

18-13592-EE

United States Court of Appeals for the Eleventh Circuit

DREW ADAMS,

Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
District Court No. 3:17-cv-00739-TJC-JBT

**EN BANC BRIEF FOR STATES OF NEW YORK, WASHINGTON,
CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE,
HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS,
MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND,
VERMONT, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA,
AS AMICI CURIAE IN SUPPORT OF APPELLEE**

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**CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3, the undersigned counsel for Amici Curiae States of New York, Washington, California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia, certifies that he believes that the Certificate of Interested Persons set forth in the Petition for Panel Rehearing and Rehearing En Banc of Appellant The School Board of St. Johns County, Florida (Aug. 4, 2021) is complete, subject to the amendments set forth in the Certificates of Interested Persons filed by other amici since that time and subject to the following further amendments.

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Respectfully submitted this 26th day of November, 2021.

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INTERESTS OF THE AMICI STATES

Pursuant to this Court's Local Rule 35-8, the States of New York, Washington, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia, file this brief as amici curiae in support of plaintiff-appellee Drew Adams. This Court directed counsel to address the following questions: (1) does the St. Johns County School District's policy of assigning bathrooms based on sex violate the Equal Protection Clause of the Constitution; and (2) does the School District's policy of assigning bathrooms based on sex violate Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq.? But this appeal does not challenge the authority of a school district to assign bathrooms based on sex. Rather, it challenges a school district policy that purports to implement that authority by excluding from the boys' bathroom a person who is identified as a male in the official identification documents issued by his home State of Florida and recognized as a male for all other purposes by the school, when the exclusion is based on the sex assigned to that person at birth.

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including equal access to school restrooms. Discrimination on the basis of transgender status causes tangible economic, educational, emotional, and health harms.

To prevent these injuries, the amici States have adopted policies aimed at combatting discrimination against transgender people. Amici submit this brief to describe their experiences with administering such policies—including policies that maintain gender-segregated restrooms while allowing transgender students to use such restrooms on an equal basis with other students of the same sex. As amici's experiences show, ensuring transgender people have access to public facilities consistent with their gender identity—including access to common restrooms—benefits all, without compromising safety or privacy, or imposing significant costs.

The amici States also share a strong interest in seeing that federal law is properly applied to protect transgender people from discrimination. The unwritten policy of the School Board of St. Johns County,

Florida (Board) barring Adams from using the boys' bathroom violates federal statutory and constitutional protections that prohibit such invidious discrimination. The policy violates Title IX by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. Further, because the policy fails to advance any legitimate interest such as protecting public safety or personal privacy, its only function is to stigmatize a particular group, which violates equal protection.

ARGUMENT

POINT I

PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS WIDE SOCIETAL BENEFITS WITHOUT COMPROMISING THE PRIVACY OR SAFETY OF OTHERS

Nearly 1.5 million people in the United States—including approximately 150,000 teenagers¹—identify as transgender.² Transgender people have been part of cultures worldwide “from antiquity until the present

¹ Jody L. Herman, et al., *Age of Individuals Who Identify as Transgender in the United States* 2 (Williams Inst. 2017) (internet). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on November 26, 2021.)

² Kerith J. Conron, *LGBT Youth Population in the United States* 1 (Williams Inst. 2020) (internet).

day.”³ They contribute to our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers, lawyers, nurses, and doctors.

Unfortunately, transgender people often experience discrimination that limits their ability to realize their potential. To combat such discrimination, States began providing civil rights protections for transgender people nearly a quarter century ago. Today, at least twenty-two States and the District of Columbia,⁴ and at least 225 local

³ American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014) (internet); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015).

⁴ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov’t Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawai‘i:** Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-

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103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas:** Kansas Hum. Rts. Comm’n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court’s Bostock Decision* (Aug. 21, 2020) (internet) (advising that Kansas laws prohibiting discrimination based on “sex” in “employment, housing, and public accommodation” contexts “are inclusive of LGBTQ and all derivatives of ‘sex’”). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov’t § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education). **Nevada:** Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *id.* § 10:5-12 (public accommodations, housing, employment); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law § 291 (education, employment, public accommodations, housing); 9 N.Y.C.R.R. § 466.13 (interpreting the N.Y. Exec. Law § 296 (Human Rights Law) definition of “sex” to include gender identity). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4

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governments,⁵ offer express protections against discrimination based on gender identity in areas such as education, housing, public accommodations, and employment.⁶ The experiences of amici States and other jurisdictions show that policies and practices that ensure equal access to public facilities for transgender people—including access to common restrooms consistent with their gender identity—promote safe and inclusive school environments that benefit all.

(housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

⁵ Human Rts. Campaign, *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity* (internet) (current as of January 28, 2021).

⁶ The U.S. Supreme Court has confirmed that longstanding federal law similarly prohibits employment discrimination based on gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender counterparts.⁷ In the 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked.⁸ More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and almost one in eight (13%) reported being sexually assaulted.⁹ Another 2015 survey showed that three-fourths of transgender students felt unsafe at school

⁷ Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xxvii, 93 (GLSEN 2020) (internet); see also Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (GLSEN 2009) (internet).

⁸ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131-35 (Nat'l Ctr. for Transgender Equal. 2016) (internet).

⁹ *Id.* at 132-33.

because of their gender expression.¹⁰ More than a quarter of transgender respondents to a survey of LGBTQ teenagers in December 2016 and January 2017 reported being bullied or harassed within the past thirty days.¹¹ As a consequence of this violence and harassment, transgender students surveyed in 2019 reported feeling less connected to their school, and had less of a sense of belonging, than other students.¹²

Discrimination against transgender youth—including denial of access to appropriate restroom facilities—can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹³ Respondents to the 2015 USTS who reported

¹⁰ Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, and Transgender Youth in Our Nation's Schools* 84-85 (GLSEN 2016) (internet).

¹¹ Human Rts. Campaign Found., *Human Rights Campaign Post-Election Survey of Youth* 8 (2017) (internet).

¹² Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 95.

¹³ *Id.* at 52, 54.

negative experiences in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.¹⁴ Transgender people attempt suicide at a rate nearly nine times that of the general population.¹⁵ And a 2016 study found that transgender people who had been denied access to bathroom facilities were approximately 40% more likely to have attempted suicide than were other transgender people.¹⁶

Suicide is not the only health risk. For example, Adams testified that the Board's denial of appropriate restroom facilities caused him to diminish his fluid intake, a practice that can cause urinary tract infections and dehydration. *Adams ex rel. Kasper v. School Bd.*, 318 F. Supp. 3d 1293, 1307 & n.28 (M.D. Fla. 2018). Research shows that Adams's experience is not unique. More than four in five (82.1%) of the transgender students surveyed in one study had avoided school restrooms

¹⁴ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁵ *Id.* at 114.

¹⁶ Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. of Homosexuality 1378, 1388 tbl. 2 (2016).

because they felt unsafe or uncomfortable.¹⁷ And 54% of respondents in another study of transgender people reported negative health effects from avoiding public restrooms, such as kidney infections and other kidney-related problems.¹⁸

Discrimination in school settings also negatively affects educational outcomes. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.¹⁹ Discriminatory school climates have also been found to exacerbate absenteeism. A 2019 survey of LGBTQ students found that those who had experienced discrimination in their

¹⁷ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 97 fig. 3.8.

¹⁸ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 75 (2013); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 600, 603, 617 (4th Cir.) (transgender boy suffered painful urinary tract infection after being denied access to boys' restrooms at school), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

¹⁹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; *see also* Greytak et al., *Harsh Realities*, *supra*, at 25, 27 fig. 15 (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

school based on their sexual orientation or gender identity were almost three times as likely to have missed school in the month before the survey because they felt unsafe or uncomfortable (44.1% vs. 16.4%).²⁰

Such harassment inhibits transgender students' ability to learn, to the detriment of the broader community. Education advances more than the private interests of students: it prepares young people to contribute to society socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

B. The Amici States' Experiences Confirm That Protecting Transgender People from Discrimination Yields Broad Benefits Without Compromising Privacy or Safety, or Imposing Significant Costs.

As noted above, at least twenty-two States and 225 localities provide civil rights protections to transgender people, including by requiring that transgender people be permitted to use restrooms consistent with their gender identity. These protections do not discard the well-established practice of segregating restrooms by gender. Rather, these policies maintain sex-segregated spaces while permitting transgender people to

²⁰ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 49.

use a facility that aligns with their gender identity—thus helping to ease the stigma transgender people often experience, with positive effects for their educational and health outcomes. Such policies promote compelling interests in “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984). And those policies do so without threatening individual safety or privacy, or imposing significant costs.

1. Nondiscriminatory restroom policies produce important benefits and pose no safety concerns.

Supportive educational environments increase success rates for transgender students. Data from one national survey show that more-frequently harassed transgender teenagers had significantly lower grade-point averages than other transgender students.²¹

Policies supporting transgender students, including by allowing them to use common restrooms consistent with their gender identity, also can reduce the health risks facing those students. For example,

²¹ Greytak et al., *Harsh Realities*, *supra*, at 27 fig. 15.

California adopted protections against gender-identity discrimination in schools to address harms suffered by transgender students, including students not drinking and eating during the school day to avoid restroom use.²²

In States allowing transgender students to use bathrooms corresponding to their gender identity, public schools have reported no instances of transgender students harassing others in restrooms or locker rooms.²³ Indeed, the experiences of school administrators in thirty-one States and the District of Columbia show that public safety concerns are unfounded, as are concerns that students will pose as transgender simply to gain improper restroom access.²⁴ The Board's speculation that student safety will suffer if transgender people are treated fairly is thus contrary to the

²² See Assemb. B. 1266, 2013-2014 Sess. (Cal. 2013) (internet); Assemb. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 5-6, 7 (internet); see also Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Texas Trib. (June 14, 2016) (internet).

²³ Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan (Sept. 1, 2016) (internet).

²⁴ Br. of Amici Curiae Sch. Adm'rs from Thirty-One States and D.C. in Supp. of Resp't ("School Adm'rs Br.") at 14-16, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

actual experiences of States and localities where nondiscrimination has long been the law.²⁵

For instance, a former county sheriff noted that Washington State has protected transgender people from discrimination for a decade “with no increase in public safety incidents as a result”; he emphasized “that indecent exposure, voyeurism, and sexual assault[] are already illegal, and police use those laws to keep people safe.”²⁶ In 2013, the Los Angeles Unified School District—the second largest school district in the country, with more than 600,000 K-12 students²⁷—reported to the California

²⁵ See, e.g., Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, Media Matters for Am. (June 3, 2015) (internet) (largest school districts in 12 States with gender-identity protection laws); Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for Am. (Mar. 19, 2014) (internet) (law enforcement officials, government employees, and advocates for sexual assault victims); Luke Brinker, *California School Officials Debunk Right-Wing Lies About Transgender Student Law*, Media Matters for Am. (Feb. 11, 2014) (internet) (six of California’s largest school districts, including two that have had antidiscrimination policies for more than a decade).

²⁶ David Crary, *Debate Over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib. (May 10, 2016) (quotation marks omitted) (internet).

²⁷ Los Angeles Unified Sch. Dist., *District Information, About the Los Angeles Unified School District* (internet).

Legislature that the district had “no issues, problems or lawsuits as a result of [a 2004] policy” allowing students to use restrooms corresponding to their gender identity.²⁸ And the Massachusetts Chiefs of Police Association and Massachusetts Majority City Chiefs expressed that allowing people to use public bathrooms consistent with their gender identity “improve[s] public safety.”²⁹ Meanwhile, in Texas, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those cities’ policies allowing transgender people to use restrooms consistent with their gender identity.³⁰

²⁸ S. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 8 (internet).

²⁹ Letter from Chief William G. Brooks III, Mass. Chiefs of Police Ass’n, & Bryan A. Kyes, Mass. Majority City Chiefs, to Sen. William N. Brownsberger & Rep. John V. Fernandes, Joint Comm. on the Judiciary (Oct. 1, 2015) (internet).

³⁰ Carlos Maza & Rachel Percelay, *Texas Experts Debunk the Transgender “Bathroom Predator” Myth Ahead of HERO Referendum*, Media Matters for Am. (Oct. 15, 2015) (internet); *see also, e.g.*, Fox News, *Manafort on Trump’s Fight to Rally GOP, Defeat Democrats; Gov. McCrory on Showdown Over NC’s Transgender Bathroom Law* (Jan. 23, 2017) (internet) (no known cases of people in North Carolina committing crimes in bathrooms under the cover of protections provided to transgender people).

2. Nondiscriminatory restroom policies neither compromise personal privacy nor require significant expenditures.

Contrary to the Board’s claim (En Banc Br. for Appellant (Br.) at 14-15), state experiences show that nondiscriminatory policies have not generated privacy issues, nor imposed untoward costs on schools. The risk that students will see others’ intimate body parts, or have their intimate body parts seen by others, is not presented by ordinary restroom use. And in any event, concerns about the presence of others (whether or not transgender) can be addressed—and are being addressed—by increasing privacy options for all students, without singling out transgender people for stigmatizing differential treatment.

School districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. In Washington State, where school districts are required to “allow students to use the restroom that is consistent with their gender identity consistently asserted at school,” schools must provide “[a]ny student—transgender or not—who has a need or desire for increased privacy, regardless of the underlying reason,” with “access to an alternative restroom (e.g., staff restroom,

health office restroom).”³¹ This gives all students with privacy concerns “the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”³²

Similar provisions apply to locker rooms. Students in Washington are allowed to participate in physical education and athletic activities “in a manner that is consistent with their gender identity.”³³ But rather than segregating transgender students, additional privacy is provided for any student who desires it, regardless of the underlying reason, by providing “a reasonable alternative changing area, such as the use of a private area

³¹ Susanne Beauchaine et al., *Prohibiting Discrimination in Washington Public Schools* 30 (Wash. Off. of Superintendent of Pub. Instruction 2012) (emphasis added) (internet); see also Washington State Hum. Rts. Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-Segregated Facilities* 3 (2016) (internet) (businesses need not “make any [structural] changes” or “add additional facilities,” but “are encouraged to provide private areas for changing or showering whenever feasible” and “may wish to explore installing partitions or curtains for persons desiring privacy”); Wash. Rev. Code Ann. § 28A.642.080 (requiring implementation by January 31, 2020).

³² Beauchaine et al., *Prohibiting Discrimination, supra*, at 30.

³³ *Id.*; Washington Interscholastic Activities Ass’n, *2021-2022 Handbook* 36 (2021) (internet).

(e.g., a nearby restroom stall with a door), or a separate changing schedule.”³⁴

At least nine other States and the District of Columbia offer similar guidance to help schools maximize privacy while complying with laws prohibiting gender-identity discrimination—for instance, by offering privacy curtains and separate restroom and changing spaces to all who desire them.³⁵ None of these solutions requires remodeling or

³⁴ Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30-31; *see also* National Collegiate Athletic Ass’n Off. of Inclusion, *NCAA Inclusion of Transgender Student-Athletes 20* (2011) (internet) (providing similar standards).

³⁵ **California:** California Sch. Bds. Ass’n, *Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities 2* (2014) (internet). **Colorado:** Colorado Ass’n of Sch. Bds. et al., *Guidance for Educators Working with Transgender and Gender Nonconforming Students 4-5* (internet). **Connecticut:** Connecticut Safe Sch. Coal., *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 9-10* (2012) (internet). **Maryland:** Maryland State Dep’t of Educ., *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination 13-14* (2015) (internet). **Massachusetts:** Massachusetts Dep’t of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment* (Oct. 28, 2021) (internet). **New Jersey:** New Jersey State Dep’t of Educ., *Transgender Student Guidance for School Districts 7* (2018) (internet). **New York:** New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students 9-10*

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restructuring restrooms, or otherwise investing in costly facility upgrades. As a spokeswoman for Texas’s Clear Creek Independent School District confirmed, that district, like many others, “ha[s] been successful in balancing the rights of all students without issue and offer[s] restrooms, showers and changing areas for students seeking privacy, regardless of their gender or gender identity.”³⁶ The experiences of school administrators in dozens of States across the country confirm that such policies can be implemented fairly, simply, and effectively.³⁷

(2015) (internet). **Michigan:** Michigan Dep’t of Educ., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* 5-6 (2016) (internet). **Oregon:** Oregon Dep’t of Educ., *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* 10-11 (2016) (internet). **Rhode Island:** Rhode Island Dep’t of Educ., *Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students* 8-9 (2016) (internet). **Vermont:** Vermont Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* 6, 8 (2017) (internet). **District of Columbia:** District of Columbia Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance* 9 (2015) (internet).

³⁶ Ura, *For Transgender Boy*, *supra* (quotation marks omitted).

³⁷ See School Adm’rs Br. at 17-21, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

Inclusive policies such as these maintain gender-segregated spaces. For example, the District of Columbia expressly requires that businesses “provide access to and the safe use of facilities that are segregated by gender” where nudity in the presence of others is customary, while also making accommodations for transgender individuals to use the facility “that is consistent with that individual’s gender identity or expression.”³⁸ And New York’s guidance for school districts explains how schools have accommodated transgender youth and “foster[ed] an inclusive and supportive learning environment,” while maintaining sex-segregated spaces.³⁹ Contrary to the arguments advanced by the States supporting the Board (En Banc Br. for Amici Curiae the States of Tenn. et al. in Supp. of Def.-Appellant at 2, 5-6), inclusive policies are thus entirely consistent with the laws that they have adopted permitting sex-

³⁸ D.C. Mun. Regs. tit. 4, § 805.

³⁹ New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*, *supra*, at 10.

segregated facilities,⁴⁰ as well as the provisions of Title IX permitting schools to maintain sex-segregated facilities.⁴¹

On the other hand, discriminatory restroom policies barring transgender students from using bathrooms that align with their gender identity are more likely to raise privacy concerns and create a needless risk of violence against transgender people, whose physical appearance may diverge from their sex assigned at birth and who therefore are likely to be perceived as using the “wrong” restroom.⁴² As the district court found, the Board’s assertion that Adams may use the girls’ restroom “seems disingenuous” given that “permitting him to use the girls’ restroom would be unsettling for all the same reasons the School District does not want any other boy in the girls’ restroom.” *Adams*, 318 F. Supp. 3d at 1308 n.30. In short, policies like the unwritten policy here, which bars transgender individuals from using a facility that aligns with their

⁴⁰ See, e.g., Neb. Rev. Stat. Ann. § 79-2,124; Okla. Admin. Code § 335:15-3-2(b)(5); W. Va. Code Ann. §§ 21-3-12, 21-3-13.

⁴¹ See 20 U.S.C. § 1686; 34 C.F.R. § 106.33 (2021).

⁴² See James et al., *2015 U.S. Transgender Survey*, *supra*, at 225-27; see also Matt Pearce, *What It’s Like to Live Under North Carolina’s Bathroom Law If You’re Transgender*, L.A. Times (June 12, 2016) (internet).

gender identity, are more likely to pose safety and privacy concerns than inclusive policies.

POINT II

TITLE IX AND THE EQUAL PROTECTION CLAUSE PROHIBIT THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

This Court directed the parties to brief whether sex-segregated bathrooms violate the Equal Protection Clause or Title IX. But Adams has never disputed a school's authority to separate bathrooms by sex. As the district court explained, "Adams is not contending that the school cannot provide separate restrooms for the sexes—he just wants the school to recognize that, interpreting sex to include gender identity, he is a boy and should be permitted to use the boys' restrooms." *Adams*, 318 F. Supp. 3d at 1322.

Both parties here agree that the issue is whether discrimination based on a person's gender identity is sex discrimination prohibited by Title IX or the Equal Protection Clause. *See Br.* at 21-23. The evidence at trial showed that Adams is a transgender male who has long identified as male, is recognized as male on both his birth certificate and his driver's license, "has undergone extensive surgery to conform his body to his

gender identity,” uses the men’s bathroom “wherever he goes” except at school, and was treated as a boy “in every way” at school except for which bathroom he was allowed to use. *Adams*, 318 F. Supp. 3d at 1296-97.

Consistent with amici’s collective State experience (see *supra* at 11-22), there is no evidence that allowing students like Adams to use the bathroom corresponding to their gender identity jeopardizes student safety or privacy, or fails to maintain the sex-segregated bathrooms allowed by Title IX. Indeed, the Board’s bathroom policy discriminates based on sex in violation of Title IX and the Equal Protection Clause because it forbids Adams from using the bathroom that matches his sex simply because he is transgender.

The Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and this Court in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), have found that gender-identity discrimination is necessarily sex discrimination.⁴³ Discriminating against a person for being transgender

⁴³ When determining whether conduct constitutes discrimination based on sex under Title IX, courts routinely look to and apply case law interpreting Title VII. See, e.g., *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636, 651 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

is sex discrimination because “[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741. For example, a person who is discriminated against for identifying as female simply because she was identified as male at birth is necessarily being discriminated against based on sex. *Id.* In reaching its conclusion, the Supreme Court acknowledged that “transgender status” is a distinct concept from “sex,” but observed that sexual harassment and motherhood are also distinct concepts that, unquestionably, still qualify as sex discrimination. *Id.* at 1742, 1746-47.

Years before *Bostock*, this Court came to the same conclusion. In upholding a transgender state employee’s 42 U.S.C. § 1983 claim for violation of equal protection based on workplace gender-identity discrimination, this Court explained that because transgender persons do not conform to the stereotypes associated with their sex assigned at birth there is “a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms.” *Glenn*, 663 F.3d at 1316. “Accordingly, discrimination against a transgender individual because of [his or] her gender-nonconformity is

sex discrimination, whether it's described as being on the basis of sex or gender." *Id.* at 1317.

Other courts have similarly recognized that Title IX's bar against sex discrimination prohibits policies like the Board's that bar transgender students from using the bathroom that aligns with their gender identity. In *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the Seventh Circuit upheld a grant of preliminary injunctive relief under Title IX where, as here, a school district denied a transgender boy access to the boys' restroom. *See* 858 F.3d 1034, 1049-50, 1055 (7th Cir. 2017). As that court explained, a "policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id.* at 1049. Such a policy also subjects transgender students to "different rules, sanctions, and treatment than non-transgender students, in violation of Title IX." *Id.* at 1049-50; *see Grimm*, 972 F.3d at 616-19; *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir.) (transgender students use of sex-segregated spaces that align with their gender

identity do not violate Title IX rights of cisgender students), *cert. denied*, 141 S. Ct. 894 (2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).⁴⁴

Courts have thus widely held that Title IX bars policies that prohibit transgender students from using sex-segregated spaces that align with their gender identity. The district court did not err in reaching the same conclusion here.

The Board's policy needlessly denies Adams something most people take for granted: the ability to use a public restroom consistent with one's lived experience of one's own gender. The policy singles out transgender students like Adams and forces them either to forgo restroom use or to choose between two other detrimental options: using common restrooms corresponding to their sex assigned at birth or using special single-user restrooms (i.e., those with no specific gender designation). The first option contravenes a core aspect of transgender people's identities, subjects

⁴⁴ See also *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 563-64 (Minn. Ct. App. 2020) (considering Title IX precedents to interpret Minnesota anti-discrimination statute).

them to potential harassment and violence, and violates medical treatment protocols. The second option stigmatizes the person—like “outing” individuals as transgender in settings where they could be exposed to danger or prefer to keep that information private—assuming that single-user restrooms are even available and equally convenient.⁴⁵ *See Adams*, 318 F. Supp. 3d at 1307-08.

Nor is there any regulatory basis for such stigmatizing discrimination. In permitting “separate toilet, locker room, and shower facilities on the basis of sex,” 34 C.F.R. § 106.33, Title IX’s implementing regulation does not dictate segregation of the enumerated facilities exclusively on the basis of “biological sex” (*see Br. at 22, 24*). Neither Title IX nor its implementing regulations define “sex” in terms of biological sex. In fact, as courts have uniformly recognized, “sex” incorporates gender identity (*see supra at 23-26*), and Title IX’s statutory language broadly prohibits discrimination on the basis of sex, 20 U.S.C. § 1681(a).

⁴⁵ The same concerns are not posed by the privacy-enhancing measures described above (*see supra at 16-19*), which are available to all students who desire additional privacy. Such measures do not single out or stigmatize transgender students, and thus do not force students into the untenable choice presented by the kind of policy at issue here.

To be valid, 34 C.F.R. § 106.33 must be interpreted as consistent with the statute. *See, e.g., United States v. Larionoff*, 431 U.S. 864, 873 (1977) (“[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated.”); *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 134 (1936) (a regulation that “operates to create a rule out of harmony with the statute” is “a mere nullity”).

In light of the courts’ uniform construction of Title IX, the Board’s interpretation of 34 C.F.R. § 106.33 is an unreasonable and inconsistent reading of Title IX’s language prohibiting sex discrimination. Indeed, the absurdity of the Board’s reading is borne out by the evidence adduced at trial, which showed that Adams is recognized by the Board (as well as the State of Florida and the Florida High School Athletic Association) as male for all other purposes, but the moment he enters the bathroom, the Board suddenly considers him a girl. *Adams*, 318 F. Supp. 3d at 1296-97. It would be irrational for Title IX’s regulation to permit statutory protections to switch on and off throughout the day, depending on whether Adams happens to be near a bathroom door. Instead, Title IX and its implementing regulations require the Board to forgo discrimination

against students based on transgender status, regardless of where on campus they may be.

Of course, allowing transgender persons to use the bathroom corresponding to their gender identity does not disturb the undisputed rule that sex-segregated restrooms are allowed by Title IX. As the amici States' successful experiences demonstrate (see *supra* at 20-21), female students would still use the girls' restrooms and male students would still use the boys' restrooms.

There is also no merit to the Board's unpreserved argument (Br. at 26-28) that interpreting Title IX to grant Adams and other transgender students access to common restrooms consistent with their gender identity will impose a new condition on the receipt of federal funds in violation of the Spending Clause. It is undisputed that Title IX lawfully requires recipients of federal funds to refrain from discrimination based on sex. The application of that longstanding principle to the Board's discriminatory policies in no way creates a new mandate violating the rule that conditions on the receipt of federal funds must be announced in advance.

The Supreme Court made clear decades ago that when Congress places conditions on the receipt of federal funds in the exercise of its

Spending Clause power, the precise parameters of a condition need not be “specifically identified and proscribed” in the statute, *Bennett v. Kentucky Dep’t of Educ.*, 470 U.S. 656, 665-66 (1985), so long as Congress “unambiguously” imposed the condition in the first place, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Accordingly, a circumstance where the details of federal requirements are clarified through litigation is not ordinarily an instance where recipients of federal funding lack the required notice of their potential liability for violating a federal command. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005).

That principle is applicable here. At bottom, the Board’s policy is a particular instance of gender-based discrimination that violates Title IX’s clear, broad, and longstanding mandate of gender equality.

For similar reasons, the Board’s policy contravenes the Equal Protection Clause. The Supreme Court has long made clear that equal protection prohibits government policies that serve only to express “negative attitudes, or fear” toward people viewed as “different.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). The policy at issue here falls squarely into this category.

As the district court noted, the Board’s policy “applies differently to transgender students” by barring them (and them alone) from using common restrooms consistent with their gender identity, and “class separation raises an ‘inevitable inference’ of animosity toward the affected class.” *Adams*, 318 F. Supp. 3d at 1312 n.37 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)). And as the district court correctly recognized, prohibiting transgender students from using common restrooms under the circumstances of this case fails to advance legitimate state interests, such as protecting public safety or personal privacy. *Id.* at 1313-16. See *supra* at 11-22.

The discrimination here is exactly the type forbidden by the Equal Protection Clause: decisions built on stereotypes and a “frame of mind resulting from irrational or uncritical analysis.” See *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 68 (2001). The Board’s alleged justification for prohibiting Adams from using the boys’ restrooms is to ensure student safety and privacy. But despite having the opportunity at trial, the Board produced no evidence that allowing Adams or any other transgender male student to use the boys’ restrooms would jeopardize student safety or privacy. In fact, the Board “has never received any

complaints of untoward behavior involving a transgender student.”
Adams, 318 F. Supp. 3d at 1305.

Based on the full evidentiary record here, it is clear that the Board’s policy is based not on evidence or even the Board’s own experience, but instead on unfounded assumptions and irrational stereotypes. The district court found that the policy stigmatizes transgender students like Adams by sending a message “that the school does not view him as a real boy.” *Id.* at 1316. Under well-established constitutional analysis, such discrimination cannot withstand any level of equal protection scrutiny.

CONCLUSION

This Court should affirm the decision below.

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November 26, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,469 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ Kelly Cheung

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's CM-ECF system on November 26, 2021. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

Dated: New York, New York
November 26, 2021

/s/ Mark S. Grube