No. 18-13592

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DREW ADAMS,

Plaintiff-Appellee,

-v-

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant.

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

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND COLUMBIA LAW SCHOOL CENTER FOR GENDER & SEXUALITY LAW IN SUPPORT OF PLAINTIFF-APPELLEE DREW ADAMS

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AMICI CURIAE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1-1, undersigned counsel certifies that the following list of interested persons and the corporate disclosure statement is true and correct:

1. 9to5 – Amicus Curiae
2. AAPL – Amicus Curiae
3. AAUW – Amicus Curiae
4. A Better Balance – Amicus Curiae
5. Aberli, Thomas A. – Amicus Curiae
6. Achievement First Public Charter Schools – Amicus Curiae
7. Adams, Drew – Appellee
8. Adams, Scott – Appellee's Father
9. Adecco Group AG – Parent company for Amicus Curiae General Assembly Space, Inc.
10. Adecco, Inc. – Parent company for Amicus Curiae General Assembly Space, Inc.
11. ADL – Amicus Curiae
12. Advocates for Youth – Amicus Curiae
13. Athlete Ally – Amicus Curiae

14. Airbnb, Inc. – Amicus Curiae
15. Akin Gump Strauss Hauer & Feld LLP – Counsel for Amici Curiae
16. Alger, Maureen P. – Counsel for Amicus Curiae
17. Allen, Tommy – Former Board Member of Appellant
18. Alliance Defending Freedom – Counsel for Amicus Curiae
19. Alphabet, Inc. (GOOG) – Parent company for Amicus Curiae Google LLC
20. Altman, Jennifer G. – Counsel for Appellee
21. Amend, Andrew –Counsel for Amicus Curiae
22. American Academy of Child and Adolescent Psychiatry (AACAP) – Amicus Curiae
23. American Academy of Nursing – Amicus Curiae
24. American Academy of Pediatrics – Amicus Curiae
25. American Association of University Women (AAUW) – Amicus Curiae
26. American Civil Liberties Union – Amicus Curiae
27. American Civil Liberties Union of Florida – Amicus Curiae
28. American College of Physicians – Amicus Curiae
29. American Medical Association – Amicus Curiae
30. American Medical Women's Association – Amicus Curiae
31. American Nurses Association – Amicus Curiae
32. American School Counselor Association – Amicus Curiae

33. Anastasio, Morgan L. – Counsel for Amicus Curiae

34. Anten, Todd – Counsel for Amici Curiae

35. Apple Inc. – Amicus Curiae

36. Asana, Inc. – Amicus Curiae

37. Association of Medical School Pediatric Department Chairs – Amicus Curiae

38. Atlanta Women for Equality – Amicus Curiae

39. Autistic Self Advocacy Network – Amicus Curiae

40. Baker & Hostetler LLP – Counsel for Amicus Curiae

41. Banks, Emily – Amicus Curiae

42. Barden, Robert Chris – Counsel for Appellant, Terminated

43. Barrera, Kelly – Board Member of Appellant

44. Barth, Morgan – Amicus Curiae

45. Baxter, Rosanne C. – Counsel for Amicus Curiae

46. Bay Area Lawyers for Individual Freedom (BALIF) – Amicus Curiae

47. Bazer, Morgan – Amicus Curiae

48. BCC – Amicus Curiae

49. Berlow, Clifford W. – Counsel for Amicus Curiae, Terminated

50. Bertschi, Craig E. – Counsel for Amicus Curiae

51. Beth Chayim Chadashim (BCC) – Amicus Curiae

52. Binning, Sarah R. – Counsel for Amicus Curiae

53. Birnbaum Women's Leadership Network at NYU School of Law – Amicus Curiae
54. BlackRock, Inc. (BLK) – Beneficial owner of Amicus Curiae Yelp Inc.
55. Block, Joshua A. – Counsel for Amicus Curiae
56. Boies, Schiller & Flexner, LLP – Counsel for Amicus Curiae
57. Bond-Theriault, Candace – Counsel for Amicus Curiae
58. Borelli, Tara L. – Counsel for Appellee
59. Boston Area Rape Crisis Center – Amicus Curiae
60. Bourgeois, Roger – Amicus Curiae
61. Brown, Meredith Taylor – Counsel for Amicus Curiae, Terminated
62. Bruce, Diana K. – Amicus Curiae
63. Buckeye Region Anti-Violence Organization, a Program of Equitas Health – Amicus Curiae
64. Bursch, John – Counsel for Amicus Curiae
65. California – Amicus Curiae
66. California Women Lawyers – Amicus Curiae
67. California Women's Law Center – Amicus Curiae
68. Campbell, James A. – Counsel for Amicus Curiae, Terminated
69. Canan, Patrick – Board Member of Appellant
70. Carney, Karen – Amicus Curiae

71. Carpenter, Christopher S., Ph.D. – Amicus Curiae

72. Carter, Heidi – Amicus Curiae

73. Casa de Esperanza: National Latina Network for Healthy Families and Communities – Amicus Curiae

74. Castillo, Paul David – Counsel for Appellee

75. Center for Constitutional Rights – Amicus Curiae

76. Center for Religious Expression – Counsel for Amicus Curiae

77. Center for Reproductive Rights – Amicus Curiae

78. Central Conference of American Rabbis – Amicus Curiae

79. Champion Women – Amicus Curiae

80. Chandy, Sunu P. – Counsel for Amici Curiae

81. Chang, Tommy – Amicus Curiae

82. Chapman, Peyton – Amicus Curiae

83. Chaudhry, Neena – Counsel for Amici Curiae

84. Chicago Foundation for Women – Amicus Curiae

85. Coalition of Black Trade Unionists – Amicus Curiae

86. Coleman Sr., Anthony E. – Board Member of Appellant

87. Coleman, Arthur - Counsel for Amicus Curiae

88. Collective Power for Reproductive Justice – Amicus Curiae

89. Colorado Consumer Health Initiative – Amicus Curiae

90. Colter, Howard – Amicus Curiae

91. Columbia Law School Center for Gender and Sexuality Law – Amicus Curiae

92. Connecticut – Amicus Curiae

93. Conron, Kerith J., M.P.H., Sc.D. – Amicus Curiae

94. Constitutional Accountability Center – Amicus Curiae

95. Cooley LLP – Counsel for Amici Curiae

96. Copsey, Alan D. – Counsel for Amicus Curiae

97. Corrigan, Hon, Timothy J. – United States District Judge

98. Credo Mobile, Inc. – Amicus Curiae

99. Cyra, Sherri – Amicus Curiae

100. Dasgupta, Anisha S. – Counsel for Amicus Curiae

101. Davis, Bryan – Amicus Curiae

102. Davis, Steven D. – Counsel for Amici Curiae

103. Day One – Amicus Curiae

104. DC Coalition Against Domestic Violence – Amicus Curiae

105. Delaware – Amicus Curiae

106. DeSelm, Lizbeth – Amicus Curiae

107. Deutsche Bank AG. – Amicus Curiae

108. DiBenedetto, Arthur – Amicus Curiae

109. Disability Rights Education and Defense Fund (DREDF) – Amicus Curiae

110. District of Columbia – Amicus Curiae

111. Doolittle, Kirsten L. – Counsel for Appellee

112. Doran, Mary – Amicus Curiae

113. Doss, Eric – Amicus Curiae

114. DREDF – Amicus Curiae

115. Dyer, Karen Caudill – Counsel for Amicus Curiae

116. Dwyer, John C. – Counsel for Amicus Curiae

117. Eaton, Mary – Counsel for Amicus Curiae

118. eBay Inc. – Amicus Curiae

119. Education Counsel, LLC - Counsel for Amicus Curiae

120. Education Law Center PA – Amicus Curiae

121. Empire Justice Center – Amicus Curiae

122. Endocrine Society – Amicus Curiae

123. Eppink Samuel T., Ph.D. (expected 2019) – Amicus Curiae

124. Equal Rights Advocates – Amicus Curiae

125. Equality California – Amicus Curiae

126. Ewing, Gregory – Amicus Curiae

127. Family Equality – Amicus Curiae

128. Family Values @ Work – Amicus Curiae

129. Feminist Women's Health Center – Amicus Curiae

130. Ferguson, Laura N. – Counsel for Amici Curiae

131. Ferguson, Robert W. –Counsel for Amici Curiae

132. Florida School Boards Insurance Trust – Insurance Carrier for Appellant

133. Flores, Andrew R., Ph.D. – Amicus Curiae

134. Flynn, Diana K. – Counsel for Appellee

135. FORGE, Inc. – Amicus Curiae

136. Forson, James (Tim) – Superintendent of the St. Johns County School District

137. Fountain, Lisa Barclay – Counsel for Appellant

138. Franke, Katherine – Counsel for Amicus Curiae

139. Gartrell, Nanette, M.D. – Amicus Curiae

140. Gates, Gary J., Ph.D. – Amicus Curiae

141. Gender Based Violence Organizations – Amicus Curiae

142. Gender Diversity – Amicus Curiae

143. Gender Justice – Amicus Curiae

144. Gender Spectrum – Amicus Curiae

145. General Assembly Space, Inc. – Amicus Curiae

146. Generales, Markos C. –Counsel for Amicus Curiae

147. Girls for Gender Equity – Amicus Curiae

148. Girls, Inc. – Amicus Curiae

149. GitHub, Inc. – Amicus Curiae

150. Glassdoor, Inc. – Amicus Curiae

151. GlaxoSmithKline LLC – Amicus Curiae

152. GlaxoSmithKline PLC – Parent company for Amicus Curiae GlaxoSmithKline LLC

153. GLMA – Health Professionals Advancing LGBT Equality – Amicus Curiae

154. GLSEN – Amicus Curiae

155. Goldberg, Suzanne – Counsel for Amicus Curiae

156. Gonzales, Gilbert, Ph.D., M.H.A. – Amicus Curiae

157. Gonzalez-Pagan, Omar – Counsel for Appellee

158. Google LLC – Amicus Curiae

159. Gorod, Brianne – Counsel for Amicus Curiae

160. Goss Graves, Fatima – Counsel for Amicus Curiae

161. Greer, Eldridge – Amicus Curiae

162. Grossman, Miriam – Amicus Curiae

163. Grijalva, Adelita – Amicus Curiae

164. Gurtner, Jill – Amicus Curiae

165. Haney, Matthew – Amicus Curiae

166. Hargis, Kellie M. – Amicus Curiae

167. Harmon, Terry J. – Counsel for Appellant

168. Harrington, Emily – Counsel for Amicus Curiae

169. Hawaii – Amicus Curiae

170. Haynes, Patricia – Counsel for Amicus Curiae

171. Healthy Teen Network – Amicus Curiae

172. Herman, Jody L., Ph.D. – Amicus Curiae

173. Heyer, Walt – Amicus Curiae

174. Hohs, Sherie – Amicus Curiae

175. Holland & Knight, LLP – Counsel for Amicus Curiae

176. Holloway, Ian W., Ph.D., M.S.W., M.P.H. – Amicus Curiae

177. Hughes, Paul W. (Mayer Brown) – Counsel for Amicus Curiae

178. Human Rights Campaign – Amicus Curiae

179. IBM Corporation – Amicus Curiae

180. Ifill, Sherrilyn A. – Counsel for Amicus Curiae

181. Illinois – Amicus Curiae

182. Illinois Accountability Initiative – Amicus Curiae

183. In Our Own Voice: National Black Women's Reproductive Justice Agenda – Amicus Curiae

184. Indiegogo, Inc. – Amicus Curiae

185. International Action Network for Gender Equity & Law (IANGEL) – Amicus Curiae

186. Iowa – Amicus Curiae

187. Iowa Coalition Against Sexual Assault – Amicus Curiae

188. Jacksonville Area Sexual Minority Youth Network, Inc. – Amicus Curiae

189. Jacobs, Edward J. – Counsel for Amicus Curiae

190. James, Letitia – Counsel for Amicus Curiae

191. Johnson, Alexsis M. – Counsel for Amicus Curiae

192. Kaiser Foundation Health Plan, Inc. ("Kaiser Permanente") – Amicus Curiae

193. Kaiser Permanente – Amicus Curiae

194. Kaplan, Aryeh L. – Counsel for Appellee

195. Kasper, Erica Adams – Appellee's Next Friend and Mother

196. Kellum, Nathan W. – Counsel for Amicus Curiae

197. Kenney, Tim – Amicus Curiae

198. Kilaru, Rakesh N. – Counsel for Amicus Curiae

199. Kimberly, Michael B. (Mayer Brown LLP) – Counsel for Amicus Curiae

200. Kirkland, Earl – Counsel for Amicus Curiae

201. Knotel, Inc. – Amicus Curiae

202. Kogan, Terry S. – Amicus Curiae

203. Kostelnik, Kevin C. – Counsel for Appellant, Terminated

204. Kunin, Ken – Amicus Curiae

205. Kunze, Lisa – Principal of Allen D. Nease High School

206. Laidlaw, Michael – Amicus Curiae

207. Lambda Legal Defense and Education Fund, Inc. – Counsel for Appellee

208. Lapointe, Markenzy – Counsel for Appellee

209. Las Cruces Public Schools – Amicus Curiae

210. LatinoJustice PRLDEF – Amicus Curiae

211. Lawyers Club of San Diego – Amicus Curiae

212. League of Women Voters – Amicus Curiae

213. Lee, Jin Hee – Counsel for Amicus Curiae

214. Legal Aid At Work – Amicus Curiae

215. Legal Momentum – Amicus Curiae

216. Legal Voice – Amicus Curiae

217. Levi Strauss & Co. – Amicus Curiae

218. Linden Research, Inc. d/b/a Linden Lab – Amicus Curiae

219. Los Angeles Unified School District – Amicus Curiae

220. Louisiana Foundation Against Sexual Assault – Amicus Curiae

221. Louisiana NOW – Amicus Curiae

222. Love, Laura H. – Amicus Curiae

223. Lyft, Inc. – Amicus Curiae

224. MacKenzie, Dominic C. – Counsel for Amicus Curiae

225. Maine – Amicus Curiae

226. Maine Women's Lobby – Amicus Curiae

227. Majeski, Jeremy – Amicus Curiae

228. Mallory, Christy, J.D. – Amicus Curiae

229. Mapbox, Inc. – Amicus Curiae

230. Marin Software Incorporated (MRIN) – Amicus Curiae

231. Martin, Emily – Counsel for Amicus Curiae

232. Massachusetts – Amicus Curiae

233. Mayer Brown LLP – Counsel for Amici Curiae

234. McCaleb, Gary S. – Counsel for Amicus Curiae

235. McCalla, Craig – Amicus Curiae

236. McRae Bertschi & Cole, LLC – Counsel for Amicus Curiae

237. Meece, Gregory R. – Amicus Curiae

238. Meerkamper, Shawn – Amicus Curiae

239. Melody, Colleen M. – Counsel for Amicus Curiae

240. Mesa, David D. – Counsel for Amicus Curiae

241. Meyer, Ilan, H., Ph.D. – Amicus Curiae

242. Michigan – Amicus Curiae

243. Michigan Coalition to End Domestic & Sexual Violence – Amicus Curiae

244. Microsoft Corporation (MSFT) – Amicus Curiae and parent company for Amicus Curiae GitHub, Inc.

245. Mignon, Bill – Board Member of Appellant

246. Miller, William C. – Counsel for Appellee

247. Minnesota – Amicus Curiae

248. Minter, Shannon – Counsel for Amicus Curiae

249. Morse, James C., Sr. – Amicus Curiae

250. Mott-Smith, Audrey – Counsel for Amici Curiae

251. Munson, Ziad W. – Amicus Curiae

252. Murray, Kerrel – Counsel for Amicus Curiae

253. NAACP Legal Defense & Educational Fund, Inc. – Amicus Curiae

254. NARAL Pro-Choice America – Amicus Curiae

255. Nardecchia, Natalie – Counsel for Appellee, Terminated

256. National Alliance to End Sexual Violence – Amicus Curiae

257. National Asian Pacific American Women's Forum – Amicus Curiae

258. National Association of School Psychologists – Amicus Curiae

259. National Association of Social Workers – Amicus Curiae

260. National Association of Women Lawyers – Amicus Curiae

261. National Black Justice Coalition – Amicus Curiae

262. National Center for Law and Economic Justice – Amicus Curiae

263. National Center for Transgender Equality – Amicus Curiae

264. National Coalition Against Domestic Violence – Amicus Curiae

265. National Council of Jewish Women – Amicus Curiae

266. National Council on Independent Living – Amicus Curiae

267. National Crittenton – Amicus Curiae

268. National LGBTQ Task Force – Amicus Curiae

269. National Organization for Women Foundation – Amicus Curiae

270. National PTA and The American School Counselor Association – Amicus Curiae

271. National Resource Center on Domestic Violence – Amicus Curiae

272. National Women's Law Center – Amicus Curiae

273. National Women's Political Caucus – Amicus Curiae

274. Neal, Blake A. – Counsel for Amicus Curiae

275. Nebraska Coalition to End Domestic and Sexual Violence – Amicus Curiae

276. Nelson, Janai S. – Counsel for Amicus Curiae

277. Nevada Coalition to End Domestic and Sexual Violence – Amicus Curiae

278. New Hampshire Coalition Against Domestic and Sexual Violence – Amicus Curiae

279. New Jersey – Amicus Curiae

280. New Mexico – Amicus Curiae

281. New Mexico Coalition of Sexual Assault Programs, Inc. – Amicus Curiae

282. New York – Amicus Curiae

283. New York State Coalition Against Sexual Assault – Amicus Curiae

284. NIO Inc. (NIO) – Parent company for Amicus Curiae NIO USA, Inc.

285. NIO NextEV Ltd. – Parent company for Amicus Curiae NIO USA, Inc.

286. NIO USA, Inc. – Amicus Curiae

287. Northern Marianas Coalition Against Domestic & Sexual Violence – Amicus Curiae

288. Oasis Legal Services – Amicus Curiae

289. Oath Inc. – Parent company for Amicus Curiae Tumblr, Inc.

290. O'Melveny & Myers LLP – Counsel for Amicus Curiae

291. O'Reilly, John – Amicus Curiae

292. OGC Law, LLC. – Counsel for Amicus Curiae

293. Ohio Alliance to End Sexual Violence – Amicus Curiae

294. Oklahoma Call for Reproductive Justice – Amicus Curiae

295. Oregon – Amicus Curiae

296. Oregon Coalition Against Domestic & Sexual Violence – Amicus Curiae

297. Orr, Asaf – Counsel for Amicus Curiae

298. Our Bodies Ourselves Today – Amicus Curiae

299. Palacios, Patricia – Counsel for Amicus Curiae

300. Palazzo, Denise – Amicus Curiae

301. Parent-Child Center – Amicus Curiae

302. Patreon, Inc. – Amicus Curiae

303. Pediatric Endocrine Society – Amicus Curiae

304. Pennsylvania – Amicus Curiae

305. PFLAG, Inc. – Amicus Curiae

306. Pierce, Jerome – Counsel for Amicus Curiae

307. Pillsbury Winthrop Shaw Pittman LLP – Counsel for Appellee

308. Pincus, Andrew J. – Counsel for Amicus Curiae

309. Planned Parenthood of South, East and North Florida – Amicus Curiae

310. Planned Parenthood of South Florida and the Treasure Coast, Inc.

311. Planned Parenthood of Southwest and Central Florida – Amicus Curiae

312. Pollock, Lindsey – Amicus Curiae

313. Portnoi, Dimitri – Counsel for Amicus Curiae

314. Postmates Inc. – Amicus Curiae

315. Powell, Wesley R. – Counsel for Record of Amicus Curiae

316. Purcell, Noah G. – Counsel for Amicus Curiae

317. Quinn Emanuel Urquhart & Sullivan, LLP – Counsel for Amici Curiae

318. Rakuten, Inc. – Beneficial owner of Amicus Curiae Lyft, Inc.

319. Ranck-Buhr, Wendy – Amicus Curiae

320. Rao, Devi M. – Counsel for Amicus Curiae, Terminated

321. Rape/Domestic Abuse Program – Amicus Curiae

322. RC Barden and Associates – Counsel for Appellant, Terminated

323. Recruit Holdings Co., Ltd. (TYO 6098) – Parent company for Amicus Curiae Glassdoor Inc.

324. Reed, Mahogane D. – Counsel for Amicus Curiae

325. Replacements, Ltd. – Amicus Curiae

326. Reproaction – Amicus Curiae

327. Retzlaff, Pamela – Amicus Curiae

328. Reynolds, Andrew, Ph.D. – Amicus Curiae

329. RGF OHR USA, Inc. – Parent company for Amicus Curiae Glassdoor Inc.

330. Rhode Island – Amicus Curiae

331. Rivaux, Shani – Counsel for Appellee

332. Robertson, Cynthia C. – Counsel for Appellee

333. Rose, Nicholas M. – Counsel for Amicus Curiae

334. Rothfield, Charles – Counsel for Amicus Curiae

335. Samuels, Jocelyn, J.D. – Amicus Curiae

336. San Diego Cooperative Charter Schools – Amicus Curiae

337. Santa, Rachel – Amicus Curiae

338. SASA Crisis Center – Amicus Curiae

339. Sears, R. Bradley, J.D. – Amicus Curiae

340. Schaffer, Brian – Amicus Curiae

341. Scholars Who Study The Transgender Population – Amicus Curiae

342. Schommer, Monica – Amicus Curiae

343. School Administrators from 29 States and the District of Columbia – Amicus Curiae

344. School District of South Orange and Maplewood – Amicus Curiae

345. Segal, Richard M. – Counsel for Appellee

346. Sethi, Chanakya A. – Counsel for Amicus Curiae

347. Shaffer, Chelsea P. – Counsel for Amicus Curiae

348. Shah, Paru – Amicus Curiae

349. Shirk, Sarah – Amicus Curiae

350. Shutterstock, Inc. (SSTK) – Amicus Curiae

351. SIECUS: Sex Ed for Social Change – Amicus Curiae

352. SisterReach – Amicus Curiae

353. Slanker, Jeffrey D. – Counsel for Appellant

354. Slavin, Alexander – Counsel for Amicus Curiae

355. Slough, Beverly – Board Member of Appellant

356. Smith, Nathaniel R. – Counsel for Appellee

357. Sniffen, Robert J. – Counsel for Appellant

358. Sniffen & Spellman, P.A. – Counsel for Appellant

359. Southern Poverty Law Center – Amicus Curiae

360. Spellman, Michael P. – Counsel for Appellant

361. Spital, Samuel – Counsel for Amicus Curiae

362. Spotify AB – Parent company for Amicus Curiae Spotify USA Inc.

363. Spotify Technology S.A. – Parent company for Amicus Curiae Spotify USA Inc.

364. Spotify USA Inc. – Amicus Curiae

365. Spryszak, Delois Cooke – Amicus Curiae

366. SSAIS.org – Amicus Curiae

367. Steptoe & Johnson LLP – Counsel for Amicus Curiae

368. Stop Sexual Assault in Schools (SSAIS.org) – Amicus Curiae

369. Stork, Victoria Lynn – Counsel for Amicus Curiae

370. SurvJustice – Amicus Curiae

371. Sutherland, Emily – Amicus Curiae

372. Taymore, Cyndy – Amicus Curiae

373. Teufel, Gregory H. – Counsel for Amicus Curiae

374. Tilley, Daniel – Counsel for Amici Curiae

375. The American Academy of Pediatrics – Amicus Curiae

376. The Impact Fund – Amicus Curiae

377. The Law Office of Kirsten Doolittle, P.A. – Counsel for Appellee

378. The School Board of St. Johns County, Florida – Appellant

379. The Southwest Women's Law Center – Amicus Curiae

380. The Women's Law Center of Maryland – Amicus Curiae

381. Toomey, Joel – Magistrate Judge

382. Trans Youth Equality Foundation – Amicus Curiae

383. Tumblr, Inc. – Amicus Curiae

384. Twitter Inc. (TWTR) – Amicus Curiae

385. Tyler & Bursch, LLP. – Counsel for Amicus Curiae

386. Tyler, Robert H. – Counsel for Amicus Curiae

387. Tysse, James E. – Counsel for Amicus Curiae

388. Underwood, Barbara D. – Counsel for Amici Curiae

389. Union for Reform Judaism – Amicus Curiae

390. UniteWomen.org – Amicus Curiae

391. Upchurch, Bailey & Upchurch, P.A. – General Counsel to Appellant

392. Upchurch, Frank D. – General Counsel to Appellant

393. Valbrun-Pope, Michaelle – Amicus Curiae

394. Van Meter, Quentin – Amicus Curiae

395. Van Mol, Andre – Amicus Curiae

396. Vannasdall, David – Amicus Curiae

397. Vaughn, Craig – Amicus Curiae

398. Verizon Communications Inc. (VZ) – Parent company for Amicus Curiae Tumblr, Inc.

399. Vermont – Amicus Curiae

400. Vermont Network Against Domestic & Sexual Violence – Amicus Curiae

401. Virginia – Amicus Curiae

402. Virginia Sexual & Domestic Violence Action Alliance – Amicus Curiae

403. Vitale, Julie – Amicus Curiae

404. Voices of Hope – Amicus Curiae

405. Wallace, Matthew M. – Counsel for Amicus Curiae, Terminated

406. Washington – Amicus Curiae

407. Washoe County School District – Amicus Curiae

408. Wasick, Joanna – Counsel for Amicus Curiae

409. Weber, Thomas – Amicus Curiae

410. Weisel, Jessica M. – Counsel for Amicus Curiae

411. Williams Institute at UCLA School of Law – Amicus Curiae

412. Wilkinson Stekloff LLP – Counsel for Amicus Curiae

413. Willkie Farr & Gallagher LLP – Counsel for Amicus Curiae

414. Wilson, Bianca, D.M., Ph.D. – Amicus Curiae

415. Wisconsin Coalition Against Sexual Assault – Amicus Curiae

416. Women of Reform Judaism, and Men of Reform Judaism – Amicus Curiae

417. Women's Bar Association of the District of Columbia – Amicus Curiae

418. Women's Bar Association of the State of New York – Amicus Curiae

419. Women's Center for Advancement – Amicus Curiae

420. Women's Institute for Freedom of the Press – Amicus Curiae

421. Women's Law Project – Amicus Curiae

422. Women's Law Project and Young Women United – Amicus Curiae

423. Women Lawyers Association of Los Angeles – Amicus Curiae

424. Women Lawyers On Guard Inc. ("WLG") – Amicus Curiae

425. Women's Legal Defense and Education Fund – Amicus Curiae

426. Women's Liberation Front – Amicus Curiae

427. Wong, Kyle – Counsel for Amicus Curiae

428. Working Assets, Inc. – Parent company for Amicus Curiae CREDO Mobile, Inc.

429. WV Free – Amicus Curiae

430. Wyoming Coalition Against Domestic Violence and Sexual Assault – Amicus Curiae

431. Xerox Corporation (XRX) – Amicus Curiae

432. Yelp Inc. (YELP) – Amicus Curiae

433. Young Women United – Amicus Curiae

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/s/ Mahogane D. Reed
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INTERESTS OF AMICI CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, and public education, LDF strives to enforce the United States Constitution's promise of equal protection and due process for all. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

Pursuant to its mission, LDF has advocated against sex-based discrimination, *see, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), and public-accommodation discrimination, *see, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

Moreover, LDF has participated as amicus curiae in several cases addressing the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amici curiae*, *amici curiae*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief.

See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Plaintiff-Appellee, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (No. 19-1952), 2019 WL 6341088; Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. & NAACP in Support of Appellees & Affirmance, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (No. 14-1167) 2014 WL 1510928; Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., *Ingersoll v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017) (No. 91615-2).

The Center for Gender and Sexuality Law ("CGSL" or the "Center") at Columbia Law School is the first and most prominent law school-based law policy center committed to translating legal scholarship into real-world change and training the next generation of lawyers and advocates fighting for gender and sexual justice. CGSL's faculty, staff, and team of researchers develop rigorous policy analysis, litigation strategy, and thought leadership on cutting-edge issues at the intersection of gender, sexual, reproductive, racial justice, and religious liberty. CGSL is the base for law and policy centers including the Law, Rights and Religion Project, and the Equal Rights Amendment Project. Professor Katherine Franke, the Director of the Center for Gender and Sexuality Law, is among the nation's most prominent

scholars on the law of sex, gender, and racial justice. Candace Bond-Theriault, the Center for Gender and Sexuality Law's Director of Racial Justice Policy and Strategy, is an attorney who specializes in the intersectional dynamics of racial, sexual, and gender-based injustice.

CGSL faculty have filed amicus curiae briefs in numerous cases including *Horton v. Midwest Geriatric Management, LLC*, 963 F.3d 844 (8th Cir. 2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Gloucester County School Board v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016); *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014); and *United States v. Windsor*, 570 U.S. 744 (2013).

Given amici's enduring support of, and interest in, robust and effective anti-discrimination laws, amici submit that their experience and knowledge will assist the Court in resolving this case.

STATEMENT OF THE ISSUES

Do either the Fourteenth Amendment's Equal Protection Clause or Title IX permit barring a transgender student from a restroom according with their gender identity on the basis of nonspecific privacy concerns, with no reason to believe transgender students are more likely than cisgender students to violate the privacy of others?

SUMMARY OF ARGUMENT

This case is about whether the state may prohibit an individual's use of public spaces on the basis of unjustified—and unjustifiable—fear and prejudice. Specifically at issue here is whether the School Board of St. Johns County, Florida (the "School Board") may single out transgender students by prohibiting them from using restrooms that are consistent with their gender identity for reasons that are unsupported by evidence or sound judgment and that perpetuate false stereotypes. The constitutional guarantee of the "equal protection of the laws" demands that the answer is no.

LDF's extensive experience challenging discrimination leads it to register three core points in this brief.

First, there is a lengthy and troubling history of state actors restricting access to public restrooms and other shared public spaces to demean and subordinate disfavored groups. The era of "Colored" and "White" bathrooms remains in the living memory of many. The private-space barriers of that *de jure* segregation—such as racially segregated bathrooms—were a source of profound indignity that inflicted indelible harms on individuals of all races and society at large. This history warrants skepticism of the School Board's rationale for its actions in this case.

Second, state officials often justified physical separation of Black Americans in the public sphere by invoking unfounded fears about sexual contact and predation.

Here, too, the School Board's repeated concerns about "privacy" cannot withstand scrutiny. The mere presence of a transgender student in a multi-user bathroom fitting their gender identity does not inherently violate the privacy of others in the bathroom, any more than the mere presence of cisgender students does. The School Board's argument requires the assumption that transgender students are more likely to actively invade the privacy rights of others. That reasoning harks back to the same false assumptions used to justify separate bathrooms for racial minorities.

Third, and more broadly, the School Board's bathroom-exclusion rule fits within a troubling tradition of local and state governments and officials justifying the physical separation of certain groups from others under the guise of generally protecting the non-excluded group—here, cisgender students and staff. These rationales conflict with the foundational constitutional principle that government actors may not draw unfounded distinctions based on differences, regardless of private community biases.

This Court should not repeat the mistakes of the past. The weight of precedent and the guarantees of equal protection require affirming the district court and its recognition of Drew Adams's dignity.

ARGUMENT

The School Board's policy of prohibiting transgender students from using restrooms that align with their gender identity singles out and physically separates those students based on an essential characteristic of their person. Due to the School Board's erroneous and outdated reliance on exclusionary definitions of "biological sex," transgender students alone are forced either to use a restroom that is inconsistent with their gender identity or to be relegated to separate, individual bathrooms away from other students. The rationale for this disparate treatment bears striking similarity to the forced racial separation of restrooms routinely imposed throughout the South prior to the Civil Rights Movement, which is now uniformly condemned in law and society.

The School Board seeks to justify its policy based on the purported danger to other students or the violation of their privacy that would result from sharing restrooms with transgender students of a different "biological sex." *See, e.g.*, Appellant Br. at 9 ("[T]he [School Board's bathroom] policy is of course substantially related to the important governmental interest of protecting student privacy in bathrooms."); *id.* at 9-10 (implying that striking down the School Board's policy would undermine student safety). But like other rules of physical separation in this country's shameful past, the School Board's invocations of any risk to student safety and privacy—other than "risk" based solely in bias and stereotype—lack

evidentiary support and legitimacy. There is simply no explanation for the School Board's policy beyond discomfort, fear, and hostility toward transgender students. Such sentiments cannot justify any policy, let alone one that stigmatizes children in their own schools.

I. Our Nation's History Makes Clear that the Physical Separation of Bathrooms Is Harmful and Stigmatizing.

The rationale for the exclusion of transgender students from bathrooms matching their gender identity—and the stigma associated with that exclusion—are reminiscent of the exclusion of Black Americans from bathrooms designated for exclusive use by white people during the Jim Crow era. At that time, "[p]ublic washrooms and water fountains were rigidly demarcated to prevent contaminating contact with the same people who cooked the white South's meals, cleaned its houses, and tended its children."[2] For example, a Florida law required separate bathrooms for Black and white people wherever Black people worked or were accommodated, *Robinson v. Florida*, 378 U.S. 153, 156 (1964), and an Alabama ordinance required separate bathrooms in workplaces, public accommodations, and certain "multiple dwellings," *King v. City of Montgomery*, 168 So. 2d 30, 31 n.2 (Ala. Ct. App. 1964). State and local governments also segregated bathrooms in

[2] Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality 107 (Knopf 1975).

government buildings by race, despite challenges to these policies. *See, e.g.*, *Dawley v. City of Norfolk*, 260 F.2d 647, 647 (4th Cir. 1958) (per curiam) (upholding a Virginia city's right to segregate state court bathrooms). The federal government even *mandated* segregation and separate bathrooms in government buildings during the early 1900s. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 394 (1978) (Marshall, J., separate op.).

In the wake of the United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which prohibited *de jure* racial segregation in public schools, state officials enacted or reinforced laws and policies to ensure the racial separation of bathrooms. For example, influenced by the white supremacist Citizens Councils, Louisiana legislators passed a series of bills to flout federal integration mandates, which included bathroom segregation provisions.[3] The Lake County, Florida sheriff maintained segregated restrooms at the county jail until the United States Department of Justice forced him to take them down.[4] And in one particularly horrific incident, a white man murdered Samuel Younge, Jr.—a veteran and member of the Student Nonviolent Coordinating Committee—in Tuskegee,

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[3] Adam Fairclough, Race and Democracy: The Civil Rights Struggle in Louisiana, 1915-1972, at 196, 204-05 (2008).

[4] *See* "Segregation Forever": Leaders of White Supremacy, Equal Just. Initiative, https://segregationinamerica.eji.org/report/segregation-forever-leaders.html (last visited Nov. 19, 2021).

Alabama, for trying to use a segregated bathroom at a gas station.[5]

State laws requiring racially segregated bathrooms caused immeasurable indignity to Black Americans. As the Senate recognized when it passed the Civil Rights Act of 1964, "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, at 16 (1964)). Such "[e]xposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims." *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 413 (1982) (Marshall, J., dissenting); *cf. Allen v. Wright*, 468 U.S. 737, 755 (1984) (recognizing that "the stigmatizing injury often caused by racial discrimination . . . is one of the most serious consequences of discriminatory . . . action").

Black parents understand the trauma that segregation and racism inflict on children all too well. Before the Civil Rights Act was passed, many Black parents instructed their children to go to the bathroom at home to avoid segregated public

[5] *See* Julian Bond, *Under Color of Law*, 47 How. L.J. 125, 128 (2003).

facilities.[6] Often, the use of segregated bathrooms required Black people to walk long distances—past bathrooms that, by right, they should have been able to use; this public humiliation further underscored the separation and shame involved.[7]

Similar harms flow from the School Board's policy here. Policies prohibiting transgender youth from using the bathrooms that align with their gender identity makes transgender youth feel unsafe and puts them at greater risk of bullying, harassment, and sexual assault.[8] As a result, transgender youth often avoid using public bathrooms.[9] Rules and policies forcing transgender people to use bathrooms

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[6] *See, e.g.*, Vernon E. Jordan Jr., *The Power of Movies to Change Our Hearts*, N.Y. Times (Feb. 18, 2017), https://www.nytimes.com/2017/02/18/opinion/sunday/the-power-of-movies-to-change-our-hearts.html.

[7] *See* Christina Cauterucci, Hidden Figures *Is a Powerful Statement Against Bathroom Discrimination*, Slate (Jan. 18, 2017), https://slate.com/human-interest/2017/01/hidden-figures-is-a-powerful-statement-against-bathroom-discrimination.html.

[8] Thea A. Schlieben, *Sex-Segregated Bathrooms and Suicidal Ideation in Transgender Youth*, 15 J. Advanced Generalist Soc. Work Prac. 1, 27, 31-32 (2020); Ryan Thoreson, *Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in U.S. Schools*, Hum. Rts. Watch (Sept. 14, 2016), https://www.hrw.org/report/2016/09/14/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us.

[9] Shoshana Goldberg & Andrew Reynolds, *The North Carolina Bathroom Bill Could Trigger a Health Crisis Among Transgender Youth, Research Shows*, Wash. Post (Apr. 18, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/18/the-north-carolina-bathroom-bill-could-trigger-a-health-crisis-among-transgender-youth-research-shows/.

according to their sex assigned at birth also severely harm their mental health.[10] Excluding transgender students based on sex assigned at birth communicates a clear message to transgender youth: "[Y]ou are not welcome here, your safety is not paramount, and you may not choose how to identify or express [your] identity."[11] Such an "emphatic social rejection" at a time when transgender youth are forming their identities is not only cruel—it is dangerous, as it lowers transgender students' self-esteem and increases their anxiety, depression, and suicidal ideation.[12] These harms cannot be overstated.

The School Board's policy places a humiliating and demeaning stigma on transgender children by physically separating them from other children who share their gender identity. Transgender children cannot change who they are—nor should they be ashamed of who they are or made to feel that they should change.

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[10] *See id*; Timothy Wang et al., State Anti-Transgender Bathroom Bills Threaten Transgender People's Health and Participation in Public Life 7 (2016), https://fenwayhealth.org/wp-content/uploads/2015/12/COM-2485-Transgender-Bathroom-Bill-Brief_v8-pages.pdf. For example, a recent study found that 60% of transgender youth who were denied access to their bathroom of choice attempted suicide. Goldberg & Reynolds, *supra* note 9. That number decreased to 43% of transgender youth who were not denied appropriate bathroom access. *Id.*

[11] Goldberg & Reynolds, *supra* note 9.

[12] *Id.*; Schlieben, *supra* note 8, at 31-32; Thoreson, *supra* note 8.

II. The School Board's Justification for Physically Separating Transgender Children Invokes the Kind of False Stereotypes Once Used to Justify Racial Segregation.

The School Board's justification for its exclusionary bathroom policy—which centers on purported concerns about the safety and privacy of cisgender children—must be viewed in the context of the baseless past anxieties about sexual predation and contagion that were used to justify race-based separation of bathrooms and swimming pools, anti-miscegenation laws, and the exclusion and criminalization of lesbian and gay individuals. The idea that the mere presence or proximity of a Black person could render a space unfit for a white person lay at the core of each of these examples of racial segregation and the effect of that segregation was to subordinate Black people as inherently inferior.[13] That history not only highlights how unsupported fears—framed by white Americans as health and safety concerns—were often a pretext for discriminatory beliefs and norms based in stereotype, but also serves as a lesson that such false reasoning cannot support discriminatory treatment like the School Board's policy towards transgender children.

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[13] S*ee* James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 How. L.J. 113, 143 (2006) ("Public accommodation segregation was the most immediate and frequent theater of White supremacy . . . Segregation in these public arenas served as a check on and denial of freedom and equality in other spheres.").

A. Bathrooms and the Myth of Contamination

Segregation's advocates often used false and racist stereotypes about sexual predation and disease to justify racial segregation of bathrooms. For example, a 1957 Arkansas newspaper advertisement mused whether white children should "be forced to use the same rest room and toilet facilities" as Black Americans given the "high venereal disease rate among Negroes . . ."[14] Public flyers hawked the "[u]ncontested medical opinion" that "girls under 14 years of age are highly susceptible to [venereal] disease if exposed to the germ through seats, towels, books, gym clothes, etc."[15] When President Franklin Roosevelt eliminated racial segregation in certain bathrooms, "white female government workers staged a mass protest, fretting that they might catch venereal diseases if forced to share toilets with black women."[16]

Supporters of segregation also employed "contamination" rhetoric,[17] to argue

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[14] Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 Ark. Hist. Q. 42, 52 (2003).

[15] *Id.* at 63-64.

[16] Nick Haslam, *How the Psychology of Public Bathrooms Explains the 'Bathroom Bills,'* Wash. Post (May 13, 2016), https://www.washingtonpost.com/posteverything/wp/2016/05/13/how-the-psychology-of-public-bathrooms-explains-the-bathroom-bills/?noredirect=on&utm_term=.eb182b0adbdc.

[17] *See, e.g.*, C.J. Griffin, Note, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 Rutgers L. Rev. 409, 423-25 (2009) (discussing privacy, cleanliness and morality rationales for race-based bathroom rules); Eileen Boris, *"You Wouldn't Want One of 'Em Dancing with Your Wife": Racialized Bodies on the Job in World War II*, 50 Am. Q. 77, 93-97 (1998).

that "racially segregated bathrooms" were necessary "to make sure that blacks would not contaminate bathrooms used by whites."[18] The clear implication of such reasoning was that Black people were inherently inferior.[19]

Those beliefs had no basis in reality. In the landmark case of *Turner v. Randolph*, 195 F. Supp. 677 (W.D. Tenn. 1961), Black Tennesseans, represented by a group of attorneys that included Thurgood Marshall and Constance Baker Motley, challenged the segregation of Memphis public libraries, including their bathrooms. Memphis justified its segregated bathrooms with purported evidence "that the incidence of venereal disease is much higher among Negroes in Memphis and Shelby County than among members of the white race." *Id.* at 678-80. In ruling in the plaintiffs' favor, the court found that "no scientific or reliable data have been offered to demonstrate that the joint use of toilet facilities . . . would constitute a serious danger to the public health, safety or welfare." *Id.* at 680.

Here, the School Board's argument that Drew Adams' mere presence in a boys' bathroom violates the "privacy rights" of a "biological boy" and poses a risk to student "safety and welfare," Appellant Br. at 7; Appellant Panel Br. at 9, 26, is

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[18] Griffin, *supra* note 17 at 423 n.84 (quoting Richard A. Wasserstrom, *Racism and Sexism, in Race and Racism* 319 (Bernard P. Boxill ed., 2001)).

[19] *See, e.g.*, *id.* at 424 (observing that segregation "taught both whites and blacks that certain kinds of contacts were forbidden because whites would be degraded by the contact with the blacks" (citation omitted)); *see also infra* Part II.B.

also based on false stereotypes and sends an unequivocal message that, as a transgender child, Drew is inferior to other children at his school. As in *Randolph*, here, the School Board can offer no evidence, scientific or otherwise, which suggests that the presence of transgender students somehow compromises the bodily privacy cisgender students can reasonably expect in the bathroom.[20] In the absence of any such evidence and considering the measures the school already has in place to address bathroom misconduct of any kind, it fails to reason that the current policy of separating transgender students is necessary to protect student safety and privacy.[21] The School Board's vague assertions about discomfort or privacy simply cannot justify sex-based disparate treatment. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 540-46 (1996).

B. Swimming Pools and the Myth of Black Sexual Predation

Supporters of racially segregated swimming pools also invoked baseless justifications to separate swimmers by race.[22] Sexual predation fears were key to this

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[20] *Turner v. Randolph*, 195 F. Supp. 677, 680 (W.D. Tenn. 1961). Rather, as a three-judge panel of this Court previously concluded, the evidence in the record supports a contrary conclusion. *See* Panel Op. at 20. Appellant identifies a single example of an anonymous student complaint about Drew's use of the boys' bathroom in September 2015. *See* Appellant Br. at 6. The transcript of the trial testimony the School Board cites as evidencing the complaint indicates that Drew's mere presence in the bathroom was the basis for the complaint.

[21] *Randolph*, 195 F. Supp. at 680.

[22] *See, e.g.*, Jeff Wiltse, Contested Waters: A Social History of Swimming Pools in America 2-4, 124 (2007).

separation: many white individuals "objected to black men having the opportunity to interact with white women at such intimate and erotic public spaces" and "feared that black men would act upon their supposedly untamed sexual desire for white women by touching them in the water and assaulting them with romantic advances."[23]

In the mid-1950s, a federal district court drew the parallel directly as it upheld Maryland's racially segregated bathing facilities: "The degree of racial feeling or prejudice in this State at this time is probably higher with respect to bathing, swimming and dancing than with any other interpersonal relations except direct sexual relations." *Lonesome v. Maxwell*, 123 F. Supp. 193, 202 (D. Md. 1954), *rev'd sub nom. Dawson v. Mayor of Baltimore*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (citation omitted). The court acknowledged other recent integration efforts but deemed integrated swimming pools a step too far because they "are for all ages, and are practically unsupervised, except by young life guards." *Id.* at 203. The plaintiffs raised an argument not dissimilar from Drew's argument here: that "segregation in recreation introduces a matter of compulsion which impairs its very nature." *Id.* at 205. The court opined that the "natural thing in Maryland at this time . . . is for Negroes to desire and choose to swim with Negroes and whites with

[23] *Id*. at 124.

whites" and for proprietors to segregate accordingly. *Id.* at 205.

We now know, however, that the concerns the court legitimized were unfounded pretexts marshaled to preserve the racial caste system.[24] The true threat of interracial social interaction on equal terms—romantic or otherwise—was the disruption of an unequal political, social, and economic order. Trumped up fears about interracial contact and sexual predation were simply pretextual vehicles to render such interaction taboo.

We recognize, of course, that the present context is not identical. But, it calls to mind these past frivolous concerns. The School Board's defense of the policy as "merely recogniz[ing] the differing natures of men and women," Appellant Br. at 9, eerily echoes the past mistakes courts made in upholding racial segregation as the "natural" social order. The School Board's policy singles out transgender students on the basis of vague concerns about "anatomical and physiological differences" between transgender and cisgender students and the implied assumption that the mere presence of a transgender student in multi-user bathrooms compels greater exposure to intimate anatomy, Appellant Br. at 17—concerns somehow not generated by the presence of non-transgender persons in the same bathrooms. Without crediting debunked stereotypes that position trans people as deviants and

[24] *See, e.g.*, Fox, *supra* note 13, at 140-43, 155.

predators, it is hard to discern any sense to the School Board's policy beyond discomfort or dislike. Yet, the "bare . . . desire to harm a politically unpopular group" is never a "legitimate state interest[]." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

C. Anti-miscegenation Laws as a Bar to Interracial Intimacy

Segregationists wielded the same pretextual rationales applied in the contexts of bathrooms and swimming pools to oppose interracial marriage, which was long exploited as the ultimate white fear. Anti-miscegenation rhetoric necessitated the maintenance of segregated shared spaces as "legal barriers to interracial intimacy were essential to establishing the political order that . . . subordinated blacks to the rule of whites."[25]

The Virginia Supreme Court decision, which the Supreme Court overturned in *Loving v. Virginia*, 388 U.S. 1 (1967), drew the bias and fear that underlay segregation and the subordination of Black Americans into sharp relief. Virginia defended its anti-miscegenation law, the Racial Integrity Act, *inter alia*, on the ground that "intermarriage constitutes a threat to society," and proffered evidence "that the crossing of distinct races is biologically undesirable and should be

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[25] Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. Sch. L. Rev. 175, 179 (2015); *see also id.* ("Laws banning interracial marriage were a key part of the segregationist edifice dismantled by the civil rights movement.").

discouraged." Brief & Appendix on Behalf of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *44, *49.

In sentencing the Lovings for violating the Virginia law, the trial judge proclaimed: "The fact that [God] *separated* the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. at 3 (emphasis added). The trial court also relied on an earlier decision, *Naim v. Naim*, which had declared that states had a right to "preserve . . . racial integrity" and prevent a "mongrel breed of citizens," "the obliteration of racial pride," and the "corruption of blood [that would] weaken or destroy the quality of its citizenship." 87 S.E.2d 749, 756 (Va. 1955); *Loving v. Virginia*, 147 S.E.2d 78, 80-82 (Va. 1966).

The United States Supreme Court struck down Virginia's law because it was "designed to maintain White Supremacy." *Loving*, 388 U.S. at 11. In so doing, the Court rejected Virginia's post-hoc and pretextual rationalizations for enshrining separate categories of marriages, finding "no legitimate overriding purpose independent of invidious racial discrimination which justifies [the] classification." *Id*. *Loving* refused to credit *Naim*'s theories about the social and genetic consequences of interracial sexual contact, casting them aside as nothing more than "an endorsement of the doctrine of White Supremacy." *Id.* at 7.

D. Lesbian and Gay Criminalization and Discrimination

Finally, baseless concerns about contagion and sexual predation were deployed more broadly to justify the criminalization of gay and lesbian individuals and their physical exclusion from certain environments regardless of their race.[26] In *Bowers v. Hardwick*, for instance, Georgia argued that homosexuality is linked to "a disproportionate involvement with adolescents," "a possible relationship to crimes of violence," and the "transmission of . . . diseases." Brief of Petitioner Michael J. Bowers Attorney General of Georgia, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939, at *36-37. In *Lawrence v. Texas*, oral argument before the Supreme Court featured discussion of whether "a State could not prefer heterosexuals or homosexuals to teach Kindergarten" based on concerns that children would be harmed because they "might be induced to . . . follow the path to homosexuality." Transcript of Oral Argument, *Lawrence v. Texas*, 539 U.S. 558

[26] Because these stigmatizing and harmful claims have been used to subordinate and socially exclude individuals on the basis of their race and sexual orientation, LGBTQ+ people of color are effectively doubly burdened by such baseless justifications. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 8 Univ. Chi. L.F. 139 (1989) (advocating for the application of multidimensional analysis of the way gender, class, and race factor into both the substance and effect of discrimination).

(2003) (No. 02-102), 2003 WL 1702534, at *20-21.[27]

The justifications for excluding openly gay and lesbian individuals from both military and civil service sounded in contagion rhetoric and fears of sexual predation. Proponents of their exclusion expressed the concern that "showering bodies would be subjected to unwanted sexual scrutiny."[28] In the 1960s, the chair of the Civil Service Commission similarly rejected a request to end a ban on openly gay people from federal civil service jobs, pointing to the "apprehension" other employees would feel about sexual advances, sexual assault, and related concerns regarding "on-the-job use of the common toilet, shower and living facilities." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010), *aff'd Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013) (citation omitted).

As the Supreme Court has made clear, dislike of—or discomfort around—gay and lesbian individuals is not a legitimate justification for discrimination. *See Romer*

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[27] *See also Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children [or] as teachers in their children's schools[.]").

[28] Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201, 227 (2012); *see also id.* ("The [anti-gay military] policy originated amidst broad assertions about the disordered quality of same-sex attractions and the degeneracy of people who acted upon them, moved through . . . the alleged duplicity and untrustworthiness of gay people, then to the supposed association of gay people with disease and lack of cleanliness[.]").

v. Evans, 517 U.S. 620, 632 (1996). The Equal Protection Clause prohibits the government from discriminating against one group to accommodate the prejudices or discomfort of another. "The Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

All told, the articulated rationales offered for physically separating transgender students in this case are analogous in many respects to those that were used to justify racially segregated bathrooms and swimming pools or the criminalization or exclusion of gay and lesbian individuals. This Court must treat the arguments today with similar skepticism.

III. The Dubious Characterization of Protecting Some Individuals from Discomfort Cannot Justify the School Board's Bathroom-Exclusion Rule.

More broadly, the Board's bathroom-exclusion rule fits within a troubling tradition of local and state governments and officials justifying the physical separation of certain groups from others under the guise of protecting the non-excluded group, here, cisgender students and staff.[29] But protecting students from

[29] The School Board concedes that both privacy and safety concerns have animated its position on the bathroom policy, *see* Appellant Br. at 5 ("Concerns of School Board personnel specifically related to bathroom use included privacy and

purported discomfort is a legally insufficient justification for the School Board's bathroom-exclusion rule. Indeed, in the context of racial discrimination, courts and society at large have repudiated the proposition that non-credible and speculative concerns justify unlawful discrimination, segregation, and exclusion. This is true regarding recreational facilities and housing.

A. Order and Peace in Public Recreational Facilities

Under Jim Crow, local and state governments imposed group-based restrictions on the use of recreational facilities—like public parks, golf courses, swimming pools, and baseball and football fields, among others—purportedly to avoid discomfort or to protect the public. *See, e.g.*, *supra* Section II.

For example, following *Brown*, the City of Baltimore argued that, *Brown* notwithstanding, it was entitled to segregate by race in public parks "for the preservation of order within the parks" and "to avoid any conflict which might arise from racial antipathies." *Dawson v. Mayor of Baltimore City*, 220 F.2d 386, 387 (4th Cir. 1955) (per curiam), *aff'd per curiam*, 350 U.S. 877 (1955). The Fourth Circuit emphatically rejected Baltimore's argument, emphasizing that post-*Brown*,

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safety."), though its position before the en banc Court diminishes the role safety concerns played in formulating the policy. And although the School Board has framed its concerns for the en banc court as concerning the privacy of all students, the School Board previously articulated its concerns much more narrowly to include only cisgender students. *See* D. Ct. Op. at 40.

"segregation cannot be justified as a means to preserve the public peace." *Id*. Other cities' efforts to perpetuate racial segregation in public parks and recreational facilities similarly failed. *See, e.g.*, *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122, 123 (5th Cir. 1958), *aff'd per curiam*, 358 U.S. 54 (1958) (the Fifth Circuit rejecting an argument that post-*Brown* segregation of public golf courses and park facilities was permissible as "completely untenable"), *Holley v. City of Portsmouth*, 150 F. Supp. 6, 7-9 (E.D. Va. 1957) (extending a temporary injunction against a city law restricting Black Americans' use of golf courses to one day per week).

Notably, the Supreme Court expressly rejected the City of Memphis's claim that safety required delaying the integration of public parks. *Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963) (recounting the city's arguments about "promot[ing] the public peace by preventing race conflicts" and that "gradual desegregation on a facility-by-facility basis is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil"). Instead, the Court stated that "neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials." *Id.* at 536. This is especially important in the instant case, where the School Board identified concerns about safety of students in a perfunctory manner, Appellant Br. at 5, 7, 9, and offered

no factual evidence or analysis whatsoever to support its position.

More broadly, arguments about danger to and discomfort of the public were also offered to justify segregation in public swimming facilities, in addition to the sexualized fears discussed above, *supra* Section II.B. Baltimore and Maryland argued, for example, that segregation of the parks offered "the greatest good of the greatest number" of both Black and white citizens, on the view that most individuals, regardless of race, "are more relaxed and feel more at home among members of their own race than in a mixed group[.]" *Lonesome*, 123 F. Supp. at 202; *see also id.* (expressing concern about "racial feeling" that would result from removing the physical-separation rules).

No matter how the rationale was couched, courts around the country rejected such physical-separation rules. *See, e.g.*, *Tate v. Dep't of Conservation & Dev.*, 133 F. Supp. 53, 61 (E.D. Va. 1955), *aff'd*, 231 F.2d 615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956) (rejecting denial of access to state parks based on race even when conducted by private actors acting on a lease); *Dawson*, 220 F.2d 386; *New Orleans City Park Improvement Ass'n*, 252 F.2d 122.

B. Residential Restrictions Based on Purported Safety Concerns

The now-condemned physical separation of homes and neighborhoods based on discomfort with a particular group of people involves the same underlying concerns of allowing fears and bias to justify discrimination, thus presenting

troubling historical parallels.

For example, in *City of Cleburne*, Texas refused to authorize a group home for people with intellectual disabilities under its zoning regulations on the grounds that it "feared that the students [from a nearby school] might harass the occupants of the [] home." 473 U.S. at 449. The City Council also noted concerns about the home's location on an old flood plain and "expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents[.]" *Id.* at 449-50.

The Supreme Court, however, concluded that the safety concerns were unfounded and that these legitimate-sounding rationales were proxies for "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding[.]" *Id.* at 448. *See also id.* at 449 (describing the permit denial as "based on . . . vague, undifferentiated fears"); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (rejecting the city's argument that an amendment to the city charter allowing discrimination in home sales should survive challenge because it involved "the delicate area of race relations").

The now discredited decision in *Korematsu v. United States* provides yet another illustration of neutral-sounding rationales offered to justify a physical-separation rule that rested on distrust of a subgroup of Americans. In *Korematsu,* the government invoked the "twin dangers of espionage and sabotage" to support the

forced removal of Japanese Americans from their residences and into internment camps. 323 U.S. 214, 217 (1944). Because those fears were baseless, Mr. Korematsu's conviction was ultimately vacated, and he received reparations from Congress, an official apology from the President, and an extraordinary confession of error from the United States.[30]

IV. The School Board's Bathroom-Exclusion Rule Is Anathema to the Fourteenth Amendment's Promise of Equal Protection.

Precedent makes clear that the government may not physically separate and ban individuals from communal spaces on the basis of irrelevant, unjustified beliefs. That is particularly true when the ostensible justifications rest upon concerns about discomfort and fear that have no factual support. As the historical record shows, state officials have used such rationales to divide and subordinate rather than to protect. In keeping with the constitutional demand for equal protection under the Fourteenth Amendment, such pretextual arguments must fail.

Today, the racial separation of bathrooms is now rightly seen for what it is: immoral, insidious, and impermissible. Even while striving to overcome the enduring vestiges and latest iterations of prejudice, judicial precedents reaffirm that

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[30] *See, e.g.*, Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

our nation has a vast capacity for progress: "[W]hat once was a 'natural' and 'self-evident' ordering" of constitutional principles of equality "later comes to be seen as an artificial and invidious constraint on human potential and freedom." *City of Cleburne*, 473 U.S. at 466 (Marshall, J., concurring). Indeed, not one of the crass, stereotypical predictions about the dangers of racially integrating restrooms—or swimming pools, neighborhoods, or beyond—have come to fruition, nor could they.

So too here. The legitimacy of any concerns about safety or privacy dissipates in the face of evidence that Drew has used bathrooms for some time without any harm to others. And the pretextual nature of these concerns is underscored by the School Board's apparent lack of concern about safety and privacy in multi-user bathrooms with respect to cisgender students. This reveals that the School Board's policy rests on nothing more than a belief that transgender youth—simply by being transgender—are somehow uniquely dangerous or sexually aggressive compared to their straight, lesbian, gay, or bisexual cisgender peers. That is a perverse reimagining of reality, given the well documented harms of discrimination and violence against transgender youth.[31] A policy, like this one, "inexplicable by anything but animus toward the class it affects," violates the Equal Protection Clause. *Romer*, 517 U.S. at 632.

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[31] *See, e.g.*, *LGBT Youth: Experiences with Violence*, U.S. Dep't of Health & Human Servs. (Nov. 12, 2014), https://www.cdc.gov/lgbthealth/youth.htm.

Today, our statutes and citizenry alike have a "continuing role in moving the Nation toward a more integrated society." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015). Drew Adams's simple plea to be treated equally in the eyes of the law is an important step along that path.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Date: Nov. 24, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(g)(1)

The undersigned certifies that this brief complies with the applicable type-face and volume limitations of Federal Rules of Appellate Procedure 29(a)(5). This brief contains 6,493 words, exclusive of the components that are excluded from the word count limitation in Rule 32(f). This certificate was prepared in reliance upon the word-count function of the word processing system used to prepare this brief (Microsoft Word). This brief complies with the typeface and type style requirements of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using Times New Roman, font size 14.

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CERTIFICATE OF SERVICE

In accordance with Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on November 24, 2021, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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