Spring 3-2-2017

Gloucester County School Board v. G.G. : Brief of Amicus Curiae in Support of Respondent

Terry S. Kogan
University of Utah, S.J. Quincy College of Law, terry.kogan@law.utah.edu

No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., By His Next Friend and Mother, DEIRDRE GRIMM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR TERRY S. KOGAN IN SUPPORT OF RESPONDENT

JAYMA M. MEYER
ISAAC M. RETHY
JULIA E. HEALD
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

ANDREW M. LACY
Counsel of Record
SIMPSON THACHER & BARTLETT LLP
900 G Street, NW
Washington, D.C. 20001
(202) 636-5500
alacy@stblaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Terry S. Kogan is Professor of Law at the S.J. Quinney College of Law, University of Utah. For more than two decades, Professor Kogan's scholarship has explored the difficulties faced by transgender people in using sex-separated public restrooms. His recent work explores the history of laws in the United States mandating sex-segregation in public restrooms. That scholarship reveals that such laws, first enacted in the late nineteenth century, were not based on anatomical differences between men and women, but rather on an archaic vision of women as weak, vulnerable, and therefore in need of protective spaces whenever they entered the public realm. This brief will assist the Court by placing interpretation of Title IX and its implementing regulation in historical context.[1]

SUMMARY OF THE ARGUMENT

This *amicus curiae* brief challenges two fundamental assumptions that underlie arguments in support of the Petitioner:

> 1. Public restrooms are separated by sex because of anatomical differences between men and women; and

---

[1] No party or its counsel authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or his counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief.

2. Public restrooms have been separated by sex throughout history.

Petitioner relies on "the (until now) universally accepted practice of separating restrooms . . . based on physiological differences between the sexes." Pet. Br. 20. *Amici* supporting Petitioner have similarly rested on these assumptions. *See, e.g.*, Br. of Gail Heriot & Peter Kirsanow, Members, U.S. Comm'n on Civ. Rights 2 ("Up until very recently, there was a strong, consensus-driven, American custom that public toilets . . . were separated on the basis of sex. No law required this . . . ."). So, too, did Judge Niemeyer's dissenting opinion in the Court below:

> Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females.[2]

These assumptions, however, are not well-founded. First, there simply is no cross-historical common social practice related to multi-user public restrooms. Multi-user public restrooms—at the center of this litigation—are a relatively modern development; they did not even exist in the United States until the 1870s when advances in public works tech-

---

[2] Pet. App. 50a. *See also* District Court Mem. Opinion, Pet. App. 111a ("Restrooms and locker rooms are designed differently because of the biological differences between the sexes.").

nology enabled effluence to be transferred through municipal sewer systems. Until then, bathrooms in both homes and public spaces were all single-user privies, water closets, and outhouses. Second, the first laws mandating that public restrooms be segregated by sex, adopted in the late nineteenth century, were not based on differences between male and female anatomies or any necessity of functionality or design arising therefrom. Rather, nineteenth century toilet laws were grounded in then-contemporary understandings of gender roles known as the "separate spheres" ideology. Women were viewed as uniquely suited to the private home and domestic affairs, while the public sphere was seen as the exclusive domain of men. Developed in response to women's expanded participation in public life and their resulting need for bathrooms outside the home, early laws requiring sex-segregated public bathrooms reflected and reinforced this ideology.

That contemporary sex-segregated restrooms can be traced directly to social norms regarding gender roles, rather than anatomical differences between men and women, demonstrates the illegitimacy of restroom policies that single out transgender students for disparate, discriminatory treatment purportedly on the basis of such anatomical distinctions. This Court should therefore reject an interpretation of the term "sex" such as that proposed by the Petitioner, which would be "determin[ed] . . . with reference exclusively to genitalia," Pet. App. 20a, and hold that Title IX and 34 C.F.R. § 106.33 require schools to provide access to restrooms congruent with students' gender identities.

The decision of the Fourth Circuit Court of Appeals reinstating Respondent's Title IX claim should be affirmed.

ARGUMENT

I. Historical Background on Public Restrooms

Until the late nineteenth century all toilets—both in public places and in homes—were single-user water closets, privies, or outhouses that emptied into "privy vaults" or cesspools located on the property.[3] Because public works systems capable of delivering water to private homes were not constructed in most United States cities until the late 1870s, few homes had running water.[4] With the exception of those belonging to the wealthy, homes did not have indoor bathrooms as we know them today. Even among the better off, "despite the growing bourgeois devotion to sanitation in person and in the kitchen, the outdoor privy was still the norm in polite society."[5]

As a result of deadly cholera epidemics during the Civil War and the post-war development of the germ theory of disease, Americans began to understand that sickness was brought about by unsanitary

---

[3] Maureen Ogle, ALL THE MODERN CONVENIENCES: AMERICAN HOUSEHOLD PLUMBING, 1840–1890, at 48 (Johns Hopkins Univ. Press 1996).

[4] Suellen Hoy, CHASING DIRT 65 (Oxford Univ. Press 1995).

[5] *Id.* at 18.

conditions and to take hygiene seriously. In the 1870s, in response to these public health concerns, reformers known as "sanitarians" focused attention on replacing the haphazard and unsanitary plumbing arrangements in homes and workplaces with technologically advanced public sewer systems.[6] By 1890, extensive public waterworks connected private homes to municipal water systems, and municipalities began to adopt plumbing codes and similar regulations.[7]

Advances in plumbing technology came even later to factories and workplaces. Though there is clear evidence of multi-user restrooms in factories after the turn of the twentieth century,[8] reports of factory inspectors at the same time made clear that single-user toilets—water-closets, privies, and outhouses—remained commonplace in American facto-

---

[6] *See* Ogle, ALL THE MODERN CONVENIENCES at 3–6.

[7] *See* Samuel W. Abbott, *The Past and Present Condition of Public Hygiene and State Medicine in the United States*, in XIX MONOGRAPHS ON AMERICAN SOCIAL ECONOMICS 37 (Herbert B. Adams & Richard Waterman, Jr., eds., Dep't of Soc. Econ. for the United States Comm'n to the Paris Exposition of 1900, 1900).

[8] *See* George M. Price, THE MODERN FACTORY: SAFETY, SANITATION AND WELFARE 280 (John Wiley & Sons 1914) (photograph of toilets in a multi-user restroom captioned, "Well Arranged, Sanitary Water-closets"); J.J. Cosgrove, *Factory Sanitation*, in FACTORY SANITATION, at xii (Standard Sanitary Mfg. Co. 1913) (photograph of toilets in multi-user restroom captioned, "The Sanitary Toilet Room is Profitable, Not an Expense").

ries through most of the nineteenth century.[9] Moreover, such single-user toilets were generally used by both men and women.[10] As discussed below, the late nineteenth century legal requirement that restroom facilities be separated by sex and so designated developed as a result of Victorian-era morals legislation that relied on then-prevailing ideology concerning the proper gender roles of men and women.

II. Sex-Segregated Restrooms Grew Out of the "Separate Spheres" Ideology of the Victorian Era

A. The "Separate Spheres" Ideology

In the early nineteenth century, the industrial revolution drove many men to leave the homestead

---

[9] An investigator for the New York State Factory Commission commented on the general condition of factory toilet facilities in 1914: "No part of an industrial establishment is so neglected as the toilet accommodations. In many cases they are located outside of the factory, causing the loss of much time and also endangering the health of the employes [*sic*] . . . . Many of the toilets were not separated for the sexes and were of an obsolete and crude type. In a large number of factories in rural communities the unsanitary privy is still being used . . . ." Price, THE MODERN FACTORY at 275.

[10] *See, e.g.*, *id.*; *Men's Ready-Made Clothing*, in 2 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES, S. Doc. No. 61-645, at 499 (prepared under the direction of Chas. P. Neill, Comm'r of Labor 1911) (quoting James Connolly & John Franey, SECOND ANNUAL REPORT OF THE FACTORY INSPECTORS OF THE STATE OF NEW YORK 26 (1888)) ("The water-closets are used alike by males and females, and usually stand in the room where the work is done.").

for work in factories while women remained in the home, rearing children and performing domestic work. This economic restructuring led to the formation of a "separate spheres" ideology—the notion that the public realm was the proper place for men and the private home the proper place for women.[11] Coupled with this ideology was a view of women as uniquely virtuous and moral.[12]

Despite this vision of the proper social role for women, the demands of a burgeoning economy soon pushed many women from the privacy of the home into the workplace. Women also moved into the civic life of the community, becoming active in social reform and suffrage movements. Nonetheless, the separate spheres ideology persisted, and the growing number of women in public spaces evidenced a "living contradiction" of the Victorian era's "cult of true womanhood."[13] Legislators feared that allowing

---

[11] *See* Terry S. Kogan, *Sex Separation: The Cure-All for Victorian Social Anxiety*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 146 (Harvey Molotch & Laura Norén, eds., New York Univ. Press 2010).

[12] *See* David E. Shi, FACING FACTS: REALISM IN AMERICAN THOUGHT AND CULTURE 1850–1920, at 17 (Oxford Univ. Press 1995) (describing the emerging faith "in the civilizing power of moral women" during the nineteenth century). "Females were widely assumed to be endowed with greater moral sensibility and religious inclinations than men." *Id.*

[13] Kogan, *Sex Separation: The Cure-All for Victorian Social Anxiety*, in TOILET at 147 (quoting Cynthia Eagle Russett, SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD 10 (Harvard Univ. Press 1989)); *see also* Terry S. Kogan, *How Did Public Bathrooms Get to Be Separated by Sex in the First Place?*, THE CONVERSATION (May 26, 2016),

women into the factory would endanger both women's bodies and the welfare of future generations.[14] To counter this threat, legislators began enacting paternalistic legislation that restricted women's ability to work and to participate in other activities viewed as incompatible with women's unique social role.[15]

Some of these laws banned women from professions deemed inherently dangerous, such as mining, jobs requiring heavy lifting, and cleaning moving machinery.[16] Other laws controlled the conditions under which women could work—limiting hours of employment,[17] mandating a rest period for women

---

https://theconversation.com/how-did-public-bathrooms-get-to-be-separated-by-sex-in-the-first-place-59575. The "cult of true womanhood" describes attributes "by which a woman judged herself and was judged by her husband, her neighbors and society," namely piety, purity, submissiveness and domesticity. Barbara Welter, DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY 21 (Ohio Univ. Press 1976).

[14] Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 27 (2007).

[15] *Id.* at 27–28.

[16] *Id.* at 14; Mary Elizabeth Pidgeon, BULL. OF THE WOMEN'S BUREAU, NO. 91, WOMEN IN INDUSTRY 55–56 (U.S. Dep't of Labor 1935). *See also, e.g.*, Act of Mar. 27, 1872, § 6, 1872 Ill. Laws 568, 570 (forbidding women from working in mines). Kansas adopted a more general law prohibiting women from working in any industry or occupation "under conditions of labor detrimental to their health or welfare." Act of May 22, 1915, ch. 275, § 10496, 1915 Kan. Sess. Laws 2147.

[17] Kogan, *Sex-Separation in Public Restrooms*, 14 MICH. J. GENDER & L. at 13.

during the work day,[18] requiring that seats be provided for women workers,[19] and prohibiting women from working immediately before or after childbirth.[20] Regulation of women's work extended beyond restrictions on physically-demanding occupations. For example, other statutes barred women from professions such as the practice of law and justified these restrictions with reference to the "[t]he natural and proper timidity and delicacy which belongs to the female sex." *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).[21]

---

[18] *See, e.g.*, Act of Mar. 31, 1915, ch. 350, § 4, 1915 Me. Laws. 367, 368.

[19] *See, e.g.*, Act of May 18, 1881, ch. 298, 1881 N.Y. Laws 402.

[20] *See, e.g.*, Act of May 26, 1913, ch. 112, 1913 Conn. Pub. Acts 1701; Act of Apr. 15, 1912, ch. 331, sec. 1, § 93-a, 1912 N.Y. Laws 660. Contemporary anti-discrimination law, of course, recognizes that such legislation is a product of outmoded gender stereotyping. For example, the Equal Employment Opportunity Commission's sex discrimination guidelines now provide that state laws prohibiting or limiting "the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth . . . do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex." 29 C.F.R. § 1604.2(b)(1).

[21] Such attitudes towards women's roles have been repeatedly rejected by this Court for at least the last half-century. *See, e.g.*, *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities"); *Frontiero v. Richardson*,

This nineteenth century "separate spheres" ideology also led to reconfiguring the architectural sites that women inhabited outside the home, as ever more public spaces were designated for the exclusive use of women. A separate ladies' reading room with furnishings that resembled those of a private home became an accepted part of American public library design.[22] Beginning in the 1840s, American railroads began designating a "ladies' car" for the exclusive use of women and their male escorts.[23] By the end of the nineteenth century, women-only parlor spaces had been created in other establishments, including photography studios, hotels, post offices, banks and department stores.[24] As discussed below, it was in this spirit of manipulating public space to carve out

---

411 U.S. 677, 684 (1973) (explaining that such laws were "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage"). This extends to legislation based on stereotypes about women's physical abilities. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 & n.10 (1982) (rejecting such laws as "illegitimate" and noting that "the many protective labor laws enacted in the late 19th and early 20th centuries often had as their objective the protection of weaker workers, which the laws assumed meant females"); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (characterizing early twentieth century "protective labor legislation" as "reflect[ing] archaic [and] stereotypical notions about pregnancy and the abilities of pregnant workers").

[22] Kogan, *Sex-Separation in Public Restrooms*, 14 MICH. J. GENDER & L. at 30–31.

[23] *Id.* at 31–32.

[24] *Id.* at 33–34.

separate, ostensibly protective spaces for women that legislators enacted the first laws mandating that public restrooms be separated by sex.

B. Early Bathroom Laws Were Examples of "Separate Spheres" Legislation

Laws in the United States mandating sex-separated public restrooms were first enacted in the late nineteenth century and were directed at factories and other workplaces. These laws often amended existing protective labor legislation aimed uniquely at women and children.[25] The first such law was passed in Massachusetts in 1887.[26] By 1920, forty-three states had enacted legislation regulating public bathrooms.[27] Any suggestion that these laws were adopted for gender-neutral reasons related to biology is belied by the titles given to many of these laws, which make explicit their paternalistic goals. For example, the 1911 Ohio factory restroom law

---

[25] *See, e.g.*, Act of May 25, 1887, ch. 462, sec. 4, § 13, 1887 N.Y. Laws 575, 577 (amending "An act to regulate the employment of women and children in manufacturing establishments" to require that "water-closets used by female shall be separate and apart from those used by males").

[26] Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass. Acts 668, 669 ("An Act to secure proper sanitary provisions in factories and workshops").

[27] *See* George Martin Kober, *History of Industrial Hygiene and its Effect on Public Health*, in A HALF CENTURY OF PUBLIC HEALTH 377 (Mazÿck P. Ravenel, ed., Am. Pub. Health Ass'n 1921).

amended an act titled, "An act for the preservation of the health of female employes [*sic*]."[28] Similarly, a 1919 North Dakota Law related to factory toilets was titled "An Act to Protect the Lives and Health and Morals of Women and Minor Workers."[29]

A review of the turn of the century literature addressing factory sanitation leaves little doubt that a central justification for providing separate spaces for women in workplaces—water-closets, resting rooms, and dressing rooms—was women's perceived special vulnerabilities.[30] Separate rooms were designated for women workers to accommodate their supposed increased susceptibility to dizziness, fainting, and

---

[28] Act of May 31, 1911, sec. 1, § 1009, 1911 Ohio Laws 488.

[29] Act of Mar. 6, 1919, ch. 174, 1919 N.D. Laws 317. *See also* Act of Jan. 22, 1897, ch. 98, 1897 Tenn. Pub. Acts 247 ("An Act to require employers of females to provide separate water-closets for them"); Act of Mar. 3, 1913, ch. 240, 1913 S.D. Sess. Laws 332 ("An Act to Regulate the Employment of Women and Girls and Children Within This State").

[30] *See, e.g.*, C. F. W. Doehring, *Factory Sanitation and Labor Protection*, in 44 BULL. OF THE DEP'T OF LABOR, H.R. Doc. No. 57-370, at 1–2 (1903) ("Women suffer even more than men from the stress of such circumstances [in unsanitary factories], and more readily degenerate. A woman's body is unable to withstand strains, fatigues, and privations as well as a man's."); *see also id.* at 28 (quoting Dr. Thomas Oliver) ("Where the two sexes are as far as possible equally exposed to the influence of lead, women probably suffer more rapidly, certainly more severely, than men. To a certain extent the reason is to be found in the fact that lead exercises an injurious influence upon the reproductive functions of women. It deranges menstruation.").

hysteria.[31] Similar to women-only rail cars and library reading rooms, these were designed as spaces to which women could retreat when overcome by the physical and emotional stresses that legislators of the era viewed as unique to women when they entered public spaces.

Victorian concepts of privacy and modesty also informed the design of multi-user factory bathrooms. Factory inspectors expressed concern about male workers observing any aspect of women's toilet use. For example, a cotton mill inspector critiqued the lack of a "reasonable privacy of approach" to water closets in many mills—*i.e.*, privacy not only within the restroom, but in entering the restroom—and facilities where "the feet and lower parts of the skirts of females occupying the water closets can be seen from the workrooms."[32]

---

[31] *See* George M. Price, Joint Bd. of Sanitary Control in the Dress & Waist Indus., SPECIAL REPORT ON SANITARY CONDITIONS IN THE SHOPS OF THE DRESS AND WAIST INDUSTRY 13 (1913) ("In the shops where there are a large number of girls working, it is probable that there are a number likely to have sudden attacks of dizziness, fainting or other symptoms of illness, for whose use provision should be made in the form of rest or emergency rooms."); s*ee also* Carroll Smith-Rosenberg, DISORDERLY CONDUCT 197–216 (Oxford Univ. Press 1985) (discussing hysteria as a condition considered unique to women in nineteenth century culture).

[32] *Cotton Textile Industry*, in 1 REPORT ON CONDITION OF WOMAN AND CHILD WAGE EARNERS IN THE UNITED STATES, S. Doc. No. 61-645, at 371 (prepared under the direction of Chas. P. Neill, Comm'r of Labor 1910). An inspector described sex-separated bathrooms located next to each other and entered by men and women through "doors opening from a common jamb"

The requirement in factory bathroom laws that water-closets be "separate and distinct"[33] and that there be "privacy of approach" thus reflected deep-seated notions of Victorian modesty which were themselves part of the broader social anxiety over men and women working together in the same space. As one factory inspector noted:

> Where men and women are thus constantly associated it is, of course, possible for immoral relations between them to spring up . . . . In many mills . . . there is no privacy of approach to the toilets, and anyone entering them does so in full view of persons of both sexes in the same workroom, a condition obviously not in the interest of good morals.[34]

Texts discussing factory sanitation practices similarly reflect the belief that separating public restrooms by sex was necessary to foster and maintain the "cult of true womanhood."[35] In a 1913 essay published by one of the country's major manufacturers of plumbing equipment, a sanitary engineer called

---

as "delinquent with reference to the lack of privacy of approach." *Men's Ready-Made Clothing*, in 2 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS, at 335.

[33] *E.g.*, Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass. Acts 668, 669.

[34] *Cotton Textile Industry*, in 1 REPORT ON CONDITION OF WOMAN AND CHILD WAGE EARNERS, at 590.

[35] *See supra* note 13.

for "separate accommodations" which were required by "moral decency" in spaces "where males and females are employed."[36] Though set forth in a technical essay on factory plumbing and sanitation, the essay implored factory owners to "[t]reat other men's daughters . . . as you would like them [to] treat yours,"[37] invoking a paternalistic vision of women as innocent and vulnerable. Like women's reading rooms in Victorian public libraries designed to recreate domestic spaces, the factory restroom for women called for by the essay was "[s]uggestive of all the comfort, cleanliness and convenience of a bath room in the home."[38]

Laws mandating sex-separated toilet facilities thus represented an effort to reconcile the early nineteenth century vision that women belonged in the domestic sphere with the conflicting realities of life in the late nineteenth and early twentieth centuries. The "separate spheres" ideology portrayed women as virtuous, vulnerable, and in need of the protection of the homestead. As women left the home for factories and other workplaces, legislators enacted laws to cordon off exclusive spaces for women that could serve as surrogates for the homestead in the public realm. Among those newly regulated spaces intended to protect supposedly weak and vulnerable women was the sex-segregated restroom.

---

[36] Cosgrove, *Factory Sanitation*, in FACTORY SANITATION, at ix.

[37] *Id.*

[38] *Id.* at xxii.

III. The History of Sex-Segregated Restrooms Demonstrates that Transgender Students Should Have Access to Restrooms that Comport with their Gender Identities

Petitioner claims that "Title IX's architects deliberately allowed separation of the sexes to protect privacy—an interest rooted in physical differences between the sexes . . . ." Pet. Br. 21.[39] As the history outlined in this brief demonstrates, however, the complex web of social norms and interests that led to sex segregation of public restrooms in the nineteenth century were *not* considerations "rooted in" distinctions between male and female anatomy. To the contrary, sex segregation of public restrooms arose as an expression of a particular ideological vision of

---

[39] The cases Petitioner cites in attempting to demonstrate that this Court has "always focused on physiological differences" in cases implicating the "privacy interests" Petitioner ostensibly seeks to advance (Pet. Br. 35) provide no support for its position. The cited portions of *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) and *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001) involve physiological differences but have nothing to do with privacy or with the "lawful separation of males and females" (Pet. Br. 35). *See Manhart*, 435 U.S. at 707 (noting, as an example of a "real" rather than "fictional difference between women and men," the fact that "[w]omen, as a class, do live longer than men"); *Tuan Anh Nguyen*, 533 U.S. at 63 ("[F]athers and mothers are not similarly situated with regard to the proof of biological parenthood."). And while the cited language in *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) gestures, in *dicta*, towards recognizing privacy interests as a basis for maintaining sex-segregated living arrangements, it nowhere purports to ground those privacy interests in physiological or anatomical difference, as opposed to social convention.

men's and women's gender roles that is not reducible to such anatomical distinctions.

The sex-segregated public restroom, first mandated by laws in the late nineteenth century, has become a pervasive architectural feature of contemporary America that is unlikely to disappear any time soon. Title IX and its implementing regulations recognize, and do not seek to alter, this arrangement. Understanding the origins of this social convention in the United States, however, illustrates that separating such facilities by sex was not simply a natural, neutral response to anatomical differences, but rather an ideological cultural response that reflected and reinforced the prevailing gender norms of the time.

Arguments that seek to justify the disparate treatment of transgender students as a byproduct of purportedly neutral, anatomically-based rules disregard this history. Such arguments improperly seek to insulate these discriminatory policies from meaningful judicial review, suggesting—incorrectly—that these policies simply reflect a "natural" division of restrooms based on so-called "biological sex." As a more accurate historical understanding helps make clear, excluding transgender students from the public restrooms that are congruent with their gender identities is a discriminatory practice that reflects and enacts social stigmatization of those students. *See* Resp. Br. 29 ("The Board's policy sends a message to Gavin and the entire school community that Gavin is unacceptable and not fit to use the same restrooms as others."). This Court should hold, con-

sistent with history and precedent, that Title IX provides redress for such discriminatory conduct.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

JAYMA M. MEYER
ISAAC M. RETHY
JULIA E. HEALD
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

ANDREW M. LACY
Counsel of Record
SIMPSON THACHER & BARTLETT LLP
900 G Street, NW
Washington, D.C. 20001
(202) 636-5500
alacy@stblaw.com

Counsel for Amicus Curiae

March 2, 2017