No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G. BY HIS NEXT FRIEND AND MOTHER, DEIDRE GRIMM,

Respondents.

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

BRIEF OF *AMICUS CURIAE* HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC IN SUPPORT OF RESPONDENTS

KARLA MCKANDERS
Counsel of Record
HOWARD UNIVERSITY SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC 20008
(202) 806-8065
Karla.McKanders@law.howard.edu

Counsel for Amicus Curiae

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INTEREST OF *AMICI CURIAE*

Howard University School of Law, the oldest historically Black law school in the nation, has a compelling interest in securing and protecting the civil rights of all Americans.[1] The law school's mission includes training lawyers to serve as the voice for underrepresented, underprivileged, and marginalized members of our society.[2] In that regard, Howard University School of Law played an active role in the Civil Rights Movement, including ensuring equality for all individuals under the Fourteenth Amendment to the U.S. Constitution. Because this case presents critical issues involving equality and civil rights, Howard University School of Law Civil Rights Clinic ("CRC") can serve the unique role of providing this Court with historical information and the potential unintended consequences that this case could have on Brown and Black children. The CRC submits this amicus brief in support of Respondents G.G. and his next friend and mother, Deidre Grimm, and other similarly situated individuals who have an interest in freedom of autonomy. The CRC urges the Court to affirm the Fourth Circuit's decision in this case.

SUMMARY OF ARGUMENT

Throughout history, the quest for equality has been wrought with fear-based resistance. The Court has

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] *Our Mission,* HOWARD UNIVERSITY SCHOOL OF LAW, http://law.howard.edu/node/194 (last visited Feb. 24, 2017).

played a significant role in combatting these fears by protecting equal rights despite public discomfort. For example, in attempt to achieve racial equality after the Civil War, this Court intervened to uphold principles of equality. In order to maintain the status quo, those who regarded African Americans as inferior instituted Black Codes and Jim Crow laws. These actions were largely rooted in unsubstantiated fears and prevented African Americans from attaining complete rights as American citizens. The Court, through various decisions including the landmark *Brown v. Board of Education*, responded to this unequal treatment and affirmed the key principles of equality and fairness to protect African Americans' rights. This case presents another opportunity for the Court to uphold equality in the face of societal fears.

The Court should not allow society's apprehension of change to determine the scope of transgender students' rights. These students' rights should be determined by the Constitution—not by society's discomfort with change in the existing social order. The school board policy at issue here, mandating separate, single-sex restrooms for transgender students, is reminiscent of the "separate but equal" doctrine that hindered racial equality for school children for over half a century. The policy singles out and labels transgender students as being different from others, rather than affording all students uniform rights. The policy is based on unfounded fears, which are inadequate to negate an individual's right to equality. Fear should never undermine the importance of equal protection and fairness under the law.

Furthermore, and perhaps equally important, the separate restroom policy will have a disparate impact on Black and Brown transgender students in lower

socioeconomic school districts. In order to execute a policy similar to the one at issue in this case, schools will be required to build new, single-sex restrooms. Often, Black and Brown students attend schools with fewer financial resources; these schools, therefore, will likely have difficulty installing truly "equal" facilities. As a result, students in these schools will be subject to makeshift accommodations that will be both separate and *un*equal. This unintended consequence will disproportionately impact many Black and Brown transgender students who already face a variety of challenges due to inadequate resources.

This case affords the Court an opportunity to uphold the principles of equality enshrined in the Fourteenth Amendment of the Constitution and Title IX's prohibition against discrimination on the basis of sex in education. In upholding the Fourth Circuit's decision, this Court will continue its tradition of ensuring equality for all Americans, as it did in *Brown*.

ARGUMENT

This case is about more than the right to use a restroom. It is about equality. Equality is a fundamental principle at the foundation of American society and "at the heart of the Fourteenth Amendment." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). At its core, this case is "about the founding ideals that have led this country – haltingly but inexorably – in the direction of fairness, inclusion and equality for all Americans."[3]

[3] Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals, Washington, DC, United States (May 9, 2016), https://www.

Protecting equality implicates all Americans, especially those who do not fit within existing social norms and the status quo. In protecting G. Grimm ("G.G."), a transgender boy, this Court will affirm "the dignity and respect we accord our fellow citizens and the laws that we, as a people and as a country, have enacted to protect them – indeed, to protect all of us."[4] G.G. has been singled out and forced to use separate restrooms in accordance with the Gloucester County Public School's ("GCPS") policy. J.A. 34. G.G. and other transgender students who will be impacted by this Court's decision only "ask for equal dignity in the eyes of the law." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

The Equal Protection Clause and Title IX are not simply aspirational in nature; instead, this Court has made those principles a reality in the face of societal fear and resistance to change in the social hierarchy and the status quo. The United States has witnessed discriminatory responses to historic moments of progress towards equality in our nation's history. The separation and discrimination G.G. has faced is reminiscent of moments in our country's history where immutable differences have been a marker to justify disparate and discriminatory treatment—the antithesis of equality. Throughout U.S. history, however, this Court has been the stalwart in safeguarding individuals who have been the targets of discrimination because of their differences. *See State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (allowing in-state tuition for African-American students); *Sipuel*

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justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint [hereinafter Lynch].

[4] *Id.*

v. Bd. of Regents of Univ. of Okl., 332 U.S. 631 (1948) (allowing African Americans to enroll in law school); *Brown v. Bd. of Ed. of Topeka*, *Shawnee Cty*., *Kan.,* 347 U.S. 483 (1954) (*Brown I*), *sub nom. Brown v. Bd. of Educ. of Topeka*, *Kan.*, 349 U.S. 294 (1955) (*Brown II*) (eliminating discrimination in public schools based on race); *Loving,* 388 U.S. 1 (eliminating discrimination in marriage based on race); *Oncale v. Sundowner Offshore Servs*., *Inc*., 523 U.S. 75 (1998) (recognizing discrimination in workplace based on same-sex harassment); *Obergefell*, 135 S. Ct. 2584 (extending marital rights to same-sex couples).

Accordingly, this Court's decision will have a critical role in affirming the principles of equality enshrined in the Constitution and promulgated in Title IX to ensure that we continue to make progress towards a more equal society in the face of potential social discomfort and unfounded fear. The theme of equal rights in American society continues to hold the force of power that will bridge the gap between the Constitution's promise of equality and the reality of deconstructing a social hierarchy where race, class, sex, and gender have unjustly been determinative of the dignity accorded to members of our society.

I. THIS COURT PLAYS A KEY ROLE IN UPHOLDING EQUALITY FOR ALL AMERICANS IN THE FACE OF PUBLIC FEAR AND DISCOMFORT WITH CHANGE.

Opponents of progress and inclusivity have often capitalized on public fear and discomfort caused by efforts to dismantle social structures that exclude individuals who do not conform to existing social norms. This fear and discomfort has resulted in oppressive laws and acts of terror against African Americans

that arose during the Civil War. For more than half a century, freed slaves were treated differently than their White counterparts solely based on the color of their skin. States created laws that permitted African Americans to remain second-class citizens within society, mandating separate schools, drinking fountains, restrooms, and even lunch counters for Black people. This Court intervened in *Brown v. Board of Education*,[5] dismantling the separate-but-equal public school system, which led to the breakdown of the legalized racial caste system. The Court's decision paved the way for decades of progress and moved society in the direction of equality for all Americans.

A. Post Emancipation Proclamation, the freedom of African Americans was met with the imposition of Black Codes, Jim Crow Laws and mob violence.

The backlash against equality for Black people began in 1863, when President Abraham Lincoln issued the executive order known as the Emancipation Proclamation, ordering all African Americans be freed from enslavement.[6] The attempt to extend principles of equality to African Americans was met with continued aggression from the rebel South. Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349 (2008). The Civil War continued for two years following the Emancipation Proclamation, as Southerners fought to keep African Americans enslaved to maintain the unjust

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[5] *See Brown I*, 347 U.S. 483 (1954); *see also Brown II*, 349 U.S. 294 (1955).

[6] *See generally* Emancipation Proclamation, January 1, 1863; Presidential Proclamations, 1791-1991; Record Group 11; General Records of the United States Government; National Archives.

social order. The South's resistance to the idea that African Americans would be treated equally to White people set the stage for the Thirteenth, Fourteenth, and Fifteenth Amendments (collectively known as the Reconstruction Amendments). Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1324 (1952). These critical Amendments provide the standard for ensuring all persons, including G.G., are treated equally.

In 1865, the Thirteenth Amendment abolished slavery, marking a milestone in American progress to dismantle racial hierarchy. Opponents viewed the Thirteenth Amendment as an unjustifiable invasion on states rights and an undue extension of federal government's power. *Id.* Underlying the federal-versus-state power argument was the fear and uncertainty that the federal government would disrupt the racialized social order in the South. *Id.* at 1323-25. To maintain the existing social order immediately after the Civil War, Southern states enacted laws known as "Black Codes" that restricted African Americans' freedoms and developed strict labor regulations to maintain the economic structure in the South.[7] The

[7] *See*, *e.g.*, Mississippi Apprentice Law, 1865 Miss. Laws 453 (An apprentice law, passed the same year, allowed courts to essentially sell into servitude orphans or children "whose parent or parents have not the means or who refuse to provide for and support" for them); Black Code from Opelousas, Louis., July 3, 1865 ("No negro or freedman shall be permitted to rent or keep a house within the limits of the town [of Opelousas] under any circumstances, and any one thus offending shall be ejected and compelled to find an employer . . . . "). Texas Black Code, 1866 ("SECTION 1. Be it enacted by the Legislature of the State of Texas, That Article 143 of the above named Code, be so amended as to hereafter read as follows : . . . 3rd. Persons of color shall not testify, except where the prosecution is against a person who is a person of color; or where the offence is charged to have been

Black Codes attempted to restore the unjust social order by keeping African Americans in a role subordinate to Whites. *See id.* at 1325. The Black Codes were in line with Southerners' common perception that African Americans were "so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856), superseded *by constitutional amendment*, U.S. Const. amend. XIV.

In response to the Black Codes, Congress passed several small constitutional amendments to ensure equal treatment of all Americans. The Fourteenth Amendment, ratified in 1868, allowed for federal citizenship to anyone born in the United States and made it unconstitutional for any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. The Fourteenth Amendment also instructed that the laws must be applied equally and that no one could be deprived of "life, liberty, or property, without due process of law." *Id.* Only two years later, Congress adopted the Fifteenth Amendment, which gave freed slaves the right to vote. U.S. Const. amend. XV. The Fourteenth and Fifteenth Amendments, in conjunction with the Thirteenth Amendment, were intended to grant full citizenship to and extend principles of equality to African Americans.

After the passage of the Reconstruction Amendments, however, opponents of progress and inclusivity

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committed against the person or property of a person of color . . . ."). Alabama and Georgia inserted into their constitutions the declaration that they would "guard [the former slaves] and the State against any evils that may arise from their sudden emancipation." Ala. Const. art. 4, § 36 (1865); Ga. Const. art. 2, § 5 (1865).

enacted Jim Crow laws to maintain the existing social order of racial oppression and actively resisted any disruption of that order. Gressman, *supra*, at 1336-37. Under Jim Crow laws, African Americans were segregated from White people in virtually every public arena possible, in "residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms." *Regents of University of California v. Bakke*, 438 U.S. 265, 393 (1978) (Marshall, J., dissenting). Because of these laws, African Americans were relegated to the margins of society and into separate and inferior spheres of existence. Gressman, *supra*, at 1324. Under the guise that separate facilities would be equal, "Jim Crow laws allowed states to circumvent the restrictions of the Reconstruction Amendments." *Id.* In particular, it is important to reflect on these moments of segregation of African Americans to inferior spheres of existence so that we can prevent repetition of this type of exclusion in this case.

Jim Crow laws ushered in the "separate but equal" doctrine upheld by the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Ed. of Topeka*, *Shawnee Cty.*, *Kan.*, 347 U.S. 483 (1954). Plessy, a man of mixed racial descent, feeling "entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race," purchased a first-class train ticket and sat in the area designated for the White people. *Id.* at 541. After failing to comply with the conductor's order instructing him to leave his seat in first-class, Plessy was ejected from the train and charged with violating Louisiana's 1890 statute that "provid[ed] for separate railway carriages for the white and colored races." *Id.* at 540.

Plessy challenged the constitutionality of the state statute under the Thirteenth and Fourteenth Amendments. *Id*. The Court upheld Louisiana's law finding that the Fourteenth Amendment "could not have been intended to abolish distinction based upon color, or to enforce social, as distinguished from political equality." *Id.* at 544. The Court's holding in *Plessy* created a legal fiction that there was a distinction between political equality and social equality. As a result, the Court created the "separate but equal" doctrine, which kept African Americans in a subordinate position to Whites and allowed society to maintain the Pre-Reconstruction social and racial caste system.

Justified by *Plessy*'s endorsement of White superiority, opponents of progress and inclusivity turned to violence and intimidation to terrorize African Americans and maintain the racial hierarchy of the South. *See generally*, Derrick Bell, Race, Racism, and American Law 229-30 (2008). This violence and intimidation was a byproduct of the Jim Crow laws. Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 23-24 (2d ed. 2015). From 1877 through 1950, there were 3,959 lynchings of Black people in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *Id*. at 40. Black people were lynched by White mobs for acts of social transgressions, such as speaking to or associating with a White woman, or for attempting to resist the social order by, for example, using a restroom labeled "White's only." *Id.* at 32. In addition, entire African-American communities were attacked and destroyed by White people. *See e.g. Id.* at 10 (White mob killed 46 African Americans, destroyed 107 buildings while crying

"kill every Negro and drive the last from the city"). Lynching was a violent means to oppose changes to the social order in which African Americans—at least under the language of the Constitution—were now to be treated as equal to White people.

As Frederick Douglass keenly observed:

> The negro meets no resistance when on a downward course. It is only when he rises in wealth, intelligence, and manly character that he brings upon himself the heavy hand of persecution. The men lynched at Memphis were murdered because they were prosperous. They were doing a business which a white firm desired to do,—hence the mob and hence the murder. When the negro is degraded and ignorant he conforms to a popular standard of what a negro should be.

Frederick Douglass, *Lynch Law in the South*, 155 N. Am. Rev. 17, 21 (1892). The purpose of lynching and other forms of violence was to invoke fear in African Americans for non-conformance to the racial caste system. This wide-spread violence by White Southerners during the Jim Crow era illustrates how changing social norms can breed fear and resistance.

B. *Brown v. Board of Education* highlights the progress to dismantle separate-but-equal policies and the role of this Court in upholding fundamental principles of equality.

After decades of terrorism and violence against African Americans, this Court in *Brown v. Board of Education* upheld principles of equality and set the stage for the Civil Rights Movement and future equality jurisprudence. At the height of this historical

movement, this Court affirmed the key principles of equality in the Fourteenth Amendment and did so in the face of societal fears and an intense desire by certain people to maintain the existing racist social order. In *Brown*, the Court overruled *Plessy* and held that "separate but equal" was unconstitutional under the Equal Protection Clause. 347 U.S. at 495.

For the first time, African-American children would no longer be legally relegated to inferior and racially segregated schools. As this Court explained,

> [t]o separate [Black children] from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Id. at 494. This Court's decision to extend principles of equality to African-American school children, however, was met with fear and discomfort because *Brown* was a step towards changing the existing social order. *See generally Cooper v. Aaron*, 358 U.S. 1 (1958). Opponents of progress and inclusivity expressed unfounded fears that integration would endanger White children because African Americans were perceived as criminals, thought to carry contagious diseases, and stigmatized as people with low morals. Amicus Curiae Brief of the Attorney General of Florida at 21, *Brown v. Bd. Of Ed.*, 347 U.S. 483 (1954), 1954 WL 45715. Despite these unfounded fears, the Court took bold and necessary steps towards dismantling racial hierarchy.

People who harbored unfounded fears resorted to outright defiance of the law set forth in *Brown*. For example, in Arkansas, a plan to desegregate schools,

devised by the Little Rock School Board, was met with resistance from other state agencies who wanted to maintain racially segregated schools. *Cooper*, 358 U.S. at 8. The state went so far as to pass a constitutional amendment declaring *Brown* unconstitutional and requiring the state to oppose integration. *Id.* at 8-9. The state's amendment contravened *Brown*'s order that racial segregation in public schools should be eradicated with "all deliberate speed." *Id.* at 7. Consistent with state law, the governor of Arkansas ordered the Arkansas National Guard to prevent African-American students from entering the all-White Central High School. *Id.* at 9. In response, however, President Eisenhower followed this Court's holding in *Brown*, and dispatched federal troops to escort the African-American students to school, ensuring that they would be admitted. *Id.* at 16.

In 1958, this Court reviewed the circumstances surrounding the Arkansas integration case. Affirming the principles of equality reiterated only a few years before in *Brown*, this Court held that "[t]he constitutional rights of [African-American school children] are not to be sacrificed or yielded to the violence and disorder, which have followed the actions of the Governor and Legislature." *Id.* Even in the face of violence, opposition, and state action, this Court remained true to the principles of equality afforded to school children.

Similarly, another case decided by this Court involved resistance to the principles of equality clearly mandated by *Brown*. *See Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218 (1964). The Prince Edward County school district in Virginia fervently resisted integration, which prompted the Virginia lawmakers to pass legislation ordering the closure of all public

schools. *Id.* at 222. As a result, private foundations provided funding for White children to attend private schools, while Black children went entirely without formal education for four years. *Id.* In 1961, Black students sued the school board for refusing to operate free public schools in compliance with *Brown* and in violation of the Equal Protection Clause. *Id.* at 220-21. This Court ultimately held that Prince Edward County's practices denied Black student's equal protection under the Fourteenth Amendment. *Id.* at 230-32.

These cases demonstrate both the great lengths to which local and state governments went to resist integration and this Court's role in upholding principles of equality despite the public resistance. *Brown* helped to dismantle the unjust social order not only in public schools, but also in society at large. After *Brown* and with the passage of the Civil Rights Act of 1964, African Americans were no longer required to use separate public water fountains, restrooms, or lunch counters. Indeed, this Court's jurisprudence over the past seventy-five years has continued to extended equality to all Americans. *See*, *e.g.*, *Loving*, 388 U.S. at 12; *Oncale*, 523 U.S. at 75; *Obergefell*, 135 S. Ct. at 2584. This Court has played and continues to play a fundamental role in protecting equality for everyone in the face of public fear and discomfort in dismantling the existing social order.

II. THIS COURT SHOULD NOT ALLOW UNSUBSTANTIATED FEARS AND PUBLIC DISCOMFORT TO DEFINE THE SCOPE OF TRANSGENDER STUDENTS' CONSTITUTIONAL RIGHT TO EQUALITY AND DIGNITY UNDER THE LAW.

> Let us reflect on the obvious but often neglected lesson that state-sanctioned discrimination never looks good in hindsight. It was not so very long ago that states, including North Carolina, had signs above restrooms, water fountains and on public accommodations keeping people out based upon a distinction without a difference. We have moved beyond those dark days, but not without pain and suffering and an ongoing fight to keep moving forward. Let us write a different story this time. Let us not act out of fear and misunderstanding, but out of the values of inclusion, diversity and regard for all that make our country great.[8]

The GCPS's policy mirrors the resistance seen in response to integrating schools and society at large. Like these earlier forms of resistance, the GCPS's policy caters to unsubstantiated fears. The GCPS policy provides:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding *biological genders*, and students with *gender*

[8] *See Lynch*, *supra* note 3.

> *identity issues* shall be provided an alternative appropriate private facility.

J.A. 34 (emphasis added). The policy mandates that individuals use restrooms that correspond with their "biological gender," and requires children with "gender identity issues" to be provided with an "alternative appropriate private facility." *Id.* The policy singles out transgender children as students with "issues," stigmatizing them by treating them differently from other students. Much like requiring "colored" restrooms for African Americans, GCPS's policy is a type of fear-based segregation that is reminiscent of policies and laws created in the face of attempts to change discriminatory social practices to create resist an inclusive America.

The comments at the Gloucester County School Board Meeting on December 9, 2014, highlight the deep-rooted bias and unsubstantiated fears that community members proffered to justify the School Board's policy. Some of the articulated fears are:

- Individuals of a biological sex will feel uncomfortable using the same facility as someone with the opposite biological sex or who is "different."[9]
- Male children would see more of the female body than they are allowed to see in a normal day, which would lead people to feel uncomfortable and would lead to indecency.[10]

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[9] Gloucester Cty. Sch. Bd. Video Tr., Dec. 9, 2014, at 37:36 – 38:10 at http://gloucester.granicus.com/MediaPlayer.php?view_id=2&clip_id=1090 (last visited Feb. 28, 2017) [hereinafter "Dec. 9, 2014 Meeting"].

[10] Dec. 9, 2014 Meeting, at 38:15 – 38:56.

- A different policy would lead children to claim a gender different than their own for the sole purpose of using the restroom for the opposite sex, which would lead to sexual assault.[11]

These fears further stigmatize transgender individuals as criminals, perverts, and different from other students, despite the lack of evidence supporting these allegations.

Like the fears expressed when racial integration was mandated by *Brown*, GCPS's policy exploits people's fear and discomfort with changes to the status quo and social order. The Gloucester County School Board cites concerns of safety to justify denying transgender students access to restroom facilities. *G.G. ex rel. Grimm*, 822 F.3d at 716. Much like the unfounded fears that Black people were criminals and carried diseases, this fear is also baseless.[12] As demonstrated by the experiences of school administrators throughout the country, transgender students simply seek equal treatment; they have not engaged in inappropriate behaviors in school restrooms. These unfounded and unsupported fears perpetuate stereotypes leading to the stigmatization of transgender students. In turn, the fear-based policies, if found to be

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[11] *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016).

[12] *See* Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predators" Argument Is A Red Herring*, TIME (May 02, 2016), http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/; *see also* Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth*,' ABCNEWS (Apr. 22, 2016), http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019.

constitutional, will legitimize discrimination against transgender students.

The GCPS's policy and the proclaimed community fears parallel justifications for the "separate but equal" doctrine. The Gloucester County School Board's solution is to provide students with "gender identity issues" an "alternative appropriate private facility." *Grimm*, 822 F.3d at 716. This Court, however, rejected similar fear-based arguments when it held "[s]eparate educational facilities are inherently unequal." *Brown I*, 347 U.S. at 495. Indeed, these arguments were rejected because public fear alone cannot withstand constitutional scrutiny and unfounded fears certainly do not negate the right to equal protection under the law. *Brown II*, 349 U.S. at 299.

GCPS's separate restroom policy violates Title IX's provision prohibiting sex discrimination and stigmatizes children, further perpetuating inequality. Separating transgender students from their peers because of their gender identity "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494. Transgender children experience psychological distress when parents or school staff repeatedly fail to acknowledge the child's gender identity or treat the child in a manner consistent with his or her birth sex. *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349 at *3. (S.D. Ohio Sept. 26, 2016).

G.G., a transgender child, has been diagnosed with gender dysphoria, a medical condition characterized by an incongruence between a person's gender identity and the person's birth-assigned sex. *Grimm*, 822 F.3d at 714. GCPS, however, has disregarded his medical

diagnosis and has created an environment where transgender students, like G.G., will be subjected to stigmatizing unequal treatment. Because gender is a core aspect of a person's identity, transgender children who are treated in this way experience that mistreatment as a profound rejection of their core self, which has serious negative consequences for their development and their long-term health and well-being. *Id.* at 728. Allowing transgender students to use the restroom facilities consistent with their gender identity is crucial to their long-term health and well-being. *Id.*

Certainly adolescent students like G.G. should not be required to shoulder society's fear of change. Nevertheless, this is exactly what will occur if this Court denies G.G. equal protection under the law. In fact, a citizen at the Gloucester County School Board meeting explained, "[t]his isn't a group trying to force an alternative lifestyle on any one. This is about recognizing that not all of us have the liberty of being accepted for who we are." *See* Dec. 9, 2014 Meeting, at 01:10:35 – 01:10:36. This comment highlights the purpose of the equal protection clause: to protect *all persons* especially individuals like G.G. who are not in the majority.

Prohibiting transgender students from using a restroom corresponding with their gender identity denies them the right to equal protection under the law. As former Attorney General Loretta Lynch stated, "this [restroom policy] will inflict further indignity on a population that has already suffered more than its fair share. This [policy] provides no benefit to society – all it does is harm innocent Americans." *See* Lynch, *supra,* note 3. This Court recognized in *Brown* that the "separate but equal" doctrine

adversely impacted the wellbeing of African-American children. Similarly here, this Court should reject a policy in which transgender students are singled out, labeled as different, and relegated to using separate restrooms. By doing so, this Court will affirm principles of equality, despite discriminatory social practices.

III. THE SEPARATE TRANSGENDER RESTROOM POLICY WILL HAVE THE UNINTENDED CONSEQUENCE OF DISPROPORTIONATELY IMPACTING BLACK AND BROWN TRANSGENDER STUDENTS IN LOWER SOCIOECONOMIC SCHOOL DISTRICTS.

GCPS claims that by providing G.G. with two utility closets that it converted into restrooms and by planning to build new unisex restrooms in the future, it has satisfied Title IX's non-discrimination provisions. J.A. at 34. If accepted by this Court, GCPS's claim will have a severely disparate impact on low-income students, many of whom will be students of color, because school districts with fewer financial resources will struggle to create even grossly unequal and facilities for transgender students. True progress is going to lie in the Court pushing decision-makers to consider the potentially racially disparate impact of actions and policies. Because Black and Brown children disproportionately attend lower income school districts, they would be impacted more than other children if this Court finds that the GCPS policy is constitutional.

The complex funding structure of the public education system, in which property taxes govern school resources, creates a rigidly stratified system where wealth is determinative of the quality of a student's educational experience. Jill Barshay, *The Gap Between Rich and Poor Schools Grew 44 Percent Over a Decade*, THE HECHINGER REPORT (Apr. 6, 2015), http://hechingerreport.org/the-gap-between-rich-and-poor-schools-grew-44-percent-over-a-decade/. Within this complex funding structure, approximately 10% of school revenue comes from federal dollars, while 45% of revenue comes from state funds and 45% from the local government. Leachman, et. al., *Most States Have Cut School Funding, and Some Continue Cutting*, CENTER ON BUDGET AND POLICY PRIORITIES (Jan. 25, 2016), http://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting. More than one-third of school funding relies on local property taxes, which differs from neighborhood to neighborhood and district to district. Cory Turner, *Why America's Schools Have A Money Problem*, NPR (Apr. 18, 2016), http://www. npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem. In a March 2015 report, the U.S. Department of Education found that the "richest 25 percent of school districts receive 15.6 percent more funds from state and local governments per student than the poorest 25 percent of school districts." *Id.*

This funding structure manifests itself in the form of the inequitable distribution of resources for school districts. The effect of the funding structure is a disproportionate impact on Black and Brown children. A 2016 Atlantic Report found the most powerful predictor of racial gaps in education achievement is the extent to which students attended schools with

low-income peers. Janie Boschma and Ronald Brownstein, *The Concentration of Poverty in American Schools*, The Atlantic (Feb. 29, 2016), https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/. In a survey of nearly 100 cities, 85.6% of African-American students and 88.5% of Hispanic students attended schools with classmates from a low socioeconomic background. *Id.* In addition, this report found that a school's poverty is a proxy for the school's quality, as low-income schools have less economic and social capital. *Id.*

The funding gap in schools across the United States results in significant resource variation. *Id.* In most instances, this funding gap is further exacerbated by the fact that school districts may not use federal funding to support construction projects—like constructing separate and unequal unisex restrooms.[13] Given the disparities in resource allocation within different

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[13] In school districts with fewer resources, Title I of the Elementary and Secondary Education Act provides financial assistance to local educational agencies (LEAs) and schools with high numbers or high percentages of children from low-income families. *See* The American Recovery and Reinvestment Act of 2009 (ARRA) (P.L. 111-5), Using Title I, Part A ARRA Funds for Grants to Local Educational Agencies to Strengthen Education, Drive Reform, and Improve Results for Students 36 (2009), https://www2.ed.gov/policy/gen/leg/recovery/guidance/titlei-reform.pdf. The funding cannot be used for construction and renovation projects. *But see*, "Title I, Part A ARRA funds may be used for "minor remodeling," defined in 34 C.F.R. § 77.1(c). The financial assistance, however, does not extend to support lower income school districts in making construction renovations, like building new unisex restrooms for transgender students. The limitation on the use of Title I funds would inhibit modifying schools to comply with the GCPS separate restroom policy. Nevertheless, federal money is not intended to equalize an unfair system, but intended to supplement state and local funding.

school districts, an unconstitutional segregated transgender restroom policy will disproportionately impact Black and Brown transgender children of lower socioeconomic status as these schools already lack equal-resource funding.

Even GCPS has struggled to implement its separate unisex restroom policy. In order to comply with its own separate restroom policy, GCPS converted two utility closets and a faculty restroom into a temporary restroom for transgender students to use, pending plans to construct new unisex restrooms. Br. Opp'n at 9. GCPS and the dissenting judge on the Fourth Circuit dismissively accept the subpar, unequal unisex restrooms by claiming that the existence of the current facilities is evidence that the district is in compliance with Title IX. *Id.* at 30; *Grimm*, 822 F.3d at 737 (Neimeyer, J., dissenting). On the contrary, a utility closet is hardly an appropriate alternative for a restroom for adolescent children and is but a modern version of the unconstitutional policy of separate but equal.

Upholding the separate restroom policy will have the unintended but serious consequence of creating a dual system for Black and Brown transgender students based on the financial resources of the school district in which they reside. Such a policy will disproportionately impact transgender students who reside in school districts with fewer financial resources and an even greater percentage of these students will be students of color. *Secretary Duncan*, *Urban League President Morial to Spotlight States Where Education Funding Shortchanges Low-Income*, *Minority Students*, U.S. DEP'T OF EDUC. (Mar. 13, 2015), http://www.ed.gov/news/media-advisories/secretary-duncan-urban-league-president-morial-spotlight-states-where-

education-funding-shortchanges-low-income-minority-students. It is not likely that school districts, already crumbling under the pressure of current educational compliance requirements, would be able to provide transgender students with anything remotely approaching "equal" alternative facilities.

With a dearth of financial resources, following GCPS's lead, other under-resourced school districts will attempt to convert utility closets into subpar facilities, which would only compound the stigma and inequality created by forcing those students to use separate facilities *solely* because they are transgender in the first place. Thus, if this Court vacates the Fourth Circuit's decision, it will force a disproportionate number of Black and Brown transgender students, who attend lower income school districts, to be relegated to facilities that are not only separate and stigmatizing but grossly unequal.

CONCLUSION

This case provides the Court with the opportunity to uphold the principles of equality enshrined in the Fourteenth Amendment to the Constitution and Title IX's prohibition against discrimination on the basis of sex in education. In upholding the Fourth Circuit's decision, this Court will continue its tradition of upholding principles of equality and not bending to the influence of public fear of change to existing social order.

Respectfully submitted,

KARLA MCKANDERS
Counsel of Record
HOWARD UNIVERSITY SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC 20008
(202) 806-8065
Karla.McKanders@law.howard.edu

Counsel for Amicus Curiae

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