

Nos. 17-1618, 17-1623, 18-107

In the **Supreme Court of the United States**

GERALD LYNN BOSTOCK, *Petitioner*,

v.

CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., *et al.*, *Petitioners*,

v.

MELISSA ZARDA, *et al.*, *Respondents*.

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner*,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
AIMEE STEPHENS, *Respondents*.

**On Writs of Certiorari to the United States Courts of
Appeals for the Eleventh, Second, and Sixth Circuits**

**BRIEF FOR *AMICI CURIAE* DEFEND MY PRIVACY,
CITYGATE NETWORK, PHOENIX DREAM CENTER,
AND STUDENTS AND PARENTS FOR PRIVACY IN
SUPPORT OF THE EMPLOYERS**

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INTEREST OF THE *AMICI CURIAE*¹

Defend My Privacy is a coalition of parents, students and other citizens, including trauma survivors, who are concerned about the invasions of their privacy inherent in opening bathrooms and changing rooms to members of both sexes based on the subjective gender identity of individuals. Defend My Privacy was formed in response to proposed laws and ordinances that would force the opening of privacy facilities to persons of the opposite sex. Members of the coalition have testified before legislative bodies, held public forums and helped provide a voice to trauma survivors concerned about bodily privacy.

Citygate Network is a 106-year-old national network of crisis shelters and life-recovery centers where leaders seek to move people in desperate situations and destitute conditions from human suffering to human flourishing. In most U.S. cities, a member of Citygate Network is the largest homeless-services provider. In some cities, it is the *only* homeless-services provider. Citygate Network believes that safe, sex-specific spaces and sex-specific staff are vital to protecting and contributing to the emotional well-being of all guests needing assistance. Trafficking victims, sexual assault survivors, drug addicts, and mental illness sufferers converge in these facilities, so

¹ The parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Citygate Network members are dedicated to providing spaces where every guest feels safe.

Phoenix Dream Center is a shelter in Phoenix, Arizona dedicated to providing safe and clean space for those without a home to go to, and an educational path to tackle addiction problems and provide re-entry programs to society. Phoenix Dream Center provides its regular services to transgender youth on the same basis as cis-gender youth, but believes that safe spaces for its sexual assault survivors depends on keeping them separated in intimate spaces from those who are biologically the opposite sex. This is particularly true in the case of trafficking and domestic violence victims.

Students and Parents for Privacy is a coalition of parents and students from a suburban Chicago school district who were negatively impacted by the Department of Education's 2015 threat to withdraw \$6 million in funding from their schools if the schools did not treat transgender students according to subjective gender identity, rather than their biological sex, for purposes of Title IX. Students and Parents for Privacy believe that schools can give accommodation to students with gender dysphoria by allowing them private changing rooms and other appropriate accommodations without exposing students to the opposite sex in bathrooms and locker rooms.

SUMMARY OF THE ARGUMENT

When a woman is sexually assaulted, she is often met by silence, and unfortunately, even accusations that she did something wrong. There are few safe havens for those victimized by sexual assault, particularly for women who are homeless or in an abusive relationship. *Amici* Citygate Network and Phoenix Dream Center are on the forefront of this fight to provide safe places for healing and restoration for survivors. Crucial in this project is the ability to provide spaces that are sex-specific, and in which only workers of the same sex are permitted access to these survivors.

Sexual assault can be perpetrated by either sex and against either sex. But women and girls are the most common target by far, by a factor of roughly 9 to 1.² In addition, female students in schools continue to report greater fear of attack or harm at school and away from school.³ Accordingly, while all students' rights are implicated by the existence of a sexually-harassing environment, young women are at the greatest risk.

² U.S. Bureau of Justice Statistics, *Special Report: Violence Against Women: Estimates from the Redesigned Survey* (NCJ-154348) (Aug. 1995), available at http://www.bjs.gov/index.cfm?ty=pb_detail&iid=805; U.S. Bureau of Justice Statistics, *2003 National Crime Victimization Survey* (2003), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=766>; U.S. Bureau of Justice Statistics, *2016 National Crime Victimization Survey* (2016), available at <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245>.

³ U.S. Bureau of Justice Statistics, *Indicators of School Crime and Safety: 2017* (2017) (Indicator 17), available at <https://www.bjs.gov/content/pub/pdf/iscs17.pdf>.

Amici submit this brief in support of the Employers, and ask the Court to take into consideration the impact that its ruling in this case will have on the psychological well-being of survivors of sexual assault in the workplace, in schools, in women's shelters and elsewhere.

ARGUMENT

I. The Sixth Circuit's reasoning would require opening all bathrooms, showers and locker-rooms in virtually every workplace, school and housing unit in America to the opposite sex.

The Sixth Circuit reasoned that sex under Title VII is a subjective construct, and that determining which sex's dress code a biological man must follow is discrimination. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). If this view is permitted to prevail, then it inescapably follows that bathrooms, showers and private changing rooms in virtually every workplace, school and housing unit in America must be open to the opposite sex. If a biological man who self-identifies as a woman must be permitted to wear a dress, then he must also be permitted to use the women's restroom, shower, changing area and women's shelter—and so may anyone whose gender identity brings him to view himself as a woman, even if only for the day.

Stephens's counsel recognizes this, and attempts to assuage these concerns by urging this Court to punt on these vitally-important privacy issues. Dedicating the final two pages of their brief to all the reasons why this

uncomfortable issue should not be addressed by this Court, they argue, “questions regarding sex-specific policies need not, and should not, be resolved here.” Respondent’s Br. at 50-51.

But the implications of this case, which will define “sex” under Title VII, and by extension other federal laws such as Title IX, are not limited to employee dress code. Counsel for Stephens has previously argued in other cases that the law demands bathroom access of a transgender individual’s choice. “It is critical that transgender children access this medically necessary care and live their lives as the boys and girls they know themselves to be—including their use of restrooms, locker rooms, and other spaces and activities typically separated by sex.”⁴ A transgender girl suffers “irreparable harm if she is not allowed to use the girls’ locker room at school.”⁵ In short, there is no way to draw a rational line between writing a subjective, gender-fluid definition of sex into our country’s civil rights statutes and opening the bathroom doors of virtually every school, workplace and publicly-subsidized housing unit in America.

Further effort on this front is provided by *amicus* in support of the Employees, Anti-Discrimination Scholars, who begrudgingly allow the independent value of bathroom and dress distinctions in the

⁴ Intervenor-Defendants’ Brief in Response to Plaintiffs’ Supplemental Brief at 9, *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, C.A. No. 1:16-CV-4945 (N.D. Ill. July 26, 2017).

⁵ Plaintiff’s Brief in Support of Motion for Preliminary Injunction at 11, *Maday v. Township High Sch. Dist.*, C.A. No. 2017-CH-15791 (Ill. Cir. Ct. Cook County Dec. 13, 2017).

workplace. While limiting that not all of their Scholars agree, at least some are willing to see that bathrooms do not enforce different stereotypes for each sex, but merely separate men and women for the purpose of preserving privacy. “One could also argue that equally professional and convenient dress options for men and women reflect standards of professional neatness and courtesy rather than stereotypical notions of masculinity and femininity.”⁶

What these *amici* offer with one hand, they take away with the other, however, arguing that “requiring a transgender employee to use a restroom or follow a dress code inconsistent with the employee’s gender identity” amounts to a mis-gendering that is harmful to the transgender employee’s dignity and psyche.⁷ In other words, the employer or battered women’s shelter may have rules requiring employees or patrons to use separate restrooms based on sex, as long as they don’t *enforce* such rules.

A. The presence of the bodies of the opposite sex in vulnerable spaces can act as a trigger for PTSD, anxiety and “intrusive memories.”

Many sexual assault, abuse and trafficking survivors experience Posttraumatic Stress Disorder (PTSD) as a result of their trauma.⁸ About a third of

⁶ Br. of Anti-Discrimination Scholars at 20-21.

⁷ *Id.*

⁸ AM. PSYCHIATRIC ASS’N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013) [hereinafter “DSM-5”]; J. M. Golding, *Intimate Partner Violence as a Risk Factor for Mental*

survivors fail to recover after many years.⁹ As a symptom of their PTSD, many survivors suffer “intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).”¹⁰ These cues can trigger “intrusive memories” and flashbacks, wherein a past victim of sexual assault is triggered into a largely-uncontrollable reliving of the sexual encounter upon being confronted with something which reminds them of the assault.¹¹

Establishing safe spaces free from such reminders is the most urgent aspect of treating trauma survivors, because if they don’t feel safe, it can significantly set back recovery.¹² Seeing any reminders of the original trauma can trigger intrusive memories and a reliving of the actual assault, which aggravates the original trauma, and acts as the equivalent of a physical reinjury.¹³ The flashbacks incurred can be associated with panic attacks, involuntary “fight or flight”

Disorders: A Meta-Analysis, 14 J. OF FAM. VIOLENCE 99–132 (1999).

⁹ R. C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES OF GEN. PSYCHIATRY 1048 (1995).

¹⁰ DSM-5, *supra* note 7, at 271 (Criterion B(4)).

¹¹ *Id.*; see also Anke Ehlers, *The Nature of Intrusive Memories after Trauma: The Warning Signal Hypothesis*, 40 BEHAVIOR RESEARCH & THERAPY 995 (2002).

¹² JUDITH L. HERMAN, *TRAUMA AND RECOVERY* (1992).

¹³ DSM-5, *supra* note 7, at 271-277 (Criterion B(4)); Ehlers, *supra* note 10, at 995.

responses and somatic symptoms.¹⁴ PTSD is also deeply tied to guilt and shame.¹⁵ The shame factor is intensified in situations where the sufferer is required to remove clothing, such as in doctor's offices and in changing rooms, heightening the likelihood of an intrusive memory.¹⁶ For survivors, establishing a safe environment in which the survivor is able to feel safe is essential to the healing process.¹⁷ Finding triggers in safe spaces can be explosive to this recovery process.¹⁸

Survivors report that seeing a person of the same sex as their assailant is a common trigger. This trigger can be intensified when the survivor sees someone of the same sex as their assailant in a position where the survivor is already feeling vulnerable. Survivor K.S.¹⁹ reports that when bathrooms were open to members of the opposite sex in Washington state, "I kept telling myself this would not affect us due to the fact I have teens now. Reality was, it was already affecting our lives more than anyone knew. Flashbacks from the first

¹⁴ DSM-5, *supra* note 7, at 271-277 (Criterion B(4)).

¹⁵ Deborah A. Lee et al., *The Role of Shame and Guilt in Traumatic Events: A Clinical Model of Shame Based and Guilt-Based PTSD*, 74 PSYCHOL. & PSYCHOTHERAPY 451 (2001); Jennie Leskela et al., *Shame and Posttraumatic Stress Disorder*, 15 J. OF TRAUMATIC STRESS 223-226 (2002).

¹⁶ *Id.*

¹⁷ JUDITH L. HERMAN, *TRAUMA AND RECOVERY* (1992).

¹⁸ Golding, *supra* note 7, at 99-132.

¹⁹ Survivors who have shared their stories with counsel will be identified by initials to protect their privacy.

30 years of my life as well as my re-occurring nightmares returned with a vengeance.”

This was also C.P.’s experience. When her local gym began allowing men who identified as transgender women to use the women’s locker room, “the traumatic memories of powerlessness [from her prior sexual assault] came flooding back at full force.” C.P. became “hypervigilant” about her surroundings,²⁰ and found herself “noticing everything and everyone around her all the time.” C.P. reports that triggers tied to the initial assault at her apartment complex are what she is most vigilant about avoiding. “Thirty years later, that hasn’t changed. It’s become a way of life.”

The memories of an assault that have been suppressed can be reawakened by these triggers. The mere seeing of a member of the opposite sex can awaken the memories—to say nothing of one who is naked or partially naked while the victim is also in a state of undress. The likelihood of a trigger causing an intrusive memory is heightened by the element of surprise. Sexual assault survivors have much to fear from the sudden and unexpected presence of persons of the opposite sex in vulnerable places, which can trigger somatic and psychological episodes that re-injure them at the points of their original trauma.

The situation is far worse for women whose initial assault happened when someone of the opposite sex assaulted them in a bathroom or shower. PTSD-linked shame and guilt, combined with a sense of

²⁰ Hypervigilance is a documented symptom of PTSD. DSM-5, *supra* note 7, at 271 (Criterion B(4)).

powerlessness, leave many survivors vulnerable to new trauma in similar settings as those where their attack occurred. Indeed, this is the situation that another survivor confronts every single day. As a college freshman, she studied late on a Friday night and went to the shower in her single-sex dorm. Aware of the drunken parties and frequent male visitors on her hall, she picked a shower where she could see the doors. Vulnerable and alone, she was horrified when the door to the bathroom open and a pair of men's boots appeared outside the shower. As the shower curtain was pulled back, she screamed and defended herself.

Like C.P., this survivor is now "hyper-aware" of her surroundings, and fears the need to use public restrooms. "In my work with domestic violence agencies throughout the years, I know many women like me who have resorted to using bathrooms as an escape route from the violent men trying to harm them," she says. This survivor fears that changing social mores and laws will eliminate one of the only safe spaces a woman fleeing an attacker can seek. As she reports, this leaves women "vulnerable, exposed and on the losing side of a very obvious power differential. It's really harmful to women like me who have endured enough trauma already."

This physical power differential between biological males and females is raised by many survivors. Survivors have lived through an experience of being overpowered by someone stronger, and many live in fear of it occurring again. Some have the irrational fear that their assailant will suddenly reappear, or that someone new will try the same thing. But the fear is

based in the feeling that the survivor will be unable to fight off a man if he attacks her. These feelings are exacerbated when law requires that males be allowed to enter female bathrooms and locker rooms.

Amicus Phoenix Dream Center’s clientele are a good example of this point. The survivors of human trafficking who come to the Phoenix Dream Center shelters for help mention safety as a major component of their healing. Others have told the staff that simply having a place where they can shower and change clothes without being subject to interactions with males has been a factor in their recovery.²¹ While some shelters and service providers may disagree about the best way to approach integration of transgender individuals, at the very least, *amici* believe that shelters should be free to choose whether to house biological females separately from biological males.

While “exposure therapy” has been advocated by some as a way of reducing the symptoms of PTSD in survivors, such therapy is decidedly dangerous for those in shelters, as it risks re-traumatizing these particularly vulnerable survivors.²² In other words, survivors in shelters are at risk of additional trauma from exposure to the triggers related to their initial trauma, such as the presence of biological men in sleeping areas, showers or bathrooms.

This is vividly confirmed in testimony given by residents of Downtown Hope Center, one of the

²¹ Some of these stories can be heard in interview form at <https://vimeo.com/287545743>.

²² JUDITH L. HERMAN, *TRAUMA AND RECOVERY* (1992).

member missions of Citygate Network, before the U.S. District Court for the District of Alaska.²³ The Executive Director of the Hope Center testified that she is “not aware of any woman at the shelter who has not been a victim of rape, sex trafficking, domestic violence, or other physical and emotional abuse.”²⁴ The Hope Center chooses to deny access to biological men in large part because of the response of the concerns of their residents. “One woman recently told me that she was beaten so badly at a shelter that the police had to be called in . . . [and] that merely seeing a biological male in a private setting sets off a severe physical and emotional reaction for her. She cannot breathe.”²⁵

Hope Center residents gave personal testimony about the terror of running into biological males at the shelter. “When I am in public, I can be around men, because . . . I can leave or seek help. I am fully dressed and awake so I can take care of my safety. That would not be true for me when I am in my pajamas,

²³ In *The Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage et al.*, C.A. No. 3:18-CV-00190-SLG, the Center allegedly refused overnight accommodations to a transgender woman—despite the fact that the staff from the mission, at the individual’s request, had taken him to the hospital for medical treatment for wounds suffered in a fight.

²⁴ Declaration of Sherrie Laurie ¶¶ 3-11, 27-33, 46, *The Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage et al.*, C.A. No. 3:18-CV-00190-SLG (D. Alaska Nov. 1, 2018).

²⁵ *Id.* ¶ 45.

sleeping.”²⁶ Another survivor of abuse explained, “I would rather sleep in the woods than sleep in the same area as a biological man.”²⁷ F.S. expresses that she survived rape and abuse at the hands of men in other shelters, so that she will only accept shelter and help at women’s shelters from now on.²⁸ But “allowing any biological male into the Hope Center would take that security away,”²⁹ because “sleeping near a biological male would cause me a lot of distress, like it did in prior shelters I stayed in.”³⁰

Bathrooms and changing rooms are a uniquely vulnerable place, requiring partial or complete unclothing, and where an absence of cameras and security is mandated by the nature of the facility. Privacy and protection inhere in their construction and design. Employers, schools and women’s shelters should be free to weigh the concerns of sexual assault survivors in determining whether to open bathrooms to members of the opposite sex, but if the EEOC prevails here, then women’s shelters, schools receiving federal funding and employers will be forced to open their

²⁶ Declaration of G.O. ¶ 6, *The Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage et al.*, C.A. No. 3:18-CV-00190-SLG (D. Alaska Nov. 1, 2018).

²⁷ Declaration of S.D. ¶ 9, *The Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage et al.*, C.A. No. 3:18-CV-00190-SLG (D. Alaska Nov. 1, 2018).

²⁸ Declaration of F.S. ¶¶ 5-12, *The Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage et al.*, C.A. No. 3:18-CV-00190-SLG (D. Alaska Nov. 1, 2018).

²⁹ *Id.* ¶ 9.

³⁰ *Id.* ¶ 12.

bathrooms, without question, to anyone claiming a subjective gender orientation.

B. Dress codes serve an important value for survivors in identifying sex and providing predictability.

One does not have to believe in dress codes to agree that employers and schools should be allowed to have dress codes. Data supports that uniforms in public schools—including sex-specific uniforms—have and positive, wide-ranging impact on schools, including better test scores, better behavior, and even teacher retention.³¹ In the context of employment, dress codes are often implemented to offer a sense of professionalism, and to instill confidence in consumers.

Once again, if Respondents prevail, the choice will be taken away from employers and schools nationwide. In the present case, employees were told they had to dress professionally—suits for men, and either business suits or dresses for women. If a man wanted to sue on the idea that he had fewer options than the women of what to wear, that might be one thing. But Stephens doesn't believe he is a man denied an option open to women—he believes he is a woman prohibited from wearing the dress required of women in his workplace.

In many contexts, uniforms serve as a protection for sexual assault survivors. They identify the sex of the wearer, they provide a sense of comfort and normalcy,

³¹ Elisabetta Gentile & Scott A. Imberman, *Dressed for Success?: The Effect of School Uniforms on Student Achievement and Behavior*, 71 J. OF URBAN ECONOMICS 1 (2012).

and they allow the survivor to make decisions about who to trust for discreet services. As one example, a survivor seeking counseling or therapy may have good reason for preferring a female therapist or counselor. From the perspective of the female counselor or therapist, there may be good reason to hire only biological women, and even to require them to dress as such. Avoiding reawakening the trauma in survivors, as discussed above, would certainly justify these approaches.

To be sure, not all undersigned *amici* believe that dress codes are important—but all undersigned *amici* agree they are not discriminatory, and that shelters and service providers for survivors should have a free hand in crafting policies to meet the needs of uniquely vulnerable groups.

II. The impact of redefining “sex” cannot be cabined in Title VII jurisprudence, because this Court held that Title IX is broader in scope. It will immediately impact schools and housing throughout the country.

If this Court were to adopt the Sixth Circuit’s redefinition of “sex,” then it would have an immediate impact on Title IX and the Fair Housing Act, where both prohibit “sex” discrimination: “This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.*, which prohibits discrimination under any federally funded education program or activity.” *Olmstead v. L. C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999).

More than once this Court has described Title IX as a “broadly written general prohibition on discrimination,” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005), whereas “Title VII is a detailed statutory scheme” and narrower in scope. *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 388, 356-57 (2013). Consequently, what meets discrimination on the basis of “sex” under Title VII, which is narrower, will surely meet Title IX, which is broader. “Discrimination,” this Court reasoned, “is a term that covers a wide range of intentional unequal treatment; by using such a term, Congress gave the statute a broad reach.” *Jackson*, 544 U.S. at 175.

There is simply no rational line to draw in cabining the harmful effects of the Sixth Circuit’s logic from immediately eviscerating the protections of women and bulwarks of equality afforded in schools and housing.

A. In civil rights legislation, Congress made an “unmistakable focus” on “sex” as a specially benefitted class, not for the protection of the general public.

Title IX prohibits certain discrimination “on the basis of sex.” 20 U.S.C. § 1681. This Court’s jurisprudence on Title IX and similar anti-discrimination statutes consistently recognized “sex” as expressly identifying a protected class rather than the general public. “The language in these statutes—which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes . . . enacted for the protection of the general public.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 (1979). Congress drafted

“with an unmistakable focus on the benefitted class,” which justified the inference of a private cause of action under Title IX. *Id.* This Court reasoned, “Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner,” a woman in that case, “is clearly a member of that class for whose special benefit the statute was enacted.” *Id.* at 694.

The Court recognized that “Title IX was patterned after Title VI of the Civil Rights Act of 1964.” *Cannon*, 441 U.S. at 694-95. The inclusion of “sex” alongside “race, color, or national origin,” created a mirror image in the two statutes which “use identical language to describe the benefitted class.” *Id.* Following this Court’s lead, lower federal courts recognize that “Title IX was Congress’ response to significant concerns about discrimination against women in education.” *Neal v. Board of Trustees*, 198 F.3d 763, 766 (9th Cir. 1999) (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-24 & n.13 (1982)); 118 CONG. REC. 5807 (1972) (statement of sponsoring Senator Birch Bayh). In passing Title IX, Congress found that women were more likely to face competitive disadvantages in life when they received an education of inferior quality. *Id.* at 5808.

But the rule proposed by the EEOC in this case would allow every person to determine their own sex based on subjective feelings. That collapses these statutes into benefitting the general public rather than a protected class, contrary to this Court’s teaching in *Cannon*. This is not a case where a challenged action sought “to exclude or ‘protect’ members of one sex because they are presumed to suffer from an inherent

handicap or to be innately inferior” to the other. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). Rather, converting the protections of Title VII to include those dealing with gender dysphoria denies the existence of sex as an objective and innate characteristic, thereby jeopardizing anti-discrimination protections for the very individuals that the statute was created to protect. Individual justices of this Court have cautioned against rulings “in a case instituted by one man, who represents no class, and whose primary concern is personal convenience.” *Id.* at 735 (Powell, *J.*, dissenting, joined by Rehnquist, *J.*); *see also, id.* at 733 (Burger, *C.J.*, dissenting).

Even accepting the Sixth Circuit’s view that transgender individuals are the sex of their inner feelings and that there is no objective way to determine one’s actual sex, the practical impact of such a rule would be to completely eliminate the protections of Title VII and other sex-based equality statutes in the law.

Where “sex” is enumerated alongside other protected classes in anti-discrimination statutes, such as “race,” “color,” or “national origin,” these all relate to innate characteristics and not a matter of preference or psychological condition. *Cf. Nassar*, 570 U.S. at 347 (recognizing “race,” “color,” “sex,” and “national origin” as “personal characteristics” rather than “conduct”).³² Persons cannot choose their sex, their race, their color, or their national origin. That’s what makes

³² The protection of “religion,” although not an innate characteristic, flows from an enumerated guarantee in the First Amendment of the U.S. Constitution.

discrimination unfair, because no one can control innate characteristics. The law regularly draws distinctions based on the objective, physical characteristics of a person: “[A]n individual’s age is a matter of objective fact, not the individual’s subjective belief.” *Kach v. Hose*, 589 F.3d 626, 641 n.16 (3d Cir. 2009). Conversely, under the Americans with Disabilities Act, Congress excluded “transvestism” and “gender identity disorders not resulting from physical impairments” from the definition of “disability.” 42 U.S.C. §§ 12208 (transvestites), 12211(b)(1) (“transvestism, transsexualism . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders”). In so doing, Congress recognized that these could have qualified as a “mental impairment,” *see id.* § 12102(1)(A), because they were not separately covered by “sex” discrimination under Title VII. At the time of enactment of Title VII, and the ADA, the American Psychiatric Association regarded Gender Identity Disorder (now, Gender Dysphoria) as clinically-significant impairment. *See* AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013). Clearly, Congress does not intend for sex to be treated as an individual preference or conflated with a psychological condition.

This case is a battle between two ways of ascertaining sex: the objective, biological view stands on one side, and the subjective, feelings-based view stands on the other. The objective view is ascertainable: a person’s reproductive anatomy defines his or her sex for purposes of Title VII and similar statutes. The subjective view is that sex is a deeply-

held identity, and because it cannot be measured by objective criteria, one who claims one sex or the other can never be doubted. Indeed, Respondents' proposed rule in this matter could create the very discrimination this statute was meant to prohibit. A biological male who enters female space or claims access to programs meant to advance women must be welcomed and included. The employer or teacher who even questions whether such actions are inappropriately-motivated rather than genuine would transgress Title VII or Title IX under the EEOC's proposed outcome in this case.

The objective view is the only way to protect both the gains of civil rights legislation for women's equality, and also to protect the safety and psychological well-being of sexual assault survivors. This is because the subjective view neither allows for rationally-based restrictions on benefits offered to one sex or the other nor lends itself to consistent and effective enforcement. Awards, scholarships or even seats on diversity counsels that were designed to redress discrimination against a woman from her birth must be offered on an equal basis to someone who has just developed, based on internal considerations, a female identity without having experienced any disadvantages or discriminatory harms encountered by women—or indeed, while having experienced advantages from such discrimination up until the moment of transition.

But it's not only in the classroom that this impact will be felt. High school and women's sports will be affected by this ruling as well. If "sex" is redefined to include one's personal preference of their sex, there can

be no meaningful distinction drawn between the Title VII and Title IX contexts. Already, throughout the country, biologically male athletes are speeding past and out-performing their female counterparts.³³ Girls lose starting positions, championships and even scholarships meant to provide for their advancement and equality to the physical bodies of men who have chosen to directly compete with them in their sphere. If sex loses its definition, these female spaces will also be up for grabs.

Critics of the objective view vociferously argue that a transgender woman³⁴ has been a woman her whole life but only learned it recently. The problem with this view is that such a “woman” may have spent her whole pre-awakened life benefiting from the very social constructs that the scholarships she now seeks were made to reverse. It does not matter whether her transition is in good faith, either. A genuine awakening to a newly-realized female metaphysic entitles her to

³³ Darrell Lincoln, *Transgender Woman that Competed as a Man in 2018 Wins NCAA Track Championship in 2019*, TOTAL PRO SPORTS, June 3, 2019, *available at* <https://www.totalprosports.com/2019/06/03/transgender-woman-that-competed-as-man-in-2018-wins-ncaa-track-championship-in-2019-video/>; Alex Putterman & Lori Riley, *Connecticut High School Athletes File Complaint over Transgender Policy*, HARTFORD COURANT, June 18, 2019, *available at* <https://www.courant.com/sports/high-schools/hc-sp-transgender-high-school-track-lawsuit-20190618-20190618-4mjsx7gllrjarlpidhnejecfosq-story.html>; *see also*, “Actually a Male”: Transgender Weightlifter Stripped of World Records, YAHOO SPORTS UK, May 14, 2019, *available at* <https://sports.yahoo.com/transgender-weightlifter-mary-gregory-raw-powerlifting-federation-094109354.html>.

³⁴ A biological man who identifies as a woman.

equal access to programs, scholarships and advancements designed to redress the privilege she has benefited from her entire life.

B. Title IX requires the protection of sexual assault survivors from being forced to share intimate spaces with the opposite sex.

Title IX's core purpose—the leveling of the playing field in education to ensure that women are not disadvantaged in society—is undercut where women are not provided safe spaces. It is well established that “student-on-student sexual harassment [may] rise to the level of ‘discrimination’ for purposes of Title IX.” *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639 (1999). The U.S. Department of Education’s Office for Civil Rights, in its “Dear Colleague” Letters, has encouraged schools to be vigilant about responding to reports of, and protecting students from, instances of sexual harassment. “The sexual harassment of students . . . interferes with students’ right to receive an education free from discrimination.”³⁵

In crafting policies for students in sensitive places, such as locker rooms and showers, public schools and other educational institutions receiving federal monies should be permitted to take into account the unique difficulties that a high percentage of their female students face as sexual assault survivors.

³⁵ *E.g.*, Letter of the Assistant Secretary of the Office of Civil Rights, U.S. Dep’t of Educ. (Apr. 4, 2011), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (last accessed December 15, 2018).

Amicus Defend My Privacy worked with one student who was shocked to find out that her college roommate was a male who was transitioning. Upon reporting her privacy concerns about this situation to the school administration, she was treated as a discriminator for suggesting such an arrangement was inappropriate. Although Title IX was passed to protect her rights, the school chose to protect the biological male instead.³⁶

Similarly, *amicus* Students and Parents for Privacy faced backlash when they reported their concerns about new bathroom and locker room policies to administration in their school district. Particularly concerning to them was that they had been given no advance notice of these changes, nor any opportunity to comment on them.

Redefining “sex” in this case will lead to many situations just like this. School districts all over the country are wrestling with these issues, and sexual assault survivors in schools are finding out that schools will not protect them in locker rooms and bathrooms. The privacy of female students should be protected by Title IX, not eliminated.

³⁶ Although this Court has never directly passed upon whether access to separate bathrooms is required under Title IX, it has previously recognized the cultural expectation of privacy in bathrooms and living quarters in *dicta. United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”).

C. The Fair Housing Act’s definition of sex is also implicated by this decision.

The Fair Housing Act also prohibits certain practices which discriminate on the basis of “sex.” 42 U.S.C. §§ 3604, 3605(a), 3606. The Act makes no attempt at further definition, and this Court has analogized FHA claims to Title VII and the ADEA. *E.g.*, *Texas Dep’t of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2518-19 (2015) (holding that disparate impact claims are cognizable). This Court reasoned, “This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.” *Id.* at 2519.

Lower federal courts, likewise, “have consistently relied on Title VII cases in their analysis of housing discrimination under the FHA.” *Lax v. 29 Woodmere Blvd. Owners, Inc.*, 812 F. Supp. 2d 228, 234 n.4 (E.D.N.Y. 2011) (citing *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 575 (2d Cir. 2003), *Braunstein v. Dwelling Managers, Inc.*, 476 F. Supp. 1323, 1326-27 (S.D.N.Y. 1979), and *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993)). Congress amended the FHA in 1974 to add “sex” as a protected class. Act of Aug. 22, 1974, Pub. L. No. 93-383, tit. VIII, § 808(b)(1), 88 Stat. 729, 728-29. That same day, Congress passed a joint-resolution, designating August 26, 1974 as “Women’s Equality Day” in commemoration of August 26, 1920, when women first gained the right to vote. Joint-Resolution of Aug. 22, 1974, Pub. L. No. 93-382, 88 Stat. 633, 633.

For shelters receiving federal funding, this is a major concern. *Amici* Citygate Network and Phoenix Dream Center are especially concerned that they not become the target of housing discrimination claims for insulating their survivor-patrons from contact with biological men in the shelters. *Amicus* Defend My Privacy is concerned that housing authorities and landlords will be unable to protect vulnerable tenants with common-sense policies about bathroom access in common areas. The Court should consider the impact that its ruling in this case will have on public housing.

III. *Amici* do not suggest that transgender individuals are more aggressive or more likely to cause an assault on others.

Amici respect transgender individuals. Indeed, *amicus* Phoenix Dream Center offers help for transgender homeless youth, including those battling addiction. Citygate Network members are building facilities with gender neutral options so that privacy in dormitories, bathing areas and bathrooms will be less of a concern.

However, there is no line to draw between being forced to accept every individual's claims about his or her gender identity and preserving any sanctuary—physical or metaphorical—for women's privacy and advancement. *Amici* believe that the redefinition of sex through the judicial process, rather than through the legislative process, will effectively deny their constituencies a voice in the defining of their own identities.

Furthermore, it should be noted that *amici* are not arguing that those identifying as transgender are more likely to perpetrate a sexual assault than a “cis-gender” individual. Rather, *amici* emphasize that the presence of male bodies in traditionally safe spaces for women is detrimental to them, and that employers, shelters and schools should be free to promulgate common-sense rules and regulations to govern these spaces and programs and to ensure that they are left open to women.

CONCLUSION

Amici are concerned that a ruling that does not allow them to make common-sense determinations based on biological sex will severely curtail their ability to reach those in need in our society. Human trafficking and sexual assault survivors often need specialized care in sex-specific housing and therapist offices. Prohibiting employers from exercising discretion will impact vulnerable communities nationwide.

This decision will also impact schools and universities, their scholarship programs for women, and even private clubs dedicated to advancing women’s interests in education and the workplace. Finally, this decision will impact landlords and housing nationwide. Changing the term “sex” in civil rights legislation from its objective meaning into a subjective term that can be determined by each individual, and protecting each person’s subjective determination about their sexual identity from any challenge of an employer on pain of a Title VII violation is an immediate way of gutting the protections of civil rights legislation in America.

The presence of the opposite sex in sleeping areas, locker rooms and bathrooms can be a trauma trigger for sexual assault survivors. Shelters, schools and employers should be free to determine what best protects survivors in these sensitive spaces.

Respectfully Submitted,

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