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 United States District Court for the Middle District of Florida, Honorable Timothy J. Corrigan, Case No. 3:17-cv-00739-TJC-JBT

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

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Adams v. The School Board of St. Johns County, Florida

Appeal No. 18-13592

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Local Rules 26.1-1 through 26.1-3 and 28-1(b), the undersigned certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action – including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case is limited to the following:

1. Kogan, Terry S. – *Amicus Curiae*
2. Mesa, David – Counsel for *Amicus Curiae*
3. Palacios, Patricia – Counsel for *Amicus Curiae*
4. Pierce, Jerome – Counsel for *Amicus Curiae*
5. Steptoe & Johnson LLP – Counsel for *Amicus Curiae*

The undersigned certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal. The undersigned will enter this information into the web-based CIP contemporaneous with the filing of this Certificate of Interested Persons and Corporate Disclosure Statement.

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STATEMENT OF THE ISSUE

Whether the District Court's opinion should be affirmed in holding that the School Board's policy of barring boys who are transgender, such as Drew Adams, from the boys' restroom violates equal protection guarantees of the Fourteenth Amendment and Title IX of the Education Amendments of 1972.

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 considered 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 "biological 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]

[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.

SUMMARY OF ARGUMENT

This *amicus curiae* brief challenges two fundamental assumptions that underlie arguments made by Appellant:

> 1. Public restrooms are separated by sex because of anatomical differences between men and women; and
>
> 2. Transgender students must be excluded from public restrooms to ensure safety and privacy concerns of patrons.

Appellant asserts that public restrooms are sex-separated based on anatomical differences between boys and girls: "Separate bathrooms . . . are separate because of real and enduring physical differences between the sexes."[2] In support of its argument, Appellant looks to Judge Niemeyer's dissent in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016).[3] That dissent set forth the position taken by Appellant in stark terms:

> 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.

Gloucester Cty. Sch. Bd., 822 F.3d at 736 (Niemeyer, J., dissenting). These assertions, however, are unfounded.

First, laws in the United States mandating that public restrooms be separated

[2] Appellant's Br. at 14-15; *see also* Appellant's Br. at 5 (asserting that student bathrooms are separated "based on the anatomical differences between the sexes").
[3] Appellant's Br. at 37 n.14.

by sex, first adopted in the late nineteenth century, were *not* based on anatomical differences between males and females. Rather, nineteenth century toilet laws were grounded in then-contemporary understandings of gender roles known as the "separate spheres" ideology. Women were viewed as weak, vulnerable, and uniquely suited to the private home and domestic affairs, *i.e.* the private sphere, 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 that ideology.

The fact that the contemporary practice of sex-segregating public 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.

Second, though Appellant correctly assumes that everyone has a strong interest in privacy and safety when using public restrooms, it does not follow that excluding transgender students from sex-separated restrooms is necessary to address that interest. Recent amendments by the International Code Council to the model plumbing code that governs most jurisdictions in the U.S., including the state of Florida, allow for the installation of all-gender, multi-user restrooms in

public buildings. These amendments make clear that safety and privacy can be fully protected in an inclusive public restroom. Many universities, museums, and other public venues have built such facilities, recognizing that the simple presence of men and women in the same restroom space does not threaten the safety or privacy of anyone.

Drew Adams is *not* advocating that all-gender restrooms be installed in his high school. As a transgender boy, he simply seeks to use the boys' communal restroom. Nonetheless, the International Code Council's recent actions challenge the longstanding taboo relied on by Appellant that men and women must be separated in public restrooms to protect privacy and safety.

The trial court judge wisely recognized that "[w]hen he goes into a restroom, Adams enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves." Appellant's App. DE 192 (Findings of Fact and Conclusions of Law at 39). His presence in the boys' restroom threatens the privacy and safety of no one. This Court should affirm the District Court's Final Judgment mandating that Adams be permitted to use boys' bathrooms at Nease High School.

ARGUMENT

I. Historical Background on Public Restrooms

Until the mid-nineteenth century all toilets in America—both in public

places and in homes—were single-user water closets, privies, or outhouses that emptied into "privy vaults" or cesspools located nearby.[4] With the exception of the very 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]

In the 1870s, in response to 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 and workplaces to municipal water systems, and municipalities began to adopt comprehensive plumbing and sanitation codes.[7]

As discussed below, the first statutes in the U.S. mandating that public restrooms be separated by sex were enacted in the late 1880s and applied exclusively to factories and other workplaces. These Victorian-era laws were not based on anatomical differences between men and women. Rather their adoption

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[4] Maureen Ogle, All The Modern Conveniences: American Household Plumbing, 1840-1890, at 48 (1996).
[5] Suellen Hoy, Chasing Dirt: The American Pursuit of Cleanliness, at 18 (1996).
[6] Ogle, *supra* note 4, at 3-5.
[7] *See* Samuel W. Abbott, The Past and Present Condition of Public Hygiene and State Medicine in the United States, in MONOGRAPHS ON AMERICAN SOCIAL ECONOMICS 37 (Department of Social Economy for the United States Commission to the Paris Exposition of 1900 No. XIX, 1900).

relied on the then-prevailing ideology concerning 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 for work in factories while women remained behind, 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.[8] Coupled with this ideology was a view of women as uniquely virtuous and moral, but vulnerable and in need of protection.[9]

Despite this vision of the proper place and social role for women, the demands of a burgeoning economy soon pushed many women from the privacy of

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[8] Terry S. Kogan, Sex-Separation in Public Restrooms: Law, Architecture, and Gender, 14 MICH. J. GENDER & L. 1, 38 (2007) (hereafter "Kogan, Sex-Separation"); *see also* Terry S. Kogan, Sex Separation: The Cure-All for Victorian Social Anxiety, in TOILETS – PUBLIC RESTROOMS AND THE POLITICS OF SHARING 146 (Harvey Molotch & Laura Norén eds., 2010).

[9] *See* David E. Shi, FACING FACTS: REALISM IN AMERICAN THOUGHT AND CULTURE, 1850–1920, at 17 (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." The effect of men moving away from the home to work "transformed the middle-class home into a 'separate sphere' governed by mothers.").

the home into the workplace.[10] Women also moved into the civic life of the community, becoming active in social reform and suffrage movements. Nonetheless, the "separate spheres" ideology maintained a tenacious hold over the American imagination, and the growing number of women in public spaces were considered by many to evidence a "living contradiction" to the Victorian era's "cult of true womanhood."[11] Legislators feared that allowing women into the factory would endanger both women's bodies and the welfare of future generations.[12] 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.[13]

Some of these laws banned women from professions deemed inherently dangerous, such as mining, jobs requiring heavy lifting, and cleaning moving machinery,[14] while other laws controlled the conditions under which women could

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[10] *See* Terry S. Kogan, *How did public bathrooms get to be separated by sex in the first place?*, THE CONVERSATION (May 26, 2016), https://theconversation.com/how-did-public-bathrooms-get-to-be-separated-by-sex-in-the-first-place-59575.

[11] Cynthia Eagle Russett, SEXUAL SCIENCE 10 (1989).

[12] *Kogan*, *Sex-Separation*, *supra* note 8, at 27.

[13] *Id.* at 28.

[14] *Id.* at 14; *see also, e.g.*, Act of Mar. 27, 1872, § 6, 1872 Ill. LAWS 570 (forbidding women from working in mines). *See generally*, U.S. DEP'T OF LABOR, BULL. OF THE WOMEN'S BUREAU NO. 91, WOMEN IN INDUSTRY 55 (1931). Kansas adopted a more general law prohibiting women from working in any industry or

work—limiting hours of employment,[15] mandating a rest period for women during the work day,[16] requiring that seats be provided for women workers,[17] and prohibiting women from working immediately before or after childbirth.[18] 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."[19] *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J.,

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occupation "under conditions of labor detrimental to their health or welfare." *Id.* at 56.

[15] *Kogan, Sex-Separation*, *supra* note 8, at 13.

[16] *See, e.g.*, Act of Mar. 31, 1915, ME. REV. STAT. ANN. Ch. 350, § 1 (1916).

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

[18] *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) (2018).

[19] Such attitudes towards women's roles have been repeatedly rejected by the Supreme Court for at least the last half-century. *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW, et al. 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*, 411 U.S. 677, 684

concurring).

The nineteenth century "separate spheres" ideology also led to the architectural reconfiguring of those sites outside the home frequented by women. A sense existed that whenever women left their domestic havens, they needed protective spaces in public buildings. Accordingly, public venues began cordoning off spaces for the exclusive use of women. The first such spaces appeared in the late 1820s in luxury hotels. For example, Boston's renowned Tremont House Hotel created a "ladies' receiving room," a "ladies' drawing room," and a "ladies' dining room."[20]

In addition to hotels, a separate ladies' reading room with furnishings that resembled those of a private home became an accepted part of American public

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(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 Miss. 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").

[20] Carolyn Brucken, *In the Public Eye: Women and the American Luxury Hotel*, in 31 WINTERTHUR PORFOLIO 214 (1996). In addition the hotel designated certain spaces for the exclusive use of men, including a "gentlemen's receiving room," a "gentlemen's drawing room," a "gentlemen's reading room," and a "public dining room," generally used only by men.

library design.[21] Beginning in the 1840s, American railroads began designating a "ladies' car" for the exclusive use of women and their male escorts.[22] By the end of the nineteenth century, women-only parlor spaces appeared in other establishments, including photography studios, post offices, banks and department stores.[23] As discussed below, it was in this spirit of manipulating public space to carve out 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 were often adopted as amendments to existing protective labor legislation aimed uniquely at women and children.[24] The first such law was adopted in Massachusetts in 1887.[25] By 1920, forty-three states had adopted

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[21] *Kogan, Sex-Separation*, *supra* note 8, at 30–31.
[22] *Id.* at 31–32.
[23] *Id.* at 33–34.
[24] *See, e.g.*, Act of May 25, 1887, ch. 462, § 13, 1887 N.Y. LAWS 575, 577 ("An Act to amend [citation omitted], entitled 'An act to regulate the employment of women and children in manufacturing establishments....'").
[25] "An Act to secure proper sanitary provisions in factories and workshops," Act of Mar. 24, 1887, ch. 103, § 2, 1887 MASS ACTS, 668, 669.

similar legislation.[26] Any suggestion that these laws were adopted for purportedly gender-neutral reasons related to "biology" is belied by the titles given to many of these laws, which make explicit the goal of protecting women. For example, the 1891 Ohio factory restroom law was titled, "An act for the preservation of the health of female employes [sic]."[27] 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."[28]

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.[29] Separate rooms were designated for

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[26] *See* George Martin Kober, *History of Industrial Hygiene and its Effect on Public Health, in* A HALF CENTURY OF PUBLIC HEALTH 377 (Mazÿck P. Pavenal ed., 1921).

[27] Ohio Act of 1891.

[28] 1919 N.D. LAWS, ch. 174, 317; *see also* S.B. 413 TENN. ACTS of 1897, ch. 98 ("An Act to require employers of females to provide separate water-closets for them."); 1913 S.D. SESS. LAWS, ch. 240, 332 ("An Act to Regulate the Employment of Women and Girls and Children Within This State").

[29] *See e.g.*, C.F.W. Doehring, *Factory Sanitation and Labor Protection*, 44 BULL. OF THE DEP'T OF LABOR 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

women workers to accommodate their supposed increased susceptibility to dizziness, fainting, and hysteria.[30] These were spaces to which women could retreat when their weak bodies were overcome by the physical and emotional stresses that legislators of the era viewed as unique to women when they entered the workplace.

Victorian concepts of privacy and modesty also informed the design of factory restrooms. 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, and facilities where "the feet and lower parts of the skirts of females occupying the water closets can be seen from the workrooms."[31]

The requirement in factory bathroom laws that water-closets be "separate and distinct" and that there be "privacy of approach" thus reflected deep-seated notions of Victorian modesty which were themselves part of the broader social

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reason is to be found in the fact that lead exercises an injurious influence upon the reproductive functions of women. It deranges menstruation.").

[30] *See, e.g.*, George M. Price, Joint Bd. of Sanitary Control in the Dress and Waist Industry, Special Report on Sanitary Conditions in the Shops of the Dress and Waist Industry 194 (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."); *see also* Carroll Smith-Rosenberg, Disorderly Conduct 197–216 (1985) (discussing hysteria as a condition considered to be unique to women in nineteenth century culture).

[31] REPORT ON CONDITION OF WOMAN AND CHILD WAGE EARNERS IN THE UNITED STATES, Volume 1: Cotton Textile Industry 371 (1910).

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.[32]

Texts discussing factory sanitation practices similarly reflected the belief that separating public restrooms by sex was necessary to foster and maintain the "cult of true womanhood." In a 1913 essay published by one of the country's major manufacturers of plumbing equipment, a sanitary engineer called for "separate accommodations," which were required by "moral decency" in spaces "where males and females are employed."[33] 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 treat yours,"[34] 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

[32] *See id.* at 590.
[33] John Joseph Cosgrove, FACTORY SANITATION, at ix (1916).
[34] *Id.*

comfort, cleanliness and convenience of a bath room in the home."[35] By enacting laws mandating sex-separated toilet facilities in factories, policymakers sought to reconcile the early nineteenth century vision that women belonged in the private sphere with the conflicting realities of life in the late nineteenth and early twentieth centuries that necessitated that women be in the workplace.

Separation of men and women in public spaces, including bathrooms, thus represented an effort to maintain the "separate spheres" ideology even as women increasingly entered public life alongside men. Early in the nineteenth century that 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 weak and vulnerable women was the sex-segregated restroom.

Appellant cites my article, Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture and Gender*, 14 MICH. J. GENDER & L. 1, 39–40 (2007), for the proposition that "the policy [of sex-separating restrooms] was universal and uncontroversial for years after ratification" of the Fourteenth Amendment. Appellant's Br. at 20. In so doing, Appellant profoundly

[35] *Id.* at xxii.

misunderstands the argument in that work. I argued therein that "the legal requirement that public restrooms be sex-separated owes its origins to the early nineteenth century ideology that advocated a cult of true womanhood, a vision of the pure, virtuous woman protected within the walls of her domestic haven."[36] Elsewhere I elaborated:

> Laws creating separate facilities for women in the workplace were a manipulation of architectural space aimed at creating a surrogate home, a protective haven, for women in the public realm. Adopted as extensions to protective labor legislation, these laws symbolized the weaker nature of women and their need for protection.[37]

It is flatly contrary to the thrust of my Article to suggest that I normalized the practice of separating restrooms by sex as somehow "universal and uncontroversial."

Understanding the origins of this social convention in the United States illustrates that separating public restrooms by sex was not simply a natural, neutral response to anatomical differences. Rather, public restrooms were separated by sex to reflect and reinforce a broad cultural vision of inequality between men and women.

Arguments that seek to justify the disparate treatment of transgender

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[36] Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 5–6 (2007).
[37] *Id.* at 55.

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 they simply reflect a "natural" division of restrooms based on biological sex. A more accurate historical understanding helps make clear that excluding transgender students from the public restrooms that are congruent with their gender identities is a discriminatory practice that reflects and enacts social stigmatization and rejection of those students.

III. Recent Amendments to the International Plumbing Code Make Clear that Excluding Transgender Students From Sex-Separated Public Restrooms is Not Necessary to Protect the Privacy and Safety of Patrons

Adams is a transgender boy who seeks to use the boys' communal restrooms in his high school. In this lawsuit he is *not* advocating that the School Board reconfigure public restrooms to allow for use by all sexes. Nonetheless, recent actions taken by the International Code Council challenge the longstanding taboo relied upon by Appellant that men and women must be separated in public restrooms to protect privacy and safety of patrons.

The International Code Council is a 64,000-member group composed of municipal code and fire officials, architects, engineers, builders, contractors, elected officials, manufacturers and others in the construction industry. The Council develops model codes and standards used to design safe, sustainable,

affordable and resilient structures throughout the world. When adopted by a state and/or a municipality, the Council's model codes become governing law in that jurisdiction. The Council's model codes have been adopted by state legislatures and/or municipal authorities in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands.

Among the model codes promulgated by the Council is the International Plumbing Code ("IPC"). At its recent Annual Meeting in October 2018, the Council adopted a proposal propounded by the American Institute of Architects to amend that section of the IPC related to "Separate Facilities" to allow for (but not require) the installation of all-gender, multi-user restrooms in public buildings. That amendment provides in pertinent part:

> Separate facilities shall not be required where rooms having both water closets and lavatory fixtures are designed for use by both sexes and privacy for water closets are installed in accordance with Section 405.3.4.[38]

[38] The entire section, with the recent amendments underlined, reads as follows:

> 403.2 Separate facilities. Where plumbing fixtures are required, separate facilities shall be provided for each sex. Exceptions: Separate facilities shall not be required for dwelling units and sleeping units.
> 1. Separate facilities shall not be required in structures or tenant spaces with a total occupant load, including both employees and customers, of 15 or fewer.
> 2. Separate facilities shall not be required in mercantile occupancies in which the maximum occupant load is 100 or fewer.
> 3. Separate facilities shall not be required in business occupancies in which the maximum occupant load is 25 or fewer.

In amending the IPC, the Council recognized that this change will improve restroom accessibility not only for transgender and other gender-nonconforming individuals, but also for people with disabilities and their caregivers, and families with small children, among others.[39] The Council's amendment in effect recognizes that, when configured wisely, all-gender multiuser restrooms pose no threat to the privacy or safety of any patron. In fact, such facilities are becoming more and more common across the country; examples can be found at New York's

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> 4. Separate facilities shall not be required to be designated by sex where single-user toilets rooms are provided in accordance with Section 403.1.2.
> 5. Separate facilities shall not be required where rooms having both water closets and lavatory fixtures are designed for use by both sexes and privacy for water closets are installed in accordance with Section 405.3.4. Urinals shall be located in an area visually separated from the remainder of the facility or each urinal that is provided shall be located in a stall.

Section 405.3.4 provides in pertinent part: "Water closet compartment. Each water closet utilized by the public or employees shall occupy a separate compartment with walls or partitions and a door enclosing the fixtures to ensure privacy."

[39] The "Reasons" set forth by the proponent of the amendment adopted by the International Code Council included the following:

> This change is proposed to clarify how toilet rooms that are configured in such a manner to allow use by either sex can also be used. Many communities have been asking to use these provisions in advance of full adoption of the 2018 codes because of their need to address significant issues of gender and equality for access. . . . With this change the codes will allow the design of facilities that are available to those needing assistance by other assistants that are of an opposite gender without causing any discomfort by anyone.

International Code Council, *2018 Public Comment Agenda* (August 2018), at 1379, available at http://media.iccsafe.org/code-development/group-a/IPC.pdf.

Museum of Modern Art and Whitney Museum,[40] San Diego State University,[41] Northwestern University,[42] and the University of Texas at Austin,[43] to name but a few.

Adams is *not* asking the Court to order that inclusive restrooms be installed in his high school. As a transgender boy, he is merely asking that he be allowed to use the boys' communal restroom. The recent actions of the International Code Council, composed of leaders in municipal government and professionals in the construction industry, make clear that excluding transgender students from restrooms matching their gender identity is not related to interests in privacy and safety.[44]

CONCLUSION

The judgment of the United States District Court for the Middle District of

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[40] Jeff Green, *Public toilets from NYC to LA get gender-neutral design overhaul*, Charlotte Observer (May 18, 2016), https://www.charlotteobserver.com/news/business/article78285877.html.

[41] San Diego State University, Campus Support Services, https://go.sdsu.edu/student_affairs/pridecenter/campus-resources.aspx.

[42] Mitchell Armentrout, *Northwestern opens first gender neutral, multi-stall bathroom*, CHICAGO SUN TIMES (June 27, 2017), https://chicago.suntimes.com/politics/northwestern-opens-first-gender-neutral-multi-stall-bathroom/.

[43] University of Texas at Austin, Gender and Sexuality Center, Gender Inclusive Restrooms, http://diversity.utexas.edu/genderandsexuality/gender-inclusive-restrooms/.

[44] *See* Joel Sanders & Susan Stryker, *Stalled: Gender-Neutral Public Bathrooms*, THE SOUTH ATLANTIC QUARTERLY, Vol. 115, at 4 (Oct. 2016) (discussing why inclusive restrooms pose no threat to any patron).

Florida, Jacksonville Division, should be affirmed.

Dated: February 28, 2019

Respectfully submitted,

/s/ Patricia B. Palacios

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains [4,752] words (within the limit of 6,500) not including the parts of the brief exempted by Fed. R. App. P. 32(f).

I FURTHER CERTIFY that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionately spaced typeface using Times New Roman 14 point font.

/s/ Jerome F. Pierce
Jerome F. Pierce

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on February 28, 2019. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. A true and accurate copy of the foregoing will be dispatched for delivery via Federal Express to counsel for the parties.

I further certify that seven paper copies of the brief with green covers and backing will be dispatched for delivery via Federal Express to:

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

/s/ Jerome F. Pierce
Jerome F. Pierce