No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

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

Respondent.

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

BRIEF OF *AMICUS CURIAE* MARTINE ROTHBLATT IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Martine Rothblatt is the chairman, founder and current CEO of United Therapeutics, a NASDAQ-listed biotherapeutics company that she created to develop path-breaking treatments for her daughter's pulmonary hypertension and for other intractable conditions. She also founded SiriusXM Satellite Radio and co-created its satellite radio technology, and she founded and led Geostar, the first company to use satellites for vehicle navigation and location. She is an innovator, researcher and inventor, with degrees in communications, law and business from UCLA and a PhD in medical ethics from The London School of Medicine and Dentistry. She is the author of, among other books, *Virtually Human: The Promise—and the Peril—of Digital Immortality*, addressing the evolution of social media and concepts of human consciousness; *Your Life or Mine*, an examination of the ethical concerns surrounding the use of animals in organ transplantation; and *The Apartheid of Sex*, a work of philosophy and social analysis on gender categories and the expression of gender.

Martine Rothblatt came out publicly as transgender in 1994. She brings to this Court the knowledge and experience earned from a lifetime of personal and scholarly engagement with questions of gender, and a

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or her counsel, made a monetary contribution to its preparation or submission. The Petitioner has filed a blanket consent and the consent from the Respondent is being submitted herewith.

career of accomplishment and achievement at the highest levels of business and innovation.

SUMMARY OF THE ARGUMENT

In assessing Title IX protection for transgender students, the Court should consider not only the harms that federal anti-discrimination laws prohibit, but also the affirmative goals that those laws seek to accomplish. *Amicus* Martine Rothblatt submits this brief to highlight those goals.

A principal purpose of federal anti-discrimination law is to remove the barriers that prevent full and equal participation in public institutions and public life, and thus to enable all people to grow to their fullest potential and contribute to their communities. This Court should assess the parties' arguments about the proper interpretation of Title IX and 34 C.F.R. § 106.33 in light of that affirmative purpose.

Discrimination against transgender students—including a refusal to acknowledge and respect students' gender in separate-sex facilities—imposes severe barriers to their ability to grow, flourish and enjoy equal opportunity and equal participation in public life. It is a core purpose of Title IX to remove those barriers. This Court should interpret the statute and its regulation of restroom facilities in light of that core purpose. The question before this Court is not whether the drafters of Title IX and its implementing regulations specifically contemplated that its provisions would encompass discrimination against transgender students. The question is whether the actions of the Gloucester County School

Board deny Respondent the opportunity to grow and flourish based on sex. The answer is yes.

STATEMENT OF THE CASE

Amicus adopts the statement of the case contained in the Brief for Respondent filed February 23, 2017, including the statement of facts, the account of challenges experienced by transgender students around the country, and the description of the controlling authorities and the proceedings below, with the following addition:

On February 22, 2017, the United States Departments of Education and Justice withdrew the guidance they had previously issued concerning the proper interpretation of Title IX and 34 C.F.R. § 106.33. While that agency guidance played a significant role in the proceedings below, neither the guidance nor its withdrawal has any bearing on the analysis offered here.

ARGUMENT

I. TITLE IX AND OTHER FEDERAL ANTI-DISCRIMINATION LAWS HAVE AN AFFIRMATIVE PURPOSE TO PROMOTE INCLUSION, OPPORTUNITY AND EQUAL CITIZENSHIP

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, establishes robust protections against discrimination based on sex for students who attend educational institutions that accept federal funds. It aims to enable all students to take full advantage of their educational prospects, develop their capacities, and

realize their potential—without having barriers based on sex placed in their way. The statute thus extends far beyond merely prohibiting a catalog of specific bad acts by schools. Instead, like other pieces of landmark civil rights legislation with which it shares a provenance and a jurisprudence, Title IX embodies a bold set of affirmative purposes: to promote equal opportunity and citizenship free from limitations based on sex.

The most visible embodiment of this affirmative purpose has been the statute's effect on the participation of women and girls in competitive sports. Title IX is widely credited with contributing to a massive expansion in the number of female student athletes in high school and college sports and a concomitant growth in the industry for professional women's athletics. *See, e.g.*, Susan Ware, *Title IX: A Brief History with Documents* 1–32 (Waveland Press 2014) (describing changes in the sporting landscape for women and girls in the years following the enactment of Title IX); Katrina Berishaj & Gregory DiBella, *Athletics & Title IX of the 1972 Education Amendments*, 15 Geo. J. Gender & L. 255, 257–60 (2014) (describing the implementation of Title IX and the developmental, social, and health benefits of Title IX's mandates with respect to athletics).

Title IX extends its mandate beyond sports to require the removal of sex-based barriers from most aspects of the educational mission. Its language is broad, commanding that students attending schools that receive federal funds cannot "be excluded from participation in" or "be denied the benefits of . . . any education program or activity" based on sex. 20 U.S.C. § 1681(a). From its inception, Title IX has had a transformational purpose. Senator

Birch Bayh, the principal author and sponsor of the law, explained that Title IX aimed to secure for all students "an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 CONG. REC. 5808 (1972) (remarks of Sen. Bayh); *see also Cohen* v. *Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996) (discussing Senator Bayh's remarks in a description of the scope of remedies available under Title IX). The statute has an affirmative purpose: to secure an equal opportunity for all students to grow and thrive without limitation or constraint based on sex.

This Court's decision in *Davis ex rel. LaShonda D.* v. *Monroe County Board of Education*, 526 U.S. 629, 633, 648–49 (1999), emphasized the affirmative purpose of Title IX in promoting equal educational opportunity when it recognized a cause of action against schools that fail to respond reasonably to severe forms of peer-on-peer harassment. *Davis* involved persistent harassment of a fifth-grade girl by a classmate, including improper sexual advances. *Id.* at 633–34. The Court recognized that such harassment, though perpetrated by another student, could have the effect of denying its target a meaningful opportunity to secure the benefits of an equal education. *Id.* at 650–51. When the mistreatment is severe and school officials are deliberately indifferent to the problem despite actual knowledge of the harassment, the school has failed in its affirmative duty to provide equal educational benefits to all students without regard to sex. *Id.* at 646–48. The language of Title IX, in particular, made clear that school officials have a duty to eliminate serious barriers to students' full enjoyment of educational opportunity based on sex:

> [W]e are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can . . . rise to the level of discrimination actionable under [Title IX]. The statute's other prohibitions, moreover, help give content to the term "discrimination" in this context. Students are not only protected from discrimination, but also specifically shielded from being "excluded from participation in" or "denied the benefits of" any "education program or activity receiving Federal financial assistance." § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.

Id. at 650 (citation omitted); *see also Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–93 (1998) (recognizing a private right of action against schools with notice of and deliberate indifference to sexual harassment of a student by a teacher).

Title VI: The drafters of Title IX built on a foundation that was first laid in Title VI of the Civil Rights Act of 1964. *See* U.S. Dep't of Just., Civil Rights Div., Title IX Legal Manual (Jan. 11, 2001), at 9 ("Because of th[e] close connection between the statutes, Title VI legal precedent provides some important guidance for the application of Title IX.") This Court recognized early in its engagement with the Civil Rights Act that the statutory prohibition against racial discrimination in educational facilities did not merely prohibit schools from imposing new burdens on racial or ethnic minorities, but sometimes required that schools affirmatively shape their programs to ensure that

students would not be systematically denied meaningful access to an education and the opportunities it offers. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), *abrogated by Alexander* v. *Sandoval*, 532 U.S. 275, 285–86 (2001), the Court found that the failure of San Francisco schools to provide English language instruction to Chinese-American students with little or no English fluency constituted a violation of Title VI and its implementing regulations. The Court of Appeals had rejected the students' claim, reasoning that every student "brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system" and that the failure of schools to assist students in overcoming these impediments "does not amount to a 'denial' by the Board of educational opportunities . . . ." *Lau* v. *Nichols*, 483 F.2d 791, 797 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974). This Court rejected the syllogism of "we did not create the problem so it is not our obligation to solve it" as no excuse for a school's denial of educational opportunity to ethnic and linguistic minorities. Rather, the Court found, Title VI and its implementing regulations imposed on schools an affirmative obligation to ensure "a meaningful opportunity to participate in the educational program" without being subject to systematic disadvantage based on ethnicity. *Lau*, 414 U.S. at 568. As Professor Olatunde Johnson has explained, equality directives such as those in Title VI and the laws modeled after it "seek to promote economic and other opportunities, full participation in government-funded programs, and social inclusion for excluded groups." Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. Rev. 1339, 1345 (2012). While *Sandoval* has

abrogated the specific holding of *Lau* concerning a private right of action based on disparate impact, *see Sandoval*, 532 U.S. at 290-91, the affirmative purpose of the statute remains. *See* Johnson, *supra*, at 1352-53

Title VII: This Court has also used Title VII of the Civil Rights Act as a point of comparison to emphasize the expansive approach that is called for when interpreting the language of Title IX. In *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167, 171 (2005), the Court considered a case of retaliation against a basketball coach who had brought to light potential violations of Title IX. Unlike Title VII, which contains an express private right of action and "spells out in greater detail the conduct that constitutes discrimination in violation of that statute," Title IX's private right of action is implied in "a broadly written general prohibition on discrimination . . . ." *Id.* at 175. The defendants in *Jackson* argued that the absence of an express prohibition against retaliation in Title IX similar to the one included in Title VII, *see* 42 U.S.C. § 2000e–3(a), militated against a finding that Title IX included such protections. *Jackson*, 544 U.S. at 175. This Court disagreed. "Congress certainly could have mentioned retaliation in Title IX expressly, as it did in . . . Title VII," the Court explained, but the open-ended structure of Title IX made the comparison inapt. *Id.* "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Id.*

The *Jackson* Court then drew a comparison, instead, to 42 U.S.C. § 1982—the provision originally enacted as the Civil Rights Act of 1866—*see Jackson*, 544 U.S. at 176,

which provides, in its entirety, that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. In *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 234–35 (1969), the Court had held that § 1982 must be read to protect a white homeowner punished by a community park facility for objecting when the park refused to approve his lease of the house to a black tenant. When a covered entity punishes someone "for trying to vindicate the rights of minorities protected by § 1982," the Court explained, it gives "impetus to the perpetuation of racial restrictions on property" and the statute must provide a cause of action in response to the retaliation. *Id*. at 237. The *Jackson* Court found *Sullivan* to be "a valuable context for understanding" the open-ended terms of Title IX and held that Title IX, too, must encompass a cause of action for retaliation in order to effectuate the "broad reach" of Title IX. The remedy was necessary, the Court found, to ensure equal access to educational opportunity. *Jackson*, 544 U.S. at 171, 175–76.

The proposition that civil rights statutes must be construed in light of their affirmative purposes and not merely as a catalog of prohibited acts finds expression throughout federal anti-discrimination law. At various points, this Court has found that laws addressing equal access to housing, employment and public accommodations all must be interpreted with reference to the affirmative mission of the statute.

The FHA: Under the Federal Fair Housing Act, the imperative to eliminate housing discrimination is not limited to protecting specific individuals from

exclusion from renting or buying a home through intentional discrimination. Instead, as this Court held in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), the FHA also empowers current residents of a rental apartment complex, of whatever race, to bring suit when management turns away nonwhite applicants on a discriminatory basis. Whether the drafters of the statute specifically contemplated that white tenants might sue to prevent discrimination against nonwhite applicants was not the issue. Rather, the Court explained, the FHA seeks to secure the "important benefits from interracial association" for all tenants. *Id.* at 209–10. Ensuring the "vitality" of the FHA required a "generous construction" that would achieve the statute's purpose of "replac[ing] . . . ghettos 'by truly integrated and balanced living patterns.'" *Id.* at 211–12 (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale); *see also id.* at 211 ("The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is . . . 'the whole community.'" (quoting 114 CONG. REC. 2706 (1968))).

This Court has reaffirmed the affirmative goals of the FHA in subsequent cases involving discrimination by landlords against testers who seek information about available apartments despite having no actual interest in renting a unit, and practices by real estate agents that steer nonwhite customers away from predominantly white neighborhoods and threaten to exacerbate residential segregation patterns. In each case, the Court found that the FHA must be applied in a way that will effectuate its affirmative remedial purpose to secure "the social and professional benefits of living in an integrated society" to all members of the community. *Gladstone, Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 98 (1979) (holding that

plaintiffs, a municipal government and individual citizens, had standing under the FHA to challenge steering practices by a realtor that allegedly would have resulted in the loss of an integrated community); *see also Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 376 (1982) (quoting *Bellwood* and holding that testers have standing under the statute even when they have no actual intention of renting an apartment). These interpretations of the FHA reflect the mandate that the Department of Housing and Urban Development has made explicit: "to take the type of actions that undo historic patterns of segregation and other types of discrimination and afford access to opportunity that has long been denied." Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,274 (July 16, 2015); *see also id*. at 42,353 (emphasizing "meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws").

The Rehabilitation Act: The affirmative purpose of federal anti-discrimination law is also manifest in laws addressing discrimination based on disability. The Rehabilitation Act expressly sets forth a mandate "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through . . . the guarantee of equal opportunity." 29 U.S.C. § 701(b)(1). That language, added to the statute in 1992, built on the commitment contained in the original version of the Rehabilitation Act to "promote and expand employment

opportunities in the public and private sectors for handicapped individuals." Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2(8), 87 Stat. 355, 357 (codified as amended at 29 U.S.C. § 701).

As this Court has explained, the Rehabilitation Act has always embodied a commitment to "improving the lot" of people with disabilities. *See Consol. Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). In *Darrone*, the Court looked to Titles IX and VI in holding that the Rehabilitation Act must be given a broad interpretation to accomplish this affirmative purpose, finding that the scope of the Rehabilitation Act was not limited to institutions that receive federal funds that are primarily aimed at providing employment. *See id.* at 635–37; *see also* S. Rep. No. 102-357, at 15 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3712, 3726 (explaining that the statute was intend to "reinforce the principle that individuals with disabilities . . . should have the same opportunity as their nondisabled peers to experience and enjoy working, leisure time activities, and other life experiences in our society").

The ADA: The Americans with Disabilities Act, enacted in 1990, carried forward and expanded upon the purpose of the Rehabilitation Act. In the ADA, Congress recognized the "compelling need" to advance "a 'clear and comprehensive national mandate'" that people with disabilities be "integrate[d] . . . 'into the economic and social mainstream of American life.'" *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001) (quoting S. Rep. No. 101-116, at 20 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 301, 303). The ADA's mandate is "broad" and its purpose "sweeping," and it is cast in affirmative terms: to achieve "the full and

equal enjoyment" of access to public life for people with disabilities. *Id.* at 675–76 (quoting 42 U.S.C. § 12182(a)). The ADA's requirement of reasonable accommodation for disabled persons makes the affirmative mandate of the statute particularly consequential. *See, e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004) (observing that in enacting the ADA, Congress "[r]ecogniz[ed] that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion"); *see also id.* at 536 (Ginsburg, J., concurring) ("Congress understood in shaping the ADA, [that it] would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation."); *U.S. Airways, Inc.* v. *Barnett*, 535 U.S. 391, 397 (2002) ("[P]references will sometimes prove necessary to achieve the [ADA]'s basic equal opportunity goal."); *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999) (concluding that Congress intended "a more comprehensive view" of discrimination than one that "requires uneven treatment of similarly situated individuals").

* * * *

These laws share a common heritage and a common structure. Our federal civil rights jurisprudence has never limited its focus to a catalog of specific bad acts, nor have our anti-discrimination laws limited their remedies to the specific applications that the drafters had foremost in their minds. As this Court explained in *Oncale* v. *Sundowner Offshore Services* when it held that Title VII authorizes a cause of action for "male-on-male sexual harassment in the workplace"—even though that application of the statute likely was never contemplated by the drafters of the Civil Rights Act— "statutory prohibitions often go beyond the

principal evil [with which Congress was concerned] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79 (1998).

The aim of our federal civil rights laws is to uplift and empower, to open opportunity and to liberate potential, to expand the capacity of all members of the human family to participate fully in the life of their communities and the public institutions of their society. That affirmative mandate should guide this Court in determining the scope of protection that Title IX provides to transgender people.

II. GLOUCESTER COUNTY'S POLICY OF BANISHING TRANSGENDER STUDENTS FROM SCHOOL FACILITIES IS A VIOLATION OF TITLE IX'S COMMAND TO PROMOTE OPPORTUNITY AND ELIMINATE BARRIERS TO AN EQUAL EDUCATION BASED ON SEX.

When Gloucester High School excluded Gavin Grimm from full participation in the life of his institution because he is transgender, it denied him an equal education on the basis of sex.[2] A school's use of a sex-specific restroom policy to banish transgender students from the infrastructure of the institution violates the affirmative commitment of Title IX to eliminate barriers to students' development and advancement based on sex.

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2. Because Respondent's brief uses his full name, *amicus* does too.

Because this case involves sex-separated restroom and locker facilities, it presents a distinctive analytical question. Ordinarily, if an institution takes sex into account when administering access to its facilities, that fact alone constitutes disparate treatment based on sex and the case for impermissible discrimination is straightforward. *See, e.g.*, *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (analyzing alleged sex discrimination using a "simple test of whether the evidence shows treatment of a person in a manner which, but for that person's sex, would be different") (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971)). Title IX's implementing regulations, however, permit schools to maintain separate restroom and locker facilities for boys and girls. *See* 34 C.F.R. § 106.33 (2016) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."). In that limited sense, schools may take sex into account without committing a *per se* violation of Title IX. The question is how those sex-specific facilities may or may not be administered.

The affirmative purposes of Title IX provide the answer. Title IX's implementing regulations must be enforced in a manner that is consistent with the statute's goal of promoting equal access and equal opportunity for all students without limitation based on sex. As Respondent correctly notes, the restroom regulation is not a categorical limitation on the scope of Title IX like those contained in 20 U.S.C. § 1681(a); on the contrary, it is an implementing regulation designed to effectuate the

statute's promise of equality. Resp't Br. 41. Any application of 34 C.F.R. § 106.33 that would use sex to limit, rather than promote, the educational opportunities of students would violate Title IX's command that no student "be excluded from participation in" or "denied the benefits of " an education on the basis of sex. 20 U.S.C. § 1681(a). "The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650.

Petitioner's exegesis of dictionaries from the 1970s and 1980s, *see* Br. of Pet'r 25–32, is beside the point. This Court has long since made clear that when federal anti-discrimination law promotes equal opportunity without regard to sex, that promise includes freedom from constraints based on gender stereotypes. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) (plurality opinion); *see also id.* at 261 (O'Connor, J., concurring in the judgment) ("I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning [the plaintiff's] candidacy absent consideration of her gender."); *accord Davis*, 526 U.S. at 650 (defining Title IX protections in terms of gender). When a student challenges a school's policy concerning separate-sex facilities, the validity of the policy does not turn on a catalog of specific prohibitions wrung from the pages of *Webster's Dictionary*, but on whether the school's actions comply with Title IX's affirmative command to eliminate—rather than impose—sex-based barriers to its students' education. That a school purports to be relying on 34 C.F.R. § 106.33 when crafting its bathroom policies does not exempt the school from that duty.

By way of illustration, suppose that a school were to provide separate restroom and locker facilities for boys and girls, but limited entrance to those facilities to only girls who "exhibit a proper feminine regard for their subordinate place in the home" and to only boys who "exhibit proper masculine qualities of dominance and aggression," labeling students who do not exhibit these qualities as having "gender identity issues" and requiring them to use "an alternative appropriate private facility." This Court would have little trouble concluding that these students are being impermissibly excluded from participation in the school's facilities on the basis of their gender. *Compare Price Waterhouse*, 490 U.S. at 235 (plurality opinion) (describing evidence that [plaintiff] was denied promotion because partners at her accounting firm found her too "macho," believed that she "overcompensated for being a woman" and thought she should "take 'a course at charm school'").

The restroom regulation allows schools to maintain separate facilities for boys and girls without committing a *per se* violation of Title IX. It does not permit schools to use separate facilities in order to segregate and ostracize students who do not conform to the school's ideas—or even to prevalent societal ideas—about gender. Recapitulation of old dictionaries cannot change that conclusion.

Gloucester County has adopted a policy that labels Gavin and other transgender students as having "gender identity issues," banishes them from key parts of the physical infrastructure of the school, and relegates them to "an alternative appropriate private facility" as the cost of pursuing an education. JA 69. That policy violates Title IX. That the county has accomplished this act of

segregation through the use of a sex-specific restroom policy does not change the analysis.

On February 22, 2017, the new presidential administration—through the Departments of Education and Justice—withdrew the agency guidance regarding protocols that schools should follow when administering sex-specific facilities under 34 C.F.R. § 106.33, which those Departments had issued on May 13, 2016. *See* U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016). The administration has not issued any new guidance, announcing instead that the Departments of Education and Justice wished "to further and more completely consider the legal issues involved." U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter 1 (Feb. 22, 2017). But the withdrawal of that earlier guidance does not and cannot license violations of Title IX. The categorical exclusion of transgender students from the infrastructure of a school violates Title IX's core commitment to secure all students an equal education without regard to sex and to promote their capacity to grow and flourish.

CONCLUSION

Much of the focus of the parties and the courts in these proceedings has centered on harm: the nature of the harm that Gavin Grimm experienced when Gloucester County adopted a policy that segregated and stigmatized him within his own school; the harms that transgender children around the country experience when they face hostility, ostracism, and violence in response to their gender; and the specific harms that members of Congress did or did not have in mind when they drafted the language of Title

IX. The focus on harm to students is both appropriate and necessary, for the injuries that transgender children experience are real. Hostility toward transgender people in the use of bathrooms and other facilities often aims to exclude them from public spaces altogether. *See* Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201, 203–09, 213–14 (2012) (describing the antagonistic personal and legal responses that transgender people sometimes encounter when they seek to use bathroom facilities that are appropriate to their gender).

The facts of this case present an apt illustration. When this courageous young man and his parents asked Gloucester County, "Which facilities do you propose that Gavin should use so that he can participate fully in the life of his school?," the county responded by separating him from the daily routine of the building. The message the Gloucester County School Board conveyed when it took these actions was clear: *We want you to go away*. That experience is all too common for transgender students. Ensuring that Title IX is available to protect kids from persecution based on gender is an urgent priority.

But the role of Title IX does not end with the prevention of such harms. Preventing harm is only where the statute begins. Title IX seeks to ensure that all young people are given the opportunity to develop into fully realized adults, rather than being deprived of the opportunity to fulfill their potential. It aims to foster doctors and athletes, train teachers and scientists, inspire captains of industry and public servants. The success of Title IX lies not merely in preventing a catalog of specific harms but also in cultivating educational institutions in which young people of every gender can aspire to greatness.

Right now, in classrooms around the United States, there are transgender students who have the potential to create a new technology that will transform an industry, to found a company that will develop a treatment for a previously intractable disease, to write the next book exploring the ethical dimensions of life-extending medical research. All that these young people require is opportunity.

Congress enacted Title IX to ensure that students would be able to pursue their dreams without having gender hold them back. *Amicus* asks this Court to fulfill that statutory promise for Gavin Grimm for and all the transgender youth for whom he has had the courage to speak.

Respectfully submitted,

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