No. 18-13592

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DREW ADAMS,

Plaintiff-Appellee,

-v-

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant.

On Appeal from the Middle District of Florida, Jacksonville Division
Case No. 3:17-cv-00739-TJC-JBT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PLAINTIFF-APPELLEE

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AMICUS CURIAE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1-1, undersigned counsel for *amicus curiae* the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), certifies that, in addition to the list of interested persons provided in Defendant-Appellant School Board of St. Johns County, Florida's opening brief, the following list of interested persons and the corporate disclosure statement is true and correct:

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No. 18-13592, Drew Adams v. The School Board of St. Johns County, Florida

LDF is a non-profit, non-partisan corporation. LDF has no parent corporation and no publicly held corporation has any form of ownership interest in the LDF.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, and public education, LDF strives to enforce the United States Constitution's promise of equal protection and due process for all Americans. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

Pursuant to its mission, LDF has advocated against sex-based discrimination, *see, e.g.*, *Phillips v. Martin Marietta*, 400 U.S. 542 (1971), and public-accommodation discrimination, *see, e.g.*, *Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. 941 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and*

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[1] The parties consent to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), *amicus curiae* state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amicus curiae*, *amicus curiae*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief.

modified on other grounds, 390 U.S. 400 (1968).

Moreover, LDF has participated as *amicus curiae* in several cases addressing the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); Br. of Amicus Curiae, *Bostic v. Schaefer*, No. 14-1167 (4th Cir. Apr. 18, 2014); Br. of Amicus Curiae, *Ingersoll v. Arlene's Flowers*, No. 91615-2 (Wash. Feb. 8, 2016).

Given LDF's enduring support of, and interest in, robust and effective anti-discrimination laws, it submits that its experience and knowledge will assist the Court in resolving this case.

STATEMENT OF THE ISSUES

Do either the Equal Protection Clause or Title IX permit barring a transgender student from a restroom according with his or her gender identity on the basis of nonspecific privacy concerns, with no reason to believe transgender students are more likely than cisgender students to violate the privacy of others?

SUMMARY OF ARGUMENT

This case is about whether the state may physically restrict individuals in public places on the basis of unjustified—and unjustifiable—fear and prejudice. Specifically at issue here is whether the School Board of St. Johns County, Florida ("School Board") may single out a discrete group—transgender students—by forcing them to use restrooms that are inconsistent with their gender identity for reasons that are unsupported by evidence or sound judgment and that perpetuate false stereotypes. The constitutional guarantee of the "equal protection of the laws" demands that the answer is no.

LDF's extensive experience challenging discrimination leads it to register three core points in this brief.

First, there is a lengthy and troubling history of state actors restricting the use of public restrooms and other shared public spaces to demean and subordinate disfavored groups. The era of "Colored" and "White" bathrooms remains in the living memory of many. The private-space barriers of that era—such as racially segregated bathrooms—were a source of profound indignity that inflicted indelible harms on individuals of both races, and society at large. This history warrants

skepticism towards the School Board's rationale for its actions in this case.

Second, state officials often justified physical separation in the public sphere by invoking unfounded fears about sexual contact and predation. Here, too, the School Board's repeated references to concerns about "bodily privacy" cannot withstand scrutiny. The mere presence of a transgender student in a multi-user bathroom fitting his or her gender identity does not inherently violate the bodily privacy of others in the bathroom, any more than the mere presence of cisgender students in such a bathroom does. The School Board's argument requires the assumption that transgender students are more likely to actively invade the privacy rights of others. That reasoning harks back to the same false assumptions used to justify separate bathrooms for racial minorities.

Third, the School Board's contention that its policy protects transgender students from those who are uncomfortable with those students' gender identity resembles prior arguments that race-based restrictions on the movement of African Americans protected them from the harm of others' discomfort. These rationales conflict with the foundational constitutional principle that government actors may not

draw unfounded distinctions based on differences, regardless of private community biases.

This Court should not repeat the mistakes of the past. The weight of precedent and the guarantees of equal protection require affirming the district court and its recognition of Drew Adams' human dignity.

ARGUMENT

The School Board's policy of prohibiting transgender students from using restrooms that align with their gender identity singles out and physically separates those students based on an essential characteristic of their person. Due to the School Board's erroneous and outdated beliefs about "biological sex," transgender students alone are forced either to use a restroom that is inconsistent with their gender identity or to be relegated to separate, individual bathrooms away from other students. This disparate treatment is analogous to the forced racial separation of restrooms prior to the civil rights movement, which is now uniformly condemned in law and society.

The School Board seeks to justify its policy based on the purported danger to other students or the violation of their privacy that would result in sharing restrooms with transgender students of a different

"biological sex." *See, e.g.*, Appellant's Br. at 5 ("To protect student privacy rights, the School Board requires biological boys to use the boys' bathrooms and biological girls to use the girls' bathrooms."); *id.* at 9 (invoking "safety" concerns).[2] But like other rules of physical separation in our shameful past, the School Board's invocations of safety and privacy lack evidentiary support or legitimacy. There is simply no explanation for the School Board's policy beyond discomfort, fear, and hostility toward transgender students. Such sentiments cannot justify any policy, let alone one that stigmatizes children in their own schools.

I. Our Nation's History Makes Clear that the Physical Separation of Bathrooms Is Harmful and Stigmatizing.

The exclusion of transgender students from bathrooms matching their gender identity—and the stigma associated with that forced

[2] The School Board's lack of clarity and consistency when referring to "biological boy" and "biological girl" illustrates the flaws in its contentions here. At times, the Board seems to use those terms for students whom the Board believes to have a gender identity that "matches" their assigned sex at birth. Yet the Board also concedes that it determines sex solely from students' representation of their sex "in enrollment documents." Appellant's Br. at 5. Thus, the meaning or relevance of the words "biological" or "anatomical differences" remains unclear. *Id.* at 10. Indeed, the Board's concept of "biological sex" appears to be reverse-engineered to express disapproval of transgender students.

exclusion—parallel the exclusion of African Americans from "white" bathrooms during the Jim Crow era. At that time, "[p]ublic washrooms and water fountains were rigidly demarcated to prevent contaminating contact with the same people who cooked the white South's meals, cleaned its houses, and tended its children."[3] For example, a Florida law required that "'where colored persons are employed or accommodated' separate toilet and lavatory rooms must be provided." *Robinson v. Florida*, 378 U.S. 153, 156 (1964). Similarly, an Alabama ordinance specified that "separate water closets or privy seats within completely separate enclosures shall be provided for each race" in workplaces, public accommodations, and certain "multiple dwellings." *King v. City of Montgomery*, 168 So. 2d 30, 31 n.2 (Ala. Ct. App. 1964).

The forced racial segregation of bathrooms included government buildings. In *Dawley v. City of Norfolk*, for example, a Black lawyer unsuccessfully sought to enjoin a Virginia city from segregating state-court bathrooms. 260 F.2d 647, 647 (4th Cir. 1958) (per curiam) (denying relief because "[t]he matter was one which affected the internal

[3] Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* 86 (Random House 1975).

operations of the court of the State"). Likewise, during the 1910s, "the Federal Government began to require segregation in Government buildings" including "separate bathrooms." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 394 (1978) (Marshall, J., separate op.).

In the wake of the United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which prohibited *de jure* racial segregation in public schools, states enacted or reinforced laws to ensure the racial separation of bathrooms. For example, influenced by the white supremacist Citizens' Councils, Louisiana legislators passed a series of bills to flout federal integration mandates, including bathroom segregation provisions.[4] In one particularly horrific incident, Samuel Younge, Jr.—a veteran and member of the Student Nonviolent Coordinating Committee—was murdered in Tuskegee, Alabama while trying to use a segregated bathroom.[5]

State laws requiring racially segregated bathrooms caused immeasurable indignity to African Americans. As the Senate recognized

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[4] Adam Fairclough, *Race and Democracy: The Civil Rights Struggle in Louisiana, 1915-1972*, 196, 204-05 (Univ. of Ga. Press 2008).

[5] *See* Julian Bond, *Under Color of Law*, 47 How. L.J. 125, 128 (2003).

in its passage of the Civil Rights Act of 1964, "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, at 16 (1964)). To avoid this humiliation, many Black parents instructed their children to use the facilities at home rather than segregated public facilities.[6] Often, the use of segregated bathrooms required Black people to walk long distances—past bathrooms that, by right, they should have been able to use; this public humiliation further underscored the separation and shame involved.[7]

As explained by Reverend Dr. Martin Luther King, Jr, "Segregation not only makes for physical inconveniences, but it does something

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[6] *See, e.g.*, Vernon E. Jordan Jr., *The Power of Movies to Change Our Hearts*, N.Y. Times (Feb. 18, 2017), https://www.nytimes.com/2017/02/18/opinion/sunday/the-power-of-movies-to-change-our-hearts.html.

[7] *See* Christina Cauterucci, Hidden Figures *is a Powerful Statement Against Bathroom Discrimination*, Slate (Jan. 18, 2017), https://slate.com/human-interest/2017/01/hidden-figures-is-a-powerful-statement-against-bathroom-discrimination.html.

spiritually to an individual. It distorts the personality and injures the soul. Segregation gives the segregator a false sense of superiority, and it gives the segregated a false sense of inferiority. . . ."[8] Consistent with Dr. King's observation, LDF presented evidence in multiple cases demonstrating that racial segregation—including segregation of restrooms—hurts both the African-American and white communities.[9] While the harms to African Americans are relatively obvious, state-sponsored racism (via segregation or other means) can distort the moral and democratic sense of those who sit at the top of the racial hierarchy.[10] In short, "harm to the Nation as a whole and to whites and [African Americans] alike inhere[d] in segregation." *Wright v. Rockefeller*, 376 U.S. 52, 69 (1964) (Goldberg, J., dissenting).

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[8] Rev. Dr. Martin Luther King, Jr., "Some Things We Must Do," Address Delivered at the Second Annual Institute on Nonviolence and Social Change at Holt Street Baptist Church (Dec. 5, 1957), https://kinginstitute.stanford.edu/king-papers/documents/some-things-we-must-do-address-delivered-second-annual-institute-nonviolence.

[9] *See generally The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, reprinted in 37 Minn. L. Rev. 427 (1953) (appendix to appellants' briefs filed in *Brown v. Board of Education*).

[10] *See, e.g.*, *id.* at 430-31 (explaining the "confusion, conflict, moral cynicism, and disrespect for authority" segregation could engender in white children "as a consequence of being taught the moral, religious and democratic principles of the brotherhood of man" by "persons and institutions" who also enact segregation).

Similar harms are inherent in the School Board's policy here. Transgender children cannot change who they are—nor should they be ashamed of who they are. The School Board's policy places a humiliating and demeaning stigma on transgender children by physically separating them from other children who share the same gender identity.

II. The School Board's Justification for Physically Separating Transgender Children Invoke the Kind of False Stereotypes that Were Once Used to Justify Racially Segregated Restrooms.

The School Board's justification for its transgender bathroom policy—which centers on purported concerns about the safety and privacy of cisgender children—must be viewed in the context of past anxieties about sexual exploitation that were used to justify race-based separation of bathrooms and swimming pools, anti-miscegenation laws, and laws criminalizing and excluding lesbian and gay individuals. That history serves as a lesson that such false reasoning must not support discriminatory treatment, like the School Board's policy towards transgender children.

A. Bathrooms

Segregation's advocates often used false and racist stereotypes about sexual contact and disease to justify racial segregation of

bathrooms. For example, a 1957 Arkansas newspaper advertisement mused whether white children should "be forced to use the same rest room and toilet facilities" as African Americans given the "high venereal disease rate among Negroes . . . ."[11] Public flyers hawked "uncontested medical opinion" that "girls under 14 years of age are highly susceptible to [venereal] disease if exposed to the germ through seats, towels, books, gym clothes, etc."[12] When President Franklin Roosevelt eliminated racial segregation in certain bathrooms, "white female government workers staged a mass protest, fretting that they might catch venereal diseases if forced to share toilets with black women."[13]

These beliefs had no basis in reality. In the landmark case of *Turner v. Randolph*, 195 F. Supp. 677 (W.D. Tenn. 1961), Black Tennesseans, represented by Thurgood Marshall and others, challenged the segregation of Memphis public libraries, including their bathrooms.

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[11] Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 Ark. Hist. Q. 42, 52 (2003).

[12] *Id.* at 63-64.

[13] Nick Haslam, *How the Psychology of Public Bathrooms Explains the 'Bathroom Bills,'* Wash. Post (May 13, 2016), https://www.washingtonpost.com/posteverything/wp/2016/05/13/how-the-psychology-of-public-bathrooms-explains-the-bathroom-bills/?noredirect=on&utm_term=.eb182b0adbdc.

Memphis justified its segregation of bathrooms with purported evidence "that the incidence of venereal disease is much higher among Negroes in Memphis and Shelby County than among members of the white race." *Id.* at 678-80. In ruling in the plaintiffs' favor, the court found that "no scientific or reliable data have been offered to demonstrate that the joint use of toilet facilities . . . would constitute a serious danger to the public health, safety or welfare." *Id.* at 680.

Supporters of segregation also employed "contamination" rhetoric,[14] suggesting that "racially segregated bathrooms" were necessary "to make sure that blacks would not contaminate bathrooms used by whites."[15] The idea that the mere presence of an African-American person in a bathroom rendered it unfit for white persons flowed from segregation's ideological core: that Black persons were inherently inferior.[16]

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[14] *See, e.g.,* C.J. Griffin, Note, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 Rutgers L. Rev. 409, 423-25 (2009) (discussing privacy, cleanliness and morality rationales for race-based bathroom rules)

[15] *Id.* at 423 n.84 (quoting Richard A. Wasserstrom, *Racism and Sexism, in Race and Racism* 319 (Bernard P. Boxill ed., 2001)); *see also id.*

[16] *See, e.g.*, *id.* at 424 (observing that segregation "taught both whites and blacks that certain kinds of contacts were forbidden because whites would be degraded by the contact with the blacks" (citation omitted)); *see also infra* Part II.B.

Here, the School Board's argument that Drew Adams' mere presence in a "boys'" bathroom violates the "privacy rights" of a "biological boy," Appellant's Br. at 27, is also based on false stereotypes and sends an unequivocal message that, as a transgender child, he is considered inferior to other children at his school. Vague assertions about discomfort or privacy simply cannot justify sex-based disparate treatment. *See, e.g., United States v. Virginia,* 518 U.S. 515, 540-46 (1996).

B. Swimming Pools

Those who supported the racial segregation of swimming pools also invoked the baseless justification of sexual-assault prevention. Before the 1920s, American swimming pools often segregated males and females for privacy and safety reasons.[17] Although that policy eventually dissipated, city officials nationwide repurposed those same concerns to separate swimmers by race.[18] Sexual predation fears were key to this separation: many white individuals "in general objected to black men having the

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[17] *See, e.g.*, Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* 2-4, 89 (2007).

[18] *See id.* at 124.

opportunity to interact with white women at such intimate and erotic public spaces" and "feared that black men would act upon their supposedly untamed sexual desire for white women by touching them in the water and assaulting them with romantic advances."[19]

In the mid-1950s, the federal district court that upheld Maryland's racial separation of bathing facilities drew the parallel directly: "[t]he degree of racial feeling or prejudice in this State at this time is probably higher with respect to bathing, swimming and dancing than with any other interpersonal relations except direct sexual relations." *Lonesome v. Maxwell*, 123 F. Supp. 193, 202 (D. Md. 1954), *rev'd sub nom. Dawson v. Mayor of Baltimore*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (citation omitted). Even though Maryland had allowed some integrated activities within its parks, swimming facilities and bath houses were deemed a step too far because they "are for all ages, and are practically unsupervised, except by young life guards." *Id.* at 203. The court opined that the "natural thing in Maryland at this time . . . is for Negroes to desire and choose to swim with Negroes and whites with

[19] *Id.*

whites" and for proprietors to segregate accordingly. *Id.* at 205.

We now know, however, that these concerns were unfounded pretexts marshaled to preserve the racial caste system.[20] Interracial social interaction on equal terms—romantic or otherwise—threatened an unequal political, social, and economic order. Trumped up fears about interracial sexual contact and predation helped render such interaction taboo.

Although the present context is not identical, it calls to mind these past frivolous concerns. The School Board's policy singles out transgender people on the basis of vague concerns about invasions upon "intimate bodily functions" triggered by their mere presence in multi-user bathrooms, Appellant's Br. 22—concerns somehow not generated by the presence of non-transgender persons in the same bathrooms. It is hard to discern any sense to this policy beyond discomfort or dislike. And it is now clear that the "bare . . . desire to harm a politically unpopular group" is never a "legitimate state interest[]." *City of Cleburne v. Cleburne Living*

[20] *See, e.g.*, James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 How. L.J. 113, 140-43, 155 (2006).

Ctr., 473 U.S. 432, 446-47 (1985).

C. Interracial Marriage

The same pretextual rationales applied in the contexts of bathrooms and swimming pools were wielded in opposition to interracial marriage, which was long exploited as the ultimate fear. Anti-miscegenation rhetoric was closely intertwined with the maintenance of segregated shared spaces. Indeed, "a primary reason for segregated schooling was to foreclose the interracial intimacy that might be sparked in integrated classrooms."[21]

Loving challenged the stereotypes and fears that underlay the separation and subordination of African Americans in marriage. When Mr. and Ms. Loving were sentenced for violating Virginia's "Racial Integrity Act," the trial judge proclaimed: "Almighty God created the races white, black, yellow, malay and red, and he placed them on *separate* continents . . . . The fact that he *separated* the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (emphasis added). Similarly, the Virginia Supreme Court decision

[21] Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. Sch. L. Rev. 175, 176 (2014-2015).

reversed by the United States Supreme Court in *Loving* relied primarily on an earlier decision, *Naim v. Naim*, which had declared that states had a right to "preserve . . . racial integrity" and prevent a "mongrel breed of citizens," "the obliteration of racial pride," and the "corruption of blood [that would] weaken or destroy its citizenship." 87 S.E.2d 749, 756 (Va. 1955) (cited in *Loving v. Virginia*, 147 S.E.2d 78, 80-82 (Va. 1966)).

Virginia defended its ban, *inter alia*, on the ground that "intermarriage constitutes a threat to society," and cited purportedly scientific evidence "that the crossing of distinct races is biologically undesirable and should be discouraged." *See* Appellee's Br., *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931 at *44. LDF pointed out, however, that "laws against interracial marriage are among the last of such racial laws with any sort of claim to viability. [T]hey are the weakest, not the strongest, of the segregation laws." Br. of Amicus Curiae NAACP Legal Defense & Educ. Fund, Inc., *Loving*, 388 U.S. 1, 1967 WL 113929 at *14.

The United States Supreme Court struck down Virginia's law because it was "designed to maintain White Supremacy." *Loving*, 388 U.S. at 11. In so doing, the Court rejected Virginia's post-hoc and

pretextual rationalizations for enshrining separate categories of marriages, finding "no legitimate overriding purpose independent of invidious racial discrimination which justifies [the] classification." *Id*. *Loving* refused to credit *Naim*'s pseudo-scientific theories about the social and genetic consequences of interracial sexual contact, casting them aside as nothing more than "an endorsement of the doctrine of White Supremacy." *Id.* at 7.

D. Lesbian and Gay Criminalization and Discrimination

Finally, concerns about sexual contact and predation were also used to justify the criminalization of gay and lesbian individuals and their physical exclusion from certain environments. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), for instance, Georgia argued that homosexuality "is marked by . . . a disproportionate involvement with adolescents, and, indeed, a possible relationship to crimes of violence," as well as the "transmission of . . . diseases." Br. of Pet'r at 36-37, 1985 WL 667939 (1985) (citations omitted). In *Lawrence v. Texas*, oral argument before the United States Supreme Court featured discussion of whether "a State could not prefer heterosexuals or homosexuals to teach Kindergarten" based on concerns that children would be harmed because they "might be

induced to . . . follow the path to homosexuality." Oral Arg., *Lawrence v. Texas*, No. 02-102, 2003 WL 1702534, at *20-21 (Mar. 26, 2003); *see also Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children [or] as teachers in their children's schools[.]").

Similarly, the reasons proffered to support the exclusion of openly gay and lesbian individuals from both military and civil service echoed fears of sexual predation. Proponents of their exclusion expressed the concern that "showering bodies would be subjected to unwanted sexual scrutiny."[22] In the 1960s, the chair of the Civil Service Commission similarly rejected a request to end a ban on openly gay people from federal civil service jobs, pointing to the "apprehension" other employees would feel about sexual advances, sexual assault, and related concerns regarding "on-the-job use of the common toilet, shower and living facilities." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010), *aff'd Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub*

[22] Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201, 227 (2012).

nom. Hollingsworth v. Perry, 570 U.S. 693 (2013) (citation omitted).

As the Supreme Court has made clear, dislike of—or discomfort around—gays and lesbians is not a legitimate justification for discrimination. *See Romer v. Evans*, 517 U.S. 620, 632 (1996). The Equal Protection Clause prohibits the government from discriminating against one group in order to accommodate the prejudices or discomfort of another. "The Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

All told, the articulated rationales offered for physically separating transgender students in this case are comparable in many respects to those that were used to justify racially segregated bathrooms and swimming pools or the criminalization or exclusion of gay and lesbian individuals. This Court must treat the arguments today with similar skepticism.

III. Physical-Restriction Rules Are Not Justified by the Dubious Guise of Protecting Some Individuals from Discomfort as "Safety" Concerns.

Viewed more broadly, the School Board's bathroom-exclusion rule fits within a troubling tradition of local and state governments justifying the physical separation of certain groups from others under the guise of providing protection or avoiding discomfort. By excluding a subset of people from a setting where they would otherwise be present, these rules have discriminated impermissibly and have been repudiated both by courts and society at large. This is true regarding recreational facilities, workplaces, and housing.

A. Public Recreational Facilities

Under Jim Crow, local and state governments imposed group-based restrictions on the use of recreational facilities—like public parks, golf courses, and baseball and football fields, among others—purportedly to avoid discomfort or protect the public.

For example, New Orleans argued that the Supreme Court's rationale in *Brown v. Board* should not extend to New Orleans's rule excluding Black plaintiffs from the city's public golf course and park facilities. The city claimed that *Brown* was "based on psychological

considerations not here applicable." *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122, 123 (5th Cir.), *aff'd per curiam*, 358 U.S. 54 (1958). In an opinion summarily affirmed by the Supreme Court, the Fifth Circuit rejected the argument as "completely untenable." *Id.* Similarly, federal courts across the country rejected a number of related physical-separation rules in public recreational facilities. *See*, *e.g.*, *Holley v. City of Portsmouth*, 150 F. Supp. 6, 7-9 (E.D. Va. 1957) (extending a temporary injunction against a city law restricting African Americans' use of golf courses to one day per week).

Notably, the Supreme Court refused to accept the City of Memphis's claim that safety required delaying the integration of public parks. *Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963) (recounting the city's arguments about "promot[ing] the public peace by preventing race conflicts" and that "gradual desegregation on a facility-by-facility basis is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil"). Instead, the Court stated that "neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials."

Id. at 536. This is especially important in the instant case, where the School Board identified concerns about safety of students in a perfunctory manner, Appellant's Br. at 6, 7, 9, 34, 44, and offered no factual evidence or analysis whatsoever to support its position.

More broadly, arguments about danger to and discomfort of the public were also offered to justify segregation in public swimming facilities, in addition to the sexualized fears discussed above, *supra* Section II.B. Baltimore and Maryland argued, for example, that "preservation of order within the parks"—and the authorities' responsibility "to avoid any conflict which might arise from racial antipathies"—justified their insistence on racial separation for use of these facilities. *Dawson v. Mayor of Baltimore City*, 220 F.2d 386, 387 (4th Cir. 1955), *aff'd per curiam*, 350 U.S. 877 (1955). They also claimed that segregation of the parks offered "the greatest good of the greatest number" of both Black and white citizens, on the view that most individuals, regardless of race, "are more relaxed and feel more at home among members of their own race than in a mixed group[.]" *Lonesome*, 123 F. Supp. at 202; *see also id.* (expressing concern about "racial feeling" that would result from removing the physical-separation rules).

No matter how the rationale was couched, courts around the country rejected such physical-separation rules. *See, e.g.*, *Tate v. Dep't of Conservation & Dev.*, 133 F. Supp. 53, 61 (E.D. Va. 1955), *aff'd*, 231 F.2d 615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956) (rejecting denial of access to state parks based on race even when conducted by private actors acting on a lease).

B. Workplaces

In the employment context, states and private actors previously sought to rely on protectionist rationales for physically separating or excluding particular groups of people from certain workspaces. These physical-separation rules similarly have been found to be fundamentally impermissible.

For example, the Supreme Court expressed skepticism toward, and ultimately rejected, a private employer's rule forbidding women of childbearing age from working in certain parts of its factories where men were permitted to work. *See Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). The interest—in protecting the health of women and the children they might have—had the patina of legitimacy. But after examining the rule in context, the Court recognized that the health and

safety rationale could not explain the sex-based exclusion. *Id.* at 198 ("Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees."). The Court added, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities," *Id.* at 211.

A deeply divided Court grappled with a similar justification in *Goesaert v. Cleary*, 335 U.S. 464 (1948), involving a Michigan law that forbid women, other than wives and daughters of the male bar owner, from working as licensed bartenders. According to the Court, "Michigan evidently believe[d] that" this law and form of familial oversight "minimizes hazards that may confront a barmaid[.]" *Id.* at 466. In particular, "bartending by women," the Court wrote, "may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures." *Id.*

While a majority at the time accepted that argument, the three dissenters saw through the state's purported interest in protecting women. Because female owners could not work in their own bars even if

a man was always present, the "inevitable result of the classification belie[d] the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women[.]" 335 U.S. at 468 (Rutledge, J., dissenting). Roughly a quarter-century after *Goesaert*, the Seventh Circuit readily invalidated a Milwaukee ordinance that imposed a similar physical-separation rule by prohibiting female employees from sitting at the bar or with male customers at tables. *See White v. Fleming*, 522 F.2d 730, 736-37 (7th Cir. 1975).

C. Residential Restrictions

The now-condemned physical separation of homes and neighborhoods based on discomfort with a particular group of people involves the same underlying concerns of allowing fears and bias to justify discrimination, thus presenting troubling historical parallels.

For example, in *City of Cleburne*, Texas refused to authorize a group home for people with intellectual disabilities under its zoning regulations on the grounds that it "feared that the students [from a nearby school] might harass the occupants of the [] home." 473 U.S. at 449. The City Council also noted concerns about the home's location on an old flood plain and "expressed worry about fire hazards, the serenity of the

neighborhood, and the avoidance of danger to other residents[.]" *Id.* at 449-50.

The Supreme Court, however, concluded that the safety concerns were unfounded and that these legitimate-sounding rationales were proxies for "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding[.]" *Id.* at 448. *See also id.* at 449 (describing the permit denial as "based on . . . vague, undifferentiated fears"); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (rejecting the city's argument that an amendment to the city charter allowing discrimination in home sales should survive challenge because it involved "the delicate area of race relations").

The now discredited decision in *Korematsu v. United States* provides yet another illustration of neutral-sounding rationales offered to justify a physical-separation rule that rested on distrust of a subgroup of Americans. In *Korematsu,* the "twin dangers of espionage and sabotage" were invoked to support the forced removal of Japanese-Americans from their residences and into internment camps. 323 U.S. 214, 217 (1944). Because those fears were baseless, Mr. Korematsu's conviction was ultimately vacated, and he received reparations from

Congress, an official apology from the President, and an extraordinary confession of error from the United States.[23]

CONCLUSION

Precedent makes clear that the government may not physically separate and restrict individuals on the basis of irrelevant, unjustified beliefs. That is particularly true when the ostensible reasons rest upon concerns about discomfort and fears of sexual predation that have no factual support. As the historical record shows, state officials have used such rationales to divide and subordinate rather than to protect. In keeping with the constitutional demand for equal protection under the Fourteenth Amendment, such pretextual arguments must fail.

Today, the racial separation of bathrooms is now rightly seen for what it is: immoral, insidious, and impermissible. Even while striving to overcome the enduring vestiges and latest iterations of prejudice, judicial precedents reaffirm that our nation has a vast capacity for progress: "[W]hat once was a 'natural' and 'self-evident' ordering" of constitutional

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[23] *See*, *e.g.,* Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During The Japanese-American Internment Cases* (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

principles of equality "later comes to be seen as an artificial and invidious constraint on human potential and freedom." *City of Cleburne,* 473 U.S. at 466 (Marshall, J., concurring). Indeed, not one of the crass, stereotypical predictions about the dangers of racially integrating restrooms—or swimming pools, neighborhoods, or beyond—have come to fruition, nor could they.

So too here. The legitimacy of any concerns about safety or privacy dissipates in the face of evidence that Drew Adams has used bathrooms for some time without any harm to others. And the pretextual nature of these concerns is underscored by the School Board's apparent lack of concern about safety and privacy in multi-user bathrooms with respect to cisgender students. This reveals that the School Board's policy rests on nothing more than a belief that transgender youth—simply by being transgender—are somehow uniquely dangerous or sexually aggressive compared to their straight, lesbian, gay, or bisexual cisgender peers. That is a perverse reimagining of reality, given the well documented harms of discrimination and violence against transgender youth.[24] A policy, like

[24] *See, e.g.*, U.S. Dep't of Health & Human Servs., *LGBT Youth: Experiences with Violence* (Nov. 12, 2014), https://www.cdc.gov/lgbthealth/youth.htm.

this one, "inexplicable by anything but animus towards the class it affects," violates the Equal Protection Clause. *Romer*, 517 U.S. at 632.

Today, our statutes and citizenry alike have a "continuing role in moving the Nation toward a more integrated society." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015). Drew Adams' simple plea to be treated equally in the eyes of the law is an important step along that path. Accordingly, for all the reasons set forth in this *amicus curiae* brief, LDF respectfully urges this Court to affirm the decision below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(g)(1)

The undersigned certifies that this brief complies with the applicable type-face and volume limitations of Federal Rules of Appellate Procedure 29(a)(5). This brief contains 5,880 words, exclusive of the components that are excluded from the word count limitation in Rule 32(f). This certificate was prepared in reliance upon the word-count function of the word processing system used to prepare this brief (Microsoft Word). This brief complies with the typeface and type style requirements of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using font size 14 Century Schoolbook.

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CERTIFICATE OF SERVICE

In accordance with Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on February 28, 2019, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PLAINTIFF-APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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