No. 16-3522

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ASHTON WHITAKER, A MINOR, BY HIS MOTHER AND NEXT FRIEND, MELISSA WHITAKER,
Plaintiff-Appellee,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND SUE SAVAGLIO-JARVIS, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF THE KENOSHA UNIFIED SCHOOL DISTRICT NO. 1,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 16-CV-943

The Honorable Judge Pamela Pepper

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, ET AL., IN SUPPORT OF PLAINTIFF-APPELLEE

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INTEREST OF *AMICI CURIAE*

The National Women's Law Center is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. The Center has participated in numerous cases involving gender discrimination before this Court and the courts of appeals. Descriptions of the other *amici* are included in an appendix to this brief.

Amici submits this brief because the policy at issue—which bars a transgender boy from using the same restroom facilities as other boys—rests on the same sort of discriminatory stereotyping that historically has been used to justify discrimination against women in schools and the workplace. Accordingly, *amici*'s perspective and experience in addressing such issues may assist the Court in its resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants claim their bathroom rule is valid under Title IX because Title IX protects against only discrimination related to an individual's sex as-

[1] Pursuant to Fed. R. App. P. 29, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

signed at birth. But that is not so. Title IX rests, in substantial part, on the rejection of gender stereotypes—that is, on rejection of the insistence that an individual's behavior must match the stereotype associated with his or her gender. That is precisely the sort of stereotyping that underlies the policy challenged in this case: Defendants' bathroom policy discriminates against a transgender student because he failed to act consistently with Defendants' limited idea of what it means to be male.

This sort of discrimination against transgender individuals—the insistence that all other persons are permitted to act in accord with their gender identity, but transgender students are punished for doing so—is itself a form of sex discrimination. This understanding of sex discrimination is firmly rooted in case law, which recognizes that references to "sex" encompass the broader concept of gender identity and that rules governing workplaces and schools may not turn on reproductive anatomy. And forbidding discrimination against transgender students is necessary to fulfill the purpose of Title IX, which Congress enacted with the broad goal of generally eradicating gender discrimination in educational programs.

Against this background, Defendants' contention that it adopted its restrictive policy to protect privacy interests is unavailing. That sort of woman-protective pretext—which is grounded on the very sorts of harmful stereotypes that civil rights laws are designed to overcome—historically has been

advanced to justify discriminatory laws. Such pretexts, for example, have long been asserted in defense of rules that kept women out of the workforce and racial minorities out of public facilities. In modern times, however, the courts have approached such "protective" rules with the skepticism they deserve. The same outcome is appropriate here.

ARGUMENT

I. Discrimination Against Transgender Individuals Is A Form Of Sex Discrimination.

A. Discrimination against transgender individuals for their nonconformity to sex stereotypes constitutes sex discrimination.

Defendants argue that their bathroom policy "merely reflects the anatomical differences between men and women," Appellants' Br. 8, and therefore is not sex discrimination. As discussed below, however, pinning an individual's sex (or gender) only to their sex assigned at birth is sex stereotyping—a prohibited form of sex discrimination. *See Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at *2-*3 (D. Ariz. June 3, 2004).

It is settled that rules against discrimination on the basis of "sex" are premised, in substantial part, on rejection of the "insist[ence] that [individuals] match[] the stereotype associated with their group . . . ." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion). As the Court has explained:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.

Ibid. (internal quotation marks and citation omitted). *See also id.* at 272-73 (O'Connor, J., concurring in the judgment). Courts have recognized the force of this reality both under Title VII,[2] as in *Price Waterhouse* itself, and under Title IX. In an oft-cited case from a federal court in the District of Kansas, a male plaintiff who wore earrings, long hair and quit the football team alleged he was harassed by classmates who called him "faggot," "masturbator," and "queer." *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1305-06 (D. Kan. 2005). There, the court found that "plaintiff did not conform to his peers' stereotypical expectations concerning how a teenage boy should act" and classmates harassed him "in an effort to debase and derogate his masculinity," *id.* at 1307—and, as a result, the school had a Title IX responsibility to address this sex-based harassment. *See also Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090-93 (D. Minn. 2000).

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[2] Courts frequently look to Title VII case law when interpreting Title IX. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999).

Discrimination against transgender individuals whose gender identity is different than their sex assigned at birth rests in large part on just this sort of stereotyping—the view that someone like Ash is not a "real" boy because he does not conform to conventional understandings of maleness. Courts consistently have recognized this conduct to constitute sex discrimination in a range of contexts. *See*, *e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (under Title VII, condemning demotion of male transgender police officer for not "conform[ing] to sex stereotypes concerning how a man should look and behave"); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (under Equal Protection Clause and Title VII, condemning suspension of a transgender firefighter "based on [her] failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance"); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (discrimination against "anatomical male[] whose outward behavior and inward identity did not meet social definitions of masculinity" is actionable sex discrimination under Gender Motivated Violence Act); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) ("[A] government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender . . . employee because of his or her gender non-conformity.").

B. Discrimination against transgender individuals is inherently sex discrimination.

It is clear that Defendants' policy constitutes discrimination based on transgender status because Plaintiff is denied access to boys' restrooms while other students who identify as male are not. That discrimination against a person because he is transgender is on its face a form of sex discrimination prohibited by Title IX, even apart from sex stereotyping doctrine, is clearly rooted in case law.

In *Schroer v. Billington*, a judge in the U.S. District Court for the District of Columbia put forth a persuasive and widely cited analogy in support of his decision that anti-transgender discrimination constituted sex discrimination. He wrote:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion.

577 F. Supp. 2d 293, 306 (D.D.C. 2008). By analogy, discrimination "because of . . . sex" encompasses discrimination because of a change of sex. *Id.*; *see also Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). Defendants' discriminatory policy cannot be saved on the theory that it does not distinguish "on the basis of sex" because it is not specifically directed at

disfavoring women (or men) as a group. Surely, discrimination against someone because he is transgender is "related to sex or ha[ving] something to do with sex," *id*. (quoting *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 822 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984)). Not extending Title IX's protection to a student that has changed or is changing gender would be "blind . . . to the statutory language itself." *Schroer*, 577 F. Supp. 2d at 307.

C. Reproductive anatomy does not determine an individual's identity or destiny.

By the same token, the Supreme Court has long recognized that, in light of anti-discrimination rules like Title VII and Title IX, reproductive anatomy does not determine an individual's role in society. In *Johnson Controls*, the Court held that employees' pregnancies or capacity to become pregnant in the future were not bases upon which to exclude them from factory work that might pose a risk to a fetus. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991). *See also Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (applicant "cannot be refused employment on the basis of her potential pregnancy"). In doing so, the Court made clear that the social meaning ascribed to reproductive anatomy—in the case of *Johnson Controls*, that people with childbearing capacity are unfit for certain types of traditionally masculine work—is not a valid basis for discrimination. *See* Reva Siegel,

Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 281 (1992) ("As history amply demonstrates, claims about women's bodies can in fact express judgments about women's roles."). As the Court noted, the employer in question was wrong to assume that people who *could* become pregnant necessarily *would* become pregnant, treating every person with a womb as first and foremost a future mother rather than a worker: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role." *Johnson Controls*, 499 U.S. at 211.

Similarly, the insight that anatomy will carry different meaning for different people underlies broader pregnancy discrimination jurisprudence beyond the specific questions of expected future pregnancy at issue in *Johnson Controls*. People manage the impact of childbearing and childrearing on the rest of their lives in different ways. The Supreme Court and this Court thus each have noted that to ignore these individual distinctions and rely instead on sweeping stereotypes is impermissible. For example, employers are prohibited from assuming that employees who have recently given birth will be too consumed by their parenting duties to make good workers. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). Nor may an employer conclude, without a doctor's judgment rooted in evidence, that a pregnant em-

ployee will be unable to manage the physical demands of pregnancy or delivery while fulfilling all job responsibilities. *E.g.*, *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir. 1999); *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 435-36 (8th Cir. 1998). On the other side of the coin, a woman's *lack* of childbearing capacity is not a valid reason upon which to discriminate. *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

Reproductive organs are not determinative of who a person is. To the contrary, free decisions about how reproductive anatomy and capacity will shape one's life are, in large part, how we create ourselves; they are among "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). *See also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (affirming fundamental importance of "the decision whether to bear or beget a child"). Just like the worker in the Johnson Controls factory, young transgender people must be free to shape their own destinies and decide the meaning of their own bodies unhindered by the pernicious assumption that whether or not a person has a womb determines who they may be.

II. Protecting Transgender Students Is Required To Fulfill Title IX's Goal Of Eradicating Discrimination Based On Gender In Educational Programs.

A. Congress intended Title IX to benefit all people who are denied full participation in the educational environment as a result of stereotyping.

The understanding that Title IX precludes Defendants' bathroom rule is compelled by precedent and also follows from the fundamental purpose of Title IX. The statute—which uses general and expansive language—had the broad purpose of generally eradicating gender discrimination in educational programs.

In fact, the Supreme Court consistently has recognized the broad policy of Title IX, and the corresponding need to interpret the statute expansively to effectuate this purpose. More than thirty years ago, for example, in *North Haven Board of Education v. Bell*, the Court recognized that to "give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." 456 U.S. 512, 521 (1982); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach."). Accordingly, Title IX's language "demonstrates breadth," and even in "situations not expressly anticipated by Congress," its provisions may not be narrowed judicially. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("Male-on-male sexual harassment in the workplace was

assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . . .").

The Court's recognition of the broad purpose of Title IX rests on the expressed goals of its drafters and principal sponsors, who regarded the statute as a comprehensive effort to combat discriminatory stereotypes, thus ensuring that all students are afforded the full opportunity to realize the benefits of education.

1. *Title IX was intended to be a broad, comprehensive effort against all forms of sex discrimination in all aspects of education.*

Title IX was intended to serve as a part of the larger effort to eradicate gender discrimination in society writ large. In introducing Title IX, Senator Birch Bayh, its principal sponsor, presented a bold goal: The "impact of this amendment" was meant to be "far-reaching" (118 Cong. Rec. 5808 (1972) (statement of Sen. Bayh)),[3] as it was "designed to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education" (*id.* at 5804). According to Senator Bayh, Title IX was designed as "a strong and comprehensive measure . . . to provide women with solid legal protection

[3] The Court has noted that "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *N. Haven Bd. of Educ*, 456 U.S. at 526-27.

from the persistent, pernicious discrimination which [was] serving to perpetuate second-class citizenship for American women." *Id*. at 5804.

In introducing the predecessor bill to Title IX, Senator Bayh represented it as a "forward step . . . in protecting equal rights for all Americans." 117 Cong. Rec. 30,404 (1971) (statement of Sen. Bayh); *see also Discrimination Against Women: Hearings Before the H. Special Subcomm. on Educ. of the Comm. on Educ. and Labor on Section 805 of H.R. 16098*, 91st Cong. 439 (1970) [hereinafter 1970 Hearings] (statement of Daisy K. Shaw, Dir. of Educ. & Vocational Guidance of N.Y.C.) (stating that the ultimate goal of the measures is "an open society, one which offers equal opportunity and freedom of choice to all").[4]

Translating this broad goal into the educational context, Senator Bayh premised Title IX's precursor bill on the principle that "educational opportunity should not be based on sex" (117 Cong. Rec. 30,406 (1971) (statement of Sen. Bayh)), and represented its purpose as ensuring "equal access for women and men students to the educational process and the extracurricular

[4] The 1970 Hearings involved a bill introduced in the House of Representatives by Representative Edith Green that sought to add "sex" into Title VI of the Civil Rights Act of 1964. They provide relevant legislative history because, as the Court has recognized, Title IX grew out of these hearings. *N. Haven Bd. of Educ.*, 456 U.S. at 523 n.13. The hearings were "repeatedly[] relied upon in both Houses during the subsequent debates on Title IX" and they made it "clear that education institutions were the primary focus of complaints concerning sex discrimination." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 n.16 (1979).

activities in a school . . . .” *Id.* at 30,407. Similarly, in introducing Title IX, Senator Bayh stated as its goal:

> [T]he essential guarantees of equal opportunity in education for men and women . . . 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) (statement of Sen. Bayh). Representative Edith Green, who introduced the bill that ultimately became Title IX in the House of Representatives, envisioned the same goal, acknowledging that sex discrimination constitutes “psychological warfare” against individuals regardless of gender, and expressing her support for the measures adopted in Title IX as “necessary to insure equal rights, equal opportunities, and equal status for human beings of both sexes.” 1970 Hearings at 269 (statement of Rep. Green).

In line with this broad purpose, Title IX was intended to address discrimination in all forms. In introducing the language, Senator Bayh stated that it was meant to combat “sex discrimination” in “all facets of education.” 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh). Demonstrating this breadth, Senator Bayh specifically mentioned discrimination in “admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales” (*id.* at 5803), as well as “discrimination [in] available services or studies within an institution” (*id.* at 5812); he also specifically left the

statute's reach open-ended, noting generally that Title IX extended to discrimination "in related areas." *Id.* at 3935.[5]

2. *Title IX was particularly concerned with eradicating sex stereotyping.*

In addition to establishing the broad purpose of Title IX, Congress was specifically concerned with eradicating pernicious sex stereotyping in educational institutions. In introducing Title IX, Senator Bayh expressly recognized that sex discrimination in education is based on "stereotyped notions," like that of "women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again." 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh). Title IX was therefore necessary to "change [these] operating assumptions" so as to combat the "vicious and reinforcing pattern of discrimination" based on these "myths." *Id.*

The recognition of stereotypes as a core problem motivating sex discrimination in education also permeated the 1970 Hearings that led to the adoption of Title IX. Numerous individuals testified to the harmfulness of

[5] To be sure, as defendants note, Congress did not intend to eliminate differential bathroom treatment between sexes. *See* Appellants' Br. 10-11; *see also* 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh). But allowing the continuation of separate bathroom facilities for men and women in no way addresses the proper treatment of transgender students, or whether they may be required by an educational institution to act in accord with the sex assigned at their birth.

stereotypes—in particular, those regarding gender roles—in perpetuating inequality. *See*, *e.g.*, 1970 Hearings at 7 (statement of Myra Ruth Harmon, President, Nat'l Fed'n of Bus. & Prof'l Women's Clubs, Inc.) (discussing "certain sex role concepts which continue to mold our society," including "educational institutions"); *id.* at 436 (statement of Daisy K. Shaw, Dir. of Educ. & Vocational Guidance of N.Y.C.) (discussing how "perceptions of sex roles develop" very early in life, and what is needed to end sex discrimination is "thoroughgoing reappraisal of the education and guidance of our youth to determine what factors in our own methods of child rearing and schooling are contributing to this tragic and senseless underutilization of American women"); *id.* at 662 (statement of Frankie M. Freeman, Comm'r, U.S. Comm'n on Civil Rights) ("Because of outmoded customs and attitudes, women are denied a genuinely equal opportunity to realize their full individual potential . . . ."); *id.* at 364 (statement of Pauli Murray, Professor, Brandeis Univ.) (discussing importance of treating each person as an individual, and not according to their stereotype).

B. Title IX's protections have never been restricted to non-transgender girls.

Against this background, courts have long made clear that Title IX forbids sex-based discrimination against male, as well as female, plaintiffs. *E.g. Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172,

1182 (10th Cir. 2001) (finding that proffered evidence raised questions of fact regarding school's alleged discrimination against male nursing students). Many Title IX cases brought by male students, discussed *infra*, concern sex-based harassment. Courts recognize this harassment as sex discrimination, consistent with Title VII precedent, *see Oncale*, 523 U.S. at 80 (holding that sexual harassment of a male employee constituted sex discrimination prohibited by Title VII).

Courts have held specifically that harassment of male students based on their non-conformity to male stereotypes can constitute sex-based discrimination prohibited by Title IX. *E.g. Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011) (holding that male student plaintiff "was legally required to show the harasser . . . was motivated by either [the plaintiff's] gender or failure to conform with gender stereotypes"). For example, a court in the Northern District of New York held that a school had a responsibility to address a male student's reports that he had been called names like "pussy," "sissy," and "girl," and mocked with effeminate gestures. *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011). *See also Theno*, 394 F. Supp. 2d at 1305-06 (D. Kan. 2005) (finding that peer-to-peer harassment based on student's deviation from masculine stereotypes triggered defendant's Title IX responsibilities). Other courts have also recognized peer-to-peer name-calling like "faggot" and "gay" as sex-based harassment

triggering schools' Title IX responsibilities to respond. *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 880 (N.D. Ohio 2003).

Courts have also found that Title IX required schools to respond to sex-based physical assaults of male students. Not all such cases rely on sex stereotyping arguments, instead recognizing sexualized violence as inherently sex-based. *E.g. Carmichael v. Galbraith*, 574 F. App'x 286, 290 (5th Cir. 2014). But in some situations, courts have recognized assaults on male plaintiff as rooted in sex stereotyping, in part because the violence escalated from verbal harassment related to the plaintiff's perceived gender nonconformity. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 442 (6th Cir. 2009); *P.W. v. Fairport Cent. Sch. Dist.*, 927 F. Supp. 2d 76, 79, 85 (W.D.N.Y. 2013). In one case, a court found that a male plaintiff adequately pled that his school violated Title IX when he alleged that, in response to his reports of harassment, administrators urged him to "stop acting like a little girl" and allowed the harassment to "continue based on the stereotypical perception that John was 'not man enough,'" *Brimfield*, 552 F. Supp. 2d at 823.

The success of these claims demonstrates that Title IX is meant to eliminate sexual harassment and sex stereotyping of *all* students, regardless

of their gender. Transgender boys and girls deserve the same Title IX protections as their non-transender, or "cisgender," classmates.

C. Transgender women suffer the same types of discrimination as cisgender women.

There is no doubt that transgender students—and particularly transgender girls and women—are sexually victimized at disturbingly high rates and need the protections of Title IX. A survey conducted by the National Center for Transgender Equality found that "[t]he majority of respondents who were out or perceived as transgender while in school (K–12) experienced some form of mistreatment, including being verbally harassed (54%), physically attacked (24%), and sexually assaulted (13%) because they were transgender." National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey 2 (Dec. 2016), *available at* https://perma.cc/M7MQ-ZQ52 ("NCTE Survey"). Transgender girls were twice as likely as transgender boys to be sexually assaulted at school because of their gender identity. *Id.* at 133.

Startlingly, 17% of respondents "experienced such severe mistreatment that they left a school as a result." *Id.* at 2. The statistics are even more disturbing for transgender women: over a fifth left a K-12 school because of harassment. *Id.* at 135. Respondents who did not complete high school were

more than twice as likely to have attempted suicide as the overall sample. *Id.* at 113.

The abuse continues after high school. According to a survey created by the American Association of Universities, nearly one in four transgender students experience sexual violence in college–a higher rate of victimization than cisgender college women. David Cantor et al., Westat, Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct 10 (Sept. 21, 2015), *available at* https://perma.cc/ZY4T-F5LE.

Certainly, then, cisgender girls and boys are not the only students who need Title IX's protections against sexual harassment. Transgender students, and particularly transgender girls, must also be able to enjoy their civil rights to learn and thrive free from violence.

III. Arguments Regarding The Safety Of Women Have Historically Been Used To Justify Discrimination And Defend Exclusionary Policies, And Have Been Rejected By Courts In Modern Times.

Against this background, Defendants maintain that their bathroom policy—a policy that unquestionably interferes with Plaintiff's ability to obtain the benefits of a public education—was adopted with the goal of "respect[ing] the privacy rights of all students to undress and perform personal bodily functions outside the presence of the opposite sex." Appellants' Br. 3. Defendants' *amicus* also makes this point, in more graphic terms. *See* Br. *Amicus Curiae* Alliance Defending Freedom 4, 9.

This argument should not succeed. Protective pretexts—which, historically, have often been grounded on the very sorts of harmful stereotypes that civil rights laws are designed to overcome—have long been used to justify discriminatory laws. In particular, bathrooms and other sex-segregated environments have been a special focus of policies grounded on protective pretexts. Defendants' bathroom policy falls squarely within this long tradition. In its modern decisions, the Supreme Court has repeatedly, and correctly, rejected these pretextual justifications for disfavoring women and other disadvantaged groups.

A. Discriminatory rules ostensibly designed to protect women have long reflected both stereotype and pretext.

Historically, the pretext of protecting women has been offered as an excuse to discriminate against both women and other disfavored groups. In the employment context, States routinely passed laws that barred women from certain professions with the ostensible aim of protecting their health and welfare. And after *Brown v. Board of Education*, 347 U.S. 483 (1954), States frequently justified policies that perpetuated segregation on the ground that such restrictions were necessary to protect women. Bathrooms and similar sex-segregated environments were a particular focus of these discriminatory rules. A review of this history shows some striking parallels to the rationales offered in support of Defendants' policy here.

1. *Discriminatory rules with protective pretexts have historically been imposed in a variety of contexts.*

The pretext of protecting women has historically been used not only to exclude women from the workplace and educational opportunities, but also to further a segregationist agenda.

In the nineteenth and earlier part of the twentieth centuries, laws that barred women from certain professions were frequently justified by their intent to protect women's health and welfare. In *Muller v. Oregon*, 208 U.S. 412 (1908), for example, the Supreme Court famously held that the State had a valid and over-riding interest in women-protective laws because "continuance for a long time on her feet at work . . . tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care . . . ." *Id.* at 421. In tune with the times, the Court accepted this rationale, concluding that "some legislation to protect [women] seems necessary to secure a real equality of right." *Id.* at 422. Laws based on this sort of protective rationale continued to be enacted, and affirmed, over the next fifty years. *See*, *e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (finding law's justification—"that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protect-

ing oversight"—was "entertainable"), *disapproved of by Craig v. Boren*, 429 U.S. 190 (1976).

The impetus to protect women—particularly white women—similarly served as justification for segregationist policies, many of which were rooted in anti-miscegenation sentiment. *See generally* Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. Davis L. Rev. 1321, 1348 (2006) ("With regards to white women, racial segregation operated as a paternalistic restriction on their liberties. It sought to 'protect' white women from 'succumbing' to their sexual desires for black men."). For example, schools forced to integrate racially after *Brown* started to consider sex-segregated schooling to avoid interracial interactions between the sexes. *See generally* Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 Yale J.L. & Human. 187, 192-93 (2006) ("But in the post-Brown era, sex-segregated schooling became salient in a different way: as a palliative for white Southern fears that racially mixed schools would lead down a slippery slope toward interracial marriage and social equality.").

2. *Bathrooms, and similarly sex-segregated environments, have been a particular focus of these discriminatory rules.*

In both the employment and racial segregation contexts, bathrooms and similar sex-segregated environments played a special role. The first laws separating restrooms according to sex were part of a nationwide practice of protecting women in the workplace, where they were seen as especially vulnerable. And after *Brown*, States tried to justify the continued segregation of public bathrooms by pointing to supposedly heightened rates of venereal disease among black communities.

As increasing numbers of women entered the workforce, the perceived need for sex-specific restrooms—and the lack of restrooms open to women—posed a real and substantial impediment to women's employment:

> Throughout the late nineteenth and early twentieth centuries, the absence of adequate lavatory facilities appeared as an insurmountable obstacle to gender integration. Institutions including the Yale Medical School, the Princeton graduate program, the Brooklyn and Bronx bar associations, prominent Wall Street law firms, and various all-male clubs were unable to circumvent this obstacle for significant periods. As one law firm partner explained to a female applicant during the 1930's, much as his firm would like to hire her, the logistical difficulties were simply too great; she couldn't use the attorney's bathroom, she couldn't be relegated to the secretaries' bathroom, and the firm couldn't afford to build a new one. Variations of the same theme continue to appear as justifications for all-male associations. As Washington Metropolitan Club officials regretfully reported, "Much as we love the girls, we just don't have the lavatory facilities to take care of them."

Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731, 1782-83 (1991) (footnote omitted).

At this time, States declared it within their traditional powers to regulate health and safety through laws that separated bathrooms by gender, usually adding such restrictions to new or existing protective legislation. *See*, *e.g.*, Act of May 25, 1887, ch. 462 § 13, 1887 N.Y. Laws 575; 1893 Pa. Laws, no. 244, 276; 1919 N.D. Laws, ch. 174, 317; 1913 S.D. Sess. Laws, ch. 240, 332; 887 Mass. Acts 668 ch. 103 § 2; *see also* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 Mich. J. Gender & L. 1, 15-16 (2007). Scholars have seen these bathroom laws largely as an expression of safety, sanitation, and modesty concerns, perhaps rooted in the idea that women were "especially vulnerable when they ventured into the public realm." *Id*. at 54; *see also* Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. Contemp. Legal Issues 1, 4-7 (1998); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581, 593-94 (1977).

Sex-separation of restrooms also served to further entrench race segregation in these spaces. Even after *Brown*, states continued to point to protective purposes to legitimate the continued segregation of public bathrooms. *See*, *e.g.*, *Turner v. Randolph*, 195 F. Supp. 677, 679-80 (W.D. Tenn. 1961) ("In an apparent effort to support the ordinance as a reasonable and valid exercise of the police power, the defendants introduced proof at the hearing showing that the incidence of venereal disease is much higher among Negroes

in Memphis and Shelby County than among members of the white race."). Desegregated bathrooms were framed as a public health threat, particularly for girls in school. *See*, *e.g.*, Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 Ark. Hist. Q. 42, 64 (2003) ("If the black girls were allowed into white schools, it was believed they would infect white girls [with venereal diseases], making them both ill and sexually corrupt. White daughters in this case needed to be protected from the sexualized presence of the black girls."). The very real impact of such restroom restrictions is dramatized in the recent film *Hidden Figures*. *See* Christina Cauterucci, Hidden Figures *Is a Powerful Statement Against Bathroom Discrimination*, Slate (Jan. 18, 2017), *available at* http://www.slate.com/blogs/xx_factor/2017/01/18/hidden_figures_is_a_powerful_statement_against_bathroom_discrimination.html.

This attitude extended to other public facilities as well, and it became particularly difficult to desegregate public spaces where people's bodies were likely to come into direct contact. For example, the City of Jackson, Mississippi, preferred to close its public swimming pools rather than desegregate them. *See Palmer v. Thompson*, 403 U.S. 217, 227 (1971) (finding no discriminatory effect in this action). *But see Lawrence v. Hancock*, 76 F. Supp. 1004,

1005-06 (S.D.W. Va. 1948); *City of St. Petersburg v. Alsup*, 238 F.2d 830, 830 (5th Cir. 1956).

B. The Supreme Court, in modern times, has rejected these protective rationales for gender discrimination.

In modern times, however, the Supreme Court has recognized that the rationale of protecting women does not justify the implementation of discriminatory laws that actually deny women opportunities. In *Frontiero v. Richardson*, the Court addressed these protective pretexts directly: "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973) (plurality opinion). The Court in *Frontiero* held that such "gross, stereotyped distinctions between the sexes" are insupportable as a basis for public policy. *Id.* at 685.

The Court has since made clear that exclusionary policies ostensibly designed to protect women or other groups often do not serve that purpose in reality—and instead operate principally to disadvantage the disfavored groups. In *Johnson Controls*, for example, the Court addressed an employer's self-described "fetal-protection policy" that excluded "fertile female employee[s] from certain jobs" because of an expressed "concern for the health of the fetus." 499 U.S. at 190. Noting that the effect of the rule was the blanket exclusion of women from those jobs, the Court found the employer's policy to be

both discriminatory against women (*see id.* at 197-200) and inconsistent with Title VII because it was unrelated to "job-related skills and aptitudes." *Id.* at 201; *see also id.* at 205 (Title VII is crafted "to protect female workers from being treated differently from other employees simply because of their capacity to bear children"). Given the manifest purpose of Title VII to achieve equal opportunities for women, the employer's "professed moral and ethical concerns about the welfare of the next generation" did not justify disparate treatment. *Id.* at 206.

Notably, in reaching this conclusion, the Court harked back to its decision in *Mueller*, observing that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." 499 U.S. at 211. But pointing to Title VII and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), the Court held that "[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role." 499 U.S. at 211. *See also Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

Courts, including this one, have also recently rejected laws that use a pretextual interest in women's health and well-being to limit their reproductive choices. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (holding that abortion laws justified as protections for women's health and safety violated women's liberty when the burdens they imposed outweighed their benefits); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920 (7th Cir. 2015) (holding that the right to abortion could not be abridged "on the basis of spurious contentions regarding women's health," especially when the health-justified abridgement would actually harm women), *cert. denied*, 136 S. Ct. 2545 (2016).

The governing principle, accordingly, is clear. Under anti-discrimination laws like Title VII and Title IX, a rule that discriminates on the basis of gender may not rest on stereotype and assumption—the sort of rationale often offered in the past to support exclusionary rules that limit opportunity and the use of public facilities. Defendants' discriminatory policy must be measured against this principle.

For the reasons explained at length by Plaintiff, Defendants' bathroom policy does not hold up to factual scrutiny. Defendants provide no evidence for their claim that transgender students in general pose a threat to their cisgender classmates. Nor do they demonstrate that Ash, who has now used the boys' restroom at school without incident for over a year and a half, Ap-

pellee's Br. 7, is a danger to his peers. Instead, it is Ash who has demonstrated harm to his physical and mental health due to his exclusion from the male-designated restroom. *Id.* at 9-10. Transgender students across the country are subject to harassment and violence while administrators claim they are the threats. NCTE Survey at 130-37. Defendants' claim that discriminating against transgender students is necessary to protect cisgender students is mere pretext to justify prejudice. The Court should reject Defendants' arguments, which find company in a long and dishonorable tradition of campaigns against civil rights.

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted,

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DATE: January 30, 2017

APPENDIX

APPENDIX A

DESCRIPTION OF *AMICI CURIAE*

A Better Balance

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ discrimination—including bathroom access rights for transgender people—through its national LGBTQ Work-Family project. A Better Balance is committed to ensuring the health, safety, and security of all LGBTQ individuals and families.

California Women's Law Center

California Women's Law Center ("CWLC") is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. CWLC places particular emphasis on eliminating all forms of gender discrimination on school campuses, including discrimination based on sexual orientation and sexual identity. CWLC remains committed to supporting equal rights for transgender folks, and to eradicating invidious

discrimination in all forms. CWLC strongly believes that Title IX protects all students from discrimination based on their gender or gender identity.

Center for Reproductive Rights

The Center for Reproductive Rights is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the U.S., the Center's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), in which the U.S. Supreme Court reaffirmed the constitutional right to access legal abortion. As a rights-based organization, the Center has a vital interest in protecting individuals endeavoring to exercise their fundamental rights free from restrictions based on gender stereotypes. Using its expertise in U.S. constitutional law, the Center seeks to highlight that discrimination against transgender people is rooted in the same gender stereotypes and false pretenses that have historically been used to justify discrimination against women.

Equal Rights Advocates

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has pursued this mission through engaging in high-impact litigation, legislative advocacy, and other efforts aimed at eliminating gender discrimination in education and employment. ERA attorneys have served as counsel and participated as amicus curiae in numerous class and individual cases involving the interpretation and enforcement of Title IX of the Education Amendments of 1972, including matters focused on ensuring equal access to education for transgender students. ERA seeks to participate in this case to establish that eliminating discrimination against transgender people is part and parcel of Title IX's purpose, to eliminate sex discrimination in education.

National Council of Jewish Women

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws, policies, programs, and services that protect every child from abuse, neglect, exploitation, bullying, and violence and provide

equal rights for individuals and couples of any and all sexual orientation, gender identity, and gender expression." Consistent with our Principles and Resolutions, NCJW joins this brief.

National Crittenton Foundation

The National Crittenton Foundation (TNCF) was founded in 1883 and its mission is to advance the health, economic security and civic engagement of girls and young women impacted by violence, adversity and trauma. Our twenty-six agencies provide services in 31 states and the District of Columbia supporting more than 135,000 girls and young women a year. As such, we represent thousands of marginalized young women across the country, some of who identify as transgender. The court's decision in this case has the potential to directly impact the young people we support in many ways, and we believe extensive experience in identifying and addressing discrimination rooted in sexism and in the denial of civil rights based on the unwillingness of systems and institutions to accept the expressed gender identity of girls and boys. As such, TNCF has an interest in joining others as signatories to support trans students, combat sex discrimination in all its forms on the amicus brief from the women's community in support of the student plaintiff in this case.

National Organization for Women Foundation

The National Organization for Women (NOW) Foundation is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal education opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization dedicated to eradicating sex-based discrimination, NOW Foundation is opposed to the use of sex-stereotypes for discriminating against transgender persons. We believe that Title IX of the Education Amendments of 1972 and the recent joint guidance from the U.S. Departments of Justice and Education that recognizes the right of transgender students to determine bathroom and locker room use in accordance with their gender identity is the correct policy.

Know Your IX

Know Your IX is a non-profit organization dedicated to ending sexual and gender violence against students. Run by students and young alumni who are themselves survivors, Know Your IX provides legal education, resources, guidance, trainings, and other support for students across the country, including in Illinois and Wisconsin. The organization also conducts policy advocacy to ensure young people can learn free from sexual abuse.

Transgender students, and particularly transgender girls, are at startling high risk of experiencing sexual violence in school. For this reason, Know Your IX advocates to ensure transgender students are fully protected by Title IX and empowered to stand up for their rights.

Red Web Foundation

The Red Web Foundation is an educational and advocacy organization promoting menstrual health and education. Many transgender men continue to menstruate and are in need of the same education and support as cis females who menstruate. The Red Web Foundation support the rights of all students to safely use the bathroom that corresponds to their gender presentation and to be included in all school activities.

San Francisco Mental Health Education Funds, Inc.

San Francisco Mental Health Education Funds, Inc. (SFMHEF) supports, staffs and manages the San Francisco Mental Health Board which oversees the San Francisco Department of Public Health Behavioral Health Services Program. The organization believes it is critical that transgender youth are treated with dignity, respect and acceptance regarding their gender presentation. Their mental health and safety require that they use the restroom that corresponds to their gender presentation, and that they be included in all school activities.

Stop Sexual Assault in Schools

SSAIS is a nonpartisan, nonprofit organization dedicated to proactively addressing the issue of sexual harassment and discrimination that impacts K-12 students and schools. SSAIS provides students, schools, and other organizations with resources so that the right to an equal education is not compromised by sexual harassment, sexual assault, and gender discrimination. SSAIS has provided legal assistance to students and their families, assistance to students and their families handling media inquiry, and has developed educational tools such as instructional videos to educate students and their families about their Title IX rights. Transgender students are at high risk for sexual victimization, and that risk is exacerbated by discriminatory school policies that stigmatize transgender students.

SurvJustice

SurvJustice, Inc. ("SurvJustice") is a national not-for-profit organization that increases the prospect of justice for survivors by holding both perpetrators and enablers of sexual violence accountable. SurvJustice does this by providing effective legal assistance to survivors that enforce their rights in campus, criminal and civil systems of justice. SurvJustice also provides policy advocacy and institutional training to changemakers working within their communities to better prevent and address sexual violence. By working on

these fronts, SurvJustice aims to decrease the prevalence of sexual violence throughout the country.

SurvJustice has an interest in *Whitaker v. Kenosha Unified School District No. 1 Board of Education* because a significant portion of its clientele are transgender and gender non-conforming students. These students are often singled out for sexual violence and harassment in educational settings. SurvJustice believes Title IX prohibits sex- and gender-based discrimination against transgender and gender non-conforming students to ensure their access to educational opportunities and benefits free from any sexually hostile environment. Furthermore, SurvJustice has an interest in this Court rejecting the pretext that the use of bathrooms by transgender and gender non-conforming students creates a safety risk for students that justifies such discriminatory treatment. The real safety risk is created when educational institutions are allowed to impose differential treatment on select groups of students. Such differential treatment may single out those students for further discrimination, such as harassment and violence, to reinforce such segregation.

Women's Law Project

The Women's Law Project is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and sta-

tus of all women throughout their lives. Since 1974, WLP has engaged in high-impact litigation, public policy advocacy, and education challenging discrimination rooted in gender stereotypes. WLP participated as *amicus curiae* in *Prowell v. Wise Business Forms*, 579 F.3d 285 (3d Cir. 2009), to ensure full enforcement of Title VII's protection against sex discrimination in the workplace for a litigant who suffered harassment based on gender stereotyping. WLP was also instrumental in passage of the Allegheny County Human Relations Ordinance, which prohibits discrimination in employment, public accommodations, and housing based on sex, gender identity, and gender expression. From 2012 to 2016, WLP represented Rainbow Alliance, an LGBTQA-student group, in litigation filed under Pittsburgh's Fair Practices Ordinance challenging the University of Pittsburgh's gendered facilities policies. WLP currently serves on the Pennsylvania Department of Health's Transgender Health Workgroup, a convening of PA advocates and government officials seeking to improve access to comprehensive health care for gender nonconforming youth. Discriminatory policies that deny transgender people access to facilities appropriate for their gender endanger their lives while reinforcing gender stereotypes historically used to discriminate against women within and outside the workplace.

CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for *Amici Curiae* certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 29(d), Fed. R. App. P. 32(a)(7)(B)(i), and 7th Cir. R. 29 because it contains less than 7,000 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified by 7th Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6).

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2017, the foregoing Brief of *Amici Curiae* National Women's Law Center, et al., in Support of Plaintiff-Appellee was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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