No. 20-1163

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER

v.

GAVIN GRIMM, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PENNSYLVANIA STUDENTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

RANDALL L. WENGER
Counsel of Record
CHERYL LYNN ALLEN
JEREMY L. SAMEK
JANICE MARTINO-GOTTSHALL
Independence Law Center
23 N. Front Street, First Fl
Harrisburg, PA 17101
(717) 657-4990
rwenger@indlawcenter.org

ANDREA L. SHAW
Law Office of
Andrew H. Shaw, P.C.
2011 W. Trindle Rd.
Carlisle, PA 17013
(717) 243-7135
andrea@ashawlaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are students and former students from two school districts in Pennsylvania that have suffered on account of their schools opening up privacy facilities—locker rooms and restrooms—on the basis of self-professed gender identity rather than objective sex. They appear as *amici* to tell their stories and to request that schools continue to be permitted to separate these spaces on the basis of sex to prevent what happened to them—bodily privacy violations and sexual harassment.

School policies, like the one that Gavin Grimm wants to force the Gloucester County School Board to adopt, harm students like *amici*. The policies manipulate students and their bodies, resulting in students seeing the unclothed bodies of opposite-sex classmates, sometimes including their genitalia. These policies also permit opposite-sex classmates to view *them* undressed and without consent. Seeing and being seen by members of the opposite sex can be extremely distressing and humiliating for any teenage student. For those who have been victims of sexual assault or harassment, it can be terrifying and traumatic.

Some have suggested that *amici*'s rationale for sex-separated privacy facilities is the belief that transgender students have ill-intent in desiring to use

---

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *amici curiae* or their counsel contributed money intended to fund preparation or submission of this brief. This brief is filed with consent of the parties. All parties were given timely notice of *amici's* intent to file.

opposite-sex spaces. But that is not the point *amici* are making; they speak to this issue based on the nature of bodily privacy. By way of illustration, when a school tells a male maintenance worker not to replace a leaking faucet while girls are using the locker room, it is not because the school believes that maintenance workers are bad people and would do something deviant. It is because the male maintenance worker's presence violates the privacy of the girls using the facility. The girls' privacy interests do not disappear based on the non-nefarious intent of the man in the privacy facility.

*Amici'*s experience will aid this Court's understanding of the implications of what is being demanded of Gloucester County School Board.

SUMMARY OF THE ARGUMENT

Gloucester County School Board was sued for alleged Equal Protection and Title IX violations. However, the school treated each student the same on the basis of sex for purposes of privacy facility usage, which has long been the practice in America and which has explicitly been allowed under Title IX. *See* 34 C.F.R. §106.33 (permitting "toilet, locker room, and shower facilities" to be separated on the basis of sex).

Privacy facilities are not separated on the basis of sex *because* sex is a protected class (such that if we adjust the meaning of sex, the new meaning should form the basis for separation), but *in spite of* the fact that sex is a protected class. The existence of "sex" as a protected class generally forbids separation based on sex. It is only our need for bodily privacy from members of the opposite sex—due to the anatomical differences between the two halves of humanity—that we have and legally permit separate spaces.

Grimm asks this court to deem separation on the basis of sex illegal, and instead to replace sex-based distinctions and require separation of privacy facilities based on gender identity. The claim is that those who assert a cross-sex identity must be affirmed in that identity by being accepted as a member of that sex. But affirmation of affiliation with a group cannot justify separate facilities, whether it is affiliation based on gender identity or affiliation based on race. Group affiliation is not a permissible reason to separate these facilities— privacy is.

Furthermore, a girl's right to privacy from a member of the opposite sex belongs to her, and should not be contingent on what a male believes about gender, and vice versa. Yet the inevitable result of the lower court's decision is that a girl's right to privacy suddenly springs into existence or ceases to exist, merely based on what males believe about their own gender.

From a policy perspective, gender identity functions differently in the context of privacy facilities than it does in the context of employment decisions. In the employment context, "sex" and "gender identity" can co-exist in the sense that a prohibition against firing people based on gender identity does not mean a person loses their protections from being fired based on their sex. In Title IX, and particularly 34 C.F.R. §106.33,[2] the opposite is true as "sex" and

[2] Because sex, rather than gender identity, is the subject of both the exemption found in 20 U.S.C. §1681 and the regulation

"gender identity" are mutually exclusive. Expanding class protections in hiring takes away no protections from existing classes, but with privacy facilities it is a zero-sum game. Either the spaces are separated on the basis of sex or on the basis of gender identity, but the moment that they are separated by gender identity, the separation is by definition and in practice, no longer on the basis of sex.

This Court's decision in *Bostock v. Clayton Cty*., 140 S. Ct. 1731 (2020), does not justify the policy change that Gavin Grimm demands. Instead, *Bostock* explains why Grimm was denied access to the male privacy facilities. But for the fact that Grimm is biologically female, Grimm would have been able to use the male privacy facilities at the school. Thus, based on the logic of *Bostock*, this constitutes discrimination on the basis of sex. Yet that sort of sex discrimination occurs every time a woman is prohibited from entering a male privacy facility. Sex based distinctions in these settings are not invidious but permissible due to the government interest at stake.

The experience of students in other districts—districts that did not protect these students' most basic rights—demonstrates the importance of what the Gloucester County School Board has done.

implementing it, a bathroom policy treating women who identify as men the same as all other biological women cannot violate Title IX. This principle is true regardless of whether a woman identifies as male, female, demigender, pangender, or something else.

Schools are in a difficult position because of the conflict between federal guidance and executive orders on the one hand, and their constitutional and statutory responsibilities on the other. This Court should take this case to help resolve these difficulties. Ultimately, the school's decision to separate multi-user privacy facilities on the basis of sex is justified based on its interest in preventing the violation of the bodily privacy of and preventing the sexual harassment of its students.

ARGUMENT

I. Students suffer when privacy facilities are opened to members of the opposite sex.

Madison Williams[3] is a student at the Wayne Highlands School District in Pennsylvania. While a sophomore, she removed her clothes in the locker room to prepare for gym class. Before she had a chance to put her gym clothes on, she was shocked to hear a male voice. Madison turned and experienced something that no 15-year-old should have to endure: an opposite-sex classmate was staring at her in her panties. She was also aghast to see the student wearing nothing but female panties with his male genitalia clearly visible. This student was also known to be exploring his gender identity—unsure of his self-identity—and also attracted to females.

[3] Most of the students use pseudonyms for protection from ridicule for exposing the sexual harassment that they have endured.

Madison did not consent to viewing her male classmate's genitalia and is now forced to carry that image in her mind. The incident replays itself as she is unable to get the image of the male student exposing his genitalia to her out of her head. She experiences feelings of shame and, because she gave no consent, profound violation. This not only angers her but causes her stress as she feels vulnerable to further exploitation by school officials.

Likewise, she cannot get the thought out of her mind that a male classmate had seen her undressed in a locker room, a place where she expected privacy from any and every male. She now has to live with the fact that a teenage male has stolen the mental image of her body in a state of undress—an image that she did not consent to give—and she suffers knowing this male classmate is free to fantasize on it. She also experiences frustration knowing that the mental image stolen from her can never be returned.

Despite this incident, the school refused to remove the male student from the girls' privacy facilities, forcing a 10th-grader to navigate a sexually harassing environment. The male student eventually agreed to change behind a curtain in the locker room, but that hardly solved the problem as he was essentially invited to view the girls' unclothed bodies while they were changing or showering as he entered and exited the facility.

The result was that Madison was unable to meaningfully access a space set apart by Pennsylvania law to be used exclusively by women and girls.[4] She would wait for the boy to be done in the locker room, always anxious that he would walk back in. It made her start gym class late and delayed her return to academic classes.

The school failed to recognize the sexual mistreatment she endured—an unwanted memory of male genitalia and a stolen image of her unclothed body—and because school policy treated a girl's privacy rights as completely contingent on what a boy believes about the nature of gender, the situation could not be remedied. Instead, she was forced out of the facilities and subjected to ridicule for standing up to the sexual harassment, an inevitable consequence of reengineering the use of privacy facilities on the basis of gender identity rather than sex.

Megan Miller also discovered the same male student directly across from her locker in the girls' locker room while getting dressed for cross-country. She was horrified at the thought of undressing in front of a male—with that image in his mind—and was outraged at seeing him undressed. Despite Pennsylvania law setting this space apart to be used exclusively by the female sex, she was forced to flee, hide, and hurriedly dress outside of the presence of a male. Megan feels violated and humiliated by the invasion of her bodily privacy and suffers an ongoing sense of vulnerability.

This policy did not just affect locker rooms. Instead, Madison, Megan, and other female students

---

[4] Public School Code of 1949, 24 P.S. §7-740 (requiring that facilities "shall be suitably constructed for, and used separately by the sexes").

like Kelly Smith worried about whether the male student would enter the restroom while they used it. They were frequently stressed and on edge, feeling like they could not use the restroom without thinking about whether the male was present or would come in at any time. They limited fluids and often opted to hold their bladders rather than use the school's restrooms. This caused an ever-present distraction throughout the school day, including during instructional time. When they were forced to use the facilities, they would scan the restroom for the presence of the male classmate and then hurriedly address their hygiene needs in the hope that they would not be confronted by the male in the restroom or realize that the male student was in an adjacent commode stall.

The girls knew that the male student often lingered in the girls' restroom, which made it difficult to find an opportunity to use it without encountering the male student. By allowing male students to use the restrooms, the girls did not feel protected by the school but left to navigate a sexually harassing situation on their own.

In allowing the male student to use the girls' privacy facilities, the school invited him to dictate the terms by which females could use these facilities — thus requiring them to waive their right to bodily privacy and subjecting them to sexual harassment if they wished to have full use of the facilities that were designated, by state law, for their exclusive use.

Girls are exploited by public authorities when schools coerce them to change clothes or do any of the activities that are uniquely appropriate inside of a girls' restroom, locker room, or shower facility when a male is present. Societies have long suffered from women and girls being used to satisfy male expectations. Yet, school policy effectively teaches girls that a male's beliefs about himself are more important than the girls' dignity, privacy, and sexual autonomy. Schools should never manipulate girls as objects to affirm boys' beliefs about their own sexual identities, especially when doing so causes girls to fear being the object of a classmate's sexual arousal.

For girls, encountering any boy in a vulnerable place where they may be undressed can be a traumatic experience and, for sexual assault survivors, it can trigger further psychological injury. *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting). Moreover, the increased vividness accompanying real-time exposure to a person of the opposite sex who is naked or in their underwear is even more arousing than a mere picture, and knowing that a member of the opposite sex obtained such a potentially arousing and unconsented-to image can be deeply troubling to those who have been exposed. By exempting privacy facilities from the general prohibition of sex discrimination in Title IX, Congress acted to eliminate that harm, as well as to protect the privacy and modesty interests of vulnerable students.

* * *

Joel Doe was a junior at the Boyertown Area School District changing in the locker room for gym class when he encountered a female changing with him. The female was wearing nothing above her waist other than a bra, and Joel was wearing only his underwear.

The situation was shocking and confusing for Joel, because he did not expect to view a female in a state of undress or to be viewed by a female wearing only underwear especially since, based on our traditions and the sign on the door, he expected the space to be separated by sex. Something was stolen from Joel that day because he did not give consent to be seen by the opposite sex in his underwear.

Joel experienced shame and loss of dignity by the school's action in opening up male spaces, and encountered ongoing vulnerability and harassment. Though difficult for a student to navigate a sexually harassing environment, Joel brought numerous students with him to the principal to find out what to do. Even then, the school's response was callous, telling the boys to "tolerate" changing with a female and repeatedly admonishing the boys to make the arrangement as "natural as possible."

Jack Jones, a junior at the time, learned about the policy as Joel did: in his underwear in the locker room while encountering a female student. Like Joel, Jack experienced a lack of dignity being seen in a state of undress without his consent. The Jones family learned from the school administration that this was happening because the school wrongly believed it was required to do so under federal law.

The anxiety and embarrassment that Joel and Jack felt was not limited to the locker room. They and other boys were often forced to avoid using the restroom out of fear of encountering a female in the male privacy facilities.

Alexis Lightcap, who was also a junior at Boyertown, encountered a male student in the girls' restroom. She left, running out of the facility because of her shock of encountering a male in a place that she considered a safe place for females. She reported the incident, because she had no idea that the school was opening up privacy facilities if students identified with the opposite sex. The school did not disclose the policy change to students or their parents. However, for Alexis and other girls at the school, like Macy Roe and Chloe Johnson, the threat of encountering a male in these spaces meant losing meaningful access to privacy facilities, which exist precisely to provide a place to disrobe and perform certain functions outside the presence of members of the opposite sex.

Many girls like Alexis used not only locker rooms but restrooms for changing. They understood what we all do about such spaces—that privacy from the opposite sex starts at the door of the privacy facility—not at the stall. So whether in the common areas of the locker rooms or the restrooms, girls would completely undress in preparation for sports or to change clothes before leaving for the day. But now they lack meaningful access to spaces that were set apart to be used exclusively for women. They worried when they needed to undress to change or to use the facilities because stall doors—notoriously with gaps—only provide the minimal level of privacy expected from members of the same sex, not the real privacy expected from members of the opposite sex.

This resulted in Alexis, Macy, Chloe, and others avoiding liquids so that they would not have to use facilities with a biological male. They were forced to navigate the use of female privacy facilities with stress, fear, and ongoing vulnerability. For some, like Alexis and Joel, it meant that they left their high school altogether to pursue education elsewhere due to the ongoing sexual harassment they were subject to by the school on account of the policy.

The experience of these students is repeated thousands of times over because many schools, like the two above, do not even inform their students that a member of the opposite sex will be using their privacy facilities because, according to these schools, a boy identifying as a girl is a girl just like any "other" girl (or vice versa). Because girls need not be warned that another girl will be with them, schools view it as discriminatory to inform students that a boy identifying as a girl will share that space with girls.

* * *

The difficulty that school districts are facing should not be minimized, especially when confronted with guidance documents and executive orders that are in conflict with both our traditions and the constitutional and statutory safeguards for our children. What's worse, the philosophical framework for assessing best practices has been poisoned by a false dichotomy—choosing between the best interest of transgender students, who are often described as emotionally fragile, and those who object to sharing privacy facilities with any member of the opposite sex for the reasons described above.

In reality, our American experience shows that this need not be a zero-sum game. Every child deserves respect and a safe, nurturing learning environment. That is best accomplished when we give schools the tools to do what we do well in America, working together collaboratively, not in spite of but because of our differences. Our experience with our religious differences is instructive. Many Americans find their core identity in their religious beliefs and commitments. In the context of religion, we don't force persons to agree with others' beliefs in order to show respect to them. Americans fervently disagree with each other on religious commitments, but still maintain a mutual respect for each other. Sometimes religious persons need accommodations for those beliefs, in schools and in the workplace, but we understand those accommodations must be reasonable, never violating others' rights. In the same way we do in the context of religion, we should facilitate a loving, respectful, nurturing environment for all students, regardless of gender identity. But it is both unreasonable and unnecessary to end sex-based distinctions in privacy facilities.

Unfortunately, some suggest that it's out of animus towards transgender classmates that students object to sharing privacy facilities. To be clear, *amici* welcome transgender students to share privacy facilities with them so long as they are the same biological sex. There is no more validity, for instance, to the claim that female *amici* hate male-to-female transgender students because they object to sharing privacy facilities than that they hate *any* male student because they don't want to share such spaces. It is simply an issue of the importance of bodily privacy that such spaces are intended to afford.

Schools have a duty to protect all students. However, as explained below, schools fail that duty when they eliminate sex-based distinctions in privacy facilities. Schools can and must do both— creating a loving, respectful, nurturing environment, including such reasonable accommodations that will serve their students, while maintaining sex-based distinctions in those places where sex-based separation is necessary for bodily privacy.

II. Sex-separated facilities are justified by the school's interest in protecting its students' bodily privacy.

Gloucester County School Board's separation of privacy facilities on the basis of sex is justified by the school's interest in protecting its students' bodily privacy in relation to members of the opposite sex. Even in the context of the Fourth Amendment where there is a governmental interest in policing contraband, strip searches—including strip searches of someone of the *same* sex—are limited due to "reasonable societal expectations of personal privacy." *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374 (2009). This is especially true in the school setting where "adolescent vulnerability intensifies the patent intrusiveness of the exposure." *Id*. at 375.[5]

The right to bodily privacy, of course, is not limited to searches. Even in a case brought by the

---

[5] *Safford* distinguished undressing for gym class from undressing for a search, *id*., but that was in the context of undressing in front of other students of the *same* sex, not what *amici* and others have experienced due to a gender identity ideology that conflates and supplants sex.

Boyertown *amici*, the Third Circuit correctly recognized a constitutional right to "privacy in a person's unclothed or partially clothed body." *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527 n.53 (3d Cir. 2018) (citing *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494, 498 (6th Cir. 2008); *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.")). The interest is so strong it is even preserved for inmates. *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980) (female inmates had a privacy interest in not being seen completely or partially unclothed by male guards).

On these principles rests "society's undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation. . . ." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). That is why "same-sex restrooms [and] dressing rooms" are allowed "to accommodate privacy needs" and why "white only rooms," which have no basis in bodily privacy, are illegal. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). Indeed, females "using a women's restroom expect[] a certain degree of privacy from . . . members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. App. 2014). Specifically, teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988).

Because of bodily privacy protections, schools cannot force the minors in their care to endure the risk of unconsented intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy from the opposite sex. Nor should they. "[P]rivacy matters" to children and is "central to their development and integrity." Samuel T. Summers, Jr., *Keeping Vermont's Public Libraries Safe: When Parents' Rights May Preempt Their Children's Rights*, 34 VT. L. REV. 655, 674 (2010) (quoting Ferdinand Schoeman, *Adolescent Confidentiality and Family Privacy*, in PERSON TO PERSON 213, 219 (George Graham & Hugh Lafollette eds., 1989)). Allowing opposite-sex persons to view adolescents in restrooms and locker rooms, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

Schools have separate facilities for boys and girls to protect students' bodily privacy rights. "Unquestionably, a girls' locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. App. Dec. 29, 2009). Grunau argued that briefly viewing a teenager showering in a full swim suit, the same thing she was wearing while swimming where members of both sex could see her, would not shock or irritate the average person. The *Grunau* court vigorously disagreed: "[A] normal female who was showering in a girls locker room would unhesitatingly be shocked, irritated, and disturbed to see a man gazing at her, no matter how briefly he did so." *Id*. It further explained: "defendant blithely ignores an important fact: where his conduct took place. . . . [The victim] was on a high school campus, out of general public view, and inside a girls' locker room, a place that by definition is to be used exclusively by girls and where males are not allowed." *Id*.

The important constitutional principle of bodily privacy should not be discarded even as we seek to eliminate class-based distinctions. For instance, in the context of a case involving a sex-based admissions policy, this Court noted that "[a]dmitting women to the Virginia Military Institute would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements. . . ." *United States v. Virginia*, 518 U.S. 515, 551 n.19 (1996). In the same way, schools must treat transgender students, like all students, with dignity and respect. But schools cannot ignore important bodily privacy issues any more than the Virginia Military Institute could do so when eliminating sex-based distinctions on that campus.

Unfortunately, some schools have violated bodily privacy while arguing that the right can be protected by providing separate facilities for students who want bodily privacy. But even that violates student privacy, because a right—in this case use of multi-user privacy facilities set apart on the basis of sex—cannot be conditioned on waiving a constitutional right—the right to bodily privacy. *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2594 (2013) (noting the unconstitutional conditions doctrine protects constitutional rights "by preventing the government from coercing people into giving them up").

Gloucester County School Board did what it was required to do under the constitution and Title IX—separate facilities used by its minor students on the basis of biological sex. Indeed, if there is no right for a school to separate facilities on this basis, there is no right to separate facilities on *any* basis. The real anatomical differences between the sexes—relevant in places where we disrobe—is the only appropriate justification for separating groups of people. *Chaney*, 612 F.3d at 913.

Because bodily privacy rights in privacy facilities depend on our bodily differences, a girl's right to bodily privacy does not spring into existence or cease to exist depending on what a male believes about his gender (or vice versa). Her right to bodily privacy is hers alone. Students should never encounter members of the opposite sex while disrobing, showering, urinating, defecating, and, in the case of females, while changing tampons and feminine napkins. The axiomatic nature of this statement is multiplied when the student is a minor in a custodial setting.

Some courts have sidestepped these important issues by simply declaring that girls who identify as boys *are* boys—just like any boy. *See, e.g., Adams v. Sch. Bd.*, 968 F.3d 1286, 1293 n.2 (11th Cir. 2020) (determining that Drew Adams, a biological female that identifies as a male, is "like any other boy"); *Boyertown,* 897 F.3d at 532-33 ("We have already explained that the presence of transgender students [i.e. females who identify as boys] in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students [i.e. boys] in those spaces.”).

Not only does that ignore the obvious and relevant biological realities discussed above, but it flies in the face of the conceptual framework this Court set forth in *Bostock*. Despite the urging of advocacy groups, this Court did not conflate sex with gender identity, 140 S. Ct. at 1739, but applied a but-for test, *id*. at 1742.

The application of *Bostock* is that but for the fact that Gavin Grimm is biologically female, Grimm would be able to use the male privacy facilities. Thus Grimm was subjected to a sex-based restriction. Yet that is precisely the kind of sex-based restriction that federal law encourages. *E.g.*, 20 U.S.C. §1686 (providing for separate living facilities) and 34 C.F.R. §106.33 (providing for separate bathrooms). And it is consistent with our long history of separating privacy facilities on the basis of sex due to the anatomical differences of the two sexes. While sex-based distinctions are subject to heightened scrutiny, the government’s interest in protecting bodily privacy justifies the distinction. *See, e.g., Chaney*, 612 F.3d at 913.

III. Sex-separated facilities are justified by the school’s interest in protecting its students from sexual harassment.

Title IX prohibits schools from denying students participation in, or the benefits of, any education program or activity “on the basis of sex.” 20 U.S.C.

§1681(a). Whatever else Title IX prohibits, “students must not be denied access to educational benefits and opportunities on the basis of gender.” *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). For example, *Davis* involved student-on-student sexual harassment in which male students physically threatened female classmates, preventing them from using a “particular school resource.” *Id.* at 650–51.

The situation described in *Davis* mirrors what happened to *amici* and many others nationwide, though without the threats of physical violence. By allowing students to access the opposite-sex privacy facilities, the schools prevented *amici*, both male and female students, from using a “particular school resource”—the locker rooms and multi-user restrooms.

Putting students in a context in which they will find themselves undressed in the presence of a member of the opposite sex, who is also undressed, constitutes harassment that is “severe, pervasive, or objectively offensive” to undermine their educational experience. *See, e.g., DeJohn v. Temple Univ.*, 537 F.3d 301, 316 n.14 (3d Cir. 2008) (setting forth the harassment standard). It is harassment to expect students, themselves minors, to navigate the situation schools place them in.

There is no avoiding countless students undergoing this harassment without any warning since the same fiction (that a girl who identifies as a boy *is* a boy like any other boy) that counsels cross-sex usage of these facilities also counsels that it would be discrimination to warn boys that a girl who identifies as a boy will be present. Therefore, without warning, students are regularly and repeatedly learning about school policies with their pants down. At that point, it is too late for a student to retrieve a stolen image of their unclothed body— an image that a student of the opposite sex would be free to fantasize on. And it is too late for a student to prevent an image of an unclothed classmate of the opposite sex from being seared in that student's mind. Schools not only facilitate but encourage students to be manipulated in sexually charged ways.

Litigants need not show that harassment be severe, pervasive, *and* objectively offensive, but only that it is "severe, pervasive, *or* objectively offensive," *id.* (emphasis added), but when schools adopt these policies, it is all three. The official expectation that children of the opposite sex undress in front of each other is both severe and objectively offensive. And a school policy that invites such conduct, as opposed to a random and unwanted occurrence at a school, is by definition pervasive. Finally, this detracts from students' educational experience because they are effectively denied access to school resources that are set apart for their sex due to the anatomical differences between the sexes.

Schools that open privacy facilities to the opposite sex subject their students to sexual harassment. Like most forms of sexual harassment, there is an unhealthy power differential between schools and the students who are pressured to share privacy facilities in this way. Many students are exceedingly uncomfortable, but at that age they would often rather endure the sexual harassment than risk the harassment and stigma that comes with going against the authority of their school on this issue. Students should not have to navigate sharing privacy facilities, places that are set apart for the removal of clothing outside of the presence of the opposite sex. Gloucester County School Board's interest in preventing this kind of sexual harassment, therefore, is sufficient to justify its sex-based separation of privacy facilities.

CONCLUSION

The Court should grant certiorari because this case presents the very issue—bodily privacy in privacy facilities—that *Bostock* said would be taken up on another day. 140 S. Ct. at 1753. Failure to do so would send the signal to other school districts that they can be sued, without recourse, when seeking to carry out twin duties—protecting the bodily privacy of their students and preventing sexual harassment. Schools can and must show respect to all students, regardless of gender identity, while carrying out these duties. As this Court recognized in *United States v. Virginia*, *supra*, these objectives should not be viewed as being in tension. In the absence of resolving this case in favor of the school, students will suffer.

Respectfully submitted,

RANDALL L. WENGER
Counsel of Record
CHERYL LYNN ALLEN
JEREMY L. SAMEK
JANICE MARTINO-GOTTSHALL
Independence Law Center
23 N. Front Street, First Fl
Harrisburg, PA 17101
(717) 657-4990
rwenger@indlawcenter.org

ANDREA L. SHAW
Law Office of
Andrew H. Shaw, P.C.
2011 W. Trindle Rd.
Carlisle, PA 17013
(717) 243-7135
andrea@ashawlaw.com

Counsel for Amici Curiae

Dated: March 26, 2021