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 196 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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A complete list of the 40 U.S. Senators and the 156 Members of the House of Representatives participating as *Amici* is provided in an appendix to this brief. Among them are:

SEN. CHARLES E. SCHUMER
Senate Democratic Leader

REP. NANCY PELOSI
House Democratic Leader

SEN. AL FRANKEN

SEN. TAMMY BALDWIN

Lead Senate Amici on Brief

REP. JARED POLIS
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SEN. PATTY MURRAY
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REP. ROBERT C. "BOBBY" SCOTT
Ranking Member, House Committee on Education and the Workforce

SEN. DIANNE FEINSTEIN
Ranking Member, Senate Committee on the Judiciary

REP. JOHN CONYERS, JR.
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INTEREST OF *AMICI CURIAE*[1]

Amici are 40 United States Senators and 156 members of the United States House of Representatives.[2] 152 are co-sponsors of the Student Non-Discrimination Act ("SNDA"),[3] S. 439, 114th Cong. (2015), which, if enacted, will ensure existing civil rights laws continue to protect lesbian, gay, bisexual and transgender ("LGBT") children from discrimination and harassment in public schools.

Title IX was enacted to protect vulnerable students from discrimination on the basis of sex and guarantee that these at-risk students receive equal educational opportunities. Title IX's prohibition on discrimination "on the basis of sex" encompasses discrimination on the basis of gender identity and sex stereotypes. It therefore does *not* allow a school to limit bathroom access based solely on birth-assigned sex or according to sex stereotypes,

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certifies that Petitioner has given blanket consent to the filing of *amicus* briefs and Respondent has given written consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in the appendix to this brief.

[3] This brief cites to the Senate version of SNDA, but the House and Senate versions, H.R. 846 and S. 439, respectively, are virtually identical in substance.

including the stereotype that a student's gender identity should correspond to birth-assigned sex.

The lower courts have overwhelmingly adopted this correct interpretation of sex discrimination. However, a minority of lower federal courts and state and local governments have allowed schools to limit bathroom access based on sex stereotypes. This impermissibly harms LGBT students—a particularly vulnerable group of young people—and undermines the governing purpose of Title IX.

We firmly believe that Title IX's prohibition on sex discrimination *already* prohibits discrimination on the basis of gender identity. In fact, the authors of SNDA designed the legislation to bring clarity and stability to an area of law that has been inconsistently interpreted and enforced. As members of Congress, we are uniquely positioned to advise the Court on the meaning of draft and pending legislation. We also have an inherent interest in the proper interpretation of enacted laws and pending legislation, particularly when differing interpretations alternately vindicate or eliminate the rights of the constituents we represent. Different interpretations of Title IX have led to uncertainty for public school children and their families and left LGBT children underprotected from discrimination despite applicable federal law. We urge this Court to uphold the Fourth Circuit's decision and allow G.G. to use the boys' bathroom at his school, as is already required by federal statutory law and consistent with this Court's own precedent.

SUMMARY OF ARGUMENT

The Fourth Circuit's judgment should be affirmed and G.G. should be permitted to use the boys' bathroom at his high school.

First, Title IX was designed to create and protect equal educational opportunities for students discriminated against on the basis of sex, who make up a particularly vulnerable and marginalized part of any student body. Respondent G.G. is a transgender boy subjected to discrimination by his school board solely because of his transgender status, and he has suffered psychologically and physically because the school board denies him access to the boys' bathroom. The school board's new bathroom policy inhibits G.G.'s academic achievement and social well-being at school. The policy fundamentally undermines Title IX's central purpose, and is thus impermissible under Title IX.

Indeed, even setting aside the Department of Education's or Department of Justice's now-withdrawn guidance, Title IX's prohibition on discrimination "on the basis of sex" encompasses discrimination on the basis of gender identity and sex stereotypes. This statutory interpretation is recognized and supported by this Court's precedent and lower court application of that precedent. Surely the stereotype that an individual's gender identity ought to correspond to that person's birth-assigned sex is the most basic form of impermissible sex-based discrimination.

Second, SNDA does nothing to change the proper interpretation of Title IX. This Court should

be wary, as it always has been, of relying on pending or abandoned legislation to interpret enacted statutes. But if this Court does look to SNDA to inform its understanding of Title IX, *amici*, as legislators, many of whom have co-sponsored SNDA, are uniquely able to advise the Court of SNDA's meaning and purpose. Despite decades-old case law interpreting civil rights statutes like Title IX to prohibit sex stereotyping, as well as congressional requests for and the subsequent adoption of proper agency guidance interpreting Title IX, discrimination against transgender students persists. SNDA's framework was therefore explicitly designed to operate in parallel with Title IX and reinforce what is already law—that transgender individuals in public schools are protected from discrimination.

ARGUMENT

I. Petitioner's Policy Limiting Bathroom Access Based on Birth-Assigned Sex Discriminates Against Transgender Students and Violates Title IX.

Title IX is designed to protect students from discrimination on the basis of sex. Transgender students are particularly susceptible to sex discrimination. By forbidding G.G. from using the boys' bathroom, the Gloucester County school board defies the animating purpose of Title IX and impermissibly discriminates on the basis of sex.

A. Petitioner's Policy Contravenes Title IX by Stigmatizing Vulnerable Students and Limiting Their Educational Opportunities.

By prohibiting discrimination "on the basis of sex", Title IX promotes equal educational opportunities for some of the most vulnerable, at-risk student body populations. *See* 20 U.S.C. § 1681 (2012). When transgender children are discriminated against by the very institutions charged with their care, development, and continued scholarship, they are robbed of the educational opportunities guaranteed by Title IX. As *amicus* Senator Murray has noted, "[w]hen kids do not feel safe at school, when they are relentlessly bullied because they are different, when they endure harassment simply because of who they are, we have failed to provide them with the educational opportunities they deserve." 161 Cong. Rec. S5040 (daily ed. July 14, 2015) (statement of Senator Murray) (speaking in support of an amendment by Senator Franken to add SNDA to the Every Child Achieves Act).

The Gloucester County school board's policy restricting Respondent G.G.'s bathroom use is thus fundamentally at odds with Title IX's core goals. G.G. is a transgender boy in his senior year of high school who has been very publicly banned from the boys' bathroom at school because of his transgender status. Compl. ¶¶ 38, 44. G.G. has identified as a

boy for as long as he can remember.[4] Compl. ¶¶ 16-17. When G.G. was in the ninth grade, a psychologist diagnosed G.G. with gender dysphoria and recommended that G.G. begin living "as a boy in all respects, including with respect to his use of the restroom". Compl. ¶ 23. Therefore, just before his sophomore year, G.G. and his family informed school officials that G.G. was a transgender boy. Compl. ¶ 28. G.G. then used the boys' bathroom at his school for seven weeks, without incident or complaint. Compl. ¶ 32.

However, when Gloucester County community members—some of whom did not even have school-age children—learned that G.G. was permitted to use the boys' bathrooms at school, they launched a campaign to limit student bathroom access based on birth-assigned sex. Compl. ¶¶ 33-35. The policy at issue in this case was introduced at a school board meeting, where attendees specifically identified G.G. by name, singling him out as the board's primary motivation for introducing the new policy. Compl. ¶¶ 37-38, 44. "G.G. was forced to identify himself to the entire community, including local press covering the meeting, as the transgender student whose restroom use was at issue." Compl. ¶ 38. G.G. pleaded with the community to be left alone to live his life as a normal child, able to "use the restroom in peace" and explained that he "did not ask to be this

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[4] G.G.'s medical and psychological evaluations agree that G.G.'s sex is male and reject the assumption that birth-assigned sex is the only proper way to determine an individual's sex. Compl. ¶¶ 21-26; Corrected Expert Decl. of Randi Ettner, Ph.D., JA34, JA41-42.

way . . . I'm just a human. I'm just a boy." Compl. ¶ 38.

Ultimately, the Gloucester County school board adopted a policy requiring transgender students to use either the sex-segregated bathrooms corresponding with their birth-assigned sex or to use "alternative" bathrooms specially provided for students with "gender identity issues". Compl. ¶¶ 34, 43. G.G. now correctly challenges this policy as a violation of Title IX. Compl. ¶ 6. Not only does it ban G.G. from the boys' bathroom, contrary to his psychologist's advice, but the policy and its humiliating implementation have understandably made G.G. afraid to use *any* bathroom at school, causing him to suffer from frequent and painful urinary tract infections. Compl. ¶¶ 5, 48-49. The "alternative" separate bathrooms only exacerbate the psychological and physical hardship G.G. grapples with as a transgender child. *Id.* They single out and stigmatize G.G., designating him as "other". *Id.*; Corrected Expert Decl. of Randi Ettner, Ph.D., JA34 ¶ 20 ("Restrooms, unlike other settings . . . categorize people according to gender. . . . To deny a transgender boy admission to such a facility, or to insist that one use a separate restroom, communicates that such a person is 'not male' but some undifferentiated 'other', interferes with the person's ability to consolidate identity and undermines the social-transition process.").

Unfortunately, these psychological and physical hardships are all too common for transgender children, who are routinely discriminated against in

their schools because of their transgender status. *See* S. 439 § 2(a)(1) (2015).[5] Students subjected to this kind of discrimination are more likely to perform poorly in school, more likely to miss days of school, more likely to drop out of school, and more likely to attempt suicide. *Id.* § 2(a)(4); *see also, e.g.*, 161 Cong. Rec. S5040 (daily ed. July 14, 2015) (statement of Senator Murray) (recounting the story of Chandler, a ninth grader who was perceived to be gay and took his own life after "enduring endless bullying and tormenting at his school"). Bathroom policies like Petitioner's intensify and institutionalize transgender discrimination and prevent transgender students like G.G. from taking advantage of the educational opportunities Title IX was enacted to protect. *See* H.R. Rep. No. 92-554 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511 (citing disparate opportunities afforded to women and men in education as an impetus for Title IX); 117 Cong. Rec. 30,155 (1971) (describing Title IX as memorializing the view of "education as the ultimate answer to our national problems of poverty, discrimination, and development"); *see also Tingley-Kelley v. Trustees of*

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[5] *See also* 161 Cong. Rec. S5044 (daily ed. July 14, 2015) (statement of Senator Durbin) ("85 percent of LGBT students reported harassment . . . these students didn't perform well when they were subjected to this harassment."); 161 Cong. Rec. S5044 (daily ed. July 14, 2015) (statement of Senator Leahy) ("Unfortunately, as many as 7 in 10 students who are, or are perceived to be, lesbian, gay, bisexual, or transgender have been bullied or harassed. But unlike other forms of harassment in our schools, bullying based on gender identity and sexual orientation is often overlooked."); 161 Cong. Rec. S5046 (daily ed. July 14, 2015) (statement of Senator Franken) ("LGBT kids are facing an epidemic of bullying in our schools.").

the Univ. of Pa., 677 F. Supp. 2d 764, 780 n.14 (E.D. Pa. 2010) ("[T]he entire purpose of Title IX is to authorize interference in [educational institution] decisions that are based on discriminatory factors.").

B. Title IX's Prohibition on Sex-Based Discrimination Encompasses Discrimination on the Basis of Gender Identity.

Because the Gloucester County school board policy prevents G.G. from using the boys' bathroom in accordance with G.G.'s gender identity, the policy violates Title IX. Discrimination "on the basis of sex" under Title IX encompasses discrimination on the basis of gender identity, sex stereotypes, gender nonconformity and transgender status. This interpretation is consistent with this Court's own precedent and lower court application of that precedent.

A proper application of this Court's line of Title VII cases interpreting sex-based discrimination logically requires protecting transgender students from discrimination under Title IX. The federal courts, including this Court, consistently look to Title VII case law to inform their interpretation of "sex" and sex-based discrimination under Title IX. *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX."); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) ("Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims.");

Yusuf v. Vassar Coll., 35 F.3d 709, 714 (2d Cir. 1994) ("[C]ourts have interpreted Title IX by looking to . . . the caselaw interpreting Title VII.").

There can be no question that "sex" under both Title VII and Title IX encompasses gender identity. It is this Court's express preference to interpret Title VII's prohibition on sex discrimination to appropriately include more than mere biological or physical differences between men and women. As Justice Scalia explained in *Oncale v. Sundowner Offshore Services, Inc.*, when this Court adopted an interpretation of sex discrimination that Congress may not have contemplated at the time of enactment, "statutory prohibitions often go beyond the principal evil [Congress was concerned with] to cover reasonably comparable evils." 523 U.S. 75, 79 (1998).

Indeed, this Court held in *Price Waterhouse v. Hopkins* that Title VII's protections were meant to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" and concluded sex stereotyping was impermissible under Title VII. 490 U.S. 228, 251 (1989) (quoting *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707, n.13 (1978)). This Court admonished employers: "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* This Court went on to find that an employer who rejected a woman for promotion because she was too "macho" and "aggressive" and failed to walk, talk or dress "femininely" had discriminated on the basis of sex stereotypes in violation of Title VII. *Id.* at 235, 251.

As *Price Waterhouse* made clear, Title VII not only bars discrimination based on birth-assigned sex, but also prohibits discrimination arising from an individual's failure to conform to "socially-constructed gender expectations". *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (citing *Price Waterhouse*, 490 U.S. at 240)).

Third, lower courts have overwhelmingly interpreted *Price Waterhouse* to mean that "sex" discrimination encompasses discrimination against transgender individuals or on the basis of gender identity. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (noting lower courts agree "with near-total uniformity" that *Price Waterhouse* explicitly rejected a definition of sex discrimination limited to "the biological differences between men and women" (citing *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)). Notably, in *Glenn*, the Eleventh Circuit reasoned that "discrimination against a transgender individual because of her gender-nonconformity *is* sex discrimination" because "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes". *Id.* at 1316-17 (emphasis added). And in *Schroer v. Billington*, District Court Judge Robertson highlighted the fallacy of excluding discrimination on the basis of transgender identity from Title VII by providing a useful analogy to religion: if an employee "is fired because she converts from Christianity to Judaism", it would constitute "a clear case of discrimination 'because of religion'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts'. . . . Discrimination 'because of religion'

easily encompasses discrimination because of a *change* of religion." 577 F. Supp. 2d 293, 306 (D.D.C. 2008). Therefore, to discriminate against transgender individuals on the basis of gender identity or transition *is* to discriminate on the basis of sex. *See Glenn*, 663 F.3d at 1316-17.[6]

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[6] *See also Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith*, 378 F.3d at 572; *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk*, 204 F.3d at 1198-203 (holding that violence against transgender plaintiff for "her assumption of a feminine rather than a typically masculine appearance or demeanor" was "because of or on the basis of gender" under the Gender Motivated Violence Act); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("[D]iscrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate . . . is literally discrimination 'because of sex.'"); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388-JAD-PAL, 2016 WL 5843046, at *9 (D. Nev. Oct. 4, 2016); *Finkle v. Howard Cty, Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by [Title VII]. . . ."); *Lopez v. River Oaks Imaging & Diagnostic Grp. Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) ("The Court cannot ignore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an 'effeminate' male or 'macho' female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes."); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173 at *2 (W.D. Pa. Feb. 17, 2006); *Kastl v. Maricopa Cty. Comm. College Dist.*, No. 02-1531PHX-SRB, 2004 WL 2008954, at *2-3 (D. Ariz. June 3, 2003), *aff'd* 325 F. App'x 492 (9th Cir. 2009) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy . . . may be deprived of a benefit or privilege of employment by reason of that nonconforming

For G.G. to use the boys' bathroom, this Court need only remain consistent with well-reasoned and accepted Title VII law and hold that the Gloucester County school board has engaged in impermissible discrimination on the basis of sex in violation of Title IX.[7] Petitioner's policy discriminates against G.G.

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trait."); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-cv-0375E(SC), 2003 WL 22757935 at *4 (W.D.N.Y. Sept. 26, 2003).

[7] Not only does Petitioner's policy violate Title IX's main prohibition on sex discrimination, it also falls outside the scope of Title IX's living facilities provision, which provides in relevant part, "[n]otwithstanding anything to the contrary . . . nothing contained herein shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686 (2012). The living facilities provision allows schools to "maintain" "equal" or "comparable" separate facilities "for the different sexes", and the Department of Education implementing regulations merely require schools to keep those facilities in good repair and condition, without preferring one facility over another. *See, e.g.*, 34 C.F.R. §§ 106.32 (housing); 106.33 (toilet, locker room and shower facilities); 106.34 (access to schools); 106.35 (institutions of vocational education); 106.37 (financial assistance and provision of facilities); 106.41 (athletic facilities, equipment, supplies, and locker rooms) (2016); *see also Biediger v. Quinnipiac University*, 928 F. Supp. 2d 414, 436 (D. Conn 2013) (holding that Title IX implementing regulations require equal access to locker rooms, practice and competitive facilities and training facilities regardless of any economic justification). Nothing in the living facilities provision—or any other provision of Title IX—authorizes the school to perpetuate the idea that a transgender boy is not masculine enough to qualify as male, or that birth-assigned sex properly and exclusively defines an individual's "sex". These are impermissible sex stereotypes under *Price Waterhouse* and its progeny.

because his gender identity, one of the "properties or characteristics" that cause him to identify as a boy, is inconsistent with his birth-assigned sex. *Fabian*, 172 F. Supp. 3d at 526. Like Ms. Hopkins, the female employee in *Price Waterhouse* who was denied a promotion for not being "feminine" enough, 490 U.S. at 235, G.G. is caught "in an intolerable and impermissible catch 22", *id.* at 251. The school board denies G.G. access to the boys' bathroom because in its view he is not "masculine" enough, and his peers ostracize and ridicule him for using the girls' bathroom because he is not "feminine" enough. Compl. ¶ 46; *cf.* Compl. ¶ 3 (noting G.G.'s teachers and peers accepted his presence in the boys' bathroom). As a result, G.G. suffers from both psychological and physical trauma, which strips him of the academic and social opportunities afforded to his peers and contravenes Title IX. *See supra* Part I.B.1; S. 439 § 2(a)(3) (2015) ("[D]iscrimination at school has contributed to high rates of absenteeism, academic underachievement, dropping out, and adverse physical and mental health consequences

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To this point, Congressional *amici* in support of Petitioner misconstrue the legislative history on the purpose behind the living facilities provision as it relates to personal privacy. *See* Brief of Members of Congress as *Amici Curiae* in Support of Petitioner 6. Senator Bayh, the principal author of Title IX, did not propose a "differential treatment" amendment to protect personal privacy in all cases; rather, Senator Bayh thought it best to empower federal *agencies* to promulgate regulations "to permit differential treatment by sex only [in] very unusual cases where such treatment is absolutely necessary to the success of the program". 118 Cong. Rec. 5807 (1972).

among LGBT youth.").[8] The school board may not condition G.G.'s access to the boys' bathroom on his ability to conform to a pre-determined model of masculinity, just as Price Waterhouse could not condition Ms. Hopkins' promotion on her ability to conform to a pre-determined model of femininity. *See Price Waterhouse*, 490 U.S. at 235.

II. The Student Non-Discrimination Act Should Not Change the Court's Interpretation of Title IX Because the Act Clarifies and Stabilizes, Rather than Supplements, Title IX.

A. Multiple and Equally Plausible Inferences Can Be Drawn from Pending or Rejected Legislation.

SNDA clarifies Title IX; it does not represent a congressional "rejection" of the idea that gender identity discrimination falls within the ambit of "sex" discrimination. *Cf.* Brief of Members of Congress as *Amici Curiae* in Support of Petitioner 6-7 (noting that "'Congress knows how to' statutorily protect gender identity 'when it wants to'", but failing to note that legislators may not feel compelled to act when case law already interprets the statute to prohibit

[8] *See also* 161 Cong. Rec. S5046 (daily ed. July 14, 2015) (statement of Senator Franken) ("More than 30 percent [of LGBT students] report missing a day of school in the last month because they felt unsafe . . . . You cannot get a good education if you dread going to school.").

this type of sex discrimination).[9] This Court has often warned against giving too much significance to abandoned or pending legislation in interpreting existing law:

> [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction including the inference that the existing legislation already incorporated the offered change.

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 181 (2000); *Fair*

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[9] Congressional *amici* in support of Petitioner's references to the 2009 Hate Crimes Prevention Act, 18 U.S.C. § 249(a)(2) (2012), and the 2013 reauthorization of the Violence Against Women Act, 42 U.S.C. § 13925(b)(13)(A) (2012), are misguided. That Congress included explicit references to "gender identity" in two individual pieces of legislation unrelated to Title IX or Title VII in 2009 and 2013—decades after Title IX was enacted and *Price Waterhouse* decided—is of no moment. It would be neither feasible nor efficient for Congress to update or amend every piece of legislation to incorporate the linguistic precision *amici* for Petitioner suggest. Legislators could furthermore view such amendments as unnecessary when the Supreme Court already appears to interpret the legislation correctly.

Housing Authority of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1223 (9th Cir. 2012) (Kozinski, J.).

The fact that SNDA was introduced by Congress but has not yet become law should not change this Court's interpretation of Title IX. First, although SNDA has not yet passed the Senate, it did garner the support of a bipartisan majority of senators during a vote in the 114th Congress. 161 Cong. Rec. S5047 (daily ed. July 14, 2015).

Second, it would be aberrational to single out SNDA's introduction as evidence of congressional intent when there have been other attempts to create similar legislation with no effect on Title VII, and by extension Title IX, jurisprudence. For example, Congress introduced the Equality Act of 1974 to protect lesbians and gay men, women and unmarried individuals in employment and places of public accommodation. Equality Act of 1974, H.R. 14752, 93d Cong. (1974). However, there is no indication that courts inferred any congressional intent from the introduction of this legislation or its failure to pass. In fact, courts subsequently found that unmarried women *were* covered under Title VII even if this legislation would have protected marital status more explicitly. *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 389 (7th Cir. 1975) (describing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

Moreover, in *Price Waterhouse*, which "overruled by logic and language" circuit court cases like *Ulane*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000), this Court did not take into account legislative

history from the Equality Act of 1974 or a number of other legislative proposals from 1975 to 1982 that would have prohibited "discrimination based upon affectational or sexual orientation". *Cf. Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 & n.11 (7th Cir. 1984) (citing failed legislative proposals from 1975 to 1982 to conclude that Title VII does *not* prohibit discrimination on the basis of sexual orientation). Instead, *Price Waterhouse*'s interpretation of "sex" discrimination was appropriately derived from plain meaning and simple logic. SNDA should likewise not discourage this Court from applying this proper interpretation of "sex" discrimination.

B. *Amici*, As Legislators, Are Best Positioned To Advise the Court on How To Interpret SNDA and Its Relationship with Title IX.

Amici wish to avoid further confusion in the courts over whether legislative measures to protect children from gender identity discrimination are an indication that such protections do not exist under current law. *See* 161 Cong. Rec. S5041 (daily ed. July 14, 2015) (statement of Senator Murray) (urging the adoption of SNDA to avoid "years of litigation about who is and who is not protected"). Indeed, *amici* believe that Title IX *already* protects transgender children. Yet decades after *Oncale* and *Price Waterhouse*, and despite overwhelming agreement among the federal courts that transgender individuals are protected from discrimination under those cases, Title IX remains inconsistently interpreted and enforced across the country. The SNDA framework was therefore

designed to operate in parallel with Title IX, to *ensure* transgender children are protected, explicitly, from discrimination in public schools. *See* S. 439 § 2(a)(6), (b)(1); *see also* 157 Cong. Rec. E2093 (daily ed. Nov. 18, 2011) (statement of Representative Jay Inslee) (noting that SNDA is needed "in order to *expressly* protect students from discrimination and harassment on the basis of sexual orientation and gender identity" (emphasis added)); House Committee on Education and the Workforce Markup on H.R. 5 (June 19, 2013), 2013 WL 3084182 (statement of Representative Jared Polis) ("Federal civil rights statutes . . . don't yet *explicitly* include sexual orientation or gender identity." (emphasis added)).

Even administrative guidance clarifying that Title IX protects transgender students—guidance prompted and supported by members of Congress—was not consistently followed. Just last year, 40 senators, many of whom are *amici*, wrote to the Department of Education requesting more specific guidance to "explain the scope of protection afforded to LGBT students under Title IX . . . and clarify that state laws requiring discrimination against LGBT students run afoul of Title IX". Letter from 40 Senators to the Honorable John King (May 2, 2016) (on file with *amici*). The request acknowledged that the Department of Education and Department of Justice had already informally clarified "that Title IX's prohibition on sex discrimination prohibits discrimination on the basis of gender identity", as is "consistent with caselaw in the areas of employment discrimination". *Id.* But in light of "ongoing legislative assaults on LGBT students, and

transgender students in particular", the request stressed the need to more *explicitly* "protect our children and young people, and to help them flourish". *Id.* When the Department of Education swiftly issued joint guidance with the Department of Justice to "ensure transgender students have access to public education in an environment free from discrimination", 137 members of Congress, many of whom are *amici*, formally thanked both agencies. Letter from 137 Congresspeople to the Honorable Loretta E. Lynch and the Honorable John B. King, Jr. (June 3, 2016) (on file with *amici*). The members heralded the guidance as "a critical step to ensure we protect our students and ensure all students have access to equal educational opportunities". *Id.* Indeed, almost 200 members of Congress collectively endorsed the joint guidance, recognizing that (1) *Price Waterhouse* and its progeny prohibit discrimination on the basis of gender identity and (2) this interpretation properly applies to Title IX. Nevertheless, many school districts throughout this country intentionally declined to follow the joint guidance.[10]

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[10] For example, in June 2016 the Kansas State Board of Education unanimously voted to refuse to comply with the Department of Justice's directive to allow students to use bathrooms based on gender identity. *See* Emma Brown, *Kansas State Board of Education Votes to Ignore Obama's Transgender Bathroom Directive*, Wash. Post, June 15, 2016, https://www.washingtonpost.com/news/education/wp/2016/06/15/kansas-state-board-of-education-votes-to-ignore-obamas-transgender-bathroom-directive/?utm_term=.3922ef16f809. A number of states have also enacted or attempted to enact similar legislation. *See, e.g.*, Joellen Kralik, "Bathroom Bill"

Thus, while Title IX already protects LGBT students from discrimination, this offers little comfort to LGBT students facing policies like Petitioner's in judicial districts that fail to properly apply *Price Waterhouse*. Indeed, despite Supreme Court precedent, there is a bullying epidemic in our schools motivated by institutionalized discrimination against transgender students.[11] As Senator Franken

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Legislative Tracking, Nat'l Conf. State Legis., http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx (last updated Feb. 23, 2017) (noting that between 2013 and 2016 "at least 24 states considered 'bathroom bills', or legislation that would restrict access to multiuser restrooms . . . on the basis of a definition of sex or gender consistent with sex assigned at birth" and that "North Carolina is the only state to enact this type of legislation"). Moreover, in the 2017 legislative session alone, legislators in 14 states have either prefiled or introduced legislation "that would restrict access to multiuser restrooms, locker rooms, and other sex-segregated facilities" on the basis of birth-assigned sex. *Id*.

[11] Unfortunately, as Senator Franken has noted and this case makes clear, not all schools fight to protect their LGBT students: "[W]hen a school acts to protect kids with disabilities from bullying but looks the other way when LGBT kids are harassed by their peers, that is discrimination. When school staff members participate in or encourage bullying of LGBT youth, that is discrimination." 157 Cong. Rec. S1557 (daily ed. March 10, 2011) (speaking on behalf of himself and Senators Harkin, Kerry, Murray, Klobuchar, Lautenberg, Bennet, Blumenthal, Udall, Mikulski, Leahy, Sanders, Bingaman, Whitehouse, Cardin, Boxer, Gillibrand, Menendez, Akaka, Schumer, Wyden, Begich, Casey, Cantwell, Shaheen, Reed, Coons and Brown of Ohio). Senator Franken concluded that "[t]his harassment deprives [children] of an equal education." *Id*. Indeed, one survey found that "nearly 60% of lesbian, gay, bisexual, and transgender students who did not expect to graduate from high school said that this expectation was due to

noted in his floor statement in support of his amendment to add SNDA to the Every Child Achieves Act, "Nearly 75 percent of LGBT students say they have been verbally harassed at school. More than 30 percent report missing a day of school in the last month because they felt unsafe." 161 Cong. Rec. S5046 (daily ed. July 14, 2015) (statement of Senator Franken). This bullying and harassment has serious negative consequences. *See supra* Part I.A. As Senator Leahy pointed out in a floor speech supporting efforts to curb bullying and harassment of LGBT students after a gay student who was publicly shamed and tormented took his own life, "It has been well documented that students who are paralyzed by fear or bullying cannot effectively learn." 158 Cong Rec. S1928 (daily ed. March 21, 2012) (statement of Senator Leahy); *see also* 157 Cong. Rec. E459 (daily ed. Mar. 11, 2011) (statement of Representative Michael M. Honda) ("The hostile environment created by harassment and bullying not

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a hostile or unsupportive school environment, including hostile peers, unsupportive school staff, and gendered school practices that caused them constant discomfort". Brief of the States of New York, Washington, California, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Oregon and Vermont and the District of Columbia as *Amici Curiae* in Support of the United States' Motion for Preliminary Injunction, at *17, *United States v. North Carolina*, 192 F. Supp. 3d 620 (M.D.N.C. 2016) (signed by *amicus* Senator Kamala Harris); *see also* Brief of States as *Amici Curiae* in Opposition to Plaintiffs' Application for Preliminary Injunction, at *19, *Texas v. United States*, No. 7:16-cv-00054, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016) (signed by *amicus* Senator Kamala Harris) (noting that transgender students who experience frequent harassment have lower GPAs on average).

only deprives students of the opportunity to receive a quality education, but also contributes to academic underachievement.").

Amici believe SNDA is therefore an important complement to Title IX's existing protections of LGBT children. SNDA is consistent with Title IX's central purpose and, by expressly including "gender identity", it would codify existing case law like *Oncale*, *Price Waterhouse*, *Glenn*, *Barnes*, *Smith*, *Rosa*, *Schwenck*, *Kastl*, *Schroer, Fabian*, *Roberts*, *Finkle*, *Lopez*, *Mitchell* and *Tronetti*. *See supra* Part I.B; *see also* Letter from 40 Senators to the Honorable John King (May 2, 2016). SNDA would further provide school administrators with certainty and predictability in fashioning school policies and make it easier for our educators to protect their students from unwanted discrimination—for the benefit of students and educational institutions alike. *See* 161 Cong. Rec. S5041 (daily ed. July 14, 2015) (statement of Senator Murray) (explaining that ordinarily "school leaders want to do the right thing and end bullying or harassment in their classrooms. . . . They want to make sure their school is safe for a particular group of students. They want to make sure students are not discriminated against simply because of who they are."). Indeed, "41 percent of principals say they have programs designed to create a safe environment for LGBT students, but only 1/3 of principals say that LGBT students would feel safe at their school." 158 Cong. Rec. E1090 (daily ed. June 20, 2012) (statement of Representative Reyes). SNDA would ensure that Title IX's protections are fully enforceable and that LGBT students, their parents, and their teachers

have the tools necessary to guarantee they are educated in a safe and accepting environment.

Finally, SNDA's drafters specifically included a "no negative inference" provision to ensure nothing in SNDA "shall be construed to preempt, invalidate, or limit rights, remedies, procedures, or legal standards available to victims of discrimination or retaliation under any other Federal law or law of a State . . . including . . . [T]itle IX of the Education Amendments of 1972". S. 439 § 10(a).

Therefore, even if this Court looks to SNDA to inform its Title IX interpretation, it should view SNDA as simply reiterating, in more explicit language, what Title IX already tells us. Our public schools cannot discriminate against our children on the basis of gender identity.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm.

March 2, 2017

Respectfully submitted,

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APPENDIX

I. COMPLETE LIST OF *AMICI CURIAE*

A. United States Senators (40)

Tammy Baldwin
Michael F. Bennet
Richard Blumenthal
Cory A. Booker
Sherrod Brown
Maria Cantwell
Benjamin L. Cardin
Thomas R. Carper
Robert P. Casey, Jr.
Christopher A. Coons
Catherine Cortez Masto
Tammy Duckworth
Richard J. Durbin
Dianne Feinstein
Al Franken
Kirsten E. Gillibrand
Kamala D. Harris
Maggie Hassan
Martin Heinrich
Mazie K. Hirono
Tim Kaine
Amy Klobuchar
Patrick Leahy
Edward J. Markey
Robert Menendez
Jeff Merkley
Christopher S. Murphy
Patty Murray
Gary C. Peters
Jack Reed
Bernard Sanders
Brian Schatz
Charles E. Schumer
Jeanne Shaheen
Jon Tester
Chris Van Hollen
Mark R. Warner
Elizabeth Warren
Sheldon Whitehouse
Ron Wyden

B. Members of the United States House of Representatives (156)

Alma S. Adams
Pete Aguilar
Nanette Barragán
Karen Bass
Ami Bera
Donald S. Beyer, Jr.
Earl Blumenauer
Suzanne Bonamici
Brendan F. Boyle
Robert A. Brady

Anthony Brown
Julia Brownley
G.K. Butterfield
Michael E. Capuano
Salud Carbajal
Tony Cárdenas
André Carson
Matt Cartwright
Kathy Castor
Joaquin Castro
Judy Chu
David Cicilline
Katherine Clark
Yvette D. Clarke
Steve Cohen
Gerald E. Connolly
John Conyers, Jr.
Jim Cooper
J. Luis Correa
Joe Courtney
Charlie Crist
Joe Crowley
Elijah E. Cummings
Danny K. Davis
Susan Davis
Diana DeGette
John K. Delaney
Rosa L. DeLauro
Suzan DelBene
Val Demings
Mark DeSaulnier
Theodore E. Deutch
Debbie Dingell
Mike Doyle
Keith Ellison
Eliot L. Engel
Anna G. Eshoo
Adriano Espaillat
Elizabeth Esty
Bill Foster
Lois Frankel
Marcia L. Fudge
Tulsi Gabbard
Ruben Gallego
Josh Gottheimer
Al Green
Gene Green
Raúl M. Grijalva
Luis V. Gutiérrez
Colleen Hanabusa
Alcee L. Hastings
Denny Heck
Brian Higgins
Jim Himes
Michael M. Honda
Steny Hoyer
Jared Huffman
Steve Israel
Pramila Jayapal
Hakeem Jeffries
Eddie Bernice Johnson
Henry C. "Hank" Johnson, Jr.
William R. Keating
Joseph P. Kennedy, III
Ro Khanna
Ruben J. Kihuen
Dan Kildee
Derek Kilmer
Raja Krishnamoorthi

Ann McLane Kuster
James R. Langevin
Brenda L. Lawrence
Barbara Lee
Sheila Jackson Lee
Sander Levin
John Lewis
Ted W. Lieu
Zoe Lofgren
Alan Lowenthal
Nita Lowey
Ben Ray Luján
Michelle Lujan-Grisham
Stephen F. Lynch
Carolyn B. Maloney
Sean Patrick Maloney
Doris Matsui
Betty McCollum
A. Donald McEachin
James P. McGovern
Gregory W. Meeks
Grace Meng
Gwen Moore
Seth Moulton
Patrick Murphy
Jerrold Nadler
Richard M. Nolan
Donald Norcross
Eleanor Holmes Norton
Frank Pallone, Jr.
Jimmy Panetta
Bill Pascrell, Jr.
Donald M. Payne, Jr.
Nancy Pelosi
Ed Perlmutter
Scott H. Peters
Chellie Pingree
Mark Pocan
Jared Polis
David Price
Mike Quigley
Jamie Raskin
Kathleen M. Rice
Lisa Blunt Rochester
Ileana Ros-Lehtinen
Lucille Roybal-Allard
Raul Ruiz
Tim Ryan
Linda T. Sánchez
John Sarbanes
Jan Schakowsky
Adam Schiff
Bradley S. Schneider
Debbie Wasserman Schultz
Robert C. "Bobby" Scott
José E. Serrano
Carol Shea-Porter
Brad Sherman
Kyrsten Sinema
Louise Slaughter
Adam Smith
Darren Soto
Jackie Speier
Tom Suozzi
Eric Swalwell
Mark Takano
Mike Thompson
Dina Titus
Paul Tonko

Niki Tsongas
Juan Vargas
Nydia M. Velázquez
Tim Walz
Bonnie Watson-Coleman
Peter Welch
Frederica Wilson
John Yarmuth