

support for the Court’s decision was that there were two gay (or at least same-sex) persons making a free-will contractual decision *as adults* to enter the marriage bond, and share the physical and other intimacies thereof. “[M]arriage was understood to be a voluntary contract[;] it is appropriate to observe these cases involve only the rights of two consenting adults”, *id.* at 2595, 2607 (Kennedy, J.).

However, in the instant case, cisgender children may not be consenting at all to the entrance of transgender children, especially ones with opposite-sex genitalia, into their bathroom. So all the hallowed status that *Obergefell* places on contract and consent is absent in G.G.’s case.

Moreover, the children may not even be *old enough* to consent to a sexualized situation, or potentially-sexualized situation, posed by a bunch of people taking their clothes off (even if behind a stall door) in close proximity to one another. Age of consent may be meaningless if it is not considered here. (Presumably, re same-sex bathrooms or locker rooms, there has been a “societal consensus”, and plenty of individuals’ consensus, that children of the same sex taking off their clothes there are not violating sexual or other proprieties as long as they avoid inappropriate touching or staring, and are using the bathroom or locker room for the room’s stated purpose instead of for a nefarious purpose.)

Since it may be difficult to bring up “assumption of risk” *per se*, re cisgender children who are comfortable choosing a transgender bathroom despite the risks there—difficult since the children,

again, may be too young to consent legally to certain things: still, for what it is worth, at least they are given a choice, under Amicus' Section I matrices. A cisgender can choose a traditional bathroom, or be "progressive" and choose a transgender bathroom. And a transgender can choose a transgender bathroom, or opt for a single-person bathroom (or a plural-use non-gendered bathroom, cell 4 of the matrices).

Let us also observe how much closer, even strained and controversial, cases about crossing marriage and/or sexual boundaries have become. *Loving v. Virginia*, 388 U.S. 1 (1967), was a 9-0 vote involving interracial consenting adults of the opposite sex. It was plainly absurd to use skin pigmentation to prevent marriage.

The same-sex-marriage case *Obergefell*, by contrast, was a barely-won 5-4 vote, even though about consenting adults. And in the instant case, we don't even have consenting adults, and the claimed gender does not match the biological sex and genitalia, and the birth certificate has changed over time. So if the Court does not give Respondent a victory, or a full victory, that will not necessarily be a blow against individual rights or social progress; it may just be common sense, and a timely, thoughtful recognition of physical and social reality.

XIII. LEE V. TAM RE PETITIONER'S, RESPONDENT'S, OR OTHERS', RIGHT TO BE OFFENDED

Do traditionalist people have a right to be offended, by the way, or should society just tell

cisgenderers who are scared of transgenderers with opposite-sex private parts, “Suck it up, snowflake! You don’t need a safe space, and you are the cause of your own problems, you bigot!” But if transgenderers have the right to feel humiliation, maybe cisgenderers do as well.

On that note, Amicus will refer to the case of *Lee v. Tam, supra* at 3, currently before the Court, for comparison. That case, *see id.*, refers to an Asian-American rock band, “The Slants”, trying to “reclaim” the racial slur “slants”, referring to stereotypically Asian eyes, by trademarking their name. The U.S. Patent and Trademark Office was not happy with this, and perhaps with good reason, Amicus guesses.

(Incidentally, the Cato Institute has filed a controversial brief in the case. Some have questioned the use of humor in the brief. But, while Amicus doesn’t agree much with their brief—including its misspelling of “N.W.A” as “N.W.A.”, *id.* at ix, 4, 11, 12—, he may, *à la* Voltaire, defend to the (euphemistic) death their right to use humor, even massively. Boffo, waggery, zany, slapstick: Cato has First Amendment rights to evince such qualities.

A Supreme Court brief—like many legal documents— can be a world-class snoozefest at times; hence, within limits, humor can be not only a relief, but even a revelation. In our frequently-bizarre world, sometimes humor is the best way to understand a given situation.

Amicus doesn’t support their using dirty words in their brief, though, when they could’ve at least taken out some crucial letters, as Amicus does *infra*. (Decorum is not always a bad thing.)

Maybe the Court will be tempted to give the “Slants” band an as-applied pass (instead of a facial invalidation of the “disparagement” provision in question), since “slants” is a pretty vague word and can refer to many things. (E.g., “slanted” news coverage.) But how far do courts want to go in destroying the “disparagement” consideration in Section 2(a) (a.k.a. 15 U.S.C. 1052(a)) of the Lanham Act of July 5, 1946, ch. 540, 60 Stat. 427 (15 U.S.C. 1051 *et seq.*)?

What might be the consequences of total destruction of that consideration? As a *reductio ad absurdum* (which could nevertheless come to pass): what if “disparagement” is no longer a criterion, and then someone tries to trademark the “N---er Noose—Great for Hanging Big Bad Black N---ers!! Buy One Today!” A sly merchant might offer a disclaimer, “This is just a novelty item for creating a hilarious ‘Old South’ atmosphere at parties; we do not advocate criminal violence against anyone.”

(If the “n-word” is already forbiddable under some other portion of the Lanham Act, then for the example above, substitute another word, say, “d-rkie” or “w-olhead”, which may correspond to the way that “slants” relates to stereotypical Asian physiognomies.)

So, does the Court really want the “N---er Noose”, or any remotely similar item, to be trademarked? Maybe it isn’t such a good idea.

Or, if another example is needed: what if someone tried to trademark a “novelty” item, “*Genuine Jew Nose! Reaches all the way to Jerusalem!!*” The item would be a gigantically long artificial nose with

Stars of David all over it. Does the Court really want to allow anti-Semitism to be trademarked?

(Amicus is well aware that the American Jewish Committee has filed a brief supporting Respondent. Should they have, though? There is too much incitement of hatred towards Jews in the world already, without the Government being forced to *trademark* it. Would the shades of the victims at Auschwitz, Belsen, Dachau, appreciate trademarked, commercialized Jew-hatred?)

Similar insulting, derisive examples could be endless. How about a product called “Dirty, Filthy Slut Slit” tampons? Or “Pathetic F-ggot” lubricating jelly? Or “Transgender Loser” pink ballet shoes? Should those really be trademarked? And should the Court be eager to geld the Government’s noble efforts to protect some sense of decency in a society that seems little better than pornographic and vicious at times, these days?

Amicus recognizes that some applications of a disparagement prohibition could go too far and needlessly chill important speech. There are gray areas in what is “disparaging language”, of course. Say, the Government might possibly allow a cat show or feline-fanciers’ convention to trademark the term “Fabulous Pussy Fest”, but might not allow that term to be trademarked for more risqué purposes, including those deemed disparaging to women. So, destroying the disparagement criterion *in toto* may be throwing out the baby with the bathwater.

Interestingly enough, there may be amici, or their law firms, in the instant case who have supported the Respondent (representing the “Slants”) in *Lee v. Tam, supra*. But if someone is pleading that people may be offended by having someone of opposite-sex genitalia in their bathroom, how is that incompatible with someone being offended by a trademarked racist/sexist/anti-Semitic/whatever item? There is a lack of congruence there, if one thinks the two types of offense are incompatible.

True, *Lee v. Tam* is arguably more about speech than the instant case, which is more about conduct. Not necessarily, though. What if a transgender in a troublemaking mood doesn’t expose herself/himself physically, but just talks in a sexually-charged way? E.g., repeating, “Don’t my shorts look great?” to other bathroom users, in a way that implies the speaker is discussing his/her private parts. The shorts would be on, not off, so there’d be no “exposure” *per se*, and it might be just a “free speech” issue; but there would still be a problem, in Amicus’ opinion.

So, *Lee v. Tam* reminds us, people have a right to be offended—including victims of centuries of vicious racial slurs—, and some right not to expect the State to support such offense overly much, or at all. As for the instant case, cisgenderers have a right to be offended by transgenderers’ exposed genitals (or anyone’s exposed genitals, actually) without being told they have no such right; and transgenderers have a First Amendment right to feel insulted by being denied their bathroom of choice, as G.G. does, though the Court will decide if any legal relief should ensue from that. Amicus hopes the Court will

vigorously try to respect “the harmony and mutual respect among *all* citizens that our constitutional tradition has always sought”, *Grutter v. Bollinger*, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting) (emphasis added) in this case.

* * *

This case may fizzle out, e.g., if the Trump Administration figuratively (or literally) shreds the Ferg-Cadima letter, and all the briefs or other paperwork in this case become much ado about nothing. But the Court may have other grist for its mill than the Ferg-Cadima letter.

The Court may not give either party the relief it seeks, for all we know. Indeed, there may be room for serious creativity here. E.g., the Court could hand Petitioner a defeat by refusing to overrule or even substantially modify *Auer*; but it could also hand Petitioner a victory at the same time, by refusing to force Gloucester to admit Respondent to boys’ bathrooms. (Then again, Petitioner could also open a boys’ bathroom corresponding to cell 5 of the Section I matrix, giving a safe space to cisgender boys, even if the Court forces a bathroom like cell 6, open to transgender boys, to be created.)

And the Court could, say, simultaneously give Respondent a minor victory, if an unsought one, by ruling that he should have at least the bathroom accommodation he has right now, a single-person non-gendered bathroom. After all, even that could be taken away from him if a new school board is elected. In fact, the Court could make that a nationwide right, whether through the Fourth Amendment, the Fourteenth Amendment, or otherwise. If there are places in the United States

that do not provide at least a single-person non-gendered bathroom, that is problematic, in our present age. It may not be the most desired safe space for some people, but it is better than nothing.

(Of course, the Fourth Amendment, the Fourteenth Amendment, or other provisions could also be used to protect the privacy of cisgender students who are repulsed by the other gender's private parts in a bathroom setting. ...It could even be considered *unconstitutional animus* for a government entity not to create a safe space for cisgender students.)

Decades from now, if we have our first transgender, or maybe non-gendered or trigender, Associate Justice, or even a Chief Justice—"Mx. [not Mr. or Ms.] Chief Justice, and may it please the Court"—, would he/she be comfortable with the Court's coming decision? And conversely, would everyone else on the Court, which may include cisgenderers with traditional sensibilities, be comfortable with the Court's decision? We do not have the same body parts, but we all have hearts, and feelings, which should be considered. As the late Ronald Dworkin said, we should try to show people equal concern and respect.

Once again, Amicus presents the matrices from Section I, which might allow, or assist, the Court to devise dignified and safe spaces for everybody:

Matrix of Possible Female, Male, and Non-Gender/Transgender Bathrooms on Axes of Singular/Plural Use and Non-Gender/Transgender Compatibility/Incompatibility

<i>Female</i>	<i>De-gendered</i>	<i>Male</i>
1. “Traditional” female bathroom not open to persons with male private parts	3. One-person non-gender or transgender bathroom	5. “Traditional” male bathroom not open to persons with female private parts
2. Female bathroom open to transgender females with male private parts	4. Multi-person non-gender or transgender bathroom	6. Male bathroom open to transgender males with female private parts

Matrix of Possible Female, Male, and Non-Gender/Transgender Bathrooms on Axes of Safe Space and Previously Mentioned Factors

<i>Female</i>	<i>De-gendered</i>	<i>Male</i>
1. Safe space for females who fear sexual assault by men, or don’t want to see male private parts	3. Safe space for anybody (except those requiring a plural, i.e., multiperson bathroom)	5. Safe space for males who fear sexual assault by women, or don’t want to see female private parts
2. Safe space for transgender females who want a female bathroom	4. Safe space for those preferring a plural, non-gender or transgender bathroom	6. Safe space for transgender males who want a male bathroom

These matrices are not the be-all and end-all of possible solutions, but they may be a beginning. As the Court ponders, how, within the law, to keep safe spaces for

- 1) cisgender, and also
- 2) transgenders,

Amicus hopes the Court finds a way to “thread the needle” or “walk between the raindrops” and create equal justice here for all concerned, despite the complex challenges present.

CONCLUSION

Amicus respectfully asks the Court to consider the matter herein, while showing respect to cisgender, transgender, and all Americans; and humbly thanks the Court for its time and consideration.

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Respectfully submitted,

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