

23-2568

**United States Court of Appeals
for the Seventh Circuit**

JANE DOE #1, a minor, by her mother and next friend, JANE DOE #2,
Plaintiff-Appellee,

v.

MUKWONAGO AREA SCHOOL DISTRICT and JOE KOCH, Superintendent,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District
of Wisconsin, District Court No. 2:23-cv-00876-LA,
The Honorable Lynn Adelman, District Court Judge

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

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INTERESTS OF THE AMICI STATES

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the States of New York, Washington, California, Colorado, Connecticut, Delaware, Hawai'i, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Vermont, and the District of Columbia, file this brief as amici curiae in support of plaintiff-appellee Jane Doe.

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 one's transgender status causes tangible economic, educational, emotional, and health harms. To prevent these injuries, many 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-separated 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. This appeal does not challenge the authority of a school district to assign bathrooms based on sex, although that is how the Mukwonago Area School District mischaracterizes the issue. *See, e.g.*, Appellants' Br. (Br.) at 20. Rather, this case challenges the School District's policy to exclude a transgender female student, Doe, from the girls' bathroom based on her sex assigned at birth. The School District's policy violates Title IX of the Education Amendments of 1972 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

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

Over 1.6 million people in the United States—including approximately 300,000 youth between the ages of thirteen and seventeen—identify as transgender.¹ Transgender people have been part of cultures worldwide “from antiquity until the present day.”² 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 impairs their physical and mental health, curtails their economic prospects, and ultimately limits their ability to realize their potential and participate fully in society. To combat such discrimination, States began providing civil rights protections for transgender people over a quarter century ago. Today, at

¹ Jody L. Herman et al., Williams Inst., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (2022). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on October 26, 2023.)

² American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* (last updated June 2023); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015).

least twenty-two States and the District of Columbia,³ and at least 374 municipalities,⁴ offer express protections against discrimination based on

³ **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). **Hawaii:** 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.* 5/1-103(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) (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); Md. Code Ann., Educ. § 26-704 (schools). **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). **Michigan:** Mich. Comp. Laws § 37.2102(1). **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).

(continued on the next page)

gender identity in areas such as education, housing, public accommodations, and employment.⁵

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.

New York: N.Y. Exec. Law §§ 291, 296 (education, employment, public accommodations, housing). **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 (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.* § 49.60.030(1)(a)-(e) (employment, public accommodations, real estate transactions, credit transactions, and insurance transactions); *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).

⁴ Movement Advancement Project, *Local Nondiscrimination Ordinances* (current as of Oct. 26, 2023).

⁵ 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.⁶ In the 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, over three quarters (77%) of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked.⁷ More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and approximately one in eight (13%) reported being sexually assaulted.⁸

In a 2022 survey of LGBTQ teenagers, nearly two in three (62.6%) transgender and gender-expansive youth respondents reported being “teased, bullied, or treated badly” at school in the prior year, and more than half (55.6%) of such youth reported being victimized specifically due to their sexual identity,

⁶ Joseph G. Kosciw et al., GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation’s Schools* xxvii, 84 (2022); see also GLSEN, *Improving School Climate for Transgender and Nonbinary Youth: Research Brief 1* (2021); Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 *Morbidity & Mortality Wkly. Rep.* 67, 67-70 (2019).

⁷ Sandy E. James et al., Nat’l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 131-35 (2016).

⁸ *Id.* at 132-33.

gender identity, and/or gender expression.⁹ In the same survey, nearly six in ten (56.9%) of LGBTQ+ youth respondents reported being verbally or physically harassed at least once in the past thirty days.¹⁰ In another 2022 survey, nearly two in three (64%) transgender and nonbinary youth respondents similarly reported being discriminated against because of their gender identity.¹¹ Students subject to such discrimination, violence, and harassment have reported feeling less connected to their schools, and less of a sense of belonging, than other students.¹² Transgender youth of color, in particular, face unique difficulties as a result of their intersecting marginalized identities.¹³

Discrimination against transgender youth—including denial of access to appropriate restroom facilities—can have serious health consequences. Research has demonstrated that discrimination against LGBTQ people—including discriminatory policies and the denial of opportunities—“increases the risks of poor mental and physical health” for LGBTQ people.¹⁴ For example,

⁹ [Human Rts. Campaign Found., 2023 LGBTQ+ Youth Report \(2023\).](#)

¹⁰ *Id.*

¹¹ [The Trevor Project, 2023 U.S. National Survey on the Mental Health of LGBTQ Young People 16 \(2022\).](#)

¹² Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 88.

¹³ [Nhan L. Truong et al., GLSEN, Erasure and Resilience: The Experiences of LGBTQ Students of Color 3 \(2020\).](#)

¹⁴ [What We Know Project, Cornell Univ., What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People? \(2019\).](#)

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.¹⁵ Respondents to the 2015 USTS who reported 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.¹⁶ Transgender people attempt suicide at a rate nearly nine times that of the general population, and half of transgender and nonbinary youth in a 2022 mental health survey reported having seriously considered attempting suicide in the past twelve months.¹⁷ 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.¹⁸ Similarly, a 2021 study found that denial of access to bathroom facilities significantly increased the odds of transgender and/or nonbinary youth reporting depressive

¹⁵ Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 43; see also April J. Ancheta et al., *The Impact of Positive School Climate on Suicidality and Mental Health Among LGBTQ Adolescents: A Systematic Review*, 37 *J. Sch. Nursing* 75, 76 (2021).

¹⁶ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁷ See *id.* at 114; The Trevor Project, *2023 U.S. National Survey on the Mental Health of LGBTQ Young People*, *supra*, at 5.

¹⁸ 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).

mood and attempting suicide—one in three youths who faced bathroom discrimination reported a suicide attempt in the past year.¹⁹ Positive school climates, on the other hand, have been linked to lower suicidality in LGBTQ youth.²⁰

Discriminatory bathroom policies also bring severe physical health risks for transgender youth. For example, the district court found that plaintiff has gastrointestinal issues that could be exacerbated if she avoids or delays using the bathroom. *See Doe v. Mukwonago Area Sch. Dist.*, No. 23-cv-876, 2023 WL 4505245, at *7 (E.D. Wis. Aug. 10, 2023). Research shows that the harm to plaintiff is not speculative. Almost three in four (72.9%) of the transgender students surveyed in one study had avoided school restrooms because they felt unsafe or uncomfortable.²¹ And more than half (54%) of respondents in another

¹⁹ Myeshia Price-Feeney et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. of Adolescent Health 1142 (2021).

²⁰ Ancheta et al., *The Impact of Positive School Climate*, supra, at 80; see also Cady Stanton, *As ‘Don’t Say Gay’ and Similar Bills Take Hold, LGBTQ Youths Feel They’re ‘Getting Crushed’*, USA Today (updated May 11, 2022) (noting that LGBTQ youths in affirming schools were nearly 40% less likely to attempt suicide than LGBTQ youths in non-affirming schools).

²¹ Kosciw et al., *The 2021 National School Climate Survey*, supra, at 89 fig. 3.13.

study of transgender people reported negative health effects from avoiding public restrooms, such as kidney infections and other kidney-related problems.²²

Discrimination in school settings also negatively affects educational outcomes. A 2021 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.²³ Discriminatory school climates have also been found to exacerbate absenteeism. A 2021 survey found that LGBTQ students who had experienced discrimination in their schools were almost three times as likely (43.3% versus 16.4%) to have missed school because they felt unsafe or uncomfortable.²⁴

²² 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).

²³ Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 36-37; see also Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* 25, 27 fig. 15 (2009) (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

²⁴ Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 36.

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

Policies that allow transgender students to access facilities and activities consistent with their gender identity create school climates that enhance students' well-being and facilitate their ability to learn.²⁵ For example, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cisgender peers.²⁶ These benefits redound to society as a whole because education advances not only the private interests of students, but also prepares them to contribute to society—socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

As noted above, at least twenty-two States and 374 municipalities expressly provide civil rights protections to transgender people, and those protections often include requirements that transgender people be allowed to use

²⁵ *See, e.g., Br. of Amici Curiae Sch. Adm'rs from Thirty-One States & D.C. in Supp. of Resp't (Br. of Amici Curiae Sch. Adm'rs) at 3-4, Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055; [Office of Elementary & Secondary Educ., U.S. Dep't of Educ., Safe & Supportive Schools \(May 30, 2023\)](#).

²⁶ *See Kristina R. Olson et al., Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 *Pediatrics* e20153223, at 5-7 (Mar. 2016); *Br. of Amici Curiae Sch. Adm'rs at 4, Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

restrooms consistent with their gender identity. Contrary to the claims of the appellants (*see* Br. at 26-28), these protections wholly comply with laws, such as Title IX, that allow separating restrooms by sex, *see* 20 U.S.C. § 1686. These policies maintain sex-separated spaces while allowing transgender people to 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 national surveys show that more-frequently harassed transgender teenagers had significantly lower grade-point averages than other transgender students.²⁷

²⁷ Kosciw et al., *The 2021 National School Climate Survey*, *supra*, at 36-37; *see* Greytak et al., *Harsh Realities*, *supra*, at 27 fig. 15.

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, 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.²⁸

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.²⁹ 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.³⁰

²⁸ See Assemb. B. 1266, 2013-2014 Sess. (Cal. 2013); Assemb. Comm. on Educ., Bill Analysis for Assemb. B. 1266, supra, at 5-6, 7; see also Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Texas Trib. (June 14, 2016).

²⁹ Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan (Sept. 1, 2016); see Beatriz Pagliarini Bagagli et al., *Trans Women and Public Restrooms: The Legal Discourse and Its Violence*, 6 Frontiers Socio. 1, 8 (Mar. 31, 2021); see also Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 Sexuality Rsch. & Soc. Pol'y 70 (2019) (comparing criminal incident reports in localities with and without gender identity inclusive public accommodations nondiscrimination laws in Massachusetts).

³⁰ Br. of Amici Curiae Sch. Adm'rs at 14-16, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

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

Contrary to the claims of appellants (*see, e.g.*, Br. at 29-30), the amici States' experiences show that nondiscriminatory policies have not generated privacy issues. 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

³¹ Susanne Beauchaine et al., *Prohibiting Discrimination in Washington Public Schools* 30 (Wash. Off. of Superintendent of Pub. Instruction 2012); see also Washington State Hum. Rts. Comm'n, *Frequently Asked Questions Regarding WAC* (continued on the next page)

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

At least twelve 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

162-32-060 Gender-Segregated Facilities 3 (2016) (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, 2023-2024 Handbook, at 36-37 (Oct. 10, 2023).

³⁴ Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30-31; see also Providence Pub. Sch. Dist., Nondiscrimination Policy: Transgender and Gender Expansive Students 4 (n.d.) (student uncomfortable with gender-segregated facility may use “a safe and non-stigmatizing alternative,” such as a privacy partition or separate changing schedule).

and separate restroom and changing spaces to all who desire them.³⁵ None of these solutions requires remodeling or 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]

³⁵ **California:** California Sch. Bds. Ass'n, *Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities 2* (2014). **Colorado:** Colorado Ass'n of Sch. Bds. et al., *Guidance for Educators Working with Transgender and Gender Nonconforming Students 4-5* (n.d.). **Connecticut:** Connecticut Safe Sch. Coal., *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 9-10* (2012). **Illinois:** Illinois Dep't of Hum. Rts., *Non-Regulatory Guidance: Relating to Protection of Transgender, Nonbinary, and Gender Nonconforming Students Under the Illinois Human Rights Act 6-7* (2021); Illinois State Bd. of Educ., *Non-Regulatory Guidance: Supporting Transgender, Nonbinary and Gender Nonconforming Students 10-11* (2020); Affirming & Inclusive Schs. Task Force, *Strengthening Inclusion in Illinois Schools 19-21* (2020). **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). **Massachusetts:** Massachusetts Dep't of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment* (Oct. 28, 2021). **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). **Minnesota:** Minnesota Dep't of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students 10* (2017). **New Jersey:** New Jersey State Dep't of Educ., *Transgender Student Guidance for School Districts 7* (2018). **New York:** New York State Educ. Dep't, *Creating a Safe, Supportive, and Affirming School Environment for Transgender and Gender Expansive Students: 2023 Legal Update and Best Practices 22-24* (June 2023). **Oregon:** Oregon Dep't of Educ., *Supporting Gender Expansive Students: Guidance for Schools 24-26* (2023). **Rhode Island:** Rhode Island Dep't of Educ., *Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students 8-9* (2016). **Vermont:** Vermont Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students 6, 8* (2017). **District of Columbia:** District of Columbia Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance 9* (2015).

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

Inclusive policies such as these maintain gender-separated 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 may accommodate transgender youth while maintaining sex-separated spaces.³⁹ Inclusive policies are thus entirely consistent with the provisions of Title IX permitting schools to maintain sex-separated facilities.⁴⁰

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 (No. 16-273), 2017 WL 930055.

³⁸ D.C. Mun. Regs. tit. 4, § 805.

³⁹ New York State Educ. Dep’t, *Creating a Safe, Supportive, and Affirming School Environment for Transgender and Gender Expansive Students*, *supra*, at 22-24.

⁴⁰ See 20 U.S.C. § 1686; 34 C.F.R. § 106.33 (2022).

In fact, it is discriminatory restroom policies rather than inclusive ones that raise privacy concerns. Such policies are more likely to 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.⁴¹ In short, policies like the one at issue here, which bar transgender individuals from using a restroom that aligns with their gender identity, are more likely to pose safety and privacy concerns than inclusive policies.

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

This Court has already twice concluded that transgender students have the basic right to use the school bathroom that corresponds to their gender identity. *A.C. by M.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 764 (7th Cir. 2023); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017). This controlling precedent disposes of the current appeal because appellants’ arguments rest on the same failed arguments raised and rejected by the Court in *A.C.* and *Whitaker*. Perhaps realizing this, the School District here invites this Court to overturn

⁴¹ 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).

its controlling precedent. But, this Court recently and expressly declined to do just that, “particularly in light of the intervening guidance in *Bostock*.” *A.C.*, 75 F.4th at 771. The School District cannot avoid the application of *Whitaker* and *A.C.* here.

The lower court correctly relied on *Whitaker* to enjoin the School District from prohibiting Doe from using the girls’ restroom at school or from punishing her for doing so. As the court properly determined, *Whitaker* already concluded that Title IX prohibits school policies that prevent transgender students from using the bathroom that aligns with their gender identity, regardless of whether a gender-neutral alternative is available. *Whitaker* also concluded that unsubstantiated privacy claims were inadequate to withstand scrutiny under the Equal Protection Clause. *See Doe*, 2023 WL 4505245, at *6.

Further, the court recognized that the facts presented here are not meaningfully different than those in *Whitaker*. *See id.* The plaintiffs in both cases are transgender students. Both plaintiffs are under the care of a mental health professional and diagnosed with gender dysphoria. For years before suing their respective School Districts, both plaintiffs consistently identified with and presented themselves as a member of the sex opposite to that to which they were designated at birth. Both plaintiffs experienced similar harms from their school denying them access to bathrooms consistent with their gender identity: missing class time and experiencing anxiety, depression, and stigma-

tization. And, importantly, both plaintiffs used the bathroom consistent with their gender identity for a time—six months in *Whitaker*, and three years here—without incident or evidence of threats to any student’s privacy. Compare *Whitaker*, 858 F.3d at 1040-42, 1052, with *Doe*, 2023 WL 4505245, at *8. The court carefully considered the School District’s attempted distinctions with *Whitaker* (see Br. at 16-17) and concluded that they are all immaterial.⁴² See *Doe*, 2023 WL 4505245, at *6-8. In short, those purported distinctions do not change the fact that the School District’s policy “depriv[es] plaintiff of a basic human need that is central to her identity.” *Id.* at *8.

Given such similar facts between the two cases, the district court properly applied *Whitaker* in holding that Doe had demonstrated a likelihood of success on the merits of her claim that the School District discriminated against her on the basis of sex in violation of Title IX and the Equal Protection Clause. *Doe*, 2023 WL 4505245, at *9; see *Whitaker*, 858 F.3d at 1050, 1054. And this Court’s decision in *A.C.* further reinforces that result. In *A.C.*, this Court rejected an invitation to revisit *Whitaker* and reiterated that “discrimination against transgender persons is sex discrimination for Title IX

⁴² For example, the district court properly found that the age difference between Doe and the plaintiff in *Whitaker* was not material: “girls in the fifth and sixth grades [in the School District] use the bathroom in the same manner as the high-school student in *Whitaker*: by entering a stall and closing the door.” *Doe*, 2023 WL 4505245, at *6.

purposes.” 75 F.4th at 769. This Court also reaffirmed the principle that unsubstantiated privacy claims are inadequate to withstand scrutiny under the Equal Protection Clause. *See id.* at 772-73. Under *Whitaker* and *A.C.*, the School District here plainly and unlawfully discriminates based on sex. It does not and cannot explain its reasons for excluding Doe from using the bathrooms that align with her gender identity without referencing Doe’s “sex” or conformity with it. *See id.* at 769; *Whitaker*, 858 F.3d at 1049, 1051.

Consistent with *Whitaker* and *A.C.*, other courts, including the Supreme Court in *Bostock v. Clayton County*, have found that gender identity discrimination is necessarily sex discrimination.⁴³ *See* 140 S. Ct. at 1741-42, 1745-47; *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing cases). As the Supreme Court explained, discriminating against a person for being transgender 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

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).

based on sex—i.e., she would not be treated differently than other females if not for the fact that her designated sex at birth was male. *Id.* In reaching its conclusion, the Supreme Court acknowledged that “transgender status” is a distinct concept from “sex,” but observed that sexual harassment and discrimination based on motherhood are also distinct concepts that, unquestionably, still qualify as sex discrimination. *Id.* at 1742, 1746-47.

Applying much the same reasoning as in *Bostock*, courts have correctly recognized that Title IX’s bar against sex discrimination prohibits policies that, like the School District’s policy here, bar transgender students from using the bathroom that aligns with their gender identity. As these courts have correctly explained, the discriminator is necessarily referring to an individual’s sex assigned at birth to deny access to a bathroom that aligns with their gender identity. *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-separated spaces that align with their gender identity does 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 Thus, a policy like the School District’s that denies a transgender girl access to the girls’ bathroom violates Title IX’s prohibition against sex discrimination because it treats the transgender girl differently than other students who identify as girls, simply because of the sex she was assigned at birth. The district court did not err in reaching the same conclusion here.

The School District’s policy needlessly denies Doe 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 Doe, and forces them either to forgo restroom use or to choose between two other detrimental options: using common restrooms that do not align with their gender 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 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

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).

that single-user restrooms are even available and equally convenient.⁴⁵ *See Doe*, 2023 WL 4505245, at *7.

Contrary to the arguments of the School District (*see, e.g.*, Br. at 19-28), there is no 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 require separation of the enumerated facilities exclusively on “physical and anatomical differences” (*see, e.g.*, Br. at 19). Neither Title IX nor its implementing regulations define “sex” in such terms. Title IX’s statutory language broadly prohibits discrimination on the basis of sex, 20 U.S.C. § 1681(a), and courts—including the U.S. Supreme Court—have uniformly recognized that discrimination based on gender identity is sex discrimination (*see supra* at 22-23). For this reason, this fundamental legal conclusion would not permit a student who was assigned male at birth and identified as male to use the girls’ bathroom simply because he wanted to, as the School District has mistakenly asserted. *See* Br. at 2, 25. The School District’s interpretation of 34 C.F.R. § 106.33 is accordingly unreasonable and must fail. *See United States v. Larionoff*, 431 U.S. 864, 873

⁴⁵ The same concerns are not posed by the privacy-enhancing measures described above (*see supra* at 14-17), 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.

(1977) (“[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated.”); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (a regulation that “operates to create a rule out of harmony with the statute” is “a mere nullity”).

Title IX and its implementing regulations require the School District not to discriminate against students based on transgender status, regardless of whether they are in a classroom, bathroom, or other location at school. As the amici States’ successful experiences demonstrate (see *supra* at 14-17), schools may continue to have sex-separated restrooms while permitting transgender students to use the bathroom that matches their gender identity. And under those circumstances, female students still use the girls’ restrooms and male students still use the boys’ restrooms.

For similar reasons, the School District’s bathroom 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); see also *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 68 (2001) (the Equal Protection Clause bars a decision built on stereotypes and a “frame of mind resulting from irrational or uncritical analysis”).

The policy at issue here falls squarely into this category. As the district court noted, “plaintiff used the girls’ bathroom for nearly *three years* without incident” and “the school has not presented evidence that plaintiff’s presence in the girls’ restroom has ever resulted in the invasion of any student’s privacy.” *Doe*, 2023 WL 4505245, at *8. And as the district court further emphasized, “the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized,” and inclusive policies have not resulted in “the demise of gender-segregated facilities in schools.” *Id.* (quotation marks omitted).

In contrast, the full evidentiary record shows that the harm the policy causes to Doe is real and irreparable. When Doe’s school informed her that she would have to either use a bathroom separate from other children or use the boys’ bathroom when she is not a boy, Doe “became extremely distressed and upset and began having thoughts of self-harm.” *Id.* at *7 (quotation marks omitted). The School District’s bathroom policy stigmatized and ostracized Doe, diminishing her academic motivation and ability to learn and potentially exacerbating Doe’s gastrointestinal issues. *Id.* The district court recognized that in the Seventh Circuit, “physical, psychological, and educational harms such as these are irreparable and that monetary damages would be an

inadequate remedy.” *Id.* 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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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Oren L. Zeve, 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 6,388 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ Oren L. Zeve