No. 16-273

E

Supreme Court of the United States

CE E C C B A D,

Petitioner,

v.

. ., B E F E D A D E , DE D E ,

Respondent.

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

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION; AMERICAN FEDERATION OF TEACHERS, AFL-CIO; NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS; AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO; SERVICE EMPLOYEES INTERNATIONAL UNION; AND SCHOOL SOCIAL WORK ASSOCIATION OF AMERICA AS *A C C A* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This brief addresses the second question accepted for review by the Court:

Whether the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that a funding recipient providing sex-separated facilities must "generally treat transgender students consistent with their gender identity," should be given effect.

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INTEREST OF *AMICI CURIAE* AND INTRODUCTION

This *amici curiae* brief is submitted, with consent of the parties,[1] on behalf of the National Education Association ("NEA"); American Federation of Teachers, AFL-CIO ("AFT"); American Federation of State,

organizing, collective bargaining, and political activism, and especially through the work that AFT members do every day. At the core of AFT's commitments to fairness and democracy is the belief that all students deserve to learn in safe and welcoming schools, regardless of the student's gender identity or expression.

AFSCME is a union comprised of a diverse group of people who share a common commitment to public service. AFSCME's 1.6 million members include workers in both the public and private sectors, and over one hundred thousand members working in public schools. Together, AFSCME and its members advocate for prosperity and opportunity for working families across the nation through the efforts of its approximately 3,400 local unions and fifty-eight councils in forty-six states, the District of Columbia, and Puerto Rico.

NASSP is the nation's leading organization and national voice for school leaders. NASSP has a long history of promoting student equity and advocating for the needs of marginalized populations. As the founder and home of the National Honor Society, NASSP encourages schools to empower students in their learning and amplify student voices.

SEIU represents over 2 million working men and women, including public school bus drivers, janitors, paraprofessionals, and other school support personnel; early learning and child care professionals; higher education faculty members; and health care and

for all, including transgender individuals, is reflected in its Mission Statement, which affirms that "we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status."

discriminatory regime harms and degrades the educational environment for all students; (3) a clear ruling holding that policies that discriminate against transgenderar rul

students are not entitled to equal respect. Such policies are defended by unjustifiable fear and disdain of transgender students—fear and disdain that in turn leads to and magnifies harassment, abuse, and even violence directed at transgender students. The harassment, violence, and abuse cause transgender students to quit and miss school, suffer deficient educational outcomes, and even commit suicide.

All this denies equal educational opportunities to transgender students. In particular, denying access to sex-segregated facilities deprives transgender students the opportunity to fully participate in the school experience; such denials often result in transgender students avoiding using the bathroom altogether at school. *Amici*'s members see firsthand how bathroom avoidance in particular puts the health and safety of transgender students at risk: it leads transgender students to avoid meals and water (to avoid having to use the restroom), causing fatigue, concentration problems, and various types of urinary infections and other health problems that are caused by failing to use the restroom.

On the other hand, school policies that respect transgender students promote a positive school climate for all students. When transgender students are welcomed equally into the school, their educational and personal outcomes improve. And the welcoming and safe school climate fostered by trans-inclusive policies benefits all students. Safe and supportive schools, as educators know, are good for all students.

A clear decision by the Court holding that Title IX proscribes transgender discrimination will clarify

not only the rights of transgender students, but also the duties of educators toward transgender students. A contrary ruling would only muddle the duties of educators.

Finally, educators themselves are harmed by discriminatory polices like Petitioner's. Compelling educators to enforce such policies harms educators professionally, personally, and emotionally. Educators are, above all, advocates and protectors of their students. Compelling them to discriminate against and harm their students runs counter to everything about their personal and professional mission.

ARGUMENT

Transgender people cannot be wished away. Being transgender is not a fad. It is innate; not a choice. Transgender youth, in particular, face difficult obstacles. Being transgender can challenge their closest relationships, including with their parents and friends; it can subject them to harassment, bullying, and violence; and the social pressure to live according to their birth-assigned sex can be intense. Those profound challenges and pressures can lead to serious psychosocial problems.

Given this reality, most educators and education policy makers understand that schools work best when they fully welcome transgender students into the educational community. This means adopting policies that, among other things, allow transgender students to use sex-segregated facilities such as restrooms that are consistent with their gender identity.

Petitioner has chosen a different path. It has chosen to make Gavin's[2] life, and the lives of other transgender students, worse by stigmatizing them, ostracizing them, denying them equal educational opportunities, and pressuring them to deny their very existence. *Amici* file this brief to explain, based on their experience as professionals and employees in the public education system, the value of inclusive school policies that respect the identities of all students, including transgender students.

I. School-based discrimination against transgender students harms them profoundly, by stigmatizing and denying them equal educational opportunities

1. "The Constitution's guarantee of equality must at the very least mean that a bare [ ] desire to harm a politically unpopular group cannot justify disparate treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (internal quotations and citations omitted). The "Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

Policies such as Petitioner's send a strong message to Gavin, other transgender students, and indeed all students and the broader school community that transgender students are not worthy of the school

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[2] Since Gavin has identified himself in public media, *Amici* refer to him by his name here.

community's equal respect, that they are outcasts and pariahs who ought to be feared by the larger community, and that their classmates must be protected from them. The "necessary consequence" of such policies is to demean and stigmatize transgender students. *See id.* at 2602.

Amici's members bear witness to how policies like Petitioner's reflect and promote hostility toward transgender youth. Much like occurred in Gavin's case, transgender students are frequently allowed to participate equally in school activities by local educators, and they do so—often for some time—without incident. But all too often, school officials—prodded by community members who have disdain and animosity for transgender individuals—decide to single the transgender student out. The school then denies the student access to facilities and programs that others have access to, telling the student that he is less than others. Scorn and abuse from students and the larger school community often follow. When this happens, transgender students forever "suffer the stigma of knowing" that in the eyes of their school district and community, they are "somehow lesser." *See id.* at 2600.

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Petitioner's make what is already a difficult problem only worse. Transgender students are often harassed and bullied at school, and school policies that deny the very existence of transgender students makes that worse by legitimizing hostility against them.

Ninety percent of transgender students have heard derogatory remarks about their gender identity and sexual orientation at school. Emily A. Greytak et al., GLSEN, Harsh Realities: The Experience of Transgender Youth in Our Nation's Schools 10 (2009), https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf. Eighty-two percent of transgender students feel unsafe. *Id.* at 14. Over three-fourths of transgender students have been sexually harassed at school, *id.* at 21, and thirteen percent of transgender adults who were out or perceived as transgender as children or adolescents report that they were sexually assaulted in school, Sandy E. James et al., Nat'l Ctr. for Transgender Equality, The Report of the 2015 U.S. Transgender Survey 135 (2016). More than half of transgender students have been physically harassed at school, and forty-four percent of transgender students report being physically assaulted at school. Greytak, *supra*, at 18–19. Only forty-six percent of harassed and bullied transgender students have reported their harassment and bullying to school officials, and only one-third of these students felt that the school responded effectively. *Id.* at 22. Transgender students from small towns and rural areas face even higher levels of victimization than students in suburban or urban areas. Joseph G. Kosciw et al., GLSEN, 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Trans-

about being able to satisfy his basic human need to use the bathroom detracts from his education, and he experiences diminished educational performance as a result.

Another interviewed teacher described how, in response to a group of parents complaining about a transgender boy using the boy's bathroom, the school administration required the transgender boy to use the girl's bathroom. But parents and students are also uncomfortable with him using the girl's room, because, by all outward measure, he expresses himself as a boy. This student suffers the cruel fate of being squeezed from both sides and feeling that he belongs nowhere at school. These experiences, sadly, are not unique.

When schools single out transgender students for stigmatization and scorn, they suffer psychosocial harms that deprive them of the opportunity to become their best selves. This harm cannot be undone on its own. "Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

The harm spreads to the broader community.

> [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. . . . We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Id. at 221.

3. On the other hand, in schools where transgender students' rights are respected, transgender students are subjected to less bullying and have better outcomes. In schools with anti-LGBT bullying policies, students have better relationships with staff and as a result feel safer in the school. Nat'l Ass'n of Sch. Psych. & Gender Spectrum, Gender Inclusive Schools: Policy, Law, and Practice 2 (2016) (citing Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. Youth & Adolesc. 1175 (2010)). In schools with LGBT inclusive environments, LGBT students have more academic success than those at schools with negative environments. Stephen T. Russell et al., *Safe Schools Policy for LGBTQ Students*, 24 Social Policy Report, no. 4, at 6–7 (2010). And when schools support transgender students who come al., ,

trans-inclusive policies described how transgender students are active and valued participants in the school community who:

- Participate in school government (La Crescenta, California);
- Do not have notable attendance or disciplinary issues (Farmingdale, Maine);
- Participate on school athletic teams (Evanston, Illinois);
- Run for homecoming court (Indianapolis, Indiana); and
- Have supportive peer groups and are academically engaged (Federal Way, Washington).

The value of inclusive policies for transgender student outcomes is pronounced even in schools that only recently adopted supportive policies. An educator in Rhode Island spoke of a student who was formerly doing poorly in school and feeling suicidal, bu225

II. School policies that respect transgender students promote a positive school climate for all students

School climate—that is, the "product of the interpersonal relationships among students, families, teachers, support staff and administrators" that sets the "norms, values, and expectations that support people feeling socially, emotionally, and physically safe" in school—is a key predictor of student engagement, student mental and physical health, and academic achievement, and is positively correlated with decreased absenteeism, dropout rates, and suspensions.[3]

The Court has long understood this intuitively. "[P]ublic education must prepare pupils for citizen-

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[3] *See* Nat'l Sch. Climate Ctr., School Climate Research Summary 2-3 (Aug. 2012), https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf; Nat'l Educ. Ass'n, Research Brief: Importance of School Climate 1 (2013), https://www.nea.org/assets/docs/15584_Bully_Free_Research_Brief-4pg.pdf; Nat'l Sch. Climate Council, The School Climate Challenge 5 (2007), http://www.schoolclimate.org/climate/documents/policy/school-climate-challenge-web.pdf; David Osher, et al., Improving Academic Achievement Through Improving School Climate and Student Connectedness (Apr. 14, 2009), http://alaskaice.org/wordpress/wp-content/uploads/2010/11/090414_AIR_AERA_ImprovingAcademicAchievementThroughImprovingSchoolClimateandStudentConnectedness.pdf; Adam Voight, Gregory Austin, & Thomas Hanson, A Climate for Academic Success (2013), http://files.eric.ed.gov/fulltext/ED559741.pdf; *see also* Alex Kajitani, *The #1 Factor That Determines A Toxic or Thriving School Culture*, EdWeek (Apr. 27, 2016), https://goo.gl/6s0q1V; Taica Hsu, *How I Support LGBTQ+ Students at My School*, Am. Educator, Winter 2016-2017, at 20-22, https://goo.gl/VW7gGM.

ship in the Republic[.]” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (internal quotations omitted). “It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” *Id.* And “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotations omitted). Moreover, the “fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.” *Bethel Sch. Dist. No. 403*, 478 U.S. at 681 (internal quotations and citations omitted).

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68, 78–79 (1979). Not just by "the presentation of course materials" but also by "the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Id.*

1. When schools adopt trans-inclusive policies and practices, appropriately respond to bullying, and allow transgender students to be acknowledged in accordance with their gender identity, not only do transgender students feel more welcome, but also the school climate overall is more positive, leading to better outcomes for all students. *See* N. Eugence Walls, Sarah B. Kane & Hope Wisneski, *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 Youth & Society 307, 323-25 (2010); *see also* Stephen T. Russell, *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers' Perspectives*, 54 J. Sch. Psych. 29 (2016).

Students who feel a sense of belonging in school are less likely to have mental health problems and later substance abuse. Ldrhence ab8l -

Students also benefit academically from inclusive settings. *See* Open Soc'y Found., *The Value of Inclusive Education* (Oct. 2015), https://goo.gl/imqFgK; Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students With and Without Disabilities and Their Educators*, 20 Remedial & Special Educ. 114, 114 (1999). Once classrooms become fully welcoming of transgender students we can expect noticeable and quantifiable benefits to transgender students and the broader community as well. Examples of the benefits of classroom inclusion and diversity abound in other contexts where such inclusion has a longer history.

Title IX itself provides one of the best examples of the power of equality to promote the common good. In the more than 40 years since its enactment, Title IX has promoted gender inclusivity in school sports, the benefits of which have rippled from the athletic field to the classroom and beyond. *See generally* Nat'l Coal. for Women and Girls in Educ., Title IX at 40: Working to Ensure Gender Equity in Education (2012), http://www.ncwge.org/PDF/TitleIXat40.pdf. In the past two Olympic games, U.S. women have brought home more medals than U.S. men, and U.S. women alone won as many medals as any other *nation*. *See* Greg Myre, *U.S. Women Are the Biggest Winners at the Rio Olympics* (Aug. 21, 2016), https://goo.gl/z5FmxN. Girls who play sports perform better academically and are more likely to graduate high school. Nat'l Coal. for Women and Girls in Educ., *supra* at 10. This increased success goes beyond the classroom: 82% of female business executives were on a school sports team. *Id.* at 11. Without Title IX's mandate of inclusivity for women in athletics, wom-

en (and the larger community) would not have reaped these benefits.

Since passage of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act, *see* 29 U.S.C. § 701

skills." Amy Stuart, Lauren Fox, & Diana Cordova-Cobo, Century Found., How Racially Diverse Schools and Classrooms Can Benefit All Students 14 (Feb. 2016), https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/02/09142501/How-RaciallyDiverse_AmyStuartWells-11.pdf.

Inclusive classrooms also reduce prejudice and promote cross-cultural friendships, which later benefit students in the workplace and in their communities. Jeanne L. Reid & Sharon Lynn Kagan, A Better Start: Why Classroom Diversity Matters in Early Education 9 (Apr. 2015); *see also* Econ. & Soc. Research Council, *Diversity In Primary Schools Promotes Harmony, Study Finds*, ScienceDaily (July 26, 2008), https://www.sciencedaily.com/releases/2008/07/080724064835.htm. Respect for the diversity of students is associated with increased feelings of safety in schools, and there is less bullying in more diverse schools. *See* ScienceDaily, *supra*; Jaana Juvonen, Adrienne Nishina, & Sanda Graham, *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 Psych. Science 393, 397 (2006).

It is well established that allowing discrimination against one group infects anti-discrimination efforts against others.[4] Educators understand this intuitive-

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[4] *See* Suzanne Pharr, Homophobia: A Weapon of Sexism 53 (1997) ("It is virtually impossible to view one oppression, such as sexism or homophobia, in isolation because they are all connected . . . There is no hierarchy of oppressions. Each is terrible and destructive. To eliminate one oppression successfully, a movement has to include work to eliminate them all or else success will always be limited and incomplete."); *see also* Wanda Cassidy & Margaret Jackson, *The Need for*

ly: their classrooms cannot embrace diversity, toler-

Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth,' ABC News (Apr. 22, 2016), http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019.

That law enforcement or school officials have not said otherwise to the Court is telling. Nonetheless, an *amicus curiae* brief from "Public Safety Experts"—filed by only two criminal justice professionals—points to various unrelated sex crimes to argue that transgender individuals should not be allowed to use sex-segregated facilities consistent with their gender identity. *See* Br. of *Amici* Public Safety Experts 13–14, App. But the reality is that there is no connection between perpetrated sex crimes and trans-inclusive policies and that brief provides no contrary authority.

Petitioner similarly asserts that respecting transgender students' rights would put schools in an unworkable position, asserting that students will "simply . . . announc[e] their gender identity" out of the blue and, following this "mere assertion," begin to use a different restroom. *See* Pet'r's Br. 37–40. Yet there is no allegation that Gavin himself seeks to use the boys' room for nefarious reasons nor is it our experience around the country that any other transgender student does either.

Indeed, administrators, educators, and other school employees find the idea that boys will pretend to be transgender to engage in sexual ogling of girls to be nonsense. The idea that a teenage boy would come out to his peers and teachers as transgender and face all that such an announcement is freighted

with in order to gain access to the girl's bathroom to engage in voyeurism is ludicrous. *Amici* and their members interviewed for this brief are unaware of *any* misconduct in a bathroom that is related to or caused by an inclusive transgender policy—and Petitioner fails to point to any specific example.

Students of course misbehave in school bathrooms, for reasons that have nothing to do with the school respecting transgender students, and schools and educators take various measures to address misconduct as it arises. But banning transgender students from using bathrooms consistent with their gender identity will do nothing to combat bathroom misbehavior and assaults.

There is absolutely no evidence that inclusive transgender policies lead to increased sexual assaults—and certainly not on the part of transgender individuals. Being transgender does not make a person more likely to commit a violent act, much less a sexually violent one. The reality is that not only do transgender individuals have no greater proclivity for physical or sexual assault than anyone else, they, in fact, are much more likely to be victims of both physical and sexual assaults. *See*, *e.g.*, Grant, *supra*, at 3 ("Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%)").

The assertion that transgender people are violent sexual deviants or that their rights must yield because of sexual deviants does not justify animus toward them but is itself another offensive form of dis-

crimination that stigmatizes transgender people. It perpetuates a harmful stereotype that has no basis in fact. Sadly, Petitioner's policy and its brief to the Court fit well into our nation's shameful history of labeling certain minorities as dangerous—and sexually dangerous in particular—as a justification for their oppression.[5]

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[5]

Fortunately, all students' privacy interests can be addressed without discriminating against transgender students. In schools that permit transgender students to use the facilities commensurate with their gender identity, gender-neutral facilities are commonly open to any student who would rather not use a sex-segregated facility, and installations that increase privacy for everyone in sex-segregated facilities are beneficial to all students. That said, the majority of out transgender students report that their classmates are supportive. James, *supra*, at 137.

It is also our members' experience that other students rarely have problems with transgender students accessing sex-segregated facilities consistent with their gender identity. As with Gavin's case, most objections to transgender students using sex-segregated facilities are raised not by other students but by political leaders and adults acting out of fear and disdain for transgender students.

III. Concluding that Title IX proscribes transgender discrimination would provide administrable rules for education employees; a contrary ruling will create confusion and sow discord

Although the Departments of Justice and Education have recently withdrawn their guidance explaining that compliance with Title IX requires equal treatment for transgender students, they did so without directly repudiating the legal conclusions in those documents. *See* Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, Withdrawal of Title IX Guid-

ance (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download.

Amici agree with the legal conclusions in the original Dear Colleague Letter[6] and can tell the Court unequivocally that the interpretation of Title IX found in the now-rescinded Departments of Justice and Education's guidance and the model policies offered therein[7] have been successfully adopted by schools throughout the nation. Indeed, at least fourteen states and the District of Columbia explicitly prohibit gender identity-based discrimination in education.[8] Likewise, numerous school districts and individual

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[6] *See*, *e.g.*, Nat'l Educ. Ass'n, Legal Guidance on Transgender Students' Rights (June 2016), https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf.

[7] *See* Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, Transgender Students (May 13, 2016), https://www.justice.gov/opa/file/850986/download; Office of Elementary and Secondary Educ., Office of Safe and Healthy Students, U.S. Dep't of Educ., Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

[8] *See* Cal. Educ. Code §§ 220, 221.5(f); Colo. Rev. Stat. §§ 24-34-301, 24-34-601; Conn. Gen. Stat. §§ 1-1n, 10-15c; 775 Ill. Comp. Stat. 5/5-102, 5/5-103(O-1); Iowa Code § 216.9; Me. Rev. Stat. tit. 5, §§ 4553(8)(j), 4553(9-C), 4592; Mass. Gen. Laws ch.76, § 5; Minn. Stat. §§ 363A.03(44), 363A.13; Nev. Rev. Stat. §§ 651.050(3)(k), 651.070; N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l); N.Y. Educ. Law §§ 11(6), 12; Or. Rev. Stat. §§ 174.100(7), 659.850; Vt. Stat. Ann. tit. 9, §§ 4501(1), 4502; Wash. Rev. Code § 28a.642.010; D.C. Code § 2-1402.4(1); *see also* Del. Code Ann. tit. 6, § 4503 (prohibiting gender-identity based discrimination in places of public accommodation); N.M. Stat. Ann. § 28-1-7(f) (same); R.I. Gen. Laws § 11-24-2 (same).

schools have adopted policies that protect the rights of transgender students and create safe learning environments.[9] These policies protect the rights of

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[9] *See e.g.*, Boulder Valley Sch. Dist., Guidelines Regarding the Support of Students and Staff who are Transgender and/or Gender Nonconforming (2016), https://www.bvsd.org/policies/Policies/AC-E3.pdf; Anchorage School District, Administrative Guidelines: Working with Transgender and Gender Nonconforming Students and Employees (2015), http://img.ccrd.clearchannel.com/media/mlib/608/2015/08/default/transgender_policy_0_1440016299.pdf ; Chicago Public Schools, Guidelines Regarding the Support of Transgender and Gender Nonconforming Students (2016), http://www.vgonline.org/wp-content/uploads/2017/01/6-VGV-Board-Approved-Policy-on-Support-of-Transgender-and-Gender-Non-conforming-Students.pdf; District of Columbia Public Schools, Transgender and Gender-Nonconforming Policy Guidance (2015), https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf ; El Rancho Unified School District, Transgender and Gender-Nonconforming Students (AR 5145.3) (2014), http://www.erusd.org/pdf/board_policies/5145_3.pdf; Kansas City 33 School District (MO), Prohibi-
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transgender students by, among other things, ensuring that transgender students are allowed to use sex-segregated facilities consistent with their gender identity and that students are referred to by names and pronouns consistent with their gender identity.

2. On the other hand, a decision holding that transgender students are not categorically protected by Title IX would sow confusion and discord in public schools.

Even if lawyers and judges can drawn a line between transgender discrimination and sex-stereotyping discrimination as some courts have tried to do—and we believe that such a line is illusory—educators and public school employees find such line drawing impossible to apply in the real world.

Educators face this real problem today. Suppose one student harasses a transgender student. Title IX is violated "when peer harassment based on . . . sex . . . is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees." *See*, *e.g.*, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, Harassment and Bullying 8 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

Should the Court conclude that transgender discrimination is prohibited sex discrimination under Title IX, the teacher's duty is clear: address and report the harassment. But if the Court were to adopt the view of a minority of the lower courts—that Title IX may prohibit some but not all forms of discrimination against transgender students—teachers would

be left in the lurch. What are their duties to transgender students and when are they triggered? Must teachers parse the harasser's motivation to determine whether the harassment is motivated by sex stereotypes or transgender animus? This is complicated by Petitioner's assertion that non-discrimination against transgender students "would perpetuate discrimination in a different form" against other students. Pet'r's Br. 39–41. If that were true, how would educators prevent and remedy sex stereotyping discrimination or harassment against transgender students while avoiding discrimination against others?

A clear ruling holding that transgender discrimination violates Title IX will go a long way toward clarifying which duties public school districts, educators, and other school employees have to transgender students. A contrary ruling would only muddle their duties.

IV. By compelling educators to be instruments of harmful discrimination against students, educators are themselves harmed by discriminatory polices like Petitioner's

Finally, and relatedly, educators and other school employees themselves are harmed when schools require them to discriminate against transgender students.

Schools like Gavin's do not discriminate on their own. Individual administrators, educators, and public school employees are compelled to carry out the discriminatory policies. Compelling educators and other public school employees to participate in such a harmful and degrading scheme—a scheme that

many educators understand is harmful (and not just to transgender students but to other students and the overall school climate)—wounds the educators and school employees themselves. To be forced to watch and participate in the stigmatization and degradation that policies like Petitioner's inflict is professionally and psychologically harmful to the educators themselves.

When policies prevent teachers from addressing student needs, teachers no longer have access to the moral rewards of being an educator, leading to demoralization. *Id.* at 1–2, 11–12; *see also* Lisa C. Ehrich, Megan Kimber, Jan Millwater, & Neil Cranston, *Ethical Dilemmas: A Model To Understand Teacher Practice*, 17 Teachers & Teaching: Theory & Practice 173 (2011). And this demoralization causes teachers to suffer "depression, discouragement, frustration, and shame," leaving them "continually frustrated" in their "pursuit of good teaching." Doris A. Santoro, *Good Teaching in Difficult Times: Demoralization in the Pursuit of Good Work*, 118 Am. J. Educ. 1, 17 (2011), http://www.journals.uchicago.

Mortality Among Heterosexuals in the United States, 104 Am. J. Pub. Health 332, 332, 335 (2014); Yeonjin Lee, et al.,

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Fourth Circuit and hold that Title IX proscribes discrimination against transgender students, and that Title IX and 34 C.F.R. § 106.33 mean that transgender students must be allowed to use sex-segregated facilities consistent with their gender identity in school.

Respectfully submitted,

A CE 'B E
Counsel of Record
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