

**IN THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

THE STATE OF ARKANSAS; THE STATE OF MISSOURI; THE STATE OF
IOWA; THE STATE OF NEBRASKA; THE STATE OF NORTH DAKOTA; THE
STATE OF SOUTH DAKOTA; A.F., a minor, by Sara Ford, her mother,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in
his official capacity as Secretary of the United States Department of Education;
CATHERINE E. LHAMON, in her official capacity as Assistant Secretary for Civil
Rights at the United States Department of Education; RANDOLPH WILLS, in his
official capacity as Deputy Assistant Secretary for Enforcement at the United States
Department of Education,
Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Arkansas (No. 4:24-cv-636-RWS)

**BRIEF OF NATIONAL WOMEN’S LAW CENTER AND 22 GENDER
JUSTICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANTS-APPELLANTS FOR REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* National Women's Law Center, Bend the Arc: A Jewish Partnership for Justice, Clearinghouse on Women's Issues, Collective Power for Reproductive Justice, Desiree Alliance, Education Law Center Pennsylvania, Equality California, If/When/How: Lawyering for Reproductive Justice, National Association of Social Workers, National Network to End Domestic Violence, National Organization for Women Foundation, National Women's Political Caucus, People For the American Way, Planned Parenthood Federation of America, Public Counsel, Reproaction, SisterLove, Inc., Stop Sexual Assault in Schools (SSAIS), The Trevor Project, The Womxn Project, Tom Homann LGBTQ+ Law Association, Women's Law Project, and Women's Bar Association of the District of Columbia state they do not have a corporate parent and are not owned in whole or in part by any publicly held corporation.

Dated: December 9, 2024

/s/ Kaitlyn Golden
Kaitlyn Golden

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INTEREST OF AMICI CURIAE¹

This brief is filed by *Amici* National Women's Law Center and 22 additional organizations committed to gender justice, including both the rights of survivors and LGBTQI+ people, in support of the Title IX Rule at issue here.

National Women's Law Center (NWLC) is a nonprofit legal organization dedicated to advancing and protecting women's legal rights and the right to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity in education for women and girls through enforcement of Title IX, the Constitution, and other laws. NWLC has led briefs in numerous cases affirming that protections against sex discrimination include protections for LGBTQI+ students. NWLC is committed to ensuring all women and girls, including transgender women and girls, are protected from sexual violence.

Additional *amici* are:

- Bend the Arc: A Jewish Partnership for Justice
- Clearinghouse on Women's Issues
- Collective Power for Reproductive Justice
- Desiree Alliance
- Education Law Center Pennsylvania
- Equality California
- If/When/How: Lawyering for Reproductive Justice
- National Association of Social Workers
- National Network to End Domestic Violence
- National Organization for Women Foundation

¹ No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund this brief, and no person other than *amici curiae*, their members, and their counsel contributed money to fund this brief. All parties have consented to the filing of this brief.

- National Women’s Political Caucus
- People For the American Way
- Planned Parenthood Federation of America
- Public Counsel
- Reproaction
- SisterLove, Inc.
- Stop Sexual Assault in Schools (SSAIS)
- The Trevor Project
- The Womxn Project
- Tom Homann LGBTQ+ Law Association
- Women’s Law Project
- Women’s Bar Association of the District of Columbia

Statements of interest for additional *amici curiae* are attached as Appendix A.

INTRODUCTION

Transgender students in America today are under attack from many directions. At school, they face higher rates of discrimination, including higher rates of sexual and other forms of violence, than their cisgender counterparts. And despite this reality, state lawmakers, including those in Appellee states, have enacted dozens of laws specifically targeting transgender students that strip them of protections needed to be safe in school, including laws preventing access to gender-aligned restrooms. These laws have been found to cause an increased risk of harm, including an increased risk of suicide for transgender youth.² Simply put, repeated attacks on transgender students from a range of fronts—including their own state legislatures—are taking a dangerous and potentially life-threatening toll on them.

² Wilson Lee et al., *State-Level Anti-Transgender Laws Increase Past-Year Suicide Attempts Among Transgender and Non-Binary Young People in the USA*, 8 Nature Hum. Behavior 2096 (2024), <https://tinyurl.com/3jejkpwv>.

Recognizing the enormous risk of harm to transgender students in school, the Department of Education (the “Department”) promulgated the final rule at issue. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024) (the “Rule”). The Rule clarifies the scope of prohibited discrimination under Title IX, recognizing that discrimination because of sex necessarily includes discrimination tied to sexual orientation and gender identity. Among other things, the Rule clarifies that schools cannot discriminate on the basis of sex by treating students in a manner inconsistent with their gender identity. Thus, schools must permit transgender students to use school facilities, such as locker rooms and restrooms, consistent with their gender identity. 89 Fed. Reg. at 33820.

The Rule aligns with Title IX’s statutory text and the statute’s history and broad purpose. It also comports with numerous court decisions addressing the scope of sex discrimination under Title IX—decided both before and after the Supreme Court’s ruling in *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* held that the federal protections against sex discrimination include protections against discrimination based on sexual orientation and gender identity under an analogous workplace civil rights law, Title VII. *Id.* at 693. In promulgating the Rule, the Department thoroughly considered this Supreme Court precedent, other Title IX precedents, the statutory text and history, concerns from commenters, and a lengthy record.

Further, the Rule is critical to ensuring that transgender students are safe from sex discrimination at school. Repeated instances of sex discrimination, including denial of access to gender-aligned restrooms, expose transgender youth to a range of harms, including negatively impacting their physical and mental health and leading to lower educational outcomes. Research confirms that when transgender students live in states with laws and policies that protect transgender youth, they are less likely to experience bullying.³ Moreover, no credible evidence suggests that transgender students' use of school facilities consistent with their affirmed gender injures *any* student. Indeed, hundreds of school districts have adopted non-discrimination policies that allow transgender students to use restrooms aligned with their gender identity while maintaining the privacy and safety of all students.⁴

BACKGROUND

In developing the Rule, the Department carefully evaluated a range of views, including allegations that nondiscrimination policies could impact some students' privacy or safety interests. *See* 89 Fed. Reg. at 33817-18. The Department addressed

³ Ryan Watson et al., *LGBTQ State Policies: A Lever for Reducing SGM Youth Substance Use and Bullying*, Drug & Alcohol Dependence (Apr. 1, 2021), <https://tinyurl.com/2v5xrymz>.

⁴ Movement Advancement Project & GLSEN, *Separation and Stigma: Transgender Youth & School Facilities* 4-5 (2017), <https://tinyurl.com/6kvvrak8>. Indeed, federal courts of appeal have held that such policies do not conflict with ensuring the privacy and safety of all students. *See, e.g., Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

the comments in depth, including discussion of relevant research and case law. *Id.* at 33818-21. The Department considered Appellees’ concerns, explaining in detail why protections against discrimination based on sexual orientation and gender identity fit within Title IX’s text and purpose, *see, e.g., id.* at 33804-06, 33809-10. The Department also correctly concluded that “the mere presence of a transgender person in a single-sex space” does not compromise “anyone’s legitimate privacy interest” or pose a safety risk to cisgender students. *Id.* at 33820.

There is a complete lack of evidence that ensuring transgender students’ access to facilities aligning with their gender identity would compromise cisgender students’ safety or privacy. *Id.* Nonetheless, the Department identified potential nondiscriminatory measures to address commenters’ safety and privacy worries. *Id.* The Department highlighted that sex harassment, including sexual violence, is already illegal and schools can and should take steps to prevent and address harassment for all students. And the Department noted that recipients of federal funds could offer “single-occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason.” *Id.* The Department also considered comments submitted by sexual-violence-prevention experts urging that, to best safeguard student safety, the Department should confirm that transgender students should not be excluded from school facilities based on their gender identity. *Id.* at 33808-09.

The Department also discussed the evidence of harm to transgender students when exclusionary policies are in place. *Id.* at 33818. The Department evaluated the

concerns of commenters “from more than 40 states in all regions” of the country that noted “high levels of sex discrimination, including sex-based harassment, against LGBTQI+ students and school employees and the negative effects of such discrimination.” *Id.* at 33808. Transgender students shared their experiences of being “threatened and physically attacked,” and the “lasting anxiety and fear” that these experiences cause. *Id.* at 33480. Commenters explained that the Rule could “alleviate threats, bullying, and harassment that students and employees experience in some schools.” *Id.* at 33801.

Despite the Department’s careful consideration of commenters’ concerns, and the lack of evidence of any privacy or safety concerns for cisgender students, a group of states and a minor student (“Appellees”) challenged the Rule, alleging incorrectly that Title IX’s mandate to prevent sex discrimination does not encompass discrimination based on sexual orientation and gender identity. Appellees also asserted that the Rule infringes on the privacy and safety interests of cisgender students.

The district court granted Appellees’ preliminary injunction request, erroneously finding Appellees had a “fair chance” of prevailing on the merits of their argument that “‘sex’ means biological sex.” R. Doc. 54, at 35, Add. 35. The district court named a few reasons for its incorrect conclusion: First, it mistakenly found that *Bostock*’s reasoning should not extend to Title IX because of the different sources of Congressional authority used to enact Title VII and Title IX, namely the Commerce

Clause versus the Spending Clause. *Id.* at 37-38. Second, the district court pointed to Title IX’s exceptions that “explicitly allow discrimination based on biological sex” as one way the statute was different from Title VII, *id.* at 38, and the court suggested that Title VII applies to workplace civil rights protections, while Title IX provides protections for students against sex discrimination in education, *id.* at 39.

Amici submit this amicus brief in strong support of the Title IX Rule, and in support of the many transgender students who would be harmed if this Rule is not in effect. *Amici* seek reversal of the district court’s opinion.

ARGUMENT

I. The District Court’s Decision Deviates from the Text, Purpose, and Legislative History of Title IX and Established Precedent.

A. The decision does not comport with the text, purpose, or legislative history of Title IX.

The district court’s opinion is partially premised on the idea that one of the “principal purposes” of Title IX was to “root out discrimination against women in education.” R. Doc. 54, at 35, Add. 35. But such a limited reading of Title IX is unmoored from both its text and intended wide-ranging mission. In fact, the statute provides that “[n]o person” should be subject to sex discrimination in an education program or activity. 20 U.S.C. § 1681. This broad language effectuates the statute’s equally broad purpose of eradicating all forms of invidious sex discrimination in educational programs.

The Supreme Court has repeatedly recognized the expansive nature of Title IX’s text. More than forty years ago, in *North Haven Board of Education v. Bell*, the Court recognized that, to “give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.” 456 U.S. 512, 521 (1982) (internal quotation omitted); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (“Congress gave the statute a broad reach.”).

The Supreme Court has acknowledged that sweeping language in “statutory prohibitions often go[es] beyond the principal evil [that prompted their enactment] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). As Justice Scalia wrote for a unanimous Court, even though “[m]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” Title VII’s broad language extended to that “reasonably comparable evil[.]” *Id.*; *see also Bostock*, 590 U.S. at 717. Indeed, male students can and do bring claims under Title IX, including in this Circuit. *See, e.g., Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 865 (8th Cir. 2020) (male student had pleaded plausible claim that University discriminated against him on the basis of sex). Thus, despite the arguments to the contrary, the “broad reach” of Title IX’s proclamation that “[n]o person” be subject to sex discrimination encompasses discrimination against *all* students regardless of their sex, including men and including transgender students.

And selective dictionary definitions suggesting the term sex only means “biological distinctions” do not compel the conclusion that Title IX is similarly limited in its protections. *See infra* Sec. I.B.

The district court did not point to anything within the text or legislative history of Title IX to suggest the term sex was meant to refer only to “biological sex”—because it could not. Nothing in the text or legislative history supports this reading. For example, the court pointed to a definition that it claimed suggested sex meant the “biological distinctions between males and females.” R. Doc. 54, at 35, Add. 35, but the definition makes no reference to any sort of “biology.”

The legislative history likewise confirms that Congress intended Title IX to offer sweeping protections. In introducing Title IX, Senator Birch Bayh, its principal sponsor, articulated that the “impact of this amendment” was meant to be “far-reaching,” 118 Cong. Rec. 5111, 5808 (1972), as it was “designed to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education.” *Id.* at 5804. Congress was specifically concerned with eradicating pernicious sex stereotyping—Senator Bayh expressly recognized that sex discrimination in education is based on “stereotyped notions,” like that of “women as pretty things who go to college to find a husband, . . . marry, have children, and never work again.” *Id.* Title IX was therefore necessary to combat the “vicious and reinforcing pattern of discrimination” based on sex stereotypes like these. *Id.*

The sex stereotyping Congress targeted in Title IX encompasses discrimination

against transgender students. Relying on broad generalizations about transgender students to exclude them from school facilities punishes them for their non-conformity with sex stereotypes associated with their sex assigned at birth—and perpetuates the rampant discrimination these students already face. Prohibiting discrimination against transgender students fits within Title IX’s sweeping protections.

B. The district court deviated from established precedent in Title IX and analogous case law.

Federal appellate courts and district courts in this Circuit have routinely concluded that federal civil rights protections include protections for LGBTQ+ people.⁵ Indeed, this Court has already addressed the issue of transgender people using school facilities that align with their gender identity under Title VII, an analogous civil rights statute. In *Cruzan v. Special School District, No. 1*, 294 F.3d 981 (8th Cir. 2002), a school district permitted a transgender female teacher to use the women’s faculty bathroom. The transgender teacher engaged in no “inappropriate conduct” and was merely present in the women’s restroom. *Id.* at 984. The Court rejected plaintiff’s argument that reasonable women “could [] find their working environment is abusive

⁵ Susan Etta Keller, *Gender-Inclusive Bathrooms: How Pandemic-Inspired Design Imperatives and the Reasoning of Recent Federal Court Decisions Make Rejecting Sex-Separated Facilities More Possible*, 23 Geo. J. Gender & L. 35, 50 (2021), <https://tinyurl.com/y5ydvnw2>. These claims echo the unfounded fears historically used to justify discrimination against other groups; courts have rejected similar arguments in the context of racial segregation. *See, e.g.*, Br. of NAACP and Asian Am. Legal Def. & Educ. Fund as *Amici Curiae* in Supp. of Resp’t at 4, *Gloucester Cnty. Sch. Bd. v. G.G.*, 580 U.S. 1168 (2017).

or hostile when they must share bathroom facilities” with a transgender woman. *Id.* Just as the presence of a transgender woman in a women’s restroom does not create a hostile work environment under Title VII, permitting transgender students to use restrooms consistent with their gender also does not create a hostile environment in an educational program or activity.

Following *Cruzan*, courts within this Circuit have repeatedly affirmed that federal civil rights laws protect transgender people. *See, e.g., Dawson v. H&H Elec. Inc.*, No. 14-cv-00583, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (explaining that plaintiff, a transgender woman, had pled sufficient facts to state a claim that the defendant discriminated against her because of her sex in violation of Title VII); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) (“Because the term ‘transgender’ describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual’s transgender status constitutes discrimination based on gender stereotyping.”).⁶ This approach is well settled in this Circuit and affirmed by the Supreme Court in *Bostock*.

Bostock held that workplace discrimination against transgender employees was discrimination “because of sex” under Title VII. 590 U.S. at 655-58. The decision recognized that “it is impossible to discriminate against a person for being homosexual

⁶ These decisions were all issued *before* the Supreme Court decided *Bostock*, which only made precedent in this area clearer.

or transgender without discriminating against that individual based on sex.” *Id.* at 660. When an employer fires an employee who is a transgender woman but tolerates the same conduct by an employee who is a cisgender woman, “the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.” *Id.*; *see also id.* at 669 (“[A]s we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”).

The Supreme Court’s reasoning in *Bostock* should extend to Title IX. This Court has recognized that Title IX is informed by Title VII. *See Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.*, which prohibits discrimination under any federally funded education program or activity.”).

Title VII and *Bostock* serve as appropriate analogues for interpreting Title IX because of the similarities in the respective statutes’ language and purpose. Both Title VII and Title IX include prohibitions on sex discrimination. *See* 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity. . . .”); 42 U.S.C. § 2000e–2 (“It shall be an unlawful

employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex[.]”). And when schools do not permit students to use school facilities, such as restrooms, consistent with their gender identity, those students are facing discrimination because of their sex. *See Bostock*, 590 U.S. at 660 (“[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”).

The district court wrongly concluded that *Bostock* should not extend to Title IX because Title IX was passed pursuant to Congress’s spending authority. R. Doc. 54, at 37, Add. 37. But Congress’s choice of legislative authority has no bearing on whether discrimination based on “sex” should hold the same meaning under both statutes. Nor do the exceptions in Title IX allowing for sex segregation afford an adequate basis to distinguish it from Title VII. *Id.* at 38, Add. 38. The Rule does not require schools to do away with sex-separated spaces. It simply ensures students can use the sex-separated restroom or locker room that aligns with their gender identity.

Courts across the country have ruled that Title IX protects against discrimination based on gender identity because such discrimination is necessarily discrimination based on sex. The Seventh Circuit has *twice* rejected policies barring transgender students from using gender-identity-aligned bathrooms on grounds the policies violated Title IX. *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 683 (2024); *Whitaker v. Kenosha Unified Sch. Dist.*

No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017). In *Whitaker*, the Seventh Circuit concluded—pre-*Bostock*—that “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.” *Whitaker*, 858 F.3d at 1049. The court recognized that “a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth,” and therefore the plaintiff was likely to prevail on a sex-stereotyping claim under Title IX. *Id.* at 1048.

Six years later, in *A.C.*, the Seventh Circuit had the opportunity to reconsider *Whitaker* following *Bostock*. The court reaffirmed its holding in *Whitaker*, namely that “discrimination against transgender students is a form of sex discrimination.” 75 F.4th at 769. The court rejected arguments that *Bostock*’s dicta refraining from addressing “sex-segregated bathrooms, locker rooms, and dress codes” demanded a different result. *Id.* at 769 (internal citation omitted). Applying *Bostock*’s reasoning, the court asked “whether our three plaintiffs are suffering negative consequences . . . for behavior that is being tolerated in male students who are not transgender.” *Id.* The answer was yes. *Id.* at 772-73.

In *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the Fourth Circuit likewise found a Title IX violation when a school denied a transgender boy the use of the boys’ restroom. *Id.* at 613-14. Although the Fourth Circuit acknowledged that students maintain privacy interests, it stressed that the “bodily

privacy of cisgender boys using the boys['] restrooms did not increase” when the plaintiff was prohibited from entering. *Id.* at 614. According to the court, the policy ignored how transgender students use restrooms aligning with their gender identity: ““by entering a stall and closing the door.”” *Id.* at 613 (quoting *Whitaker*, 858 F.3d at 1052).

Relatedly, in *Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018), addressing purported privacy concerns, the Third Circuit found that a policy allowing all students to use gender-identity-aligned facilities did not discriminate based on sex, and “therefore does not offend Title IX.” *Id.* at 535. The court determined that “the presence of transgender students in the locker and restrooms is no more offensive to constitutional or [state] law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs’ rights under Title IX.” *Id.* at 521. Rather, the Third Circuit noted, it was actually “its own form of discrimination” to require “transgender students to use single user or birth-sex-aligned facilities.” *Id.* at 530.

The Ninth Circuit also found that a policy allowing transgender students to use restrooms and locker rooms consistent with their gender identity did not violate Title IX, nor did it violate cisgender students’ Fourteenth Amendment privacy rights. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020). The court recognized that Title IX’s *allowance* of sex-segregated facilities did not mean such facilities “*must* be segregated based only on biological sex and cannot accommodate gender identity.”

Id. at 1227 (emphasis added). And, the court held, “the use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender.” *Id.* at 1229.

Here, the district court’s decision deviated from this clear line of precedent. Indeed, until the recent decisions addressing the Rule, all but one appellate court had concluded that transgender students should be permitted to use school facilities that align with their gender identity. There have been no intervening changes in law that justify a different result.

II. Barring Transgender Students From Using Facilities Aligned with Their Gender Identity Harms Transgender Students, and Policies that Allow Students to Use Gender-Aligned Facilities Do Not Harm Cisgender Students.

The Department proposed the Rule, in part, to ameliorate the intense and documented harms transgender students can experience when forced to use school facilities inconsistent with their gender identity. Indeed, barring transgender students from facilities aligned with their gender identity has potentially catastrophic consequences for their physical safety and mental health. There is abundant data, including through students’ lived experiences, confirming that policies permitting transgender individuals to use gender-identity-aligned school facilities serve to protect them, while not harming other students.

A. Excluding transgender students from school facilities aligned with their gender identity harms them.

Transgender students suffer significant harms when barred from using facilities aligned with their gender identity. These harms can have long-lasting impacts on students' health and educational outcomes. Because of transgender students' heightened risk of experiencing sex-based discrimination, the Department's changes to the Rule are critical for three reasons.

First, a majority of transgender students report having avoided school facilities because of safety concerns. A recent CDC study reported that approximately one fourth of transgender and questioning students missed school because of feeling unsafe in the past month.⁷ One survey of K-12 students shows 82.1% of transgender students avoid using the restroom and 69.1% of transgender students avoid using the locker room because they felt unsafe or uncomfortable.⁸ Research also shows that when schools exclude transgender students from restrooms matching their gender identity, they avoid using the restroom altogether while at school, leading to serious health

⁷ Nicolas Suarez et al., *Disparities in School Connectedness, Unstable Housing, Experiences of Violence, Mental Health, and Suicidal Thoughts and Behaviors Among Transgender and Cisgender High School Students – Youth Risk Behavior Survey, United States, 2023*, Morbidity & Mortality Wkly. Rep. (Sept. 10, 2024), <https://tinyurl.com/5fwwftvj> [hereinafter CDC Study].

⁸ Joseph Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN, at 97 (2020), <https://tinyurl.com/5cy9fvad>.

risks, including kidney damage and urinary tract infections.⁹ Some transgender students also avoid drinking or eating throughout the school day to avoid having to use the restroom.¹⁰ These absences, illnesses, hunger, dehydration, and fear all create immense harms and ultimately impede these students' ability to fully access education based on transgender status.

Second, non-cisgender students are more susceptible to violence in these settings and “at risk of physical, verbal, or sexual assault from other students or adults.”¹¹ About forty percent of non-cisgender students were bullied at school, and these students experience “more violence” and “less school connectedness” than their cisgender peers.¹² For example, cisgender boys broke seventeen-year-old nonbinary student Cobalt Sovereign's jaw after Cobalt used the restroom aligned with their sex

⁹ Sandy James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equal. 224-30 (2016), <https://tinyurl.com/2p8xex48> [hereinafter 2015 Survey] (citing 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*, 972 F.3d at 593 (transgender student plaintiff developed urinary tract infections due to bathroom avoidance).

¹⁰ See, e.g., *Doe*, 897 F.3d at 523 (forcing transgender students to use restrooms that do not match their gender identity causes students to “avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the day”); *Whitaker*, 858 F.3d at 1041 (transgender student denied restroom access “restricted his water intake to ensure that he did not have to utilize the restroom at school”); 2015 Survey, *supra* note 10, at 229 (nearly 32% of transgender adult responders avoided eating or drinking to avoid using the restroom).

¹¹ Ryan Thoreson, *Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools*, Hum. Rts. Watch (Sept. 14, 2016), <https://tinyurl.com/ynw75m3e>; see also CDC Study, *supra* note 7.

¹² CDC Study, *supra* note 7.

assigned at birth.¹³ The assault occurred after a *cisgender* boy violated Cobalt’s privacy and peered over Cobalt’s stall while they were using the facility.¹⁴

Further, transgender students who are not permitted to use facilities that align with their gender identity are significantly more likely to experience sexual assault than those students who do not.¹⁵ One study showed that 25.9% of transgender and nonbinary U.S. adolescents experience sexual assault—substantially higher than rates of 15% for cisgender high school girls and 4% for cisgender boys.¹⁶ However, transgender and nonbinary youth subjected to locker or restroom restrictions experienced an even higher prevalence of sexual assault: 36%.¹⁷

Notably, locker and restroom policies that deny transgender students access to bathrooms aligned with their gender identity also harm cisgender girls. Specifically, cisgender girls who do not conform to rigid femininity standards are often targeted, as such policies lead to enforcement of sex-based stereotypes to determine who is a “real” girl. There are numerous examples of gender-nonconforming cisgender women being

¹³ Kiara Alfonseca, *Transgender Student Alleges Assault After Using Bathroom, Family Calls For Charges*, ABC News (June 7, 2024), <https://tinyurl.com/3rvrsydu>; see also Amber Jayanth, *Transgender Butler County Man Says Group Beat Him Up Over Restroom Use*, Fox News 19 (July 8, 2022), <https://tinyurl.com/27vbncec> (noting a group of cisgender men battered Noah Ruiz after a campground owner forced him to use the women’s restroom).

¹⁴ *Id.*

¹⁵ Gabriel R. Murchison et al., *School Restroom/Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, Pediatrics (2019), <https://tinyurl.com/yc79eztx>.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 6.

harassed or ejected from women’s restrooms, an experience that is both humiliating and harmful.¹⁸ For example, one twenty-four-year-old cisgender woman who had cut her hair very short reported being harassed in a women’s restroom.¹⁹ While in a stall, a stranger asserted that she was transgender and said she “better not come out of there.”²⁰ Enjoining the Rule will increase this sort of harassment of cisgender women and girls through increased gender policing, which would contribute to greater emotional or physical harm in school facilities.

Third, policies preventing transgender students from using gender-identity-aligned restrooms and locker rooms also cause psychological harm—which can lead to serious physical harm, or even death. Many of these policies arise pursuant to newly enacted anti-transgender state laws. A recent *Nature Human Behavior* study evaluated the impact of these laws, which included laws that limited bathroom access, and found that the laws “*directly caused* an increase in suicide attempts” among transgender and nonbinary people.²¹ The results are clear: “young people in states where anti-transgender laws were enacted experienced statistically significant increases in both

¹⁸ See, e.g., Melanie Springer Mock, *I’m a Woman Who Got Kicked Out of Women’s Bathrooms*, Christianity Today Int’l (June 7, 2016), <https://tinyurl.com/47dbuk5y>; Matt DeRienzo, *Woman Mistaken for Transgender Harassed in Walmart Bathroom*, News Times (May 16, 2016), <https://tinyurl.com/49aaxxch>.

¹⁹ Christopher Wiggins, *Cis Woman Mistaken as Transgender Records Being Berated in Bathroom*, The Advocate (updated May 26, 2023), <https://tinyurl.com/4uv36a4b>.

²⁰ *Id.*

²¹ Jo Yurcaba, *Study Establishes First Causal Link Between Anti-Trans Laws and Suicide Attempts*, NBC News (Sept. 30, 2024), <https://tinyurl.com/57da9ks7> (emphasis added).

the number of past-year suicide attempts and the reporting [of] at least 1 past-year suicide attempt, especially 1 and 2 years after anti-transgender law enactment.”²² And the study found a clear *causal* relationship between the enactments of these laws and increased risk of suicide.²³ As a co-author of the study noted, the “causation is the key aspect . . . not associated with, not linked to—we can say very confidently” that these laws caused increased harm to transgender youth.²⁴

“When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening.” *Doe*, 897 F.3d at 529. The pervasive discrimination that too many transgender students experience at school often results in adverse mental health outcomes. LGBTQ students who encounter hostility and discrimination in K-12 educational settings—such as verbal harassment, sexual assault, or other physical attacks—report higher levels of depression and lower levels of self-esteem than students who have not experienced victimization.²⁵ More severe experiences of victimization are tied to higher levels of depression and lower self-esteem.²⁶ The consequences of discrimination can be catastrophic: transgender students who encounter verbal or physical harassment, including violence, have a “higher prevalence of lifetime and past-year suicide

²² Lee et al., *supra* note 2, at 2100.

²³ *Id.*

²⁴ Yurcaba, *supra* note 22.

²⁵ Kosciw, *supra* note 8, at 52-54.

²⁶ *Id.*

thoughts and attempts” than respondents who did not have such experiences.²⁷ Devastatingly, one in four transgender youth attempted suicide in the past year—with ten percent of those requiring medical treatment following the attempt.²⁸

Discrimination in schools—including verbal or physical harassment—can negatively impact transgender students’ attendance, academic achievement, and educational aspirations.²⁹ When students experience harassment or other hostility at school, they may be less likely to attend to avoid hurtful experiences.³⁰ In one national survey of LGBTQ students, they “were nearly three times as likely to have missed school in the past month” if the student had experienced a “higher level[] of victimization” because of their sexual orientation or gender identity.³¹ LGBTQ students experiencing victimization also report lower GPAs and lower aspirations for secondary education than those not being victimized.³²

B. Transgender-inclusive locker and restroom policies do not harm other students.

Research confirms that stated “fears of increased safety and privacy violations as a result of nondiscrimination laws” protecting transgender people’s access to

²⁷ Jody L. Herman et al., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey*, Williams Inst., UCLA Sch. L., at 22 (2019), <https://tinyurl.com/ynxj9jcd>.

²⁸ *Id.*

²⁹ See Lee et al., *supra* note 2, at 2102.

³⁰ Kosciw, *supra* note 8, at 48.

³¹ *Id.* at 47.

³² *Id.*

restrooms and locker rooms “are not empirically grounded.”³³ Indeed, it is “exceedingly rare” that criminal incidents take place in public restrooms, locker rooms, or changing rooms.³⁴ Specifically, results from a 2018 study revealed “the passage of such nondiscrimination laws is not related to the number or frequency of criminal incidents in such public spaces.”³⁵

Data from cities and states with nondiscrimination policies protecting transgender individuals highlight how baseless these stated worries are. Specifically, law enforcement officials in two jurisdictions with nondiscrimination policies “could not identify a single case in which a transgender person ha[d] been charged with assaulting or harassing women in a public bathroom.”³⁶ A report from Human Rights Watch also found no evidence that transgender students’ use of restroom or locker room facilities “correspond[ing] to their gender identity puts other students at risk.”³⁷ As the American Medical Association explained in one report, “no evidence exists” to support claims that those engaging in sexual violence “will take advantage of public

³³ 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, 81 (2018), <https://tinyurl.com/4fvt6m23>; see also Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, NBC News (Sept. 19, 2018), <https://tinyurl.com/3w4f88v7>.

³⁴ Hasenbush et al., *supra* note 33, at 79.

³⁵ *Id.* at 81.

³⁶ Lou Chibbaro Jr., *Predictions of Trans Bathroom Harassment Unfounded*, Washington Blade (March 31, 2016), <https://tinyurl.com/msw8mtyn>.

³⁷ Thoreson, *supra* note 12.

accommodation laws” to target women and children.³⁸

It is also important to highlight that the Rule implements Title IX’s requirement that schools maintain safe educational environments. Specifically, the Rule clarifies that schools must promptly investigate reports of sex harassment, take steps to end harassment, prevent its recurrence, and remedy its effects. 34 C.F.R. § 106.44(f)(1). *Amici* include advocates and service providers for all survivors of sexual violence, including student survivors, and their support of the Rule and its protections for transgender students is based on their certainty that the Rule will reduce risk of sexual assault or harassment in schools. Indeed, experts who are advocates for survivors of sexual assault, like *amici*, routinely support transgender-inclusive locker and restroom policies precisely because there is no evidence supporting Appellees’ claims that such policies harm others.³⁹

Appellees also consistently fail to acknowledge the range of available or existing mitigating measures in connection with their asserted concerns. For example, restroom stalls enable all students to use facilities discreetly and privately. *A.C.*, 75 F.4th at 773 (observing that a student’s presence behind the door of a restroom stall does not threaten student privacy). Schools can also install privacy strips and screens.

³⁸ Am. Med. Ass’n & GLMA, *Transgender Individuals’ Access to Public Facilities* (March 1, 2019), <https://tinyurl.com/mt3cp77z>.

³⁹ Nat’l Task Force to End Sexual & Domestic Violence Against Women, *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (updated Apr. 29, 2016), <https://tinyurl.com/mvnnev93>.

See, e.g., Grimm, 972 F.3d at 614. And cisgender students may use available single-occupancy facilities, as the Rule states.⁴⁰ *See, e.g., Parents for Priv.*, 949 F.3d at 1225 (holding alleged privacy violation mitigated by “alternative options and privacy protections” for those who did not want to share a facility with a transgender student, even if alternatives “appear[ed] inferior or less convenient”).

In promulgating the Rule, the Department engaged in a thorough consideration of the factual record—including Appellees’ concerns—and correctly concluded that the Rule would not infringe on the privacy and safety rights of cisgender students. *See* 89 Fed. Reg. at 33820. As set forth above, the social science data confirms that transgender-inclusive policies create no actual harms to cisgender students. Arguments to the contrary come at a cost—a cost too often measured in the health, wellbeing, and lives of transgender students. This Court should reject such arguments and uphold the Rule protecting all students from sex discrimination.

⁴⁰ The Rule ensures the privacy of all students, whether cisgender, transgender, or nonbinary, by allowing students to choose whether to use sex-separated restrooms that match their gender identity or to use a single-user restroom if they prefer. 89 Fed. Reg. at 33820. No student is forced to use a sex-separated restroom that does not match their gender identity or a single-user restroom, which ensures every student can pick the facility where they feel safest. *Id.* (“[N]othing in Title IX or the final regulations prevents a recipient from offering single occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason.”).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Dated: December 9, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Pursuant to Eighth Circuit Rule 28(A)(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

Dated: December 9, 2024

Respectfully submitted,

/s/ Kaitlyn Golden

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2024, a true and accurate copy of the foregoing proposed brief was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

Dated: December 9, 2024

Respectfully submitted,

/s/ Kaitlyn Golden

APPENDIX A

Bend the Arc: A Jewish Partnership for Justice: Bend the Arc is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Clearinghouse on Women's Issues: The Clearinghouse on Women's Issues is a national non-profit organization founded in 1974 in Washington, DC to address economic, health, educational, social, political and legal issues facing women and girls. It has hybrid public meetings to raise awareness and act as a catalyst to attain greater equity.

Collective Power for Reproductive Justice: Collective Power for Reproductive Justice is a national organization that educates, trains, and inspires new leadership to advance reproductive freedom and bodily autonomy. Directly impacted communities are our center: Collective Power opposes policies that subject transgender students to discrimination and harm.

Desiree Alliance: Desiree Alliance is a national coalition of current and former sex workers working together with supporting networks for an improved understanding of sexual policies and its human, social and political impacts of criminalization's surrounding sex work. Our priorities are building local, regional, and

national leadership to constructively advocate sex workers' human, health, labor, and civil rights. We commit ourselves to the tenets of human rights and base our foundations upon equity, equality, empowerment, and agency, to bring those voices into constructive and productive leadership roles in the sex worker rights movements and umbrella issues unique to sex workers.

Education Law Center Pennsylvania: The Education Law Center-PA (ELC-PA) is a nonprofit legal advocacy organization dedicated to ensuring that all Pennsylvania's children have access to a quality public education. ELC-PA works to eliminate systemic inequalities that lead to disparate educational outcomes based on race, gender, sexual orientation, gender identity, gender expression and disability status.

Equality California: Founded in 1999, Equality California (EQCA) is the nation's largest statewide lesbian, gay, bisexual, transgender and queer+ (LGBTQ+) civil rights organization. Equality California brings the voices of LGBTQ+ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ+ people. We advance civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve.

If/When/How: Lawyering for Reproductive Justice: If/When/How: Lawyering for Reproductive Justice is a nonprofit organization that works to transform the law and policy landscape through advocacy, legal support, and organizing, so all

people have the power to determine if when and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms.

National Association of Social Workers: The National Association of Social Workers (“NASW”), founded in 1955, is the largest association of professional social workers in the United States with 110,000 members in 55 chapters. NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education and enforces the NASW Code of Ethics. In alignment with its mission to ensure the efficacy and quality of practicing social workers, NASW provides resources and develops policy statements on issues of importance to the social work profession. The NASW National Committee on Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning + Issues develops, reviews, and monitors programs of the Association that significantly affect LGBTQ+ individuals. Consistent with those policy statements, NASW is committed to advancing policies and practices that improve the status and well-being of transgender, gender diverse, nonbinary people.

National Network to End Domestic Violence: The National Network to End Domestic Violence (NNEDV) represents the 56 U.S. state and territorial coalitions against domestic violence. NNEDV was instrumental in the passage and implementation of the Violence Against Women Act. NNEDV is dedicated to creating

a social, political, and economic environment in which domestic violence no longer exists. NNEDV works to make domestic violence a national priority, change the way society responds to domestic violence, and strengthen domestic violence advocacy at every level.

National Organization for Women Foundation: The National Organization for Women Foundation is a 501 (c) (3) entity of the National Organization for Women (NOW) and is dedicated to advocating for women's equal rights through education and litigation. NOW Foundation focuses on a range of issues, including economic justice, pay equity, and equality of opportunity and treatment in education.

National Women's Political Caucus: The National Women's Political Caucus is a progressive, pro-choice, multi-partisan, grassroots membership organization dedicated to identifying, recruiting, training and supporting women candidates for elected and appointed office. In addition to endorsements and financial donations, the Caucus offers campaign training for candidates and campaign managers, as well as technical assistance and advice. State and local chapters provide support to candidates running at state and local levels by helping raise money and providing crucial hands-on volunteers.

People For the American Way: People For the American Way (PFAW) is a national nonpartisan civic organization established to promote and protect civil and constitutional rights, including equal protection of the law. Founded in 1981 by a group of civic, educational, and religious leaders, PFAW now has hundreds of thousands of

members nationwide.

Planned Parenthood Federation of America: Planned Parenthood Federation of America (PPFA) is a nonprofit organization that works to protect and expand access to sexual and reproductive health care and education and provides support to its independently incorporated Planned Parenthood affiliates, which operate nonprofit health centers across the United States that serve patients of all gender identities and expressions. As part of its mission, PPFA advocates for public policies that help people live full, healthy lives, regardless of their sex, gender identity, sexual orientation, or other protected characteristics.

Public Counsel: Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as to amplifying the power of our clients through comprehensive legal advocacy. The Audrey Irmes Gender Justice Project advises and represents individual clients in Title IX, employment discrimination, and gender equity matters and supports community-led efforts to transform unjust systems in and beyond Los Angeles to secure equal opportunities for women, girls, and gender expansive people.

Reproaction: Reproaction is a left-flank culture change organization specializing in strategic communications, opposition research, and community organizing, including but not limited to non-violent direct action. We were founded in 2015 with a vision to uphold abortion rights and advance reproductive justice as a matter of human dignity.

SisterLove, Inc.: SisterLove, Inc., founded in 1989, is the first women's HIV, Sexual and Reproductive Justice organization in the southeastern United States dedicated to eradicating the adverse impact of HIV, and sexual and reproductive health rights and justice challenges impacting women and their families, gender expansive and LGBTQ+ individuals, and others from marginalized communities. SisterLove operates at the intersection of human rights and social justice, focusing on education, prevention, support, research, and legal and political advocacy both in the United States and internationally.

Stop Sexual Assault in Schools (SSAIS): Stop Sexual Assault in Schools (SSAIS) is a national nonprofit founded in 2015 dedicated to educating students, families, and schools about the right to an education free from sexual harassment. We provide resources to students, K-12 schools, and organizations so that the right to an equal education is not compromised by sexual harassment, sexual assault, and gender discrimination.

The Trevor Project: The Trevor Project is the nation's leading LGBTQ+ youth suicide prevention and crisis intervention organization. The Trevor Project offers the only nationwide accredited, free, and confidential phone, instant message, and text message crisis intervention services for LGBTQ+ youth. These services are used by tens of thousands of youths each month. Through analyzing and evaluating data obtained from these services and national surveys, The Trevor Project produces innovative research that brings new knowledge, with clinical implications, to issues

affecting LGBTQ+ youth.

The Womxn Project: The Womxn Project is a nonprofit advocacy organization in Rhode Island dedicated to building a strong movement that harnesses the power of policy pressure and creative inclusive activism. We believe that together we can dismantle systems of oppression and uplift the voices of Rhode Islanders in order to shift power and shape bodily freedom policies for a more just state to live with dignity in.

Tom Homann LGBTQ+ Law Association: The Tom Homann LGBTQ+ Law Association was established to provide a forum and network for legal professionals who are interested in helping to secure the human and civil rights of LGBTQ+ people; to defend and expand the legal rights of LGBTQ+ people and to secure basic human rights for LGBTQ+ people; to educate LGBTQ+ people of San Diego about their legal rights; to implement activities and programs of particular interest to LGBTQ+ attorneys; and to expand and facilitate networks and relationships between LGBTQ+ attorneys and with other members of the Bench and Bar.

Women's Law Project: Founded in 1974, the Women's Law Project is a Pennsylvania-based public interest legal organization whose mission is the eradication of all forms of sex discrimination and gender bias, including discrimination against LGBTQ people. Because discrimination on the basis of gender identity arises from and perpetuates invidious sex-role stereotypes that are harmful to all people, the Women's Law Project provides free legal representation, policy advocacy, and public

education in support of transgender students and workers facing gender-based discrimination.

Women's Bar Association of the District of Columbia: Founded in 1917, the Women's Bar Association of the District of Columbia (WBA) is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, we continue to pursue our mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among our members. The WBA supports the LGBTQ+ community and one of our priority issues is to speak out against sexual harassment and discrimination in all forms.