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

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QUESTION PRESENTED

Amici States address the following question:

Whether Gloucester County School Board's policy—which prohibits school administrators from allowing transgender boys and girls to use 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, 20 U.S.C. § 1681(a).

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INTEREST OF THE AMICI STATES

Amici States New York, Washington, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, along with the District of Columbia, file this brief in support of respondent G.G. The amici States strongly support the right of transgender people—individuals whose gender identity differs from their sex assigned at birth—to live with dignity, be free from discrimination, and have equal access to employment, housing, public accommodations, education, and other necessities of life. Discrimination against transgender people has no legitimate basis, and serves only to injure a group that is feared for being different. It harms transgender people at work, at school, and in other settings, causing tangible economic, emotional, and health consequences. To prevent such harms, most of the amici States have adopted policies to protect transgender people against discrimination on the basis of their gender identities.

The amici States' shared experience demonstrates that protecting transgender people from discrimination benefits all members of the public. And contrary to the petitioner's claims, our shared experience demonstrates that ensuring the civil rights of transgender people—including by allowing them access to common restrooms consistent with their gender identity—creates no public safety or personal privacy threat and imposes no meaningful financial burden.

The amici States also share a strong interest in seeing that Title IX is properly applied to protect transgender people from discrimination in federally funded educational institutions. The policy petitioner seeks to defend here violates Title IX by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. If entities receiving Title IX funds are allowed to discriminate in this way, transgender people will be denied equality in the schools operated by petitioner and in many other places. The amici States have important interests in ensuring that their transgender populations, including students, college faculty, and other state employees, do not experience indignity and discrimination when they travel to other States.

SUMMARY OF ARGUMENT

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

Title IX provides a crucial additional tool for ensuring equality by guaranteeing that transgender people can travel freely across State lines without fearing discrimination by educational institutions receiving federal funds. And contrary to the arguments of petitioner and its amici, enforcing Title IX's mandate of gender equality in the circumstances of this case does not violate the Spending Clause of the

Constitution, U.S. Const. art. I, § 8, cl. 1. The application of federal equality requirements to particular fact patterns inevitably raises questions, but the resolution of those questions does not impose new mandates on recipients of federal funds in violation of the Spending Clause where—as here—the text of the statute itself, as informed by prior judicial decisions, is sufficient to resolve the issue.

ARGUMENT

I. Discrimination Against Transgender People Harms the Amici States and Their Residents.

A. Transgender People Are an Important Part of the Population of the Amici States, and of Every State in the Union.

Nearly 1.5 million people in the United States identify as transgender.[1] They serve our communities in a broad array of roles, including as members of the

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

armed services,[2] police officers,[3] firefighters,[4] doctors,[5] scientists,[6] engineers,[7] professors,[8] and attorneys.[9] Professional psychologists recognize that transgender people have been part of cultures worldwide "from antiquity until the present day," and that being transgender is natural and not any form of pathology.[10]

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[2] Jennifer Rizzo & Zachary Cohen, *Pentagon Ends Transgender Military Ban*, CNN (June 30, 2016) (internet).

[3] Rick Rojas, *Transgender on the Force,* N.Y. Times, Aug. 5, 2016) (internet); Craig Sailor, *Seattle-Area Transgender Cops Interviewed in HBO Documentary*, News-Tribune (Tacoma, WA), Jan. 6, 2017 (internet).

[4] *Finding Lana: The Story of a Transgender Columbus Firefighter*, Columbus (OH) Monthly, June 4, 2015 (internet); Claire Cohen, *Meet New York's Only Transgender Firefighter*, Daily Telegraph (London), Nov. 4, 2015 (internet).

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[7] Laura Keeney, *Transgender Lockheed Martin Engineer Receives Top LGBT Award*, Denver Post, Nov. 7, 2014 (internet); Lynn Conway, *Lynn's Story* (2004) (internet).

[8] Deirde N. McCloskey, *When Donald Became Deirdre—In Making the Transition from Male to Female, It Helps to Have a Sense of Humor*, Wall St. J., June 4, 2016, at C3; Gabrielle Russon, *Transgender Professor Teaches Tolerance Along with Math*, Orlando Sentinel, Feb. 17, 2017 (internet).

[9] Cynthia Lee, *Transgender Lawyer's Appeal for Justice*, UCLA Today, May 22, 2007 (internet).

[10] *See* 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*

Being transgender does not in itself inhibit a person's ability to contribute to society.

Unfortunately, however, transgender people are often subject to harsh discrimination that limits their ability to realize their potential.[11] See *infra* 7-15. Recognizing the stigma, isolation, and other harms caused by such discrimination—and the benefits of combatting such discrimination—States began providing explicit civil rights protections for transgender people nearly a quarter century ago. Currently, twenty States and the District of Columbia offer such protections: New York, Washington, California, Colorado, Connecticut, Delaware, Hawai'i,

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for Psychological Practice With Transgender and Gender Nonconforming People, 70 Am. Psychol. 832, 834 (2015) ("Gender as a nonbinary construct has been described and studied for decades. There is historical evidence of recognition, societal acceptance, and sometimes reverence of diversity in gender identity and gender expression in several different cultures." (citations omitted)); World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 4 (4th Ver. 2012) (internet) ("[T]he expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and culturally diverse human phenomenon [that] should not be judged as inherently pathological or negative." (quotation and alteration marks omitted)).

[11] *See also* APA, Answers to Your Questions, *supra*; APA, *Guidelines*, *supra*, 70 Am. Psychol. at 840 (discussing adverse effects of anti-transgender prejudice within "families, schools, health care, legal systems, workplaces, religious traditions, and communities."); Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity*, HuffingtonPost (June 4, 2013) (internet) ("[T]he distress that accompanies gender dysphoria arises as a result of a culture that stigmatizes people who do not conform to gender norms[.]").

Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Utah, and Vermont.[12] At least six more States bar gender-identity discrimination in state employment: Michigan, Kentucky, Virginia, Louisiana, Montana, and Pennsylvania.[13] In addition, at least 225 local governments prohibit discrimination based on gender identity or expression.[14] As the experience of these jurisdictions shows, policies that ensure equality for transgender people—including by allowing them access to public facilities consistent with their gender identity—promote safe and inclusive communities, workplaces, and schools: a benefit that accrues to all.

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[12] Relevant provisions are listed in the Appendix.

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

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

B. Transgender People Face Pervasive and Harmful Discrimination, Including by Being Denied Access to Common Restroom Facilities.

1. Hate crimes pose a serious and enduring problem for transgender people and the amici States.

Transgender people have long been subject to murder, assault, and other crimes on account of their gender identity.[15] Recent data indicate that such incidents continue to occur and, in fact, are on the rise.[16] For example, in just the first few months of 2017, at least seven transgender people were murdered.[17]

Such hate crimes harm transgender people in the amici States, physically and psychologically. In doing so, those crimes damage the social fabric and impair "the States' compelling interest in the maintenance of domestic peace," *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983).

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[15] *See*, *e.g.*, ABC News, *Downtown: Brandon Teena's Tragic Story* (internet) (recounting 1992-1993 rape and murder of transgender man that later became the subject of the film *Boys Don't Cry* and the documentary *The Brandon Teena Story*).

[16] Eric Lichtblau, *U.S. Hate Crimes Surge 6%, Fueled by Attacks on Muslims*, N.Y. Times, Nov. 14, 2016 (internet).

[17] *GLAAD Calls for Increased and Accurate Media Coverage of Transgender Murders*, GLAAD (updated Feb. 27. 2017) (internet).

2. Discrimination at school also causes enormous harm to transgender students and the States.

Transgender students experience levels of discrimination, violence, and harassment that are much higher than for non-transgender students.[18] 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.[19] More than half of transgender students (54%) reported verbal harassment, and more than a third reported suffering either a physical attack (24%) or sexual assault (13%).[20]

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[18] 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) ("Compared to other LGBT students, transgender, genderqueer, and other non-cisgender students faced the most hostile school climates."); *see also* Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools, Gay, Lesbian and Straight Education Network* xi (Gay, Lesbian & Straight Educ. Network 2009) (internet) ("Although LGBT students overall reported high levels of harassment and assault in school, transgender students experienced even higher levels than non-transgender students.").

[19] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat'l Ctr. for Transgender Equality 2016) (internet); *see also* Greytak et al., *Harsh Realities*, *supra*, at xi (finding that 87% of transgender students were verbally harassed during the prior school year).

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

The harassment experienced by transgender students leads, for many, to absenteeism and trouble graduating. The 2015 NTDS survey revealed that nearly twenty percent of transgender students left a K-12 school because the mistreatment was so severe.[21] A 2015 school survey showed that more than 60% of lesbian, gay, bisexual, and transgender (LGBT) students who did not expect to graduate from high school attributed their academic struggles to a hostile or unsupportive school environment, hostile peers, unsupportive school staff, and gendered school practices.[22] The survey found that three-fourths of transgender students felt unsafe at school because of their gender expression.[23]

In one national survey, 46% of transgender students reported missing at least one day of school in the last month because they felt unsafe or uncomfortable at school.[24] The same survey found that 40% of students who experienced frequent verbal harassment because of their gender expression did not intend to continue their studies by attending college.[25] Another study showed that of transgender students who left

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[21] *Id.* at 135.

[22] 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* 43 (Gay, Lesbian & Straight Educ. Network 2016) (internet).

[23] *Id.* at 84-85.

[24] Greytak et al., *Harsh Realities*, *supra*, at 14.

[25] *Id.* at 27 fig. 16.

school due to harassment, 48% experienced homelessness at some point in their lives.[26]

These outcomes illustrate the harms suffered by transgender students from discrimination and harassment in educational settings. Such discrimination and harassment also infringes core state interests. As this Court has recognized, "[p]roviding public schools ranks at the very apex of the function of a State," *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), and education advances more than the private interests of students: it establishes "the very foundation of good citizenship" by "awakening [children] to cultural values," "preparing [them] for later professional training," and "helping [them] to adjust normally to [their] environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (acknowledging "the vital role of education in a free society").

3. Discrimination in the workplace further harms transgender people and the States.

Discrimination and harassment follow transgender people into the workplace. In 2011, the NTDS found that transgender people report "[n]ear universal harassment on the job": 90% of those surveyed reported either experiencing "harassment or mistreatment on

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[26] Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 33 (Nat'l Ctr. for Transgender Equality and Nat'l Gay & Lesbian Task Force 2011) (internet).

the job or t[aking] actions to avoid it."[27] Mistreatment includes verbal harassment, inappropriate questions about surgical status, denial of access to restrooms, and physical and sexual assault.[28] "As a consequence of discrimination and abuse," 57% of 2011 NTDS respondents reported delaying their gender transition and 71% reported hiding their gender identity for some period of time.[29]

Job-related discrimination has negative consequences for transgender people and the economies of the States and communities where they live. Harassment can result in transgender workers changing or quitting jobs, experiencing poor job performance, and having excessive absences and tardiness.[30] The unemployment rate for transgender people is three times the national average.[31] Nearly half of transgender people report being under-employed due to gender identity or expression, because they are working in a field or in a position for which they are overqualified.[32] Nearly one-third of transgender people live in poverty—twice the rate of

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[27] Grant et al., *Injustice at Every Turn*, *supra*, at 51; *see also* D.C. Office of Human Rights, *Qualified and Transgender: A Report on Resume Testing for Employment Discrimination Based on Gender Identity* (2015) (internet).

[28] Grant et al., *Injustice at Every Turn*, *supra*, at 56.

[29] *Id.* at 63.

[30] *See* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, J. Pub. Mgmt. & Soc. Pol'y 75 (Spring 2013).

[31] James et al., *2015 U.S. Transgender Survey*, *supra*, at 140-41.

[32] Grant et al., *Injustice at Every Turn*, *supra*, at 55.

the population as a whole.[33] Home ownership is one-fourth that of the population.[34] Nearly one-third of transgender people have been homeless at some time in their life—and the rate is nearly twice as high for transgender women in ethnic or racial minorities.[35] Such outcomes not only harm transgender people, but also have tangible consequences for the economies and fiscs of the amici States.[36]

4. Discrimination against transgender people poses significant health risks.

In addition to affecting school and work outcomes, gender-identity harassment can have serious health consequences. The high incidence of suicide attempts by transgender people has been widely reported.[37] Transgender people attempt suicide at a rate nine

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[33] James et al., *2015 U.S. Transgender Survey*, *supra*, at 140, 142-45.

[34] *Id.* at 176-77.

[35] *Id.* at 178.

[36] *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).

[37] *See*, *e.g.*, Luke Malone, *Transgender Suicide Attempt Rates are Staggering*, Vocativ, Mar. 5, 2015 (internet); Laura Ungar, *Transgender People Face Alarmingly High Risk of Suicide*, USA Today, Aug. 16, 2015 (internet).

times that of the general population.[38] Forty percent of transgender people have attempted suicide, and the rate is even higher for persons who do not complete high school (52%) or who belong to certain racial or ethnic minorities (up to 57%).[39] Ninety-two percent of those attempting suicide first did so before the age of 25.[40] Seventy-one percent of those attempting suicide have done so more than once.[41] Eighty-two percent of all respondents in the 2015 NTDS had seriously thought about killing themselves at some point in their life.[42]

There are direct links between the bathroom access of transgender people and transgender health. A recent study analyzing the relationship between access to college bathrooms and suicide found a correlation: transgender people who had been denied access to bathroom facilities were approximately 40% more likely to have attempted suicide in their lifetime than transgender people who had not.[43]

And suicide is not the only health risk. In this case, for example, petitioners' denial of appropriate

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[38] James et al., *2015 U.S. Transgender Survey*, *supra*, at 114.

[39] *Id.*

[40] *Id.* at 115.

[41] *Id.* at 112.

[42] *Id.* at 114.

[43] 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) (rate of lifetime suicide attempts for transgender survey respondents who had been denied access to bathroom facilities was 60.5%, compared to 43.2% for transgender people who had not been denied access).

restroom facilities to G.G. has caused him to avoid drinking fluids during the school day so that he can avoid needing to use a restroom while at school; as a consequence, he has developed multiple urinary tract infections. Pet. App. 109a.

Research shows that G.G.'s experience is not unique, and that transgender people are often denied access to appropriate restroom facilities, with sometimes-serious consequences for their physical health.[44] One recent study showed that more than two-thirds (69.5%) of the transgender students surveyed avoided school restrooms because they felt unsafe or uncomfortable.[45] Attempting to avoid going to the bathroom for an entire school day can cause a variety of health problems, including dehydration, urinary tract infections, kidney infections, and other kidney-related problems.[46] Indeed, in a recent study of transgender people, 54% of respondents reported negative health effects from avoiding public restrooms.[47]

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[44] James et al., *2015 U.S. Transgender Survey*, *supra*, at 228 (59% of respondents said they sometimes or always avoided restrooms in public, at work, or at school because they were afraid of confrontations or other problems).

[45] Kosciw et al., *2015 National School Climate Survey*, *supra*, at 86; *see also* Kristie L. Seelman et al., *Invisibilities, Uncertainties and Unexpected Surprises: The Experiences of Transgender and Gender Non-Conforming Students, Staff, and Faculty at Colleges and Universities in Colorado* 143 (2012) (internet) (transgender students in Colorado reported not using bathrooms as frequently as they would if they felt safe and not drinking water on campus to avoid needing to use the bathroom).

[46] *See* Pet. App. 109a; Herman, *Gendered Restrooms*, *supra*, at 75.

[47] Herman, *Gendered Restrooms*, *supra*, at 75.

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In summary, data about the experiences of transgender people paint a stark picture. Transgender people experience significant discrimination and harassment, with severe negative consequences for themselves, their schools, their employers, and their communities. The amici States, in turn, are injured in ways this Court aptly summarized a quarter-century ago. "[A] State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests," and to an interest in "securing residents from the harmful effects of discrimination. This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982).

The amici States and other jurisdictions accordingly have acted to protect their transgender populations from discrimination. The experience of these jurisdictions demonstrates the broad social benefits of doing so.

C. The Amici States' Experience Shows That Protecting Transgender People from Discrimination Provides Important 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. These antidiscrimination provisions—including policies allowing transgender people to use

restrooms consistent with their gender identity—help to ease the stigma that transgender people often experience, thereby mitigating the related negative effects on their educational, work, and health outcomes. Moreover, such laws and policies achieve those ends without threatening the safety or privacy of any individual, or imposing significant costs.

1. Measures protecting transgender people from discrimination enhance their chances of success and their ability to contribute to their work-places and communities.

Supportive educational environments increase the likelihood of success for transgender students. Data from one national survey show that transgender students who were often or frequently harassed had significantly lower grade-point averages than transgender students who were never, rarely, or sometimes harassed.[48]

Inclusive school policies help to reduce harassment of transgender students by creating an atmosphere of general respect and tolerance. For example, a survey of 31,000 Oregon students found that lesbian and gay students living in counties where few school districts had anti-bullying policies were 2.25 times more likely to attempt suicide than similar students living in counties where many school districts had adopted inclusive policies.[49]

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[48] Greytak et al., *Harsh Realities*, supra, at 27 fig. 15.

[49] Mark L. Hatzenbuehler & Katherine M. Keyes, *Inclusive Anti-bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth*, 53 J. Adolescent Health S21, S23 (2013) (internet).

Anecdotal evidence also demonstrates the importance of inclusive policies that allow transgender students to live consistently with their gender identity. California adopted its protections against gender-identity discrimination in schools after legislators received reports of harms suffered by transgender students, including students not drinking and eating during the school day to avoid having to use the restroom.[50] Clear Creek Independent School District in Houston allowed a transgender boy to use the boys' bathroom at school after learning that he was trying to "'hold it in' for the entire school day."[51]

In the context of employment, antidiscrimination protections of this type benefit employees and employers alike. Recently, 68 companies, including some of the largest in the United States, submitted a brief supporting the United States' challenge to a state law mandating the discriminatory denial of bathroom access to transgender people.[52] As those companies explained, LGBT-friendly policies—such as policies allowing transgender employees to use restrooms consistent with their gender identity—offer tangible advantages for employee recruitment and retention.[53]

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

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

[52] 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.

[53] *See id.* at 16 (LGBT-friendly policies help recruitment and retention) (citing Christy Mallory & Brad Sears, *Discrimination, Diversity, and Development: The Legal and Economic Implications of North Carolina's HB2*, at 2, 38-39 (Williams Inst. May

Indeed, three-fourths of Fortune 500 companies, and 92% of U.S. companies surveyed by the Human Rights Campaign in 2016 provide their employees with explicit protections against discrimination on the basis of gender identity.[54] 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.[55]

Like the 68 companies supporting the lawsuit brought by the United States, the amici States are employers that seek to maximize employee health, productivity, and retention. And like those companies, the amici States have seen that when employees are able to express their true gender identity at work, they can bring more to their jobs.[56] For example, when transgender workers can safely transition and have their gender identity respected, they experience increased job performance and satisfaction.[57]

The ability to use work restrooms corresponding to one's gender identity plays a significant role in transgender employees' levels of job satisfaction, and

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2016) (internet); Matt Motyl et al., *How Ideological Migration Geographically Segregates Groups*, 51 J. Experimental Soc. Psychol. 1 (2014) (internet) (individuals are moving from ideologically unfriendly communities to congruent communities); Pew Research Ctr., *Data Trend: Gay Marriage* (internet) (70% of millennials favor same-sex marriage)).

[54] *See id.* at 4 (citing Human Rights Campaign Found., *Corporate Equality Index 2016*, at 4 (internet)).

[55] *Id.* at 16.

[56] *Id.* at 6 (citing Deloitte, *Only Skin Deep? Re-examining the Business Case for Diversity* 7 (Sept. 2011) (internet)).

[57] Grant et al., *Injustice at Every Turn*, *supra*, at 3.

consequent decision 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.[58]

All workers benefit from a workplace environment that is civil and free of harassment. And by protecting transgender workers from discrimination, public and private employers benefit from an economy that maximizes the contributions of such individuals.

2. Public safety is not compromised when transgender people are protected from discrimination through policies allowing them to use common restrooms corresponding to their gender identity.

Petitioner suggests that its policy of denying transgender students access to common restrooms consistent with their gender identity is necessary to protect students from bad actors who—unlike G.G. and other transgender students legitimately seeking to "liv[e] in a manner that is consistent with their gender identity" (Resp. Br. 10)—will attempt to "use the opposite sex's" restrooms "for less worthy reasons." Pet. Br. 37. Petitioner, however, provides no support for that assertion, which is belied by the experience of the many jurisdictions where nondiscrimination is already the law. Reviews of public school records in States that allow transgender people to use the bathrooms corresponding to their gender identity have

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[58] *Id.* at 61.

failed to turn up any examples of transgender students harassing others in restrooms or locker rooms.[59]

One of petitioner's amici nonetheless attempts to conjure a safety threat by citing examples of sex offenders and voyeurs who have invaded women's restrooms *without regard to transgender policies*, and then speculating that accommodating transgender students would facilitate even more of that same criminal behavior.[60] The speculation that this criminal conduct will increase if transgender people are treated fairly is unfounded, and is contrary to the actual experience of States and local jurisdictions that allow transgender people to access facilities matching their gender identity.[61]

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[59] Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, 98 Phi Delta Kappan 20, 21 (Sept. 2016) (internet) (citing Carlos Maza & Coleman Lowndes, *Here's the Truth About the Anti-LGBT "Bathroom Predator" Myth* (Media Matters for Am., Apr. 12, 2016) (internet)).

[60] Br. of Amici Curiae Public Safety Experts in Support of Pet. Only two of the so-called "relevant incidents" listed in the appendix to the amicus brief appear to be related to transgender accommodation. One involved a transgender person in an area off-limits to minors—an enclosed sauna at a state college. Cristan Williams, *Colleen Francis and the Infamous Evergreen State College Incident*, The TransAdvocate (Nov. 9, 2013) (internet). The other appears to have been a protest by someone who was not transgender. *Man in Women's Locker Room Cites Gender Rule* (KING 5 News (Seattle, Wash.) broadcast Feb. 16, 2016) (internet).

[61] *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) (officials at the largest school districts in 12 States with gender-identity protection laws reported no "incidents of harassment or

In such jurisdictions, the public-safety concerns often cited in support of policies like petitioner's simply have not materialized.[62] For instance, former Snohomish County Sheriff John Lovick described Washington State's experience: "We've protected gay and transgender people from discrimination in Washington for 10 years, with no increase in public safety incidents as a result. It's important to remember that indecent exposure, voyeurism, and sexual assault, are already illegal, and police use those laws to keep people safe."[63] Similarly, in 2013, the Los Angeles Unified School District—the second largest district in the country, with more than 640,000 K-12 students—reported to the California Legislature that the school district had "no issues, problems or lawsuits as a result of [a 2004] policy" requiring that students be allowed to use restrooms corresponding to their

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inappropriate behavior"); 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 victims of sexual assault describe this type of speculation as baseless and "beyond specious").

[62] For example, Media Matters interviewed officials with six of the largest California school districts regarding their implementation of anti-discrimination policies. Two of the districts had such policies in place for more than a decade; none reported any incidents or problems with the policies. Luke Brinker, *California School Officials Debunk Right-Wing Lies About Transgender Student Law*, Media Matters for Am. (Feb. 11, 2014) (internet).

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

gender identity.[64] And the Massachusetts Chiefs of Police Association reported that allowing people to use bathrooms consistent with their gender identity in places of public accommodation actually "improve[s] public safety."[65] In Texas, meanwhile, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those cities' policies allowing transgender people to use restrooms consistent with their gender identity.[66]

These accounts have been confirmed by organizations that provide services to victims of sexual assault and domestic violence. In April 2016, nearly 325 sexual assault and domestic violence service providers—including 46 national organizations, and 277 state and local organizations (representing 44 States, the District of Columbia, and the Territories of Guam and the Virgin Islands)—issued a statement rebutting claims that restricting transgender people's access to gender-specific facilities is necessary to prevent sexual violence against women and children. Those organizations explained that "[a]s rape crisis

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[64] Cal. Sen. Comm. on Educ., Bill Analysis: Assem. Bill No. 1266, at 8 (2013-2014 Reg. Sess.) (internet); *see also* L.A. Unified Sch. Dist., District Information (internet).

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

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

centers, shelters, and other service providers who work each and every day to meet the needs of all survivors and reduce sexual assault and domestic violence throughout society, we speak from experience and expertise when we state that these claims are false."[67] The statement notes that a considerable number of municipalities and States have enacted nondiscrimination laws protecting 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.[68] Yet "[n]one of those jurisdictions have seen a rise in sexual violence or other public safety issues due to nondiscrimination laws."[69] Simply put, "discriminating against transgender people does nothing to decrease the risk of sexual assault." [70]

Indeed, discriminatory restroom policies create, if anything, a needless risk of violence against transgender people, whose physical appearance diverges from their sex assigned at birth and who therefore are likely to be perceived as using the "wrong" restroom.[71]

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

[68] *Id.*

[69] *Id.*

[70] *Id.* at 2.

[71] 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) (transgender man with a full beard stating that "[i]t makes everybody uncomfortable" when he uses

3. Allowing transgender people to use common restrooms consistent with their gender identity also does not compromise personal privacy or require significant public expenditures.

State experiences show that the privacy and cost concerns of petitioner and its amici are similarly unfounded. Calls for privacy are premised on the suggestion that students will see others' intimate body parts or have their intimate body parts seen by others. That risk, however, is not presented by ordinary restroom use. Nor is it particular to situations in which transgender students are present in common restrooms: it arises whenever *any* group of students is present in a common facility. And in any event, concerns about the presence of others (whether or not transgender) can be addressed—and are being addressed—by increasing privacy options for all students, without singling out transgender people for differential treatment.

Employers and school districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. In Washington State, for example, school districts are to allow students to use the restroom that is

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the women's bathroom); *cf.* Matt DeRienzo, *Woman Mistaken for Transgender Harassed in Walmart Bathroom*, News-Times (Danbury, Conn.), May 16, 2016 (internet) (non-transgender woman with short haircut, wearing a t-shirt and baseball cap, accosted in women's bathroom and told "You're disgusting!" and "You don't belong here!").

"consistent with their gender identity consistently asserted at school," and "[a]ny student—transgender or not—who has a need or desire for increased privacy, regardless of the underlying reason, should be provided access to an alternative restroom (e.g., staff restroom, health office restroom)."[72] In this way, "students who may feel uncomfortable sharing the facility with the transgender student(s) [have] the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student. No student, however, should be required to use an alternative restroom because they are transgender or gender nonconforming."[73]

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."[74] But

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[72] 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) (State gender-identity protection rules "do not require businesses to make any [structural] changes or to add additional facilities." Instead, "[b]usinesses 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.").

[73] Wash. State Super., *Prohibiting Discrimination*, *supra*, at 30.

[74] The Washington Interscholastic Activities Association also allows all students "the opportunity to participate in WIAA activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records." Wash. Interscholastic Activities Ass'n, *2016-17 Official*

rather than segregating transgender students into separate facilities, additional privacy is to be provided for any student who desires it, regardless of the underlying reason, by providing "a reasonable alternative changing area, such as the use of a private area (e.g., a nearby restroom stall with a door), or a separate changing schedule."[75]

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 as well as separate restroom

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Handbook § 18.15.0, at 31-32 (2016) (internet). The California Interscholastic Federation has likewise provided that "[a]ll students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records." *See* Cal. Dep't of Educ., Frequently Asked Questions: Equal Opportunity & Access (Jan. 18, 2017) (internet).

[75] Wash. State Super., *Prohibiting Discrimination*, *supra*, at 30-31. This standard is similar to that provided by the National Collegiate Athletic Association:

> Transgender student-athletes should be able to use the locker room, shower, and toilet facilities in accordance with the student's gender identity. Every locker room should have some private, enclosed changing areas, showers, and toilets for use by any athlete who desires them. When requested by a transgender student-athlete, schools should provide private, separate changing, showering, and toilet facilities for the student's use, but transgender students should not be required to use separate facilities.

NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 20 (2011) (internet).

and changing spaces to all who desire them.[76] None of these solutions requires remodeling or 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."[77]

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[76] Cal. Sch. Bds. Ass'n, Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities 2 (Mar. 2014) (internet); Colo. Ass'n of Sch. Bds. et al., Guidance for Educators Working with Transgender and Gender Nonconforming Students 4 (n.d.) (internet); Conn. Safe Sch. Coal., Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 8 (Apr. 2012) (internet); D.C. Pub. Schs., Transgender and Gender-Nonconforming Policy Guidance 9 (June 2015) (internet); Iowa Dep't of Educ., Equality for Transgender Students (Feb. 2015) (internet); 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); Mass. Dep't of Elem. & Secondary Educ., Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment 9-10 (n.d.) (internet); 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); Or. Dep't of Educ., Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students 10-11 (May 2016) (internet); R.I. Dep't of Educ., Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students (June 2016) (internet); Vt. Agency of Educ., Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students 6, 8-9 (Feb. 2017) (internet) ("A transgender student should not be required to use a locker room or restroom that conflicts with the student's gender identity.").

[77] Ura, *For Transgender Boy*, *supra*.

II. Title IX Is a Crucial Supplement to State and Local Efforts to Combat Gender-Identity Discrimination.

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

Petitioner's policy requires transgender people to use facilities that are inconsistent with their gender identity, as perceived by themselves and by others, thereby demeaning transgender people and subjecting them to hostile encounters with other users of those facilities. The effects of this policy—and others like it in jurisdictions around the country—will be felt not only by students in those jurisdictions, but by all who have reason to travel to those jurisdictions.

The residents of the amici States, including those who are transgender, may often have occasion to travel to jurisdictions with policies like petitioner's. In particular, our students may travel to such jurisdictions to study, or to participate in or watch sporting events or other competitions, performances, or exhibitions. They may wish to attend universities in such jurisdictions, especially institutions that offer unique academic programs or scholarships.

Similarly, our scholars may collaborate with researchers at universities in such jurisdictions or attend conferences at such universities. And our students and scholars may need to use distinctive laboratory or other facilities, or consult archives and other unique research materials, which they may access only by visiting such universities. These trips may be important to our residents' personal

fulfillment and their ability to advance their professional lives within our States.

If allowed to stand, discriminatory policies like the one at issue here will make travel to other jurisdictions more difficult for residents of our States who are transgender or who do not conform to traditional sex stereotypes. And such policies may dissuade them from such travel altogether. Those residents thus face barriers in their personal or professional lives that are not faced by other residents of our States—precisely the sort of disparate treatment on the basis of gender identity that the amici States have sought to prevent. Permitting such disparate treatment is inconsistent with important interests of the amici States and with Title IX.

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

There is no merit to petitioner's claim that if Title IX is interpreted to grant G.G. and other transgender students access to common restrooms consistent with their gender identity, that interpretation will impose a new condition on the receipt of federal education funds in violation of the Spending Clause. *See* Pet. Br. 41-43; *see also* West Va. et al. Amicus Br. 28-35 (arguing that Spending Clause categorically prohibits deference to agency interpretations of provisions governing spending-clause programs). It is undisputed that Title IX lawfully requires recipients of federal funds to refrain from discrimination based on sex. And contrary to petitioner's suggestion, the application of that principle to new facts and new discriminatory policies does not create a new mandate violating the

requirement that conditions on the receipt of federal funds must be announced in advance, at a time when the recipient can decide whether or not to accept the funds.

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

This Court has similarly recognized that where the scope of federal requirements is clarified through litigation, that circumstance alone does not compel a conclusion that recipients of federal funding lack required notice of their potential liability for violating the underlying federal command. In *Jackson v. Birmingham Board of Education*, it held that Title IX provided sufficient notice to the defendant school board that intentional retaliation against the plaintiff—a coach who complained of sex discrimination against a high school girls' basketball team—was forbidden. 544 U.S. 167, 182-83 (2005). *Jackson* makes clear that further judicial explication of existing federal requirements governing spending-clause programs does not inherently violate the Spending Clause.

Indeed, this Court has long applied the broad anti-discriminatory commands of Title IX and comparable antidiscrimination laws to particular discriminatory conduct without suggesting that it was imposing new obligations. For instance, in *Price Waterhouse v.*

Hopkins, 490 U.S. 228 (1989)—a watershed Title VII decision—the Court held for the first time that sex discrimination includes disparate treatment based on an employee's failure to live up to gender stereotypes.[78] 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 women: in the partners' view, she was "macho," should "take 'a course at charm school,'" and should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235 (plurality op.).

This Court rejected the notion that refusing to promote plaintiff on these bases was mere "sex stereotyping" that somehow fell outside Title VII's ban on gender discrimination. *Id.* at 251 (plurality op.); *see also id.* at 272-73 (O'Connor, J., concurring in the judgment). The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251 (plurality op.). As the Court explained, "Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quotation marks omitted; emphasis added).

Price Waterhouse thus made clear that federal sex-discrimination laws cover more than just discrimination based on an individual's biological status as

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

"male" or "female"—and it did so without hinting that its application of Title VII to the distinct circumstances of that case created a new rule of conduct. Along similar lines, the Court in *Oncale v. Sundowner Offshore Services, Inc.*, applied Title VII in the novel context of male-on-male sexual harassment. 523 U.S. 75, 79-80 (1998). The Court expressly acknowledged that such harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* As the Court explained, however, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Id.*[79]

In this case, discrimination against transgender people is just such a comparable evil. As the courts of appeals have increasingly recognized, disadvantaging someone because of gender nonconformity is equally impermissible regardless of whether the discrimination is based on the birth-assigned gender or the gender identity of the person involved.[80] In each case,

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[79] *See also Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954) (holding that racially segregated public schools in District of Columbia violated Constitution); *cf.* Br. for Resp. at 12-13, *Bolling*, 347 U.S. 497 (No. 8), 1952 WL 47280 (arguing that such segregation was permissible based on Congress's provisions for segregated schools contemporaneously with adoption of Fourteenth Amendment).

[80] *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (transgender people may state a claim under the Gender Motivated Violence Act); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (biological male dressed in feminine attire may have a viable claim under Equal Credit Opportunity Act when bank refused to provide him a loan); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (Equal Protection Clause's prohibition of sex-based discrimination violated when transgender employee fired because of gender

"the victim has suffered discrimination because of his or her gender non-conformity" in violation of federal sex discrimination law. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).[81]

Petitioner's policy subjects G.G. and other transgender students to just such discrimination. Under that policy, transgender people are needlessly denied a privilege most people take for granted—the ability to use a public restroom consistent with their lived experience of their gender. Transgender people are thus singled out and forced either to forgo restroom use or to choose between two other detrimental and demeaning options. First, they can in principle use common restrooms corresponding to their sex assigned at birth. But doing so transgresses a core aspect of their identities, violates medical treatment protocols (*see* JA 66-67), and subjects them to potential harassment and violence.[82] Second,

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nonconformity); *cf. Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 983-984 (8th Cir. 2002) (per curiam) (dismissing employee's claim alleging that transgender co-worker's use of women's restroom created hostile work environment).

[81] *See also Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (employer violated Title VII by refusing to hire transgender woman in response to her decision to transition); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. 02-cv-1531, 2004 WL 2008954, at *2-*3 (D. Ariz. June 3, 2004) (discriminating against a transgender person because the person's anatomy and gender identity are not congruent is actionable sex discrimination under both Title VII and Title IX).

[82] In addition, restricting access to facilities based on students' "biological genders" raises important interpretive and pragmatic difficulties. For example, it is unclear how such a policy would apply to that segment of the population whose sexual characteristics are ambiguous and who, like transgender

transgender people can use single-use restrooms. Yet such facilities may not be readily available and, in any event, the use of such facilities may have stigmatizing effects. For example, use of such a facility may result in "outing" the individual as transgender in a setting where he or she could be exposed to danger or prefers to keep that aspect of his or her identity private. *See* Resp. Br. 31-32.

Contrary to petitioner's arguments, such discrimination is not shielded from Title IX's provisions simply because Congress was focused principally on other types of sex-based disparate treatment when it enacted that statute in 1971; this Court expressly rejected that notion in *Oncale*. Nor is such discrimination authorized by Title IX's implementing regulation permitting "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33. Petitioner wrongly asserts that the term "on the basis of sex" unambiguously permits segregation of the enumerated facilities exclusively on the basis of "*biological* sex" (Pet. Br. 16, 26 (emphasis added; quotation marks omitted)). 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

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people, are often stigmatized and discriminated against. The term "intersex" is used to describe a range of natural bodily variations. Experts estimate the proportion of individuals born with intersex traits to be between 0.05% and 1.7% of the population—the upper estimate is similar to the proportion of the population with red hair. U.N. Office of the High Comm'r for Human Rights, Fact Sheet: Intersex 1 (internet).

genitalia or the assignment of a particular sex at birth.[83] Title IX should not be read to ignore these developments.[84] Nor should its implementing regulations be interpreted in a manner that undermines the core antidiscrimination mandate of that statute.

At bottom, petitioner's policy is a particular instance of gender-based discrimination that, although arising in new circumstances because of a new discriminatory policy imposed by petitioner, nonetheless violates Title IX's clear, broad, and long-standing mandate of gender equality. Indeed, this Court has long made clear that governments may not adopt policies that serve only to express "negative attitudes, or fear" toward people viewed as "different." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). The present matter is a case in point: petitioner's policy serves no legitimate state interest,

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[83] *See* APA, Guidelines for Psychological Practice, *supra*, at 834-35; Gender Identity in U.S. Surveillance Group, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* ix (Williams Inst. 2014) (internet); 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).

[84] Equally meritless is petitioner's attempt (*see* Pet. Br. 47-48) to rely on 20 U.S.C. § 1686's provision allowing "separate living facilities for the different sexes." That provision refers to living quarters (such as dormitories) rather than the types of facilities at issue in this case. *See* Resp. Br. 16 n.17. In any event, Title IX and its regulations do not prescribe how the term "different sexes" should be applied to transgender students for purposes of § 1686. Any argument that that section unambiguously authorizes disparate treatment of students based exclusively on their "*biological* gender" accordingly fails.

such as promoting public safety or personal privacy. See *supra* 19-27. Instead, its lone function is to stigmatize G.G. and other transgender students. Petitioner's assertion that it lacked notice that such a policy was impermissible rings hollow, and should be rejected.

CONCLUSION

This Court should affirm the decision below.

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March 2017

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APPENDIX

Statutory Civil Rights Protections for Transgender People

California *Cal. [subject]*	Civ. Code § 51(b) (public accommodations) Educ. Code §§ 220, 221.5(f) (education and school restrooms) Gov't Code §§ 12926(r)(2), 12940, 12949, 12946 (employment) Gov't Code § 12955 (housing) Penal Code § 422.7685 (hate crimes)
Colorado *Colo. Rev. Stat.*	§ 24-34-301(7) (definition) § 24-34-402 (employment) § 24-34-502 (housing) § 24-34-601 (public accommodations)
Connecticut *Conn. Gen. Stat.*	§ 10-15c (schools) § 46a-51(21) (definition) § 46a-60 (employment) § 46a-64 (public accommodations) § 46a-64c (housing)

Delaware *Del. Code Ann.* *[tit.], [§]*	tit. 6, § 4501 (public accommodations) tit. 6, § 4603(b) (housing) tit. 19, § 711 (employment)
District of Columbia *D.C. Code*	§ 2-1401.02(12A) (definition) § 2-1402.21 (housing) § 2-1402.11 (employment) § 2-1402.31 (public accommodations) § 2-1402.41 (education)
Hawai‘i *Haw. Rev. Stat.*	§ 489-2 (definition) § 489-3 (public accommodations) § 515-2 (definition) § 515-3 (housing)
Illinois *[ch.] Ill. Comp. Stat. Ann. [§]*	ch. 775, § 5/1-102(A) (housing, employment, access to financial credit, public accommodations) ch. 775, § 5/1-103(O-1) (definition)

Iowa	§ 216.2(10) (definition)
Iowa Code	§ 216.6 (employment)
	§ 216.8 (housing)
	§ 216.9 (education)
	§ 216.7 (public accommodations)
Maine	tit. 5, § 4553(9-C) (definition)
Me. Rev. Stat.	tit. 5, § 4571 (employment)
[tit.], [§]	tit. 5, § 4581 (housing)
	tit. 5, § 4591 (public accommodations)
	tit. 5, § 4601 (education)
Maryland	§ 20-304 (public accommodations)
Md. Code Ann.,	§ 20-606 (employment)
State Gov't	§ 20-705 (housing)

Massachusetts *Mass. Gen. Laws* *[ch.], [§]*	ch. 4, § 7, Fifty-ninth (definition) ch. 76, § 5 (schools) ch. 151B, § 4 (employment, housing, credit) ch. 272, §§ 92A, 98 (public accommodations)* (*as amended by Mass. Acts ch. 134 (2016))
Minnesota *Minn. Stat.*	§ 363A.03(44) (definition) § 363A.08 (employment) § 363A.09 (housing) § 363A.13 (education) § 363A.11 (public accommodations)
Nevada *Nev. Rev. Stat.*	§ 118.100 (housing) §§ 613.310(4), 613.330 (employment) §§ 651.050, 651.070 (public accommodations)
New Jersey *N.J. Stat. Ann.*	§ 10:5-4 (public accommodations, employment, housing) § 10:5-5(rr) (definition) § 10:5-12 (employment)

New Mexico *N.M. Stat. Ann.*	§ 28-1-2(Q) (definition) § 28-1-7(A) (employment) § 28-1-7(F) (public accommodations) § 28-1-7(G) (housing)
New York *N.Y. [subject]*	Executive Law § 296 (definition) N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13 (agency regulation)
Oregon *Or. Rev. Stat.*	§ 174.100(7) (definition) § 659.850 (education) § 659A.006 (employment, housing, public accommodations)
Rhode Island *R.I. Gen. Laws*	§§ 28-5-6(11), 28-5-7 (employment) §§ 34-37-3(9), 34-37-4 (housing) § 11-24-2 (public accommodations)
Utah *Utah Code Ann.*	§ 34a-5-106 (employment) § 57-21-5 (housing)

Vermont *Vt. Stat. Ann.* *[tit.], [§]*	tit. 1, § 144 (definition) tit. 9, § 4502 (public accommodations) tit. 9, § 4503 (housing) tit. 21, § 495 (employment)
Washington *Wash. Rev. Code*	§ 28A.642.010 (schools) § 49.60.040(26) (definition) § 49.60.180 (employment) § 49.60.215 (public accommodations) § 49.60.222 (housing)