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 AMICI CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, FORGE, TRANSGENDER LAW & POLICY INSTITUTE, AND THE TRANS PEOPLE OF COLOR COALITION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are a coalition of six civil and human rights groups committed to protecting the equal rights of transgender individuals. *Amici* have a particular interest in protecting the legal rights of transgender youth in schools. *Amici* submit this brief in support of Respondent Gavin Grimm.

Amicus curiae GLBTQ Legal Advocates & Defenders ("GLAD") is a legal rights organization that seeks equal justice for all persons under the law regardless of their sexual orientation, gender identity, or HIV/AIDS status. The Transgender Rights Project of GLAD seeks to establish clear legal protections for the transgender community through public impact litigation and law reform. The project's work has long focused on ensuring that transgender men have equal access to all programs, facilities, and services generally available to other men and that transgender women similarly receive equal treatment to that accorded to other women, including ensuring that transgender people receive full and equal access to facilities separated on the basis of sex. *See, e.g.*, *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000); *Doe v. Yunits*, No. 001060A,

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[1] In accordance with Supreme Court Rule 37.3(a), all parties have consented to the filing of this amicus brief, and copies of their written consent have been lodged or filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

2000 WL 33162199 (Mass. Super. Oct. 11, 2000); *O'Donnabhain v. Comm'r*, 134 T.C. 34 (T.C. 2010); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014).

Amicus curiae National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. NCLR has a particular interest in promoting equal opportunity for transgender youth through its "Transgender Youth Project," which takes on precedent-setting cases to expand legal protections for youth, advocates for inclusive, affirming, and welcoming policies at all levels of government, and furthers equality through public education.

Amicus curiae National Center for Transgender Equality (NCTE) is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity and well-being for transgender people through education and advocacy on national issues. NCTE has worked with school districts and other state and local government agencies around the country for over a decade to develop fair and effective policies.

Amicus curiae FORGE is a national transgender anti-violence organization, founded in 1994. Since 2009, FORGE has been federally funded to provide direct services to transgender, gender non-conforming and gender non-binary survivors of sexual assault. FORGE has a strong interest in

ensuring that transgender people are treated equally and that false, unsupported, and discriminatory rationales based on privacy and safety are not misused to justify discrimination against transgender people, including the many transgender individuals who have suffered sexual assault and other types of violence.

Amicus curiae Transgender Law & Policy Institute (TLPI) is a non-profit organization dedicated to engaging in effective advocacy for transgender people in our society. TLPI brings experts and advocates together to work on law and policy initiatives designed to advance transgender equality.

Amicus curiae Trans People of Color Coalition (TPOCC) envisions a world where trans people of color can live and work safely, where health and economic equity are basic rights, and we are celebrated for our visibility and leadership in our workplaces, homes, and communities. TPPOC has a strong interest in opposing laws and policies that stigmatize, isolate, and harm transgender people, including the many transgender people of color who live, work, and attend public schools.

SUMMARY OF THE ARGUMENT

Petitioner Gloucester County School Board (the "School Board") claims that privacy interests justify excluding transgender students from the restrooms used by other students. The School Board asserts, as did the dissenting judge below, that these interests are rooted in universally accepted norms,

constitutional protections, and the Court's suggestion in *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), that a military school for men would need to alter its facilities in order to accommodate privacy interests when it began admitting women. The School Board also claims that these privacy interests were recognized by Congress at the time that it enacted Title IX.

The Court should reject the School Board's claim that privacy interests justify its discriminatory policy for three reasons. First, there is no basis for this Court to create a new privacy right that justifies excluding transgender students from shared restrooms. Second, nothing in Title IX's text or regulations supports the School Board's claim that Congress created an unwritten privacy exception to Title IX. Finally, although not required by Title IX or its regulations, schools that wish to enhance students' privacy in restrooms can use readily available, non-discriminatory means to do so that do not violate Title IX.

ARGUMENT

I. THE SCHOOL BOARD'S PRIVACY ARGUMENT HAS NO LEGAL BASIS AND WOULD UNDERMINE WELL-ESTABLISHED LAWS AND POLICIES.

At its core, this is a straightforward sex discrimination case. Gavin is a boy who is transgender, and the School Board's policy treats him differently than other students for that sex-based reason. J.A. 67–68. Gavin has been

diagnosed with gender dysphoria. J.A. 64–65. He has obtained medical treatment and undergone a medically supervised gender transition. J.A. 67. His school records, state-issued identification card, and birth certificate all reflect his male identity. J.A. 67. Gavin simply wishes to be treated the same as other boys at school. The School Board has refused to do so, going so far as to adopt an official policy, designed expressly for Gavin, that mandates that he be treated differently than all other students because he is transgender. *See* J.A. 69. That discriminatory treatment is based on sex, as virtually every court to consider the issue in the past ten years has concluded. *See* Pet. App. 34a–35a (collecting cases).

To sidestep an otherwise straightforward Title IX violation, the School Board invokes legally and factually unsupported claims that its discrimination is justified by privacy interests. The School Board does not precisely define the contours of those interests, nor does it explain how they were purportedly invaded under the circumstances of this case, but nevertheless suggests that they require a rule that categorically excludes Gavin from the same restrooms used by other boys. In short, the School Board's asserted privacy justification is a smokescreen for bias based on "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable." *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

Like the defendants in a long line of discrimination cases that preceded this case, the School Board seeks to justify its discriminatory

behavior by invoking unsubstantiated stereotypes and fears. *All* of these concerns, however, ignore the factual record demonstrating that Gavin is a transgender boy. Equally troubling, they ignore the reality of transgender people's existence. And in presuming that the presence of a transgender boy in a space reserved exclusively for boys could violate other boys' privacy, the School Board demeans transgender individuals and consigns them to the kind of disparagement, unequal treatment, and indignity that Title IX sought to prevent.

A. The School Board's Privacy Argument is Inconsistent with Decisional Law.

The School Board's claim that excluding transgender students from shared restrooms is necessary to protect the privacy of other students has no footing in the law. In essence, the School Board asks the Court to recognize, as the dissenting judge below did, a new right to privacy that would require the exclusion of transgender students from shared restrooms. In support of his decision, the dissenting judge cited dicta from *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), and the "universally accepted concern for bodily privacy that is founded on the biological differences between the sexes." Pet. App. 51a–52a. Similarly, the School Board refers to the "settled expectations of privacy" and suggests that these privacy norms are founded on the physiological differences between the sexes. Pet. Br. 5, 20–21, 35.

These arguments have no legal merit. Contrary to the School Board's argument, neither this Court

nor other courts have recognized any privacy interest that would be implicated merely by sharing a public restroom with a transgender person. No court has held in any other context that a privacy right permits an exception to an anti-discrimination law based on asserted discomfort. For example, few would contend today that there exists a privacy right that would permit the exclusion from men's restrooms of gay or disabled men, or men who belong to a religious or ethnic minority. Such an exclusion, and its resulting injury and indignity, would be immediately recognizable as overt and unlawful discrimination. The same principle applies here. The possibility that some boys might feel uncomfortable with sharing a public restroom with a transgender boy underscores the importance of Title IX enforcement, rather than providing a basis to retreat from it.

1. The constitutional right to privacy does not provide a basis to exclude a transgender boy from the boys' restroom.

There is no doctrinal support for the School Board's argument that merely sharing a public restroom with a transgender person violates an established constitutional right to privacy. Instead, existing privacy law focuses on circumstances in which government action intrudes upon a person's privacy. In that context, courts have recognized that individuals have a constitutionally protected "reasonable expectation of privacy" in one's unclothed body. *See, e.g.*, *Doe v. Luzerne Cty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (holding that the constitutional right to privacy may be violated by

nonconsensual videotaping of an individual's partially exposed body by police department actors for training purposes); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 497–98 (6th Cir. 2008) (finding a privacy violation where a middle school's surveillance cameras recorded the plaintiff students in their undergarments while in the school locker room); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 603 (6th Cir. 2005) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337–38 (1985)) (explaining that students have a privacy right that protects against unreasonable strip searches by school officials). As all of these courts have recognized, the constitutional right to privacy protects against invasions of privacy *by the government*. *See, e.g.*, *Luzerne Cty.*, 660 F.3d at 176, 179.

Moreover, even in cases involving a government intrusion into an individual's privacy in a restroom, the Court has concluded that the "character of the intrusion" in shared restrooms may be "negligible." *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995). In *Vernonia*, the Court addressed whether the random drug testing of student-athletes through monitored urinalysis is a violation of the Fourth and Fourteenth Amendments. *Id.* at 652–65. In addressing the "character of the intrusion" caused by a school official's monitoring of the collection of urine samples from students, the Court noted that the circumstances in which the samples were collected (male students at a urinal while fully clothed and visible from behind and female students in an enclosed stall) was "nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use

daily." *Id.* at 658. The Court concluded, "[u]nder such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible." *Id.*

2. *United States v. Virginia* did not recognize or create a privacy right that justifies the exclusion of a transgender boy from the boys' restroom.

The School Board relies on the Court's dicta in *Virginia*, 518 U.S. at 550 n.19, for the proposition that sex discrimination laws are subject to and limited by individual privacy rights. Contrary to the School Board's argument, however, that decision did not recognize or create any such limitation. Although the parties in *Virginia* agreed, and the Court acknowledged, that minor adjustments would be necessary "to afford members of each sex privacy from the other sex," the Court rejected the idea that the need to make such adjustments justified the discriminatory exclusion of women. *Id.* at 550–51.

Importantly, moreover, the Court in *Virginia* was focused on protecting rights of the *excluded* group—there, women—in order to ensure their equal access to school. *Virginia* holds quite clearly that, with respect to sex discrimination, "a remedy must be crafted . . . that will end [the] *exclusion* from a state-supplied educational opportunity." *Id.* (emphasis added). Here, by contrast, the School Board does just the opposite—invoking the interests of the non-excluded group of students (non-transgender boys) in order to justify excluding a transgender boy from the boys' restroom at his school. If anything, *Virginia*

counsels that the School Board must take whatever practical steps are necessary to ensure that Gavin has equal access to the boys' restrooms, not that the majority may assert a privacy right to exclude him from the restroom entirely.

3. "Universally accepted" norms do not justify discrimination against an unpopular minority group.

The Court should also be skeptical of appeals to supposedly "universally accepted" norms as a legal justification for the exclusion of or discrimination against an unpopular group of people. In the past, similar claims were invoked to justify discrimination against lesbians and gay men. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 192, 196 (1986) (holding that "majority sentiments" about the immorality of gay people provided a sufficient basis for criminalizing private sexual conduct between consenting same-sex adults), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

Over a century ago, such claims were also used to justify discrimination against women. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (upholding a law limiting the number of hours women could work based on the widely held belief that "woman has always been dependent upon man"); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (defending a law that barred women from being attorneys on the ground that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman").

Similar claims have also been used to justify discrimination against racial minorities. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 7–8 (1967) (holding that a law barring interracial marriage could not be justified by longstanding social norms); *Plessy v. Ferguson*, 163 U.S. 537, 545–46 (1896) (holding that separation of the races is "universally recognized" as a legitimate exercise of state power).

The danger in arguments that rely on purportedly "universally accepted" norms, as the Court has repeatedly acknowledged in other contexts, is that such norms may mask discrimination. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."). Indeed, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 578–79.

B. The Widespread Practice of Permitting Transgender People to Use the Same Restrooms as Others Confirms that Doing So Does Not Violate Others' Privacy.

The School Board's argument is also belied by the wealth of experience showing that, across the country, transgender men use men's restrooms and transgender women use women's restrooms. This collective experience powerfully rebuts the School Board's unsupported claim that permitting

transgender persons to use public restrooms violates universally accepted social norms about privacy.[2]

Across the country, universities and K-12 schools have adopted policies that permit transgender students to use the same restrooms as other students, consistent with their gender identity.[3]

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[2] To support the claim that transgender people must be excluded from public restrooms, the *amicus curiae* brief submitted by the "Public Safety Experts" in support of the School Board attempts to cast certain instances of invasive, voyeuristic, and illegal conduct as evidence of the risks associated with permitting transgender people to use restrooms that match their identity. Public Safety Experts Am. Br., App. A. But none of those purported incidents involved a transgender person.

[3] *See, e.g.*, *Idaho School Adopts Gender Identity Bathrooms Policy*, Idaho State Journal (Aug. 19, 2016), http://idahostatejournal.com/news/local/idaho-school-district-adopts-gender-identity-bathrooms-policy/article_09e85e89-f1d0-5b2e-ab2a-41ef84b0a87e.html (reporting school in central Idaho, like many others in the state, adopting trans-inclusive restroom policy); Curtis Tate et al., *Here's What Happens When Schools Let Transgender Students Use the Bathroom They Want*, Miami Herald (June 20, 2016), http://www.miamiherald.com/news/nation-world/national/article84797527.html (detailing stories of schools in Kentucky, Missouri, and Washington adopting trans-inclusive bathroom policies without incident); Walker Orenstein, *Transgender Bathroom Choice Nothing New for Seattle Schools*, AP The Big Story (May 17, 2016), http://bigstory.ap.org/article/ca5d8f92a1bf486da533a55260071599/transgender-bathroom-choice-nothing-new-seattle-schools (noting gender-identity based restroom policies have existed in Seattle since 2012); Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, MediaMatters (June 3, 2015), http://mediamatters.org/research/2015/06/03/17-

Among colleges, all Seven Sisters colleges admit transgender women and provide them access to school facilities on equal terms, including with regard to restrooms.[4] In addition, myriad organizations and institutions, including the United

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school-districts-debunk-right-wing-lies-abou/203867 (reporting school districts in Los Angeles, San Francisco, and Sacramento have had gender identity restroom policies since at least 2013); Travis Anderson, *Schools Get Guidelines on Transgender Students*, Boston Globe (Feb. 17, 2013), https://www.bostonglobe.com/metro/2013/02/17/transgender/FHmjIUlSZo0LCMy02xF97M/story.html (reporting new Massachusetts guidelines establishing the gender-identity based restroom policy); Colorado Civil Rights Commission and Division, *2009 Annual Report* (Dec. 2009), www.cde.state.co.us/artemis/regserials/reg91internet/reg912009internet.pdf (announcing rules outlining restroom separation based on gender).

[4] *See, e.g.*, Barnard College, Transgender Admissions Policy & FAQ, https://barnard.edu/admissions/transgender-policy (last visited February 28, 2017); Bryn Mawr College, Transgender Applicants, https://www.brynmawr.edu/node/3620 (last visited February 28, 2017); Mount Holyoke College, Admission of Transgender Students, https://www.mtholyoke.edu/policies/admission-transgender-students (last visited February 28, 2017); Smith College, Gender Identity & Expression, https://www.smith.edu/about-smith/diversity/gender-identity-expression (last visited February 28, 2017); Wellesley College, Mission and Gender Policy, http://www.wellesley.edu/news/gender-policy#OQ2oxu3BBsDUMZkt.97 (last visited February 28, 2017); *see also* Susan Svrluga, *Barnard will admit transgender students. Now all 'Seven Sisters' colleges do.*, Washington Post (June 4, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/06/04/barnard-will-admit-transgender-students-now-all-seven-sisters-colleges-do/?utm_term=.86dbb889728d.

States Military,[5] the International Olympic Committee,[6] the National Collegiate Athletic Association,[7] the Girl Scouts,[8] and most recently, the Boy Scouts,[9] have fully integrated transgender people into their organizations. And since Minneapolis adopted the first transgender nondiscrimination law in 1975, eighteen states and the District of Columbia have enacted laws that

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[5] *See DODI No 1300.28: In-Service Transition for Transgender Service Members*, U.S. Department of Defense (June 30, 2016), http://www.defense.gov/Portals/1/features/2016/0616_policy/DoD-Instruction-1300.28.pdf.

[6] *See* International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015), http://www.stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

[7] Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (Aug. 2011), www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

[8] *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, www.girlscouts.org/en/faq/faq/social-issues.html (last visited Feb. 23, 2017) ("[I]f the child is recognized by the family and school/community as a girl and lives culturally as a girl, then Girl Scouts is an organization that can serve her in a setting that is both emotionally and physically safe.").

[9] *See* Editorial Board, *Welcoming Transgender Scouts*, N.Y. Times (Feb. 2, 2007), https://www.nytimes.com/2017/02/02/opinion/welcoming-transgender-boy-scouts.html.

prohibit gender identity discrimination in places of public accommodation, including public restrooms.[10]

Similarly, major companies, including Accenture, Airbnb, American Airlines, Apple, Biogen Idec, Bloomberg, Boehinger Ingleheim USA, Box, Capital One, Cisco, Corning, Dropbox, E.I. dePont de Nemours & Company, eBay, Etsy, Expedia, the Gap, General Electric, Glassdoor, Hilton Worldwide, IBM, IKEA, John Hancock Financial, Levi Strauss, LinkedIn, Marriott International, Microsoft, Morgan Stanley, Nike, Oppenheimer Capital Funds, Pay Pal, RBC Capital Markets LLC, TD Bank, the Dow Chemical Company, Thermo Fisher Scientific, United Airlines, Williams-Sonoma, and Yelp, among others, have all adopted non-discrimination policies that treat transgender employees equally in all respects, including access to the same restrooms used by others. *See, e.g.*, *Amicus Curiae* Brief by 68 Companies Opposed to H.B.2 and In Support of Plaintiff's Motion for Preliminary Injunction, *United*

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[10] Cal. Educ. Code § 221.5(f) (Deering 2016); Cal. Civ. Code § 51 (Deering 2016); Cal. Health & Safety Code § 118600 (Deering 2017); Colo. Rev. Stat. §§ 24-34-301, 24-34-601 (2016); Conn. Gen. Stat. § 46a-64 (2016); Del. Code Ann. tit. 6, § 4504 (2013); Haw. Rev. Stat. § 489-3 (2016); 775 Ill. Comp. Stat. 5/5-102, 5/1-103 (2016); Iowa Code § 216.7(1)(a) (2016); Me. Stat. tit. 5, §§ 4592, 4553(9-C) (2017); Md. Code Ann., State Gov't § 20-304 (LexisNexis 2017); Mass. Gen. Laws ch. 272, § 98 (2016); Minn. Stat. §§ 363A.11, 363A.03(44) (2017); Nev. Rev. Stat. § 651.070 (2016); N.J. Rev. Stat. § 10:5-12(f) (2017); N.M. Stat. Ann. § 28-1-7(f) (2016); Or. Rev. Stat. §§ 174.100, 659A.403 (2016); R.I. Gen. Laws § 11-24-2 (2016); Vt. Stat. Ann. tit. 9, § 4502 (2016); Wash. Rev. Code §§ 49.60.215, 49.60.040(26) (2016); D.C. Code § 2-1402.31 (2017).

States v. North Carolina, No. 16-cv-00425 (M.D.N.C. July 8, 2016), ECF Nos. 85, 85-1. These policies acknowledge that the presence of transgender men in men's rooms or transgender women in women's rooms does not inherently violate any other users' privacy. *Id.* at 11.

Were this Court to recognize a new privacy right guaranteeing that men do not have to share a restroom with a transgender man and that women do not have to share a restroom with a transgender woman, that ruling would invalidate all of these policies, practices, and laws, on which millions of people have come to rely.

II. NOTHING IN TITLE IX'S TEXT OR REGULATIONS SUPPORTS THE ARGUMENT THAT ITS PROTECTIONS ARE LIMITED BY STUDENTS' PRIVACY INTERESTS.

The School Board argues that Title IX's text and regulations prove that Congress intended to limit the statute's reach in order to protect personal privacy. Pet. Br. 7–9. That argument has no merit.

The School Board ignores the plain language of Title IX's exceptions, which are narrow, permissive, and contain no mention of privacy. In addition, when interpreting Title IX's application to contact sports, courts across the country have consistently rejected arguments like those advanced by the School Board, holding that paternalistic allusions to privacy and safety cannot justify sex discrimination.

A. The Text of Title IX and Its Exceptions Shows That Title IX Is an Antidiscrimination Statute, Not a Privacy Statute.

When seeking to discern a statute's purpose, courts start with the text. *See, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). Title IX's stated purpose is combatting sex discrimination. *See* 20 U.S.C. § 1681. Any interpretation of Title IX and its exceptions must remain consistent with that "dominating general purpose." *See, e.g.*, *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350–51 (1943). If, as the School Board contends, Congress sought to limit Title IX's prohibition on discrimination in certain areas to "preserve 'personal privacy'," Pet. Br. 32, there would be clear indication in the statutory text. Congress does not "alter the fundamental details of a regulatory scheme" in vague or uncertain terms. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

A plain reading of Title IX provides no evidence in support of the School Board's argument. The word "privacy" does not appear anywhere in the statute nor its implementing regulations. *See* 20 U.S.C. § 1681 *et. seq.*; 34 C.F.R. § 106. Nothing in the text suggests or even hints that Title IX's promise of equal educational opportunities is limited by privacy interests.

The School Board contends that the very existence of Title IX's "living spaces" exception proves that Congress recognized that exceptions were "*needed* to preserve privacy" in intimate

facilities. Pet. Br. 7 (emphasis added). But the exception's permissive nature undercuts the School Board's argument. The living spaces exception does not require sex separation, but merely states that the statute does not "prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. In drafting this exception this way, Congress plainly contemplated the possibility of facilities not separated by sex. If Congress had a concern about this possibility, the living spaces exception would not be permissive.

The School Board's attempt to read a privacy limitation into Title IX is particularly inappropriate given the enumeration of specific exceptions. *See* 20 U.S.C. § 1681. As the Court has noted, "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). While the statutory basis for the School Board's privacy argument is unclear, to the extent that the School Board seeks to read an additional exception for privacy into Title IX, that argument is precluded by Title IX's existing exceptions. *See, e.g.*, *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (noting that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied").

If instead the School Board seeks to imbue Title IX's existing exceptions with a privacy interest, it gives those exceptions a weight and breadth far beyond the text of the statute. Title IX's exceptions

do nothing more than permit schools and organizations to choose to separate the sexes in certain limited, enumerated circumstances, such as the boy scouts, girl scouts, father-daughter dances, beauty pageants, and living facilities. 20 U.S.C. §§ 1681, 1686. Providing schools with the flexibility to continue adhering to social conventions like father-daughter dances does not insert a roving privacy exception into the statute, and certainly not one that would justify the otherwise unlawful exclusion of a member of a disfavored minority.

B. Title IX's Contact Sports Exception Further Demonstrates That Congress Was Not Focused on Addressing Purported Safety or Privacy Issues Arising from Anatomical Differences.

The School Board argues that Title IX's contact sports regulation, 34 C.F.R. § 106.41, which permits sex-based separation in the context of contact sports, reflects Congress's acknowledgement that Title IX's anti-discrimination mandate is limited by privacy and safety interests "plainly grounded in physiology." Pet. Br. 40. This conclusion, however, ignores the regulation's history and decades of judicial interpretation.

The legislative history of the contact sports regulation belies any suggestions that Congress and the Department of Health, Education, and Welfare ("HEW") were addressing privacy or safety concerns. To the contrary, the only official justification provided by HEW for permitting sex-based separation in such sports was to provide students

with equal athletic opportunity. *See* Policy Interpretation, 44 Fed. Reg. 71,414 (1979); Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance, 40 Fed. Reg. 24,134 (1975).

If Congress and HEW had any other interests in mind, those interests were the universities' interests in revenue-producing sports, not students' purported safety or privacy interests. *See* 44 Fed. Reg. 71,414 (1979); 121 Cong. Rec. 20,913 (1975). In 1974, Senator Tower introduced an amendment that would have expressly exempted all revenue-producing athletics from Title IX, out of concern that co-ed teams would generate less revenue. 120 Cong. Rec. 15,323 (1974). The amendment failed, but soon thereafter Congress directed HEW to create "reasonable provisions" governing athletics. *See* 40 Fed. Reg. 24,134 (1975). HEW developed a list of "contact sports" that included football and basketball, two sports that generate significant revenue for colleges. 120 Cong. Rec. 15,323 (1974). HEW did not, however, include other contact sports, like field hockey, soccer, and lacrosse, which traditionally generate less revenue for colleges and universities.

The School Board's argument also ignores decades of judicial interpretation of the regulation. Before the regulation's promulgation, courts across the country consistently held that excluding girls from boys' sports teams on the basis of purported safety concerns constituted unconstitutional sex

discrimination.[11] As the Eighth Circuit pointed out in 1973, "discrimination on the basis of sex can no longer be justified by reliance on 'outdated images of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity.'" *Brenden*, 477 F.2d at 1296 (quoting *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 606 (S.D.N.Y. 1970)). Thus, if HEW had adopted the regulation out of concern for female students' safety or privacy, its regulation would have risked constitutional challenge.

After 1975, courts continued to reject "safety concerns" as a basis for excluding women from contact sports teams.[12] In fact, many courts

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[11] *See, e.g.*, *Carnes v. Tennessee Secondary Sch. Athletic Ass'n*, 415 F. Supp. 569, 572 (E.D. Tenn. 1976) (granting preliminary injunction permitting female student to try out for boys' baseball team); *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 351 (1st Cir. 1975) (same); *Clinton v. Nagy*, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (same for football); *Brenden v. Indep. Sch. Dist.*, 477 F.2d 1292, 1302 (8th Cir. 1973) (same for all non-contact sports); *Reed v. Nebraska Sch. Activities Ass'n*, 341 F. Supp. 258, 263 (D. Neb. 1972) (same for golf); *see also Opinion of Justices to House of Representatives*, 371 N.E.2d 426, 430 (Mass. 1977) (counseling state legislature that a statute restricting girls' participation on boys' contact sports teams "serves no compelling State interest" and would be unconstitutional); *Packel v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A.2d 839, 843 (Pa. 1975) (declaring state statute denying female athletes equal opportunity in sports denied equality under law).

[12] *See, e.g.*, *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (granting female student's motion for preliminary injunction against defendants denying her the opportunity to

characterized purported safety-based justifications as running directly *counter* to Title IX's purpose and mandate by perpetuating sex stereotypes. *See, e.g.*, *Adams*, 919 F. Supp. at 1504; *Saint*, 684 F. Supp. at 629 ("Such a paternalistic gender-based classification, that is, one resulting from 'ascribing a particular trait or quality to one sex, when not all share that trait or quality,' is not only 'inherently unfair, but generally tends only to perpetuate 'stereotypical notions' regarding the proper roles of men and women.'" (quoting *Force*, 570 F. Supp. at

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participate in wrestling); *Saint v. Nebraska Sch. Activities Ass'n*, 684 F. Supp. 626, 630 (D. Neb. 1988) (issuing a temporary restraining order against a school activities association refusing to permit female student to wrestle on boys' wrestling team); *Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (enjoining school officials from interfering with female student trying out for the all-male football team on the basis of assumptions about her strength and agility); *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1024 (W.D. Mo. 1983) (granting preliminary injunction for 13-year-old female student seeking to try out for the eighth grade football team, explaining there is nothing in Title IX or the regulations that mandates her exclusion); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (enjoining state athletic association from barring female students from participating in interscholastic sports based on generalizations about girls' bodies and risk of injury); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977) (striking down rule excluding female students from participating in any form of interscholastic soccer competition on the basis of "safety concerns"); *see also Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 293–95 (Mass. 1979) (denying safety arguments as a basis for excluding boys from girls' sports teams).

1029)). Indeed, *amici* are unaware of any case in which a court accepted "safety concerns" as a legitimate basis for sex-segregation in sports.

Courts have also refused to countenance arguments that resemble "privacy concerns," focused on "moral objections" and beliefs regarding what is appropriate with respect to interactions between women and men. *See Beattie v. Line Mt. Sch. Dist.*, 992 F. Supp. 2d 384, 392 (M.D. Pa. 2014); *Adams,* 919 F. Supp. at 1504 (rejecting "student and parent objections based on moral beliefs" as an "important governmental objective" justifying excluding girls from wrestling team). In *Beattie*, for example, the district court rejected the school's argument that the "lowering of students' inhibitions, desensitizing them and possibly impacting moral standards for all of those who participate in the sport" was a legitimate basis for excluding girls from boys' contact sports. 992 F. Supp. 2d at 392. The court refused to sanction the view that discomfort with bodies of the opposite sex is a legitimate basis for separation or exclusion, writing "it is not the duty of the school to shield students from every situation which they may find objectionable or embarrassing due to their own prejudices." *Id.* at 394–95 (quoting *Adams*, 919 F. Supp. at 1504).

The result should be the same here: unsupported safety and privacy interests are not legitimate justifications for the exclusion of a transgender boy from the boys' restrooms. As courts have repeatedly held in the contact sports context, purported justifications rooted in students' anatomical

differences or social norms simply cannot be squared with Title IX's text and its broad remedial purpose.

III. SCHOOLS CAN USE NON-DISCRIMINATORY MEANS TO ENHANCE STUDENT'S PRIVACY WITHOUT DISCRIMINATING AGAINST TRANSGENDER STUDENTS.

That the School Board's privacy argument is a pretext for discrimination against transgender people is underscored by the ready availability of other non-discriminatory means to enhance students' privacy.

To be clear, Title IX does not *require* schools to make privacy-based accommodations. But it bears noting that schools can enhance the privacy interests of all students, including transgender students, through a variety of non-discriminatory measures and have done so for years. For example, while a school cannot compel a transgender student to use a separate restroom, a school may provide separate restrooms, where available, for any student who wishes not to use the general boys' or girls' restrooms. Schools may also accommodate students by, for example, providing curtains or ensuring that there are sufficient enclosed stalls in the restrooms. *See, e.g.*, U.S. Department of Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students* 7–8 (May 2016), https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf. These non-discriminatory and non-stigmatizing accommodations would be consistent with Title IX and *Virginia's* teaching that

any asserted privacy interests must be accommodated in a way that does not exclude people from educational opportunity. *See, e.g.*, *Virginia*, 518 U.S. at 550 n.19, 555 n. 20, 557–58.

In addition, the School Board implies, as the dissenting judge below expressly stated, that the privacy interest of students in restrooms is linked to the importance of preventing "sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." Pet. App. 52a. By this logic, lesbian students could be excluded from girls' bathrooms and gay male students could be excluded from boys' restrooms. Surely no court or community would countenance these unprincipled exclusions.

Instead, the law properly focuses on misconduct, which is the predicate for state statutory and common law tort remedies in cases involving intentional and "highly offensive" conduct between private citizens. Restatement (Second) of Torts, § 652 (1977). While the "invasion of privacy" tort does not provide a general privacy right that justifies discrimination, it provides a remedy to any student who experiences intrusive, invasive, or other offensive conduct in school restrooms. Similarly, in cases involving egregious invasions of privacy, such as voyeurism or exhibitionism, state criminal law punishes such conduct. *See, e.g.*, National District Attorneys Association, NDAA Voyeurism Compilation (July 2010), http://www.ndaa.org/pdf/Voyeurism%202010.pdf (compiling state "peeping tom" statutes).

Schools also have an obligation under Title IX to prevent and address peer-on-peer sexual harassment, including peer sexual harassment that occurs in restrooms, and can be liable for damages by failing to respond to severe and pervasive peer harassment. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646–47 (1999) ("[Schools] may be liable for subjecting their students to discrimination where the [school] is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." (internal quotation marks omitted)). In other words, schools are already required to ensure that no student—transgender or otherwise—is subjected to sexual harassment, which would encompass the hypothetical concerns identified by the School Board and its *amici* in school restrooms.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision below.

Respectfully submitted,

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