CASE NO. 20-1001 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BONNIE PELTIER, as Guardian of A.P., a minor child; ERIKA BOOTH, as Guardian of I.B., a minor child; and KEELY BURKS, a minor child,

Plaintiffs-Appellees, Cross-Appellants

v.

CHARTER DAY SCHOOL, INC.; ROBERT P. SPENCER; CHAD ADAMS; SUZANNE WEST; COLLEEN COMBS; TED BODENSCHATZ; and MELISSA GOTT in their capacities as members of the Board of Trustees of Charter Day School, Inc.,

Defendants-Appellants, Cross-Appellees

and

THE ROGER BACON ACADEMY, INC.,

Defendant-Appellant, Cross-Appellee

On Appeal from the United States District Court
Eastern District of North Carolina, Southern Division
Case No. 7:16-cv-00030-H-KS

AMICUS CURIAE BRIEF OF PROFESSOR RUTHANN ROBSON IN SUPPORT OF APPELLEES AND AFFIRMANCE

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IDENTIFICATION AND INTEREST OF AMICUS CURIAE

Professor Ruthann Robson submits this amicus curiae brief in support of Appellees under Rule 29 of the Federal Rules of Appellate Procedure with the consent of all parties.[1]

Ruthann Robson is Professor of Law and University Distinguished Professor at the City University of New York (CUNY) School of Law, teaching and writing in the areas of Constitutional Law and Gender, Sexuality, and Law. She is the author of several casebooks and books, including DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY (2013). The interest of amicus is in the development of constitutional law, including matters of attire. Given her experience in these areas, the perspectives of the amicus may assist the Court in resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The effects of a dress code, whether in school or outside, far exceed one's ability to make sartorial choices for themselves. Dress codes and regulations have often been used as means to distinguish certain individuals—such as nobility, enslaved people, women considered unworthy—from others and to control their

[1] Amicus states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the amicus contributed money that was intended to fund preparing or submitting this brief.

public status. The same is true for a school's rule requiring that girls wear skirts or dresses that severely restricts their movements, for no other purpose than to preserve chivalry.

It is now well-established law that heightened scrutiny must apply to all sex-based classifications. *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683-84 (2017). In application of this standard, Appellants must justify the requirement that girls wear skirts, and not pants or shorts, and show that the rule is substantially related to the school's goals. But Appellants have not done so, and they cannot. Like other dress regulations before, the school's dress code serves only to cultivate archaic stereotypes and overbroad generalizations about the talent, capabilities, and preferences of female students.

Thus, this Court should affirm the district court's decision to award summary judgment on Appellees' equal protection claim.[2]

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[2] Amicus curiae focuses on Appellees' equal protection claim and does not address the questions raised by their Title IX claim.

ARGUMENT

I. REGULATION OF DRESS IS OFTEN AN OBSTACLE TO EQUALITY.

A. THE HISTORY OF DRESS REGULATION IS A HISTORY OF IMPOSING INEQUALITY.

The policing of attire can be central to instilling inequality. Most famously, sumptuary laws in Anglo-American law sought to reify class status through regulation of dress. For example, as early as 1337, English Parliament passed an extensive law promulgating different rules for the attire of people from different estates, with prohibitions against wearing imported cloth and furs subject to many exceptions, including "the King, Queen, and their Children, the Prelates, Earls, Barons, Knights, and Ladies." Statutes of the Realm (1337), 11 Edward III, c. 1-5; Ruthann Robson, *Dressing Constitutionally*, 9 (2013). English lawmakers spent considerable energy over the next several centuries regulating dress in order to maintain social hierarchies, including requiring impoverished persons to wear specific "badges." Robson, *supra* at 10-15. Some laws were nationalist: the English sought to establish "Great Britain" by eradicating Irish and Scottish identities, prohibiting particular Irish hairstyles and certain Scottish "plaids" and kilts. *Id.* at 18-20. Other laws sought to establish and maintain sexual and gender hierarchies, in addition to class and national status. Some laws focused on distinguishing appropriate women from those who were less respectable,

prohibiting some women from hiding their faces and requiring others to wear "striped and unlined hoods." *Id.* at 13.

The colonies adopted and adapted these laws mandating inequality. For example, the Massachusetts colony enforced prohibitions of certain women wearing silk hoods. *Id.* at 23. In South Carolina, the clothing allowed to enslaved persons was strictly defined, with an upper limit on the fineness of the fabric allowed, with an exception for "livery men." *Id.* at 24-25.

While sumptuary laws gradually abated**,** for women, the struggle for the right to vote and to be part of public life was intertwined with challenging cultural norms that mandated they wear only skirts and dresses. By the early 19th Century, women were wearing "bloomers" or "pantaloons" in order to move without restriction. *See generally* Gayle V. Fisher, *Pantaloons and Power: A Nineteenth-Century Dress Reform in the United States* (2013). However, pants for women only became well-established when women gained equality.

The history of so-called "cross-dressing" laws are another example of government dress regulations imposing inequality. Undoubtedly certain instances of cross-dressing—including during wars when many women fought as men, as well as during celebrations such as Mardi Gras—demonstrate some cultural acceptance of dressing against one's gender norm. I. Bennett Capers, *Cross Dressing and the Criminal*, 20 Yale J.L. & Human 1 (2008). And prohibitions

against dressing in a manner "inappropriate" to one's gender were often combined with prohibitions on masking or disguises, with the purpose of combatting criminal acts. Robson, *supra* at 124-127. However, particular ordinances did define wearing gender "inappropriate" clothing as criminal lewdness, equating morality with sex-based hierarchies. The constitutional challenges to such ordinances, brought by men, had mixed success. *Id.* at 60-63. They were mostly grounded in the First Amendment and Due Process, and did not explicitly address gender equality. *Id.*

The direct criminal sanctions for gender-inappropriate dress faded and prosecutions for "impersonation," *i.e.*, men dressing in a manner considered inappropriate for their assigned sex, became rare. As some courts observed, social change in dress since the 1960s has made the notion of gender-appropriate dress incoherent, rendering cross-dressing laws unconstitutionally vague. *See e.g.*, *City of Columbus v. Rogers*, 324 N.E.2d 563, 565 (Ohio 1975) ("[T]he terms of the ordinance, 'dress not belonging to his or her sex,' when considered in the light of contemporary dress habits, make it 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"); Robson, *supra* at 64.

B. THE BOYS' "HAIR CASES" ARE IMPORTANT BACKGROUND BUT SHOULD NOT GUIDE THIS COURT'S EVALUATION OF THE SKIRTS REQUIREMENT.

The imposition of supposedly "sex-appropriate" dress by schools is, similar to the dress regulations discussed above, central to fostering inequality. Yet in the context of constitutional challenges to sex-segregated dress regulations in schools, courts have sometimes struggled with whether wearing so-called non-gender-conforming clothes is best protected by equal protection or by the constitutional right of free speech (expression). The opinions are fraught with doctrinal blurring and incoherence, and this is best seen through the decisions in the boys' "hair cases."

The 1970s courts saw a long series of cases concerning boys' haircuts and hair length. In these cases, equal protection and sex equality claims were nascent at best, and indeed many courts trivialized the equal protection issues. Instead, the cases were most usually grounded in the First Amendment right to free expression. As the district judge stated in the present case in ruling upon the mandate of skirts for female students, "[a]rguably the most analogous cases are the hair length cases of the Vietnam era, [but they are] cases decided long before *United States v. Virginia* [518 U.S. 515 (1996)], and not based explicitly on an Equal protection analysis." JA 2740. Moreover, they were decided against a backdrop of concerns

about counterculture and opening the floodgates of litigation. These cases should be viewed in light of this historical context.

The United States Supreme Court denied certiorari in at least nine cases involving male students' hair length, often over a dissent by Justice William O. Douglas if the circuit court had found the school policy constitutional.[3] Douglas's opinions provide helpful insight into the controversies and the emphasis on First Amendment issues, as opposed to Equal Protection Clause issues, in the 1970s hair cases. For example, in 1968, in his brief dissent from the denial of certiorari of a case involving a group of male students with a musical group and the Beatles-style haircuts to match, Justice Douglas situated the right as one grounded within liberty. *Ferrell v. Dallas Ind. Sch. Dist.*, 393 U.S. 856 (1968) (Douglas, J., dissenting from

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[3] *See e.g.*, *Ferrell v. Dallas Ind. Sch. Dist.*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968) (Douglas, J., dissenting from denial of petition for writ of certiorari); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970) (Douglas, J. dissenting without opinion); *Olff v. East Side Union High Sch. Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972) (Douglas, J., dissenting from denial of petition for writ of certiorari); *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 989 (1972) (Douglas, J., dissenting without opinion); *King v. Saddleback Jr. College Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 979 (1971) (Douglas, J., and White, J., dissenting without opinion); *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972), *cert. denied,* 411 U.S. 986 (1973) (Douglas, J., dissenting without opinion); *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), *cert denied*, 405 U.S. 1032 (1972) (Douglas, J., dissenting from denial of petition for writ of certiorari); *Holsapple v. Woods*, 500 F.2d 49 (7th Cir. 1974), *cert. denied,* 419 U.S. 901 (1974).

denial of petition for writ of certiorari). And four years later, in his longer dissent from certiorari in a case from the Ninth Circuit, Justice Douglas noted the doctrinal incoherence in the male student hair length cases, stating that they produced a conflict in the circuits that is deep, irreconcilable, and recurrent, with the "[federal court] decisions in disarray." *Olff v. East Side Union High Sch. Dist.*, 404 U.S. 1042 (1972) (Douglas, J., dissenting from denial of petition for writ of certiorari). Again, Justice Douglas stressed the liberty aspects, including this time the liberty of parental rights to direct the upbringing of their children.

And hair was not the only type of dress regulation in schools during this time that were dealt with in the same manner. In *Tinker v. Des Moines Independent Community School District,* the expression at issue was the wearing of a black armband in protest of the Vietnam war. 393 U.S. 503 (1969). There, the Supreme Court similarly grounded its decision in the First Amendment, pronouncing that students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and required schools to demonstrate that the expression was a substantial disruption or material interference with appropriate school discipline. *Id.* at 506.

The failure of lawyers to convincingly raise and the courts to seriously address equal protection on the basis of sex in the 1970s hair cases is perhaps understandable. It was not until 1971 that the Supreme Court decided *Reed v.*

Reed, 404 U.S. 71 (1971), and held unconstitutional a probate rule that gave preference to males over females in appointing the administrators of decedents' estates.[4] And while *Reed* served as the basis for a much more demanding standard for sex classifications, its import only became clear gradually.

In the few instances in that period where courts recognized the importance of developing sex equality doctrine in considering schools' restrictions on boys' hair length, they found the restrictions unconstitutional. In *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970), for example, the Seventh Circuit used sex equality to refute the school's government interest in "health and safety" as supporting the short-hair for only boys mandate:

> Defendants' second theory argues that short hair is required for health and safety reasons. Thus, Keith Farrand, chairman of the physical education department, testified that long hair may impair the vision of students engaged in sports such as flag football, tennis, and volleyball, and that long hair could 'get caught' when students are using the trampoline. He also noted that students with long hair would be forced to go to class with wet hair after a shower following gym class. Lickliter testified that long hair creates significant danger when Bunsen burners are in use.
>
> We think this testimony fails to satisfy defendants' burden of justification for two reasons. First, both Farrand and Lickliter admitted that health and safety objectives could be achieved through narrower rules directed specifically at the problems created by long hair.

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[4] In *Reed*, the Court found that the statutory preference was unconstitutional as "arbitrary" under the rational basis test. It did not engage with precedent such as *Goesaert v. Cleary*, 335 U.S. 464 (1948), in which the Court upheld a Michigan statute banning women from being licensed as bartenders, with an exception for women whose husbands or fathers were the owners of the establishment.

> * * * *
>
> Second, both witnesses admitted in their testimony that although girls engage in substantially the same activities in gym and biology classes, only boys have been required to cut their hair in order to attend classes. Although classification on the basis of sex has been held constitutional in certain circumstances, *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct 198, 93 L.Ed. 163 (1948); *Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968); *but cf. McCrimmon v. Daley*, 418 F.2d 366 (7th Cir. 1969), defendants have offered no reasons why health and safety objectives are not equally applicable to high school girls. On the present record, therefore, we believe that defendants' action constitutes a denial of equal protection to male students.

Id. at 1266.

Sex equality resurfaced two years later in *Karr v. Schmidt,* 460 F.2d 609 (5th Cir. 1972) (en banc). In that case, the Fifth Circuit considered a constitutional challenge to an El Paso, Texas, school board regulation that provided "FOR BOYS: 1. Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. No artificial means to conceal the length of the hair is to be permitted; i.e., ponytails, buns, wigs, combs, or straps." The district judge at trial had found an equal protection violation, but on the basis of a classification between those [males] being denied free public education due to the length of their hair and those [males] not being so denied. The Fifth Circuit reversed the trial judge's finding on equal protection and, citing *Crews*, noted the Seventh Circuit's holding "that hair regulations [were] violative of the Equal Protection clause because they appl[ied] solely to male students and

not to female students." *Karr*, 460 F.2d at 616. Notably, Judge Wisdom, writing for himself and four other judges, dissented and raised sex equality. In his dissenting opinion, he vigorously objected to the court's statement of doctrine and analysis, and citing *Reed*, articulated the correct standard: "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a hair and substantial relation to the object of the legislation.'" *Id.* at 622. In refutation of the majority's trivialization of constitutional challenges to public school hair length regulations, Judge Wisdom further stated that the crowding of federal dockets was no reason to "blink a violation of a liberty which obviously means a great deal to many young people." *Id.* at 621. Indeed: "[a]lmost every day, the federal courts spawn new classes of litigation—most recently, perhaps, litigation over the constitutional rights of women." *Id.* These twin concerns—that the matter is trivial and that the courts will be inundated with claims—are often implicit in decisions against recognition of a constitutional right to be free from school regulations that impinge on free expression, liberty, or equality.

In *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972), this Court found unconstitutional a school's hair length restriction for boys and rejected the applicability of the First Amendment. The decision rested on "the right to be secure in one's person guaranteed by the due process clause," and recognized the existence of "overlapping equal protection clause considerations." *Id.* at 783. This

Court concluded that the school's justifications were weak and were not actually being served by the long-hair ban for boys:

> There was no proof of the ineffectiveness of discipline of disrupters or a showing of any concerted effort to convey the salutary teaching that there is little merit in conformity for the sake of conformity and that one may exercise a personal right in the manner that he chooses so long as he does not run afoul of considerations of safety, cleanliness and decency. In short, we are inclined to think that faculty leadership in promoting and enforcing an attitude of tolerance rather than one of suppression or derision would obviate the relatively minor disruptions which have occurred.

Id. at 783.

When courts did consider sex equality, the sex-differential standard was troubling, even in the 1970s. Indeed, some judges recognized that central to the schools' rationale prohibiting boys from having "long hair" was the maintenance of sexualized hierarchy. In one case, the principal testified "if boys were allowed to wear long hair so as to look like girls, it would create problems with the continuing operation of the school because of confusion over appropriate dressing room and restroom facilities." *Bishop v. Colaw*, 450 F.2d 1069, 1076 (8th Cir. 1971). Concurring in the same case, a judge found it worthwhile to dispute the link between male hair length and "effeteness." *Id.* at 1077 (Aldrich, J., concurring).

In sum, it is crucial to recognize that while they provide insight into the First Amendment doctrine, the male student hair cases of the 1970s offer no more than a preview of the equal protection and sex equality doctrines as they developed. As

the Fourth Circuit broached in *Massie* and the Seventh Circuit discussed in more detail in *Crews*, the justifications offered by the schools in these cases for imposing a hair length requirement on male students but not female students suffered from incoherence that could only be explained by a desire to maintain sex inequality.

II. THE SCHOOL'S MANDATED POLICY OF WEARING SKIRTS ONLY FOR FEMALE STUDENTS VIOLATES THE EQUAL PROTECTION CLAUSE.

Although in 1971 the United States Supreme Court utilized a rational basis test for sex classifications in *Reed*, within a few years the Court departed from this approach. In *Craig v. Boren*, decided in 1976, the Court carefully articulated the standard for review for sex classifications under the Equal Protection Clause, holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. 190, 197 (1976). The Court further articulated the standard for evaluating sex and gender classifications under the Equal Protection Clause in *United States v. Virginia (VMI)*, 518 U.S. 515 (1996), affirming the Fourth Circuit.

At issue in *VMI* was not only the exclusion of female students from the Virginia Military Institute (VMI), but the constitutionality of a separate school for women, the Virginia Women's Leadership Institute at Mary Baldwin College. At the women's school, rather than the VMI "adversative method," the pedagogical method would be a "cooperative method which reinforces self-esteem." *VMI*, 518

U.S. at 527. The school's purpose at VMI was to prepare men as "citizen-soldiers," for "leadership in civilian life and in military service." *Id.* at 520.

Under *VMI,* when there is differential treatment of the sexes, the reviewing court must determine whether the proffered justification is "exceedingly persuasive," a burden which is demanding and rests entirely on the entity imposing the differential classification. *Id.* at 531. "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* at 533. The school must show "at least that" this sex classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.*

The Court reiterated this standard in its most recent Equal Protection Clause case considering sex and gender, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

The school's policy mandating skirts (or dresses) for only girls falls far short of satisfying the applicable equal protection standard.

A. THE SCHOOL'S JUSTIFICATION FOR MANDATING THAT GIRLS BUT NOT BOYS WEAR SKIRTS IS NOT SUPPORTED BY CONSTITUTIONALLY SATISFACTORY INTERESTS.

As stated above, the proffered justification for a sex classification must be genuine, not hypothesized or invented *post hoc* in response to litigation; it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females; and it must be exceedingly persuasive, a burden which is demanding and rests entirely on the school.

Here, the difficulty of the school in articulating its justifications for mandating that girls wear skirts is an indication that it is not genuine. The school offers little in the way of a justification other than statements that the administrators subjectively believe it is appropriate. The two justifications that do emerge—"community norms" about attire for women in professional settings and the need to reflect differences between the sexes—fail to be genuine, fail to be exceedingly persuasive, and are merely overbroad generalizations.

Simply stated: women wearing pants at work is widely accepted and has been for decades.

Consider the legal profession. Courts and professional offices do not mandate skirts for women, and pants have been accepted for decades. As the Ninth Circuit Gender Bias Task Force Report found three decades ago, only three percent of judges at the time *preferred* women not wear pantsuits. John C.

Coughenour et al., *The Effects of Gender in the Federal Courts; the Final Report of the Ninth Circuit Gender Bias Task Force,* 67 S. Cal. L. Rev. 745, 853 (1994). In 1995, the Fourth Circuit decided not to produce its own report, finding that it would be duplicative. Samuel Phillips, *Fourth Circuit: The Judicial Council's Review on the Need for a Gender Bias Study*, 32 U. Rich. L. Rev. 721 (1998).

Most of the cases cited by the Appellants in their opening brief supporting sex-based dress codes in professional contexts are from the 1970s. *See* Appellants' Opening Brief 39-40. Even at that time, pants had already become an increasingly common staple for women in the workplace. Further, judicial policing of the attire of women attorneys in court was not upheld. For example, in *Peck v. Stone*, an appellate court reversed an order prohibiting a female attorney from appearing in court in a "mini-skirt" requiring that she wear "suitable, conventional and appropriate" clothing. 304 N.Y.S.2d 881, 883-84 (N.Y. App. Div. 1969). Similarly, an appellate court reversed a contempt citation against a female attorney for failure to wear "customary courtroom attire;" after she wore the same sweater she had worn in the trial court to argue her case on appeal. *Matter of De Carlo*, 141 N.J. Super. 42, 357 A.2d 273 (N.J. Super. Ct. App. Div. 1976).

Even if preparing students for the "real world" of professionalism might be an acceptable justification for schools implementing dress codes, such dress codes would need to "imitate the type of clothing one would need to wear in a

professional office." Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Entry Point for the Trans* School to Prison Pipeline*, 24 Am. U. J. Gender Soc. Pol'y & L. 263, 271-72 (2015). That is simply not the case here. Instead, the mandated skirts policy seeks to inculcate a stereotyped view of girls that their physical movements should be restricted. Rather than imitating a current professional setting, the school's skirts requirement harkens back to previous centuries, before women sought to fully participate in public life by wearing bloomers and pantaloons. *See supra* Fisher.

The school's justification that the dress code helps "[reflect] the differences between the sexes" (JA 1549-50; D.E. 159 at 40), not only relies on overbroad generalizations about the different talents, capabilities, and preferences of males and females, but it also seeks to impose sex-based stereotypes. In the school's view, girls must be distinguished from boys through more restrictive dress for girls. The message conveyed by this view is that girls are less capable than boys.

That the skirts requirement is rooted in sex-based stereotyping and overbroad generalizations is evinced repeatedly in this record. For example, when asked about the skirts requirement, Baker Mitchell emailed:

> The Trustees, parents, and other community supporters were determined to preserve chivalry and respect among young women and men in this school of choice. For example, young men were to hold the door open for the young ladies and to carry an umbrella, should it be needed. Ma'am and sir were to be the preferred forms of address. There was felt to be a need to restore, and then preserve, traditional regard for peers.

JA 0070-71, 0331-32. An earlier draft of this e-mail stated:

> Both the Trustees, the parents, and the other community supporters were determined to respect the traditional gender roles in this school of choice. . . Thus, the uniform policy seeks to make clear the mutual respect and values that traditionally prevailed for ladies and gentlemen before the statistics on rape, unwed motherhood, spousal abuse, STDs, and abortions began to skyrocket. That gentlemen wear pants and ladies wear dresses is not just a policy of the school that has prevailed for 15 years, it has been a norm of civilization for many thousands of years. The school is chartered to preserve this norm along with many others. . . . The uniform policy is an important aspect of the school acknowledging the importance of traditional values.

JA 0332, 1086. Mitchell further explained during his deposition that the skirts requirement is meant to instill "chivalry," which he defined as "a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor." JA 0332.

In a similar vein, Board Member Melissa Gott stated: "I also believe that . . . the purpose of [the uniform policy] is to preserve chivalry and respect among the students. I believe also that traditional roles such as opening the doors for young ladies, carrying umbrellas [sic] is important and is fostered by the uniform policy . . . ." JA 1722. And Lisa Edwards, the Assistant Headmaster of CDS Elementary, said: "[W]e teach and expect that boys open the doors for the girls and that the gentlemen let ladies go before them. In wearing skirts, it models the difference and that we expect the proper treatment of young ladies." JA 0333. And Board Member Colleen Combs explained:

> [W]e are attempting to teach people respect for each other using . . . the tool of a uniform policy. One that makes a distinction between boys and girls. . . . [It] is nice that boys who are often bigger . . . learn to respect girls and to treat them as a matter of respect more gently than they might treat other boys.

JA 0801-02.

All of these statements seek to justify mandated skirts for girls based on outdated stereotypes and an attempt to inculcate overbroad generalizations about the talent, capabilities, and preferences of female students. Importantly, the skirts policy is not sex segregation for its own sake, as might be the case if males wore yellow-colored clothes and females wore green-colored clothes. Rather, it is girls and not boys who have their movement restricted and who must wear clothes that are inconsistent with workplace norms. Like the male suitability for "adversative education" and the female suitability for a "cooperative method which reinforces self-esteem" held unconstitutional by the Court in *VMI*, this differential must be held invalid.

The school has failed to meet its burden that its justifications satisfy the demanding standard of *VMI*. Indeed, its justifications are more akin to maintaining patriarchy and male supremacy, which harkens back to a much earlier case where Virginia's justifications of "racial integrity" for prohibiting some interracial marriages were deemed by the Court as intending to maintain white supremacy. *Loving v. Virginia*, 388 U.S. 1 (1967). Just as the Court in *Loving v. Virginia* rejected Virginia's argument that there was no equal protection violation because

both Black and white parties to the marriage were subject to prosecution, the Court here should reject any arguments that there must be unequal burdens on girls. While an "unequal burden" standard was seemingly raised as dicta in the context of different hair lengths for boys and girls in *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 582 (7th Cir. 2014), the Seventh Circuit ultimately found that the differential standards for male and female student athletes were unjustified, even with an invocation of "community norms."

The justifications of the skirts policy are not exceedingly persuasive in a society that takes sex equality seriously.

B. EVEN IF THE SCHOOL'S JUSTIFICATIONS ARE EXCEEDINGLY PERSUASIVE OR AT LEAST IMPORTANT, THE MEANS CHOSEN ARE NOT SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF ITS OBJECTIVES.

The school has failed to demonstrate that the "discriminatory means employed are substantially related to the achievement of [its] objectives." *VMI,* 518 U.S. at 524 (internal citation omitted).

The regular suspension of the skirts requirement shows that the means employed are arbitrary, underinclusive, and pretextual at best. The skirts requirement is woefully underinclusive as it is lifted for Physical Education ("PE") classes and various other activities. On days they have PE class, students wear the gender-neutral PE uniform, which consists of a t-shirt and sweatpants or shorts. JA 0040, 0326, 2508-09. As different classes have PE on different days, a portion of

the female student population is not subject to the skirts requirement on any given day. JA 0441. Beyond PE, the skirts requirement is frequently suspended for various reasons including field trips; special events, such as health, archery, or girls' sports; when students achieve certain academic benchmarks; when students make donations to non-school-related charity organizations; and for celebrations or special events at the school. JA 0326-27.

The lifting of the skirts requirement for some events that involve physical activity shows that the school recognizes the burden on girls' mobility. In PE, lifting the requirement allows for equal participation; however, during recess, where students regularly engage in physical activities on the playground and in playing fields, female students are subject to the requirement and unable to participate equally. JA 0340; *see* JA 0427 (Letter to Christopher Brook, Sept. 8, 2015 ("CDS agrees that students should be able to attend school and actively participate in school related activities without unfair or unequal treatment based on sex. Per CDS's policies, during physical education and activities where pants or shorts are appropriate, such as some field trips, girls may wear shorts or pants.")). The district court recognized the school's lack of connection between its means and the stated goals in highlighting the absence of evidence that the boys treat the girls differently or vice versa on the days that the skirts requirement is suspended. JA 2741-42.

The school's faculty attempted to show that the skirts requirement is substantially related to the school's goals. The school's assistant headmasters testified that they had "observed changes with student learning" on days when the skirts requirement was suspended for a special occasion. JA 1551. Importantly, this observation concerns the entire "Uniform Policy" and not simply the skirts requirement. The elementary assistant headmaster described students on these days as "rowdy," "excited," and "distracted," stating that on such days, "the classroom level usually is not as orderly." JA 1869-70. The middle-school assistant headmaster agreed that, on such days, "[s]tudents tend to be less focused in the sense of being a little bit . . . sillier and excited, ... and they are very much more distracted on those days." JA 1889. Again, there is no link between the skirts requirement and these observations applicable to the suspension of the entire uniform policy. Further, these suspensions occur on "special occasions," which in and of themselves would—and should—be expected to cause students to be "excited." The school simply fails to make a direct connection between the suspension of the skirts requirement and the change in student behavior. It is the school's burden to do so.

The school states that changing any one of the components of the educational model risks fundamentally altering the school. JA 1550. However, not only can the school not explain why it is willing to take that risk on certain

occasions, its own evidence belies any connection at all between the skirts requirement and student success (either for girls or boys). For example, Defendants' own expert, Dr. Yishi Wang, whose report compared results for boys and girls at the school to those of other area schools, denied any conclusions regarding the causes of the school's results, and did not attribute them to the uniform policy at all, let alone to the skirts requirement. JA 2623-29. And he did not dispute that girls at the school could have performed even better in the absence of a requirement that they wear skirts. JA 2466-67; DE 132-4 at 5-6, 14-15.

Even if the school's justifications were found to be exceedingly persuasive, the skirts requirement is not rationally related, let alone substantially related, to the school's justifications. As in *VMI*, in which the school could not articulate how female students would alter the "adversative" pedagogy except to assert that they would, the school's skirts requirement here fails to explain how the skirts requirement is necessary. Moreover, as in the much earlier cases concerning boys' hair length, the school's valid interests could easily be "achieved through narrower rules" that would affect boys and girls equally. *See Crews*, 432 F.2d at 1266. As the Fourth Circuit stated decades ago holding a sex-based requirement of hair length unconstitutional, perhaps the better view is that there should be "faculty leadership in promoting and enforcing an attitude of tolerance rather than one of suppression or derision." *Massie*, 455 F.2d at 783.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that this Court affirm the decision of the district court to award summary judgment on Appellees' equal protection claim.

Dated: New York, New York
July 13, 2020

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Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B), 29(a)(4)(G) and 29(a)(5).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared using Microsoft Office Word and is set in Times New Roman font in a size equivalent to 14 points or larger.

2. As provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 5,681 words.

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July 13, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July 2020, I transmitted the foregoing Brief of Amicus Curiae Professor Ruthann Robson to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by email. The Brief was also served upon all counsel by email.

Dated: New York, New York
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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