

19-1952

United States Court of Appeals for the Fourth Circuit

GAVIN GRIMM,

Plaintiff-Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia at Newport News

**BRIEF FOR THE STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAII, 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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INTERESTS OF AMICI

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, submit this brief in support of plaintiff-appellee Gavin Grimm. The amici States strongly support the right of transgender people—individuals whose gender identity differs from their sex assigned at birth—to live with dignity, be free from discrimination, and have equal access to education, employment, housing, public accommodations, and other necessities of life. Discrimination against transgender people has no legitimate basis, and serves only to injure a group that is feared for being different. Such discrimination harms transgender people at school, at work, and in other settings, causing tangible economic, educational, emotional, and health consequences.

To prevent these harms, nearly all of the amici States have adopted policies to protect transgender people against discrimination. The amici States' shared experience demonstrates that 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 financial costs. The amici States also share a strong interest in seeing that federal law is properly applied to protect transgender people from discrimination, so that our transgender residents do not experience indignity and discrimination when traveling to other States for work, educational, or recreational purposes.

The Gloucester County School Board's (Board) policy denying transgender students access to the same common restrooms that other students may use, and its refusal to update Grimm's school records in accordance with the gender marker stated on his valid birth certificate, violate the Constitution's guarantee of equal protection. The factual record in this case—which is consistent with the experience of the amici States—demonstrates that the Board's actions do not advance any legitimate governmental interest in protecting personal privacy or ensuring records' accuracy, but rather are premised on speculative and unfounded concerns that do not justify treating Grimm and others like him differently. Because the sole function of the challenged actions is to stigmatize transgender students like Grimm, they violate equal protection under any level of scrutiny.

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 They serve our communities as police officers, firefighters, doctors, teachers, and more. Transgender people have been part of cultures worldwide “from antiquity to the present day,” and psychologists recognize that being transgender is natural and not any form of pathology.³ Being transgender does not in itself inhibit a person’s ability to contribute to society.

¹ Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States* 2 (Williams Inst. Jan. 2017) (internet). (For authorities available on the internet, full URLs appear in the Table of Authorities.)

² Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* 3-4 (Williams Inst. June 2016) (internet).

³ Am. Psychol. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1-3 (3rd ed. 2014) (internet); see also APA, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70 Am. Psychol. 832, 834-35 (2015).

Unfortunately, transgender people often experience harsh discrimination that limits their ability to realize their potential. See *infra* at 6-9. States accordingly began providing explicit civil-rights protections for transgender people nearly a quarter century ago. Today, twenty States and the District of Columbia offer such protections.⁴ And at least 225

⁴ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220, 221.5(f) (education and school restrooms); Cal. Gov't Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955(a) (housing); Cal. Penal Code § 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 tit. 6, § 4501 (public accommodations); *id.* § 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.* 5/1-103(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). **Maine:** Me. Rev. Stat. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code, State Gov't § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing). **Massachusetts:** Mass. Gen. Laws Ann. 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 Mass. Acts ch. 134 (2016)). **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. § 118.100

local governments prohibit discrimination based on gender identity.⁵ As the experience of these jurisdictions shows, policies ensuring equal access to public facilities for transgender people—including access to common

(housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Jersey:** N.J. Stat. Ann. §§ 10:5-4, 10:5-12 (public accommodations, housing); *id.* § 10:5-5(rr) (definition); *id.* § 18A:36-41 (directing state department of education to issue guidance to local school districts ensuring equal treatment for transgender students). **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); N.Y. Comp. Codes R. & Regs. tit. 9, § 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(7) (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.* § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code § 28A.642.010 (education); *id.* § 49.60.040(26) (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 Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (last updated Jan. 28, 2018) (internet).

restrooms consistent with their gender identity—promote safe and inclusive communities, workplaces, and schools: a benefit to all.

A. Transgender People Face Pervasive and Harmful Discrimination.

As the Supreme Court has recognized, “invidious discrimination in the distribution of publicly available goods, services, and other advantages cause[s] unique evils.” *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). Transgender students experience levels of discrimination, violence, and harassment that are much higher than those experienced by non-transgender students.⁶ In the 2015 National Transgender Discrimination Survey (NTDS), the largest survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12 reported experiencing harassment by students, teachers, or staff.⁷ More

⁶ Joseph G. Kosciw, *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools* xxiii (Gay, Lesbian & Straight Educ. Network 2014) (internet); see also Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools* xi (Gay, Lesbian & Straight Educ. Network 2009) (internet).

⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat’l Ctr. for Transgender Equality Dec. 2016) (internet).

than half of transgender students (54%) reported verbal harassment, almost a quarter reported suffering a physical attack (24%), and more than one in eight reported being sexually assaulted (13%).⁸ Another 2015 survey showed that three-fourths of transgender students felt unsafe at school because of their gender expression.⁹ More than a quarter of transgender respondents to a survey of LGBT teenagers in late December 2016 and early January 2017 reported being bullied or harassed within the past thirty days.¹⁰

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

⁸ *Id.* at 132-34.

⁹ 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 (Gay, Lesbian & Straight Educ. Network 2016) (internet).

¹⁰ Human Rights Campaign Found., *Human Rights Campaign Post-Election Survey of Youth* 8 (2017) (internet).

The 2015 NTDS revealed that nearly 20% of transgender students left a K-12 school because the mistreatment was so severe.¹¹ In another national survey, 46% of transgender students reported missing at least one day of school in the preceding month because they felt unsafe or uncomfortable there.¹² The same survey found that 40% of students who experienced frequent verbal harassment because of their gender expression did not plan to continue on to college.¹³

B. Gender-Identity Harassment Presents Significant Health Risks.

Gender-identity harassment—including denial of access to appropriate restroom facilities—can have serious health consequences, including death. Transgender people attempt suicide at a rate nearly nine times that of the general population.¹⁴ Forty percent of respondents to the 2015 NTDS had attempted suicide, and twice that number (82%) had seriously thought about killing themselves.¹⁵ A 2016 study found

¹¹ James et al., *2015 U.S. Transgender Survey, supra*, at 135.

¹² Greytak et al., *Harsh Realities, supra*, at 14.

¹³ *Id.* at 27 fig. 16.

¹⁴ James et al., *2015 U.S. Transgender Survey, supra*, at 114.

¹⁵ *Id.*

that transgender people who had been denied access to bathroom facilities were approximately 20% more likely to have attempted suicide than were other transgender people.¹⁶

Suicide is not the only health risk. For example, Grimm testified that the Board's refusal to allow him to use the appropriate restroom facilities caused him to diminish his fluid intake, or avoid urinating during the school day altogether, which led to frequent and painful urinary tract infections. (Joint Appendix (J.A.) 118, 133.)

Research shows that Grimm's experience is not unique. Almost 70% of the transgender students surveyed in one study had avoided school restrooms and other spaces 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

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) (internet).

¹⁷ Kosciw et al., *2015 National School Climate Survey*, *supra*, at 86.

¹⁸ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, J. of Pub. Mgmt. & Soc. Policy 65, 75 (2013).

C. The Amici States' Experience Confirms That Protecting Transgender People From Discrimination Yields Broad Benefits Without Compromising Privacy or Safety, or Imposing Significant Costs.

As noted above, twenty States and at least 225 localities provide civil-rights protections to transgender people—including by requiring that transgender individuals be permitted to use restrooms consistent with their gender identity. These provisions help ease the stigma transgender people often experience, with positive effects for their educational, work, and health outcomes. Such provisions thus promote compelling interests in “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Roberts*, 468 U.S. at 626. And the provisions 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 students had significantly lower grade-point averages than other transgender students.¹⁹

Policies protecting transgender students, including by allowing them to use common restrooms consistent with their gender identity, also can reduce the health risks facing those students. 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.²⁰ Clear Creek Independent School District in Houston, Texas, allowed a transgender boy to use the boys' bathroom at school after learning he was trying to "hold it in' for the entire school day."²¹

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

¹⁹ Greytak et al., *Harsh Realities*, *supra*, at 27 fig. 15.

²⁰ Cal. Assemb. Comm. on Educ., Bill Analysis: Assemb. Bill No. 1266, at 5 (2013-2014 Reg. Sess.) (internet).

²¹ Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Tex. Trib., June 14, 2016 (internet).

rooms.²² Indeed, the experience of school administrators in thirty-one States and the District of Columbia shows that safety concerns are unfounded, as are concerns that students will pose as transgender simply to gain improper restroom access.²³ The Board's speculation that student safety will suffer if transgender people are treated fairly is contrary to the actual experience of States and localities where nondiscrimination is already the law.²⁴

For instance, a former county sheriff noted that Washington State has protected gay and transgender people from discrimination for a

²² Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan, at 20, 21, Sept. 1, 2016 (internet).

²³ Br. of Amici Curiae School Administrators from Thirty-One States and the District of Columbia in Supp. of Resp't (School Administrators Br.), *Gloucester Cty. Sch. Bd. v. G.G.*, 2017 WL 930055, at *14-16 (S. Ct. Mar. 2, 2017) (No. 16-273).

²⁴ 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 twelve 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).

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.”²⁵ In 2013, the Los Angeles Unified School District—the second largest in the country, with more than 600,000 K-12 students²⁶—reported to the California Legislature that the district had “no issues, problems or lawsuits as a result of the [2004] policy” allowing students to use restrooms corresponding to their gender identity.²⁷ And the Massachusetts Chiefs of Police Association reported that allowing people to use public bathrooms consistent with their gender identity “improve[s] public safety.”²⁸ Meanwhile, in Texas, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those cities’

²⁵ David Crary, *Debate Over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib., May 10, 2016 (internet).

²⁶ L.A. Unified Sch. Dist., *About the Los Angeles Unified School District* (internet).

²⁷ Cal. Sen. Comm. on Educ., Bill Analysis: Assemb. Bill No. 1266, at 8 (2013-2014 Reg. Sess.) (internet); L.A. Unified Sch. Dist., District Information (internet).

²⁸ Letter from Chiefs William G. Brooks III & Bryan Kyes to State Senator William N. Brownsberger & State Representative John V. Fernandes (Oct. 1, 2015) (internet).

policies allowing transgender people to use restrooms consistent with their gender identity.²⁹

On the other hand, discriminatory restroom policies 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.³⁰ (See J.A. 110.)

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

States’ experiences show that nondiscriminatory policies have not generated serious privacy issues, nor imposed untoward costs on schools or employers. The risk that students will see others’ intimate body parts,

²⁹ 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 Sunday, *Transcript: Gov. McCrory on Showdown over NC’s Transgender Bathroom Law* (May 8, 2016) (internet) (no known cases of people in North Carolina committing crimes in bathrooms under the cover of protections provided to transgender people).

³⁰ James et al., *2015 U.S. Transgender Survey*, *supra*, at 226-27; 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).

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 transgender or not) can be addressed—and are being addressed—by increasing privacy options for all students, without singling out transgender people for stigmatizing differential treatment.

Employers and 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, school districts 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

³¹ Wash. State Superintendent of Pub. Instruction, *Prohibiting Discrimination in Washington Public Schools* 30 (Feb. 2012) (internet); see Wash. State Human Rights Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-Segregated Facilities* 3 (Jan. 15, 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”).

concerns “the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”³²

POINT II

THE EQUAL PROTECTION CLAUSE PROHIBITS THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

As the Supreme Court has long recognized, the Constitution’s guarantee of 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). “[V]ague, undifferentiated fears” about a class of persons further no legitimate state interest, and cannot be used to “validate” a policy of different treatment. *Id.* at 449.

The present matter is a case in point: the Board’s actions—in denying Grimm access to common restrooms consistent with his gender identity, and refusing to update his school records to correspond to the gender marker on his birth certificate—serve only to stigmatize Grimm and other transgender students, and do not further any legitimate state

³² Wash. State Superintendent, *Prohibiting Discrimination*, *supra*, at 30.

interests, such as promoting personal privacy or accurate recordkeeping. The district court thus correctly concluded that the challenged actions violated equal protection.³³

As a general matter, the Board's exclusionary restroom policy needlessly denies Grimm a privilege most people take for granted—the ability to use a public restroom consistent with their lived experience of their gender. Transgender people like Grimm are singled out and forced either to forgo restroom use or to choose between two other detrimental and demeaning options: using common restrooms corresponding to their sex assigned at birth or using single-use restrooms. The first option transgresses a core aspect of transgender people's identities, subjects

³³ For the reasons described in Grimm's brief (Br. at 45-50) and herein, the district court also correctly held that the Board's actions violated Title IX's prohibition against discrimination and harmed Grimm, including by excluding him from and denying him the benefits of the Board's education program "on the basis of sex." See 20 U.S.C. § 1681(a). As the Supreme Court explained in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989), disparate treatment based on a perceived deviation from gender stereotypes constitutes sex discrimination. In this case, the Board's differential treatment of Grimm on the basis that his gender identity differed from his gender assigned at birth necessarily relied on impermissible gender stereotypes. The district court therefore rightly held that the Board's disparate treatment of Grimm constituted "*per se*" unlawful sex discrimination in violation of Title IX. (J.A. 53.) The Court should affirm on this basis as well.

them to potential harassment (*see* J.A. 110) and violence, and violates medical treatment protocols (*see* J.A. 112-113). The second option also may have stigmatizing effects—like “outing” individuals as transgender in settings where they could be exposed to harassment or danger. (*See* J.A. 110, 113-114, 117.)

The amici States’ experiences show that legitimate privacy concerns may be addressed through a variety of cost-effective options that improve privacy for all restroom users without discriminating against transgender people. These measures include installing or expanding privacy partitions as well as offering separate restrooms to all who desire them. These steps—like those implemented at Gloucester High School (J.A. 1010-1020)—provide all students desiring additional privacy the option to use a stall or one of the single-stall restrooms, *see Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017), without singling out or stigmatizing transgender students.

The factual record in this case demonstrates—consistent with the experiences of the amici States—that the privacy concerns relied on by the Board to justify its discriminatory restroom policy are “based upon sheer conjecture and abstraction.” *Id.* at 1052. As the district court noted,

Grimm used the male restrooms at his high school for seven weeks without incident, and the Board received no complaints of claimed privacy invasions stemming from Grimm's *actual* use of the male bathroom. (See J.A. 1186.) Other courts have made similar observations.³⁴ This is consistent with the experiences of the amici States, where anti-discrimination protections have been in place, and the supposed privacy concerns relied on by the Board simply have not materialized.³⁵ Nor can the Board explain how the privacy interest of any student was actually impacted by the manner in which Grimm used the common male bathrooms at his high school: by entering a stall and shutting the door, since he could not use urinals. (See J.A. 1187.)

³⁴ See, e.g., *Whitaker*, 858 F.3d at 1052 (transgender male student used male restrooms for six months without complaints from other students); *Adams by & through Kasper v. School Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1314 (M.D. Fla. 2018) (no complaints or problems in six weeks when transgender boy used common male bathrooms at school).

³⁵ See *supra* at 10-14. See School Administrators Br. at *11-13; *Adams*, 318 F. Supp. 3d at 1314 (noting "research and experience" of school officials from other counties similarly "revealed no privacy concerns when transgender students used the restrooms that matched their gender identity").

The Board has not demonstrated why any impingement on privacy concerns cannot be accommodated by affording privacy to the person who desires it. As numerous courts have observed, no additional or unique privacy concerns are implicated by a transgender person's use of common restrooms beyond those already present when any other student—transgender or not—uses those same facilities. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 532-33 (3d Cir. 2018); *Whitaker*, 858 F.3d at 1052; *Adams*, 318 F. Supp. 3d at 1314; *Board of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 875 (S.D. Ohio 2016). Here, excluding Grimm from the common male restrooms solely on the basis of his transgender status “does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy.” *See Whitaker*, 858 F.3d at 1052.

Similarly irrational is the Board's purported reliance on the gender markers on a student's birth certificate (*see* J.A. 459) in determining his or her “biological gender” for purposes of administering the bathroom policy. The distinction fails to advance any purported interest in protecting “bodily privacy” because it is premised on the flawed assumption that the gender marker on a person's birth certificate corresponds to that person's

“anatomical and physiological” gender. *See* Br. for Appellant at 50, 53. But States have widely differing standards governing when individuals may change the gender designation on their birth certificates from the gender assigned to them at birth. Some of the amici States permit changes to gender markers on birth certificates without any gender-affirming surgery, while other States do not permit gender amendments to birth certificates even after such surgery has altered a person’s physical anatomy.³⁶ Administration of the Board’s policy also creates irrational distinctions between transgender individuals who were born in the same State and who have the same physical anatomy, based solely on whether an individual has obtained an amended birth certificate. Because an individual’s “physiological” gender may have little relationship to the gender marker on his or her birth certificate, relying on birth certificate

³⁶ *Compare New York:* N.Y. Dep’t of Health, Bureau of Vital Records, Letter to Applicants (Sept. 28, 2015) (internet); **Washington:** Wash. Dep’t of Health, *Sex Designation Change on a Birth Certificate* (internet); **California:** Cal. Health & Safety Code § 103426; **New Jersey:** N.J. Stat. Ann. § 26:8-40.12 *with Tennessee:* Tenn. Code Ann. § 68-3-203(d) (“The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”).

gender designations in administering the restroom policy is simply irrational and does not further any privacy interests whatsoever.

Finally, as the district court found, the Board's continued refusal to update Grimm's school records to reflect his male gender consistent with his birth certificate is "egregious" and plainly discriminatory. (*See* J.A. 1182-1183.) Here, the Board's insistence that Grimm's records cannot be updated because of purported concerns about the validity and authenticity of his birth certificate is wholly irrational in light of the undisputed attestation to the contrary by the Virginia state official responsible for administering Virginia's vital records laws (*see* J.A. 982). Furthermore, as the district court recognized, the Board's ongoing failure to update his educational records causes Grimm harm as he seeks employment, because he must show a new employer a document that "marks him as different" from other young men. (*See* J.A. 1184.) The 2011 NTDS found that transgender people report "[n]ear universal harassment on the job," including verbal harassment, intrusive questions about surgical status,

denial of access to restrooms, and physical and sexual assault.³⁷ The stress of job-related discrimination and harassment causes transgender workers to change or quit jobs, be frequently absent or tardy, and suffer unemployment at rates that far exceed those of the population as whole—outcomes which harm transgender people and also impair the economies of their States.³⁸ For jobs that require Grimm to provide his transcript, the Board's actions unjustifiably expose him to further harm and discrimination as he moves forward with his life and career.

In sum, the policies and actions challenged in this case, when “weighed against the facts of the case and not just examined in the abstract,” *Whitaker*, 858 F.3d at 1052, do not further any legitimate governmental interests, but instead were impermissibly motivated by

³⁷ Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51, 56 (Nat'l Ctr. for Transgender Equal. & Nat'l Gay & Lesbian Task Force 2011) (internet).

³⁸ *Id.* at 55, 68; Taylor N.T. Brown & Jody L. Herman, *The Cost of Employment Discrimination Against Transgender Residents of Florida* 1-3 (Williams Inst. Apr. 2015) (internet); Jody L. Herman, *The Cost of Employment and Housing Discrimination against Transgender Residents of New York* 1-5 (Williams Inst. Apr. 2013) (internet); Crosby Burns et al., *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers* 3-5, 19-21 (Ctr. for Am. Progress & Am. Fed'n of State, Cty. & Mun. Emps. Sept. FSCME 2012) (internet).

“irrational prejudice” against transgender persons like Grimm. *See Cleburne*, 473 U.S. at 450. Accordingly, the Board’s actions violate the Equal Protection Clause.

CONCLUSION

This Court should affirm the judgment of the district court.

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November 25, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, 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 4,787 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ William P. Ford

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Court's CM/ECF system on November 25, 2019. I certify that all parties and counsel of record in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 25, 2019
New York, NY

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