

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 HUMAN RIGHTS WATCH
AND THE NEW YORK CITY BAR ASSOCIATION
AS AMICI CURIAE SUPPORTING RESPONDENT**

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	3
ARGUMENT	6
I. FOUR COUNTRIES FROM DIFFERENT PARTS OF THE GLOBE HAVE PROTECTED THE RIGHT OF TRANSGENDER PEOPLE TO USE RESTROOMS CONSISTENT WITH THEIR GENDER IDENTITY, SETTING EXAMPLES THAT THE UNITED STATES SHOULD FOLLOW.....	6
A. Canada.....	7
B. Malta	11
C. Argentina.....	15
D. Ireland	21
II. THE UNITED STATES IS BOUND TO PROTECT TRANSGENDER INDIVIDUALS FROM DISCRIMINATION ON THE BASIS OF GENDER IDENTITY UNDER THE ICCPR	23
A. The International Covenant on Civil and Political Rights Protects the Rights of Transgender People.	23

- B. To Exclude Discrimination on the Basis of Gender Identity from Prohibitions on Discrimination on the Basis of “Sex” Would Offend the United States’ Obligations under International Law..... 28

- C. The United Nations has Recognized That Discrimination Against Transgender Students Risks Meaningful Harm to Such Individuals. . . 30

- III. DISCRIMINATORY POLICIES TOWARDS TRANSGENDER STUDENTS’ USE OF RESTROOMS HAS INFLECTED HARM ON TRANSGENDER STUDENTS IN AMERICAN SCHOOLS..... 32
 - A. Restricting Use of Facilities That Are Necessary to Perform Bodily Functions or Maintain Physical Hygiene Negatively Affects the Physical and Mental Health of Transgender Youth..... 35

 - B. Restricting Transgender Students From Using Restrooms Consistent With Their Gender Identity Harms Their Ability to Learn and Participate in Their School Environments..... 37

C. Restrictions on Use of Restrooms Undermines Transgender Students' Right to Privacy By Effectively Outing Them as Transgender to Peers and School Staff.	40
CONCLUSION.....	42

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bond v. United States</i> , 134 S. Ct. 2077 (2014)	24
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INTEREST OF AMICI CURIAE¹

Human Rights Watch is a non-profit, non-governmental, non-partisan international organization devoted to defending the rights of human beings worldwide, including, among many others, lesbian, gay, bisexual, and transgender (“LGBT”) individuals. Human Rights Watch, among many other initiatives, documents and exposes abuses based on sexual orientation and gender identity worldwide. Established in 1978, Human Rights Watch is known for its accurate fact-finding, each year reporting on human rights conditions in about 90 countries. With roughly 400 staff members around the world, Human Rights Watch employs human rights professionals, country experts, lawyers, journalists, and academics of diverse backgrounds and nationalities. Human Rights Watch meets with governments, the United Nations, regional groups such as the African Union and the European Union, financial institutions, and corporations to press for changes in policy and practice that promote human rights and justice around the world.

¹ The parties have consented to the filing of this brief. (Petitioner filed a blanket consent letter with the Clerk and Respondent consented to the filing of this brief by email dated February 21, 2017.) Pursuant to Supreme Court Rule 37.6, counsel affirms that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The New York City Bar Association (the “City Bar”) is a voluntary association of over 24,000 member lawyers and law students. Among other initiatives, the City Bar addresses unmet legal needs, especially the needs of traditionally disadvantaged groups and individuals such as those in the LGBT community. The Committee on LGBT Rights addresses legal and policy issues that affect LGBT individuals. The City Bar’s programs and non-profit affiliates include the Cyrus R. Vance Center for International Justice, which provides pro bono legal representation to civil society organizations and international human rights bodies around the world. Its numerous initiatives include supporting the Alliance for Marriage in the Americas, a collaboration of U.S. and Latin American lawyers advocating and litigating for recognition of an international human right to marriage equality. The Vance Center supports LGBT advocates in promoting and protecting the rights of LGBT people worldwide, including supporting new hate crime legislation in El Salvador that protects the transgender community and securing key rights for intersex babies in the Kenyan High Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Most people take for granted the free use of a public restroom, especially in a school setting. Many of America's transgender students, however, face constant uncertainty, anxiety, and other harm from discriminatory policies that dictate which restrooms they can and cannot use. This is especially true when such policies force transgender students to use a restroom that fails to match their gender identity or a specially-designated restroom that exposes them in violation of their right to privacy or separates them from their peers. But the questions before the Court are about much more than just what bathroom a transgender student can (and cannot) use. They concern whether transgender students can fully and safely participate in school and public life on an equal footing with other students. Prohibiting transgender students from using facilities consistent with their gender identity means that many such individuals cannot use any restroom facility at all, are thus excluded from critical aspects or the entirety of the educational experience and public life, and face constant threats to their physical and psychological well-being.

Fortunately, other countries have recognized this human rights issue and have adopted legal protections for transgender people, including affording transgender people the right to use restroom and other public facilities consistent with their gender identity. Such policies and protections have not infringed on the privacy of non-transgender people; rather, these policies have ensured that

public facilities are inclusive, safe, and free from harassment for all individuals, regardless of their gender identity.

The first section of this brief focuses on four countries—Canada, Malta, Argentina, and Ireland—that have lead the way in enacting meaningful protections for transgender individuals against discrimination in their daily lives. These countries often have recognized, as Respondent urges here, that existing prohibitions on discrimination on the basis of “sex” prohibit discrimination on the basis of gender identity; for example, Canadian courts have enforced that principle for more than 15 years. These countries have determined that guaranteeing transgender people the right to conduct their public life in accordance with their gender identity, including in the use of restrooms, is an expression of self-autonomy and dignity that warrants vigilant protection. At the same time, these countries have concluded that the right of transgender people to utilize facilities corresponding to their gender identity can coexist with the privacy rights of others.

The second section of this brief focuses on international law to which the United States is bound—in particular, the International Covenant on Civil and Political Rights—that protects the equal rights of transgender individuals. Interpreting Title IX of the Education Amendments Act of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its regulations to require that schools allow transgender students the use of restrooms consistent with their gender identity, as Respondent urges here, is consistent with these treaty obligations and the growing

international consensus recognizing the rights of transgender people.

The final section of this brief highlights research by amicus Human Rights Watch and other studies which demonstrate that blocking use of restrooms consistent with a student's gender identity inflicts significant harm on transgender students. For instance, when transgender students are haunted by the lack of a safe and comfortable restroom, they also refrain from participating in physical education classes or other school activities, and suffer other negative effects. Worse, when schools require transgender students to use restrooms according to their sex assigned at birth, or even a special bathroom, they put those students at risk of verbal and physical assault. Indeed, a paper by Jody L. Herman and published by the Williams Institute at the UCLA School of Law found that, in Washington, D.C., 70% of transgender survey respondents reported being denied use, verbally harassed, or physically assaulted in public restrooms. Thus, restricting the use of restrooms in accordance with transgender students' gender identities negatively affects their physical and mental health and access to educational opportunities. As described more fully below, transgender students have experienced loss of education opportunity, suicidal thoughts, hospitalization, urinary tract infections, kidney problems, and other issues as a result of being denied access to restrooms consistent with their gender identity. These are exactly the types of unacceptable harms that Title IX was designed to prevent.

ARGUMENT**I. FOUR COUNTRIES FROM DIFFERENT PARTS OF THE GLOBE HAVE PROTECTED THE RIGHT OF TRANSGENDER PEOPLE TO USE RESTROOMS CONSISTENT WITH THEIR GENDER IDENTITY, SETTING EXAMPLES THAT THE UNITED STATES SHOULD FOLLOW**

Canada, Malta, Argentina and Ireland are among the countries that have adopted legal protections for transgender people, including guaranteeing transgender individuals the freedom to use restroom facilities consistent with their gender identity. The recognition of these legal rights and the adoption of such protections arose in response to a growing understanding of the often life-threatening discrimination transgender people face in their daily lives, as well as from a commitment to respecting the basic dignity of individuals. And, in recognizing these rights and in adopting these protections, through constitutional amendments, legislation, and court rulings, such countries have often expressly recognized that pre-existing prohibitions on discrimination on the basis of sex necessarily mean that discrimination on the basis of gender identity is prohibited.

This Court has, of course, drawn on international experience in construing our own federal laws. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (referring to international opinion with respect to juvenile death penalty); *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988) (“We have previously recognized the relevance of the views of

the international community in determining whether a punishment is cruel and unusual”); Restatement (Third) of Foreign Relations Law § 701 reporter’s note 7 (1987) (“[c]ourts in the United States have increasingly looked to international human rights standards as law in the United States or as a guide to United States law”). Here, again, the Court should consider the protections provided around the world in deciding the issues presented.

To that end, the below analysis sets forth how four countries—Canada, Malta, Argentina, and Ireland—have recognized the basic human rights of transgender individuals.

A. *Canada*

Canada and its provinces have extended protections to transgender individuals for many years. In fact, Canadian courts have recognized that “discrimination on the basis of Transsexualism constitutes sex discrimination” for over 15 years. *Kavanagh v. Canada*, 2001 CanLII 8496 (CHRT) at para. 135. Further, in 2014, the Department of Education for the Province of Nova Scotia issued Guidelines for Supporting Transgender Students. Although not binding on individual school boards, the Guidelines provide that each student must have use of a restroom that corresponds to their gender identity.² Several other provinces and districts in

² *Guidelines for Supporting Transgender and Gender-nonconforming Students*, NOVA SCOTIA DEPARTMENT OF EDUCATION (2014), available at <https://studentservices.ednet.ns.ca/sites/>

Canada have issued similar policies and guidelines, emphasizing that students should be able to self-identify and should not be asked to prove their gender identity.³ Indeed, the Human Rights Commissions of New Brunswick, Nunavut Territory, Quebec, and the Yukon Territory all include “gender identity” in protections against discrimination on the basis of gender or sex.⁴

In one of the earliest cases to consider the issue, the Quebec Human Rights Tribunal held that transgender individuals were protected under prohibitions against discrimination based on “sex” after an extensive review of Canadian and international law. *M.L. v. Maison de jeunes*, 1998 CanLII 28 (QC TPD).⁵ The Tribunal noted that Quebec and seven other provinces had long allowed transgender individuals to change their name and sex in official documents. *Id.* at *12-13. Moreover, since that right first was acknowledged, the trend favored extending more protections to transgender

default/files/Guidelines%20for%20Supporting%20Transgender%20Students_0.pdf.

³ See, e.g., *Transgender Bathrooms Toronto: New Guidelines For Students, Teachers in Toronto Schools*, THE HUFFINGTON POST (December 4, 2012), available at http://www.huffingtonpost.ca/2012/10/04/transgender-bathrooms-toronto_n_1940584.html.

⁴ *Fact Page – Human Rights Across Canada*, TRANS EQUALITY SOCIETY OF ALBERTA (July 2016), available at <http://www.tesaonline.org/human-rights-across-canada.html>.

⁵ This decision was translated from a foreign language into English. A certified English translation can be obtained and provided upon request.

individuals and recognizing that gender is related to sexual identity. *Id.* Drawing on international law, the Tribunal observed that, as early as 1996, the Court of Justice of the European Community had ruled that “dismissal of a transsexual on the ground of a change in her sexual identity constituted discrimination on the basis of sex.” *Id.* at *15. The Tribunal also considered the works of jurists from several countries and concluded that “transsexualism is clearly a matter of sexual identity,” not sexual orientation. *Id.* at *17-18. In the end, the Tribunal concluded that the word “sex” as used in Canadian human rights legislation was broad enough to cover “sexual identity”; as the Tribunal framed it, “sex not only refers to the state of a person but also includes the very process of unification, of transsexualism.” *Id.* at 20.

More recently, many Canadian provinces and territories have amended their Human Rights Acts to explicitly provide protections to transgender individuals. In fact, of the 13 provinces and territories in Canada, nine have added explicit protections against discrimination on the basis of gender identity and gender expression to their laws.⁶ Newfoundland and Labrador, for example, amended their Human Rights Act in December of 2013 to explicitly include gender identity and expression. Despite the fact that such protections were already interpreted to be included under the protections based on “sex,” these jurisdictions felt that an

⁶ *Fact Page – Human Rights Across Canada*, TRANS EQUALITY SOCIETY OF ALBERTA (July 2016), available at <http://www.tesaonline.org/human-rights-across-canada.html>.

explicit amendment would send a message of inclusion “and contribute to public education and dialogue.”⁷

In 2015, Alberta amended two statutes governing human rights to add “gender identity” and “gender expression.”⁸ Although the Alberta Human Rights Commission already recognized gender protections to include protection of transgender people, it felt the protection should be made explicit.⁹ Additionally, British Columbia, Manitoba, Northwest Territories, Saskatchewan, Nova Scotia, Ontario, and Prince Edward Island all include either “gender identity” or “gender identity and gender expression” in their Human Rights Act or Human Rights Code.¹⁰

Finally, the Canadian legislature is considering Bill C-16, which would amend the Canadian Human Rights Act and the Canadian Criminal Code to add explicit protections at the federal level on the basis of “gender identity or

⁷ *Newfoundland Labrador Human Rights Commission Annual Report 2013-2014*, NEWFOUNDLAND LABRADOR DEPARTMENT OF JUSTICE AND PUBLIC SAFETY, at *4, available at http://www.justice.gov.nl.ca/just/publications/2013-2014/HRC_Annual%20Report%202013-14_FINAL_sign.pdf.

⁸ *Fact Page – Human Rights Across Canada*, TRANS EQUALITY SOCIETY OF ALBERTA (July 2016), available at <http://www.tesaonline.org/human-rights-across-canada.html>.

⁹ *Id.*

¹⁰ *Id.*

expression.”¹¹ In October 2016, the House of Commons passed the bill at its second reading by a vote of 248-40, sending it to the Senate.¹²

Canada, our immediate neighbor to the north, thus leads the way in North America in protecting transgender individuals and the United States should follow its example.

B. Malta

Across the ocean, on April 14, 2014, Malta adopted constitutional protections against discrimination on the basis of gender identity.¹³ In fact, the underlying legislation, which introduced sweeping protections for both transgender individuals and same-sex couples, was approved unanimously.¹⁴

Soon thereafter, Malta published an education policy and procedures for transgender, gender

¹¹ *Fact Page – Human Rights Across Canada*, TRANS EQUALITY SOCIETY OF ALBERTA (July 2016), available at <http://www.tesaonline.org/human-rights-across-canada.html>.

¹² *Transgender rights bill passes key Commons vote, heads to committee*, THE GLOBE & MAIL (October 20, 2016), available at <http://www.theglobeandmail.com/news/politics/transgender-rights-bill-passes-key-commons-vote-heads-to-committee/article32429543/?service=print>.

¹³ *Malta: Douze Points! First Constitution in Europe to Name Gender Identity*, TRANSGENDER EUROPE (April 15, 2014), available at <http://tgeu.org/malta-douze-points-first-constitution-in-europe-to-name-gender-identity-tgeu-statement/>.

¹⁴ *See id.*

variant, and intersex students.¹⁵ These policies apply to all state schools and were designed specifically to “[f]oster a school environment that is inclusive, safe and free from harassment and discrimination for all members of the school community, students and adults, regardless of sex, sexual orientation, gender identity, gender expression and/or sex characteristics.”¹⁶ The policy further protects the use of toilets and changing facilities by transgender students.¹⁷ In contrast to the positions advocated by Petitioner, the Government of Malta advises:

With respect to all toilets or changing facilities, students shall have access to facilities that correspond to their gender identity... [A]ny student who is uncomfortable using a shared facility, regardless of the reason, shall, upon the student’s request, be provided with a safe and non-stigmatising alternative. However, *requiring a trans, gender variant or intersex student to use a separate, non-integrated space threatens to publicly identify and marginalise the student as trans or intersex and should not be done unless requested by [the] student...* under no

¹⁵ *Malta Launches Education Policy for Trans, Gender Variant and Intersex Children*, TRANSGENDER EUROPE (June 16, 2015), available at <http://tgeu.org/malta-launches-education-policy-for-trans-gender-variant-and-intersex-children>.

¹⁶ *Trans, Gender Variant and Intersex Students in Schools Policy*, MINISTRY FOR EDUCATION AND EMPLOYMENT, (June 2015), available at <http://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Policy.pdf>.

¹⁷ *Id.*

circumstances may a student be required to use such facilities merely because they are trans, gender variant or intersex.”¹⁸

These protections were adopted in the wake of the landmark, years-long battle of Joanne Cassar, a transgender Maltese woman. After gender confirmation surgery, Joanne amended her birth certificate; however, when Joanne and her boyfriend later applied for a marriage license, they were denied. *Cassar v. Malta* (dec.), no. 36982/11, ECHR 2013. Joanne sued to compel the Director of Public Registry to issue a license. *Id.* Joanne’s case wound its way through the judicial system, but, eventually, after Joanne appealed to the European Court of Human Rights, the parties reached a settlement, in which the Government agreed “to present and pilot a Bill... to enable the applicant to marry a person of the sex opposite to that of the applicant’s acquired sex in Malta.” *See id.* at *4. This commitment and the resultant actions by the Maltese Government “started a process for launching a gender identity act,” eventually resulting in the constitutional amendment to protect the civil rights of transgender individuals.¹⁹

¹⁸ *Trans, Gender Variant and Intersex Students in Schools Procedures*, MINISTRY FOR EDUCATION AND EMPLOYMENT, at *7 (June 2015) (*ital. added*), available at <http://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Procedures.pdf>.

¹⁹ *Updated: Opposition presents Constitutional amendment against sexual orientation discrimination*, TIMES OF MALTA (June 20, 2013), available at <http://www.timesofmalta.com/articles/view/20130620/local/de->

Malta's efforts to protect the human rights of transgender people continued thereafter. In April of 2015, the government adopted the Gender Identity, Gender Expression and Sex Characteristics Act, further cementing the rights of transgender individuals.²⁰ The fundamental purpose of such legislation was to "recognize the right of each person to their gender identity" and encourage individuals to freely develop their gender identity.²¹ The Act simplified the process for individuals to change their gender on official documents and prohibited the government from requiring medical information to approve such a change, with the purpose of minimizing the economic and emotional boundaries that previously blocked individuals' ability to receive recognition of their gender identity.²²

Additionally, the Act allows individuals who are detained in gender-segregated detention facilities to be placed in the facility corresponding to their gender identity by completing an affidavit that

marco.474664. *See also Gender Identity, Gender Expression and Sex Characteristics Act*, GOVERNMENT OF MALTA MINISTRY FOR SOCIAL DIALOGUE, CONSUMER AFFAIRS AND CIVIL LIBERTIES, *available at* https://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/2014%20-%20GIGESC/GIGESC%20-%20Outcome%20Report.pdf

²⁰ *Malta Adopts Ground-breaking Trans and Intersex Law – TGEU Press Release*, TRANSGENDER EUROPE (April 1, 2015), *available at* <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>.

²¹ *Id.*

²² *Id.*

they have been living as that gender and plan to continue living as that gender.²³

Finally, the Act gave the government broad power to create additional regulations to better enforce the provisions of the Act, leading ultimately to the adoption of supportive educational policies for transgender, gender variant, and intersex students.²⁴

C. *Argentina*

Back in the Americas, in 2012, Argentina recognized a growing crisis: the Argentinian Health Ministry estimated the life expectancy of transgender individuals at a stunningly short 35 years.²⁵ The New York Times reported that, “[a]shamed to be called by a name out of sync with the gender they present, transgender people in Argentina frequently drop out of school early, avoid hospitals and struggle to find gainful employment.”²⁶ A 2012 report by Inadi, Argentina’s antidiscrimination agency, found that transgender people are often the target of violent crimes, and

²³ §9A Gender Identity, Gender Expression and Sex Characteristics Act, Act XI of 2015 (April 14, 2015).

²⁴ *Id.* at §17.

²⁵ Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, NEW YORK TIMES (May 24, 2012), available at, <http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html>.

²⁶ *Id.*

that most transgender individuals surveyed by the agency had not completed primary school.²⁷

As a result, on May 9, 2012, the Argentine National Congress passed the landmark Gender Identity Law with overwhelming majorities: 167 votes in favor, 17 against, and 7 abstentions in the Chamber of Deputies;²⁸ and unanimous support in favor, with one abstention, in the Senate.²⁹

The Gender Identity Law broadly recognizes Argentineans' rights to their own gender identity and to be recognized and treated accordingly.³⁰ Specifically, the law provides that all people have the right to (a) the recognition of their gender identity; (b) the "development of their person" according to their gender identity; and (c) be treated according to, and identified consistently with, their

²⁷ *Id.*

²⁸ Danny Olvera, *Argentina Chamber of Deputies Approves Gender Identity Law*, XQSI MAGAZINE, (December 1, 2011), available at, <http://xqsimagazine.com/2011/12/01/argentine-chamber-of-deputies-approves-gender-identity-law/>.

²⁹ *El Senado Aprobo la Ley Identidad Genero 55 Votos Favor*, UNO, (May 9, 2012), available at, <http://www.diariouno.com.ar/pais/el-senado-aprobo-la-ley-identidad-genero-55-votos-favor-20120509-n105079.html>. This source document was translated from a foreign language into English. A certified English translation of the source can be obtained and provided upon request.

³⁰ Gender Identity Law, *Codigo Civil* 26.743, Article 1 (May 9, 2012). This source document was translated from a foreign language into English. A certified English translation of the source can be obtained and provided upon request.

gender identity in official acts and documents.³¹ The law defines gender identity as a concept understood to include the “internal and individual way in which gender is perceived,” which may or may not correspond to the “gender assigned at birth.”³²

The law provides that whenever a person’s “sex” is recorded in government documents—a birth certificate, national identity card, and the like—in a manner that does not correspond with his or her “self-perceived gender identity,” the individual can have the record amended.³³ The requirements for such a change are minimal: a person must submit a request to the appropriate government agency stating that they fall within the protection of the law.³⁴ Surgical procedures, hormonal therapies, or any other psychological or medical treatment are expressly *not* required.³⁵

The law codifies the principle of “dignified treatment”: the gender identity a person adopts must be respected and used for all official purposes.³⁶ Thus, under the law, “[i]n those circumstances in which the person must be named in public, only the chosen first name respecting the adopted gender identity will be used.”³⁷ And the law

³¹ *Id.* at Article 1.

³² *Id.* at Article 2.

³³ *Id.* at Article 3.

³⁴ *Id.* at Article 4.

³⁵ *See id.*

³⁶ *Id.* at Article 12.

³⁷ *Id.*

broadly recognizes that “every norm, regulation or procedure must respect the human right to gender identity.”³⁸ The law further emphasizes that particular care should be exercised when considering the rights and wellbeing of transgender minors.³⁹ Finally, the law imposes a guarantee from public officials for vital and gender affirming health services under state, private, or trade union-run health insurance systems, including surgical treatment and hormonal therapy.⁴⁰

During a special meeting of the Congress, one national representative emphasized the idea that the state owes individuals a right to gender self-determination and autonomy as an element of human dignity:

The State is indebted, because the right to identity, which, as has been said, is a human right that this country with much sacrifice has been able to guarantee in reality has no distinction of epochs and is a prerequisite for the exercise of rights [to] Education, health, housing and even the right to life ... I believe that in the development of this project, something that has been said here is fundamental: that the identity and the body, they are not something separable. In the project that we do, this has to be included

³⁸ *Id.* at Articles 7, 12, 13.

³⁹ *Id.* at Article 5.

⁴⁰ *Id.* at Article 11.

definitively, according to the autonomous decision of the person that chooses.⁴¹

Similarly, Vice President Amado Boudou said the law was a “path toward equality, inclusion and recognition of rights for all Argentinians ... Today is a day when thousands and thousands of Argentinians have new rights, without anyone else losing an ounce of their own rights.”⁴²

Between the passage of the law and May 2016, more than 10,000 Argentineans changed their gender on government documents.⁴³ Indeed, in 2015, the World Health Organization cited Argentina’s Gender Identity Law as an example for other countries to follow.⁴⁴

⁴¹ Anahi Farji Neer, *Body, rights, and integral health: Analysis of the parliamentary debates of the laws of Gender Identity and Assisted Fertilization* (Argentina 2011-2013), COLLECTIVE HEALTH, Vol. 1, Num. 3 (March 15, 2015).

⁴² Mariano Castillo, *Argentine Law Lets People Identify Own Gender*, CNN (May 11, 2012), available at <http://www.cnn.com/2012/05/10/world/americas/argentina-gender-identity/>.

⁴³ Ximena Schinca, *Police Has Changed Its Attitude Towards Transgender Community*, BUENOS AIRES HERALD (May 15, 2016), available at, <http://www.buenosairesherald.com/article/214340/%E2%80%98police-has-changed-its-attitude--towards-transgender-community%E2%80%99>.

⁴⁴ *WHO Praises Argentina’s Gender Rights*, BUENOS AIRES HERALD (July 23, 2015), available at, <http://www.buenosairesherald.com/article/194616/who-praises-argentina>.

The national Gender Identity Law came on the heels of measures recognizing transgender rights on the local level. In December 2010, for example, the Administrative Courts of Buenos Aires held that gender identity was a human right and rejected the notion that any psychiatric or medical requirement was necessary to justify a person's decision to articulate his or her gender identity in a manner different from their birth assigned gender.⁴⁵ Later that same month, a court found that “[a] person's sexual identity goes far beyond the biological.”⁴⁶ The judge urged the Argentine Congress to adopt legislation simplifying the procedures whereby an individual could receive protection and recognition of their gender identity.⁴⁷ Importantly, not requiring any medical procedures was crucial, since such a requirement would be “forcing the person to face the ‘paradoxical dilemma’ of having to suffer physical mutilation so as to be able to repair institutional mutilation.”⁴⁸ In the year and a half that followed before the passage of the nationwide Gender Identity Law, universities and Buenos Aires city-level offices began to mandate protections for transgender

⁴⁵ Ines M. Pousadela, *From Subjects of Shame to Agents of Change: The LGBT Movement in Argentina*, Crossroads Initiative, Society for Participatory Research in Asia (2012), available at http://www.academia.edu/2403479/From_Subjects_of_Shame_to_Agents_of_Change_The_LGBT_Movement_in_Argentina_Crossroads_Initiative_Society_for_Participatory_Research_in_Asia_PRIA_New_Delhi_India_2012.

⁴⁶ *Id.* at 17.

⁴⁷ *Id.*

⁴⁸ *Id.* at 17-18.

individuals, including simple name-change procedures.⁴⁹ The Public Security Minister of Argentina also issued a regulation that required all police and security to be able to wear uniforms and use restrooms and changing rooms according to their self-perceived gender identity.⁵⁰

D. Ireland

Finally, much like Argentina, Ireland recognizes individuals' right to change their legal gender based solely on self-identification. An applicant under Ireland's Gender Recognition Bill 2015 must submit a written form, free of charge, to the Minister for Social Protection, detailing identifying information and a statutory declaration that he or she has a "settled or solemn intention of living the preferred gender for the rest of his or her life" and attests to the consequences of this affirmation.⁵¹ Generally, upon receipt of a gender recognition certificate, the person is henceforth recognized as the identified gender "for all purposes."⁵²

⁴⁹ *Id.* at 18.

⁵⁰ *Id.*

⁵¹ Gender Recognition Act 2015 (Act No. 25/2015), §§ 8(2), 10 (Ir.), available at <http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf>

⁵² *Being LGBT in School: A Resource for Post-Primary Schools to Prevent Homophobic and Transphobic Bullying and Support LGBT Students*, GAY AND LESBIAN EQUALITY NETWORK (2016), available at <https://www.education.ie/en/Publications/Education-Reports/Being-LGBT-in-School.pdf>.

To implement this new official gender recognition law, Ireland's Department of Education released guidelines for schools on how to support LGBT students. The guidelines provide that transgender students "should be able to access toilet and changing facilities that correspond with their gender identity."⁵³ The guidelines further recognize that some students may "feel uncomfortable with a transgender student using the same gender-specific facilities," but concludes that "[t]his discomfort may be rooted in an unfounded assumption of inappropriate behaviour on the part of the student who is transgender and consequently it is not a reason to deny access to the transgender student."⁵⁴

Just months after the guidelines were published, an education officer of the human rights organization Transgender Equality Network Ireland, which provides training workshops for schools on how to support transgender students, reported that, "we have really positive outcomes. Very often, if I go back to a school a month later, [the school will] say it's old news, they've moved on."⁵⁵

⁵³, *'Being LGBT in School' A Resource for Post-Primary Schools to Prevent Homophobic and Transphobic Bullying and Support LGBT Students*, at 23, GAY +LESBIAN EQUALITY NETWORK (2016), *available at*, http://www.glen.ie/attachments/Being_LGBT_at_School_-_Jan_2016.pdf

⁵⁴ *Id.*

⁵⁵ Meadhbh McGrath, *Supporting transgender students in schools*, INDEPENDENT.IE (April 6, 2016), *available at* <http://www.independent.ie/irish-news/education/supporting-transgender-students-in-schools-34602473.html>

* * * *

In summary, countries such as Canada, Malta, Argentina, and Ireland recognize the right to gender identity protections for transgender people, and some have expressly allowed transgender people access to the restrooms that comport with their gender identity. In these countries, governments at all levels appreciated the harms and the stigma imposed on transgender individuals and took corrective steps to mitigate those harms. Title IX should be construed by this Court to protect the basic human right of transgender students to the use of restrooms consistent with their gender identity.

II. THE UNITED STATES IS BOUND TO PROTECT TRANSGENDER INDIVIDUALS FROM DISCRIMINATION ON THE BASIS OF GENDER IDENTITY UNDER THE ICCPR

Interpreting Title IX's prohibition of discrimination on the basis of "sex" to include the prohibition of discrimination on the basis of gender identity would be consistent with the human rights policies of leading countries, as discussed above. Importantly, such an interpretation would comport with the United States' international treaty obligations.

A. *The International Covenant on Civil and Political Rights Protects the Rights of Transgender People.*

In 1992, the United States ratified the International Covenant on Civil and Political

Rights.⁵⁶ The ICCPR protects the civil and political rights of the residents of signatory countries, including the rights of transgender Americans.⁵⁷ This includes the human rights of transgender individuals as discussed below.

Article 2 of the ICCPR sets forth the core principle of nondiscrimination:

Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*⁵⁸

Other provisions of the ICCPR pertinent to the specific forms of harm and discrimination faced by transgender students, including discriminatory policies regarding bathroom use, buttress these fundamental principles. For example, Article 17 recognizes an explicit right to privacy: “No one shall be subjected to arbitrary or unlawful interference

⁵⁶ International Covenant on Civil and Political Rights, Oct. 5, 1977, KAV 2306, 999 U.N.T.S. 171 (ratified Sept. 8, 1992) (hereinafter, “ICCPR”).

⁵⁷ Although the ICCPR is not a self-executing treaty, and thus does not give rise to an independent cause of action, it nonetheless constitutes a binding commitment among signatory nations. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2084 (2014); *Medellín v. Texas*, 552 U.S. 491, 505, n.2 (2008). *See generally Foster v. Neilson*, 27 U.S. 253, 254 (1829).

⁵⁸ ICCPR, Oct. 5, 1977, KAV 2306, 999 U.N.T.S. 171.

with his privacy”⁵⁹ Article 19 provides that “Everyone shall have the right to freedom of expression”⁶⁰ Article 26 provides that “the law shall prohibit any discrimination and guarantee to all persons an effective protection against discrimination on any such ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.”⁶¹

The United States itself and international bodies have interpreted these provisions to provide full protections for transgender individuals and these interpretations are entitled to substantial weight. *Cf. Breard v. Greene*, 523 U.S. 371, 375 (1998) (This Court “should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such.”). For example, the United States submits periodic reports to the United Nations on its compliance with the ICCPR. In the United States government’s fourth such report, the United States admitted to a “significant history of purposeful discrimination” against the LGBT community and cites increased efforts by all branches of government to protect transgender individuals.⁶²

⁵⁹ *Id.* at Article 17.

⁶⁰ *Id.* at Article 19.

⁶¹ *Id.* at Article 26.

⁶² United States Government, Fourth Periodic Report of the United States Under Article 40 of the Covenant, CCPR/C/USA/4, at 106, 606 (2011).

In addition, the United Nations repeatedly has recognized that the ICCPR (together with several other international human rights treaties) provides protections for transgender people.⁶³ According to a report by the United Nations High Commissioner on Human Rights, Articles 2 and 26 protect transgender individuals from discrimination; Article 19 protects transgender individuals' freedom of expression; Article 21 guarantees their freedom of association; and Article 22 ensures their freedom of peaceful assembly. Likewise, Articles 6 and 9 protect individuals from transphobic violence, and Article 7 prevents the torture and cruel, inhuman, and degrading treatment of transgender persons.⁶⁴

Furthermore, the Yogyakarta Principles—a set of international legal principles developed by the International Commission of Jurists and the International Service for Human Rights—confirm that the ICCPR and other international treaties protect the rights of transgender individuals. These principles were adopted to bring greater clarity and coherence to states' obligations under existing international human rights law to prevent human

⁶³ See, e.g., United Nations Office of the High Commissioner on Human Rights, U.N. Rep. Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, U.N. Doc. HR/PUB/12/06 (2012).

⁶⁴ *Id.* at 14, 22, 25. Article 6 guarantees every human being has the right to life, which shall be protected by law, and that no individual shall be arbitrarily deprived of his life. Article 7 forbids torture or cruel, inhuman or degrading treatment or punishment, including non-voluntary medical or scientific experimentation. Article 9 grants every person the right to liberty and security of person.

rights violations based on sexual orientation and gender identity.⁶⁵ As the UN itself has explained, the Yogyakarta Principles “although not binding, reflect well-established principles of international law.”⁶⁶

Principle 6 of the Yogyakarta Principles reiterates the right to privacy provided by Article 17 of the ICCPR, Principle 19 reiterates the guarantee of freedom of expression of Article 19 of the ICCPR, and Principle 2 reiterates the protections from discrimination of Article 26 of the ICCPR, all with respect to matters of sexual orientation and gender identity.⁶⁷

Cumulatively, these various sources confirm that, as part of the framework of international human rights law, the ICCPR provides full protection for the expression of gender identity.

⁶⁵ International Commission of Jurists, Yogyakarta Principles (March 2007), *available at* <http://www.yogyakartaprinciples.org/principles-en>.

⁶⁶ United Nations Office of the High Commissioner on Human Rights, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/12/09, at 3 (Oct. 23, 2012).

⁶⁷ International Commission of Jurists, Yogyakarta Principles (March 2007), *available at* <http://www.yogyakartaprinciples.org/principles-en>.

B. To Exclude Discrimination on the Basis of Gender Identity from Prohibitions on Discrimination on the Basis of “Sex” Would Offend the United States’ Obligations under International Law.

Federal laws should be construed to avoid conflict with American treaty obligations.⁶⁸ As discussed above, the United States has international obligations to protect transgender individuals from discrimination under the ICCPR. Recognizing discrimination on the basis of gender identity as a form of prohibited “sex” discrimination, as Respondent urges, would align Title IX with the United States’ treaty obligations.⁶⁹

⁶⁸ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (where a treaty and a statute “relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either”); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

⁶⁹ Furthermore, where a treaty and federal law relate to the same subject and conflict, the “last in time” controls. *Whitney*, 124 U.S. at 194 (where a treaty conflicts with federal legislation that relates to the same subject, the more recent in time prevails); *Kappus v. Comm’r of Internal Revenue*, 337 F.3d 1053, 1057 (D.C. Cir. 2003) (coining this principle of law as the “last-in-time rule”). Both Title IX and the ICCPR deal with prohibitions on systematic discrimination of certain individuals based on their immutable characteristics. Congress passed Title IX in 1972, twenty years before the ICCPR was ratified in 1992. Thus, the ICCPR and its interpretation should prevail if in conflict with Title IX.

Petitioner's reading of Title IX and its policy regarding student bathroom use, by contrast, are at odds with the dictates of the ICCPR. In addition to failing to guarantee protection against discrimination for transgender individuals, Petitioner's interpretation and its restroom policy jeopardize transgender students' rights guaranteed under the ICCPR. Among other things, Petitioner's requirement that transgender students, like G.G., use a separate designated facility calls attention to the individual's transgender status. The fact that a student is transgender is a private, intimate part of personal identity that should only be shared by choice. Petitioner's policy eviscerates that sense of privacy by forcing students like G.G. to identify themselves by using a separate facility. By contrast, allowing G.G. and other transgender students to use the restroom consistent with their gender identity—while also allowing all students to use the single-stall restroom—makes it possible for students to exercise their right to privacy while not discriminating against transgender students because of their transgender identity. This comports with the United States' obligations under the ICCPR.⁷⁰

Moreover, Petitioner's policy of isolating transgender students like G.G. may cause such students to repress their gender identity for fear of being treated differently in violation of Article 19 of the ICCPR, which protects individuals' rights to freedom of expression. The Respondent's interpretation of Title IX, in contrast, would

⁷⁰ Specifically, this aligns with Article 17 and Article 26 of the ICCPR.

maintain consistency with the United States' obligations under Article 19 because it would permit G.G. to freely express his gender identity by using the boys' restroom.

C. The United Nations has Recognized That Discrimination Against Transgender Students Risks Meaningful Harm to Such Individuals.

Consistent with the international treaty obligations discussed above, the United Nations has cautioned against using vague notions like morality as a pretext for discrimination against transgender students and has noted that laws that criminalize the use of restrooms consistent with the individual's gender identity risk increasing the victimization of transgender individuals:

Human rights mechanisms continue to emphasize links between criminalization and . . . transphobic hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization put on the work of human rights defenders. The Special Rapporteur on freedom of religion or belief has noted that these laws [using vague concepts such as 'morality'] may give a pretext to vigilante groups and other perpetrators of hatred for

intimidating people and committing acts of violence.⁷¹

Actions like those taken by the Petitioner single out transgender students for exclusion, exacerbate the isolation and stigmatization of transgender students, and put them at greater risk of discrimination and harm.

Indeed, in 2011, the United Nations High Commissioner for Human Rights documented widespread violence and discrimination against individuals on the basis of gender identity after decades of monitoring and observation.⁷² The report highlighted that “sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals” and “criminalization increases social stigmatization and made people ‘more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.’”⁷³

In its 2015 report, the High Commissioner noted marked improvements in the protection of

⁷¹ *Cf.* U.N. Human Rights Council, Discrimination and violence against individuals based on their sexual orientation and gender identity, ¶ 45, U.N. Doc. A/HRC/29/23 (May 5, 2015).

⁷² U.N. Human Rights Council, Discrimination and violence against individuals based on their sexual orientation and gender identity, ¶ 1, 45, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

⁷³ *Id.* at ¶ 42 (internal citations omitted).

transgender rights around the world, suggesting a growing consensus that discriminating against individuals on the basis of their gender identity is both morally wrong and inconsistent with international legal obligations to protect human rights. The report highlighted increased “initiatives taken by national, provincial and local governments – including measures to combat hate crime, address bullying of children, and ensure fair treatment of LGBT . . . people in the workplace and in access to housing, healthcare and public services.”⁷⁴

III. DISCRIMINATORY POLICIES TOWARDS TRANSGENDER STUDENTS’ USE OF RESTROOMS HAS INFLICTED HARM ON TRANSGENDER STUDENTS IN AMERICAN SCHOOLS.

Denying transgender students the use of restrooms consistent with their gender identity inflicts significant harm across a range of dimensions. For instance, such students often cannot comfortably (or at all) use the other options available – namely, the restroom inconsistent with their gender identity or, if available, a separate bathroom, the use of which exposes them as transgender – and therefore such students have no or limited bathroom options. In such scenarios, transgender students lose meaningful access to the

⁷⁴ U.N. Human Rights Council, UN: Human Rights Council Report Discrimination and violence against individuals based on their sexual orientation and gender identity, summary, U.N. Doc. A/HRC/29/23 (May 5, 2015), *available at* http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/A_HRC_29_23_One_pager_en.pdf.

larger facility containing the bathroom – *i.e.*, their school. For transgender youth all across the nation, access to bathrooms therefore is an urgent issue that affects their health, safety, privacy, ability to learn, and right to an education. Indeed, in a recent survey, 70% of transgender respondents in Washington, D.C. reported being denied use, verbally harassed, or physically assaulted in public restrooms.⁷⁵

A study conducted by *amicus* Human Rights Watch established that transgender youth are struggling on a daily basis to meet their basic needs within their school environments. For these students, being restricted from using restroom facilities consistent with their gender identity is not an abstract legal question, but a concrete source of hurt and isolation in their daily lives. In an interview with Human Rights Watch in Texas, Tanya H., the mother of a nine-year-old transgender boy named Elijah, recalled that Elijah’s school prevented him from using the boys’ restroom, yet when he would go into the girls’ bathroom female students would yell, “There’s a boy in here!”, prompting “a lot of meltdowns” for Elijah. As a result, Elijah stopped going to the bathroom at school all together.⁷⁶ When Elijah mentioned suicide

⁷⁵ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender Peoples’ Lives*, J. PUB. MGMT. & SOC. POL’Y (2013) at 71.

⁷⁶ See Shut Out – Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools, HUMAN RIGHTS WATCH, 1 (September 2016), *available at* <https://www.hrw.org/report/2016/09/13/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us-schools> (hereinafter “*Shut Out*”).

and was hospitalized for a brief period, his mother spoke to administrators at a new school to ensure that Elijah would be treated as a boy and be allowed to use the boys' restroom when he started attending the new school the following fall. Tanya told Human Rights Watch that, since transferring schools and being allowed to use the restroom consistent with his gender identity, Elijah has "just fallen into it, and he's so much happier. ... He's making friends who know him as a boy."⁷⁷

Even in the many school districts that have *not* enacted sweeping anti-transgender-student restrictions like those instituted by Petitioner in G.G.'s district in Virginia, in the absence of explicit nondiscrimination policies, protective attitudes at the school and school district level, and training for teachers and administrators, transgender students face enormous challenges in attending school. Indeed, restricting transgender students' use of shared facilities is not only unnecessary, but dangerous.⁷⁸

⁷⁷ *Id.* at 1.

⁷⁸ In gathering the findings published in *Shut Out*, Human Rights Watch researchers interviewed 74 transgender current or former students in Alabama, Pennsylvania, South Dakota, Texas, and Utah from November 2015 to May 2016. *Id.* at 5. Human Rights Watch researchers also spoke about accessibility issues in schools with more than 50 teachers, administrators, parents, service providers, and advocates for transgender youth. *Id.* No compensation was paid to interviewees, and interviews were conducted in one-on-one settings whenever possible. *Id.* When interviews were conducted in group settings due to students' requests or time and/or space constraints, students who were present but did not actively

A. ***Restricting Use of Facilities That Are Necessary to Perform Bodily Functions or Maintain Physical Hygiene Negatively Affects the Physical and Mental Health of Transgender Youth.***

When transgender students lack a safe or accessible bathroom in school, many such students avoid the use of these facilities for extended periods of time, leading to dehydration, urinary tract infections, and kidney problems.⁷⁹

Being denied the use of facilities consistent with their gender identity also has grave effects on transgender students' mental health, including causing anxiety and feelings of gender dysphoria, particularly prevalent in elementary and middle school-aged students.⁸⁰ Acanthus R., a 17-year-old transgender student in Utah, described his experience:

participate or volunteer information were not counted in the final pool of interviewees. *Id.* The research conducted for *Shut Out* was gathered as part of a larger project on LGBT issues in American schools. *Id.* at 2.

⁷⁹ *Herman* at 75-76.

⁸⁰ The American Psychiatric Association has explained that gender dysphoria occurs when there is “a marked difference between the individual’s expressed/experienced gender and the gender others would assign him or her,” which “causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *DSM-5 Fact Sheets: Gender Dysphoria*, AMERICAN PSYCHIATRIC ASSOCIATION, (2013), available at, <https://psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets>.

If you're assigned female at birth now, [and you have to] go to the women's room, and it's just a reminder about what you hate most about yourself. And if you go [to] the men's bathroom, it's, . . . "Am I going to get suspended," ". . .?"⁸¹

That policies restricting use of school bathrooms consistent with gender identity are a cause of these types of harm is also shown by the remarkable shift observed by some parents of transgender youth when their children were allowed to use facilities consistent with their gender identity. Ingrid A., the mother of a transgender girl in Pennsylvania, recalled:

She was a darker child, prior. When she would be angry, her tantrums would go to a dark place: "I want to die," "God made a mistake," "I'm not supposed to be a boy." . . . But that year of transition, she just became comfortable with herself and you just saw this kid blossom."⁸²

Further, when schools require transgender students to use restrooms according to their sex assigned at birth, they put those students at risk of physical, verbal, or sexual assault from students or adults. Indeed, safety in bathrooms is one of the most salient concerns for transgender youth. The reality is that transgender individuals face high

⁸¹ *Shut Out* at 11.

⁸² *Id.*

rates of verbal and physical assault.⁸³ Forcing transgender students to use restroom facilities that do not correspond to their gender identity makes them feel unsafe and exposes them to verbal and physical assault.⁸⁴

B. Restricting Transgender Students From Using Restrooms Consistent With Their Gender Identity Harms Their Ability to Learn and Participate in Their School Environments.

Preventing transgender students from using bathrooms consistent with their gender identity effectively means that many transgender students are prevented from using any bathroom at all, excluding them from the public life of their schools. If a student is forced to use a bathroom in a nurse's office or a faculty breakroom (or even a distinct single-stall restroom), or forced to leave the school entirely in order to relieve him or herself, that student is required to engage in actions and expend time in order to perform basic bodily functions that other students do not have to deal with. This leaves transgender students unable to receive the same education and participate fully in the school community on an equal footing with other students.

⁸³ Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who is at Risk?*, NPR WEEKEND EDITION SUNDAY (May 15, 2016), available at <http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk>.

⁸⁴ *Shut Out* at 9.

In some instances, students who have been offered the use of special all-gender or single-stall bathrooms noted that these facilities were inconveniently located, taking up valuable class time and impeding students' ability to learn. Zack T., a 16-year-old transgender boy in Texas, told Human Rights Watch:

I have a problem holding it or having to go to the counselor's restroom or the office's bathroom. It takes probably three minutes to get there, three minutes to use the restroom, three minutes to get back, like ten minutes. And that's out of an hour of classroom time, and is cutting into my learning time. But the nearest guy's room is just down the hallway.⁸⁵

The lack of freedom to use a convenient bathroom also constrains transgender students' ability to participate in their school communities more generally. After his principal denied his request for use of the single-stall staff restroom as an alternative to being required to use the girls' restroom, Lucas K., an 18-year-old transgender boy in South Dakota, created his own alternative. "I go home for lunch and use the bathroom there. And I don't go for the rest of the day."⁸⁶

Many students have told similar stories of having to leave the school campus entirely in order to find a safe and comfortable place to use the bathroom, preventing them from being able to enjoy

⁸⁵ *Shut Out* at 15.

⁸⁶ *Id.* at 15-16.

lunch at school and socialize with their peers as other students do.⁸⁷ Likewise, many students refrain from participating in extracurricular activities – primarily sports, but also activities like choir – or going on school trips because they would be required to participate as their sex assigned at birth in the activity and any associated use of bathrooms.⁸⁸

Further, restricting transgender students' use of shared facilities puts students at risk of disciplinary action by the school. When students feel that they have no place to relieve themselves, they often break the rules. A number of students shared stories with Human Rights Watch of being policed by other students while using the restroom and being reprimanded by teachers and administrators – despite the fact that no incidents had occurred as a result of their use of facilities consistent with their gender identity.⁸⁹ In one incident, a transgender student in Alabama was dragged from the restroom by the school principal, and, in many other incidents, students were told that they had to stop using the bathroom that aligns with their gender identity immediately.⁹⁰

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 17.

⁹⁰ *Id.*

C. *Restrictions on Use of Restrooms Undermines Transgender Students' Right to Privacy By Effectively Outing Them as Transgender to Peers and School Staff.*

As with G.G.'s school district, some schools have given transgender students use of single-stall restrooms or faculty restrooms or other facilities usually off-limits to students as an alternative to allowing transgender students to use facilities corresponding with their gender identity. However, this "compromise" creates still further problems. Indeed, forcing gender neutral options (including faculty, office, and nurse's restrooms, among others) on transgender students unfairly requires publicly conveying their transgender status to administrators, teachers, and peers, a clear violation of their right to privacy.⁹¹ It also singles out transgender students and sends the message that they are somehow inferior to or unfit to share space with their peers.

Petitioner cites the right to privacy of *cisgender*⁹² students as a justification for excluding transgender youth from the bathroom consistent with their gender identity. But petitioner's

⁹¹ *Shut Out* at 12-13. Many transgender students' fear of being "outed" extends beyond their school environments to their own family lives. *Shut Out* at 12-13. Some transgender students fear disapproval from family members, violence, or being kicked out of their homes if their transgender status were revealed to their parents. *Id.*

⁹² "Cisgender" refers to people who identify with the sex assigned at birth.

argument turns the privacy violation on its head. If cisgender students truly have such concerns, rather than barring transgender students from using facilities consistent with their gender identities, school administrations should consider measures (such as insuring all bathroom stalls have doors) to increase the level of privacy provided to all students or offer cisgender students with privacy concerns private facilities.

CONCLUSION

Restricting transgender students from using restroom facilities consistent with their gender identity is not only unnecessary, as proven by the experience of the four countries discussed above, but contrary to the United States' human rights obligations under international law. In short, such practice is discriminatory and dangerous to the well-being of transgender students. The failure of school authorities at all levels to respect the rights of transgender students creates an environment that negatively impacts their ability to participate fully in the educational experience, puts them at heightened risk of violence, harassment, and bullying, and places their physical and mental health at risk.

Thus, the Fourth Circuit's decision reinstating the Title IX claim should be affirmed to bring United States law into compliance with the ICCPR, and the stay of the preliminary injunction should be dissolved.

Respectfully submitted,

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