No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Respondent.

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

BRIEF OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit civil rights legal organization that, for over 75 years, has fought to enforce the guarantee of equal protection and due process in the United States Constitution on behalf of victims of discrimination. 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).

Having advocated for integration throughout the country and in numerous aspects of public life—including access to public restrooms—LDF now writes to highlight the ways in which history is at risk of repeating itself. Although focused primarily on vindicating the constitutional rights of victims of racial discrimination, LDF has also successfully fought against discrimination on the basis of sex, see, *e.g.*, *Phillips* v. *Martin Marietta*, 400 U.S. 542 (1972), and in places of public accommodation, 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 modified on other grounds*, 390 U.S. 400 (1968).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for *amici curiae* has obtained the consent of the parties to file this brief. Petitioner has given blanket consent in a letter filed with the Court, and Respondent has consented in an email addressed directly to counsel for *amici curiae*.

LDF has also participated as *amicus curiae* in cases across the nation about the rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals. See, *e.g.*, *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015); *United States* v. *Windsor*, 133 S. Ct. 2675 (2013); *Romer* v. *Evans*, 517 U.S. 620 (1996); *Bostic* v. *Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Jackson* v. *Abercrombie*, 585 F. App'x 413 (9th Cir. 2014); *Latta* v. *Otter*, 771 F.3d 456 (9th Cir. 2014); *Perry* v. *2 Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Ingersoll* v. *Arlene's Flowers*, No. 91615-2 (Wash. Feb. 16, 2017); *Strauss* v. *Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway* v. *Deane*, 932 A.2d 571 (Md. 2007); *Hernandez* v. *Robles*, 855 N.E.2d 1 (N.Y. 2006); *Masterpiece Cakeshop, Inc.* v. *Colorado Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. App. Apr. 25, 2016); *Gifford* v. *McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016).

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. Asian Americans have been subject to overt discrimination and segregation by governmental agencies, often justified by racially-biased beliefs. The resolution of issues of discrimination against transgender students presented in this case will affect Asian Americans and all minority groups.

Amici have a strong and enduring interest in advancing integration and ensuring that the protections of anti-discrimination laws apply with equal measure to every individual, and submit that their experience and knowledge will assist the Court in its resolution of the questions presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

While this case involves complex issues of agency deference and the proper interpretation of Title IX of the Education Amendments of 1972, one fundamental question lies at its core: can state actors physically separate and restrict individuals in public places solely because they are perceived to be different based on unfounded fears and prejudices?

Time and time again, this Court has rightly said that the principle of equality under the law dictates that the answer to this question is no. Accordingly, this Court has made clear that it is unconstitutional for a state to physically separate people into different schools or bathrooms by their race, regardless of the quality of the respective facilities; to separate and prohibit people from enjoying the benefits of marital union because of race or sex; to separate and restrict people from neighborhoods based on race or disability; and/or to separate and exclude people from the workplace based on race or sex. The broad application of this principle is central to the enduring strength of liberty and equal protection.

Given the vital importance of equal access to public accommodations and *amici*'s long experience challenging discrimination against disfavored groups—including discrimination justified by claims of "states' rights"—*amici* register three core points in this brief:

First, there is a lengthy and troubling history of state actors using public restrooms and similar shared spaces to sow division and instill subordination. Not so long ago, bathrooms nationwide were designated "Colored Only" and "Whites Only." A key lesson of that painful and ignoble era is that while private-space barriers like racially segregated bathrooms may have seemed to some like

minor inconveniences or insignificant sources of embarrassment, they were in fact a source of profound indignity that inflicted deep and indelible harms on individuals of both races, and society at large. This disreputable tradition of state and local governments enshrining fear or hostility toward a disfavored group of people into laws requiring their physical separation from others should encourage this Court to view with skepticism the rationales proffered by local officials here.

Second, state officials often justified physical separation in restroom facilities, swimming pools, and marriage by invoking unfounded fears about sexual contact and exploitation. As demonstrated below, the purported concerns about sexual predation currently used as a basis for excluding transgender students from school bathrooms uncomfortably echo those used to justify the separate bathrooms for racial minorities.

Third, certain physical-separation rules that were applied to African Americans were also justified as protectionist—*e.g.*, for the good of the African-American community and/or to protect African-Americans from harm that could arise from others' feelings of discomfort. Eventually, these kinds of rules were rejected by both the courts and society at large because they conflict with the foundational constitutional principle that government shall not distinguish between people based on sex, race, or other arbitrary, perceived differences.

The arguments offered to defend the discriminatory singling out of G.G. are painfully similar to those that this Court long ago deemed to be insufficient to justify discrimination based on race. The proposition that G.G. should go back to using the "separate restroom," Pet. App. 88a, parrots the functionalist logic that this Court discarded along with "separate but equal."

The Trump Administration's recent withdrawal of the guidance on transgender students and its description of bathroom access as a "states' rights issue"[2] only amplifies the disconcerting historical echoes in this case. State and local officials often invoked "states' rights" as a basis for opposing this Court's decisions and insulating prohibited discrimination from statutory and constitutional review. Indeed "states' rights" was the frequent refrain of officials who fought against racial integration, including in bathrooms. Ultimately, however, the claim of "states' rights" has no relevance to this Court's interpretation of a federal statute—in this case Title IX—as states are bound by this Court's interpretation of federal law.

We must not repeat the mistakes of the past. These all-too-familiar arguments—about sexual contact, predation, danger, and discomfort—remain both factually baseless and legally immaterial. Instead, the weight of precedent and the guarantee of equal protection inexorably support this Court in recognizing G.G.'s simple and inherent dignity by letting him use the boys' bathroom with his peers.

In "striving to achieve our 'historic commitment to creating an integrated society,'" *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (citation omitted), our nation has demonstrated a consistent capacity to move forward. *Brown* v. *Board*, *Loving* v. *Virginia*, and *Obergefell* v. *Hodges* powerfully demonstrate that forms of equality that were once inconceivable can, and do, become

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[2] See Press Briefing by Press Secretary Sean Spicer, Feb. 23, 2017, https://www.whitehouse.gov/the-press-office/2017/02/23/press-briefing-press-secretary-sean-spicer-2232017-15/ ("[I]f a state wants to pass a law or rule [about transgender bathrooms] * * * that's their right. But it shouldn't be the federal government getting in the way of this.").

indisputable. We are confident that the same will ultimately prove true for transgender students. The Court should affirm the decision below.

ARGUMENT

The Gloucester County School Board ("School Board") has adopted a policy of singling out and physically separating certain students it perceives to be different based on an essential characteristic of their person. Specifically, nearly all students can use the bathroom that is consistent with their identity as male or female. However, G.G. and other transgender students[3] are not permitted to use the bathroom that aligns with their gender identity. Instead, they are relegated to separate, individual bathrooms away from other students.

To justify such blatant and unabashed discrimination and differentiation among students of the same gender, the School Board and its supporters contend that allowing transgender students to use a bathroom consistent with their gender identity would endanger or violate the privacy of other students. But the claim of danger is demonstrably false, and the Board's own actions undermine its purported concern for the privacy needs of non-transgender students vis-à-vis their transgender peers. At the same time that it excluded transgender students from the regular student bathrooms, the Board instituted changes *within* those bathrooms "to improve general privacy for *all* students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms,

[3] The School Board labels these students as having "gender identity issues."

and constructing single-stall unisex restrooms available to all students." Pet. App. 11a (emphasis added).[4]

In short, like other physical-separation rules in this tradition, the patina of legitimacy the School Board sought here by invocations of safety and privacy concerns disappears upon close examination and reveals instead discomfort, fear, and hostility toward transgender students because of their gender identity. Indeed, the decision below plainly described what prompted the rule: "Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a 'young lady.'" Pet. App. 10a. "One speaker called G.G. a 'freak' and compared him to a person who thinks he is a 'dog' and wants to urinate on fire hydrants." Pet. App. 11a. Neither discomfort nor hostility can justify disparate treatment by the state.

The remainder of this brief shows the connections between this policy and others that, in the name of safety, order, and/or privacy, sought impermissibly to rely on fear, discomfort, and hostility to impose physical separations between one group of people and another. When assessing the School Board's claims here, therefore, it is especially important to consider the troubling history of physical-separation rules involving bathrooms, *infra* § I, how unfounded fears of sexual predation have often been used to justify discrimination, *infra* § II, and how this Court and lower courts have struck down physical-separation rules in these and various other contexts, recognizing the discomfort and unsupported fears behind them, *infra* § III.

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[4] See also Speaker Tim Moore (@NCHouseSpeaker), Twitter (Feb. 23, 2016 9:39 AM), https://twitter.com/NCHouseSpeaker/status/702140832867074052/ (statement by North Carolina Speaker of the House that transgender bathroom access posed "major public safety issue.").

I. THE PHYSICAL SEPARATION OF BATHROOMS BY RACE WAS CONTROVERSIAL AND HARMFUL.

The School Board asserts that this case is novel because it involves transgender students in restrooms.[5] But history reveals that the exclusion of transgender students from bathrooms relies on a time-tested tactic of seizing upon sensitivities regarding bathrooms to sow division and discord.

The archetypal example is the physical separation of bathrooms by race, a defining feature of the Jim Crow era. "Public 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." Richard Kluger, *Simple Justice: The History of* Brown *v.* Board of Education *and Black America's Struggle for Equality* 86 (1975). Because the courts and the country now see that type of separation of bathrooms as invidious and unconstitutional, it is worth examining the history and harms involved.

Before the Civil Rights Act of 1964, laws requiring the racial segregation of bathrooms were widespread. Typifying these rules was a Florida Board of Health provision stating that "'where colored persons are employed or accommodated' separate toilet and lavatory rooms must be provided." *Robinson* v. *State of Fla.*, 378

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[5] In actuality, protections for transgender persons are not new, as federal law prohibits discrimination on the basis of sex, including on the basis of gender stereotypes. See, *e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989); *Glenn* v. *Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith* v. *City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Rosa* v. *Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk* v. *Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

U.S. 153, 156 (1964) (footnote omitted). An Alabama ordinance likewise specified that in workplaces, public accommodations, and in certain "multiple dwellings," "separate water closets or privy seats within completely separate enclosures shall be provided for each race * * * ." *King* v. *City of Montgomery*, 168 So. 2d 30, 31 (Ala. Ct. App. 1964).

Among other settings, some courthouses physically separated bathroom users based on race. In *Dawley* v. *City of Norfolk*, 260 F.2d 647 (4th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959), for example, a Black lawyer sought to enjoin a Virginia city "from maintaining certain signs in the State courthouse * * * indicating the segregation of the races in the public restrooms maintained in the building for men and women." At the time, the federal courts declined to intervene, observing simply that "[t]he matter was one which affected the internal operations of the court of the State." *Ibid.* Similar segregation occurred in other parts of government, as well. "Under President [Woodrow] Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off [and] separate bathrooms * * * were provided * * * ." *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 394 (1978).

In the 1950s, still more of these laws governing bathrooms were enacted or reinforced in response to this Court's rulings in *Brown* and *Brown II*, as state officials tried to galvanize resistance to integration. "By 1956, Senator [Harry] Byrd [of Virginia] had created a coalition of nearly 100 Southern politicians to sign on to his 'Southern Manifesto,' an agreement to resist the implementation of *Brown*." LDF, Brown *at 60: The Southern Manifesto and "Massive Resistance" to* Brown, http://www.naacpldf.org/brown-at-60-southern-manifesto

-and-massive-resistance-brown/. That same year, legislators in Louisiana passed a series of bills intended to flout federal integration mandates, including by requiring segregation in bathrooms. Adam Fairclough, *Race and Democracy: The Civil Rights Struggle in Louisiana, 1915-1972*, 205 (2008). See also Katie Riley, *'Little Rock Nine' Student: Transgender Bathroom Debate Is Part of Civil Rights Fight*, Time, May 13, 2016, http://time.com/4329931/transgender-bathroom-obama-law-debate-civil-rights/ (comparing personal experience of integrating school post-*Brown* in 1957 with that of transgender students today).

Through the 1960s, physical-separation rules about bathrooms persisted, were often enforced by violence and sparked intense political conflict. For example, in 1961, a group of Freedom Riders embarked on a bus trip to commemorate the *Brown* decision and faced beatings when they attempted to use whites-only restrooms and other segregated facilities in South Carolina. Birmingham's Commissioner of Public Safety, "Bull" Connor, stated that "if the Negros attempt to use the restroom in the [bus] depot, Klansman are to beat them in the rest room and 'make them look like a bulldog got a hold of them'; then remove the clothing of the victim and carry the clothing away. If the nude individual attempts to leave the restroom, he will be immediately arrested and it will be seen that this person is sent to the penitentiary." Raymond Arsenault, *Freedom Riders: 1961 and the Struggle for Racial Justice* 92 (2011). When the Freedom Riders reached Alabama, a mob attacked them so brutally that it resulted in hospitalizations and the journey had to be cut short. In 1966, in Tuskegee, Alabama, "a white gas station attendant shot and killed, Sammy Younge, Jr., a black Navy veteran and member of [the Student Nonviolent Coordinating Committee], as he attempted to use a 'white' toilet." Nat'l Park Serv., U.S. Dep't of the

Interior, *Civil Rights in America: Desegregation of Public Accommodations* 1, 79-80 (2004, rev. 2009).

These state laws requiring separate facilities visited an immeasurable indignity on African Americans. To avoid it, many Black parents instructed their children to use the facilities at home and avoid using segregated public facilities. See, *e.g.*, Vernon E. Jordan Jr., *Movies That Unite Us*, N.Y. Times, Feb. 19, 2017, at SR3. Often the use of segregated bathrooms involved walking long distances, in front of others, which further underscored the separateness and shame involved. See Margot Lee Shetterly, *Hidden Figures: The American Dream and the Untold Story of the Black Women Mathematicians Who Helped Win the Space Race* 108 (2016) ("It was the proximity to professional equality that gave the slight [of having no "Colored" restrooms in the building] such a surprising and enduring sting. * * * It was difficult enough to rise above the silent reminders of Colored signs on the bathroom doors and cafeteria tables. But to be confronted with the prejudice so blatantly, there in the temple to intellectual excellence and rational thought, by something as mundane, so ridiculous, so universal as having to go to the bathroom [was especially hurtful] * * * .").

Dr. Martin Luther King, Jr. eloquently recounted his experience with segregated bathrooms:

> I looked over and saw another sign which said "Men." "Colored Men" and "Men." So I thought I was a man [and I used the "Men's" room]. * * * But as soon as I walked up, there was a colored man in there; he was working in there [as an attendant]. * * * [H]e looked over at me and said: "The, the, the colored room is over there." I didn't say anything; I just stood there. But he came up and touched me, and said: 'You belong over there; that's where the colored room is." I said: "Are you speaking to me?" 'Yes, sir, yes, sir. You see,

> the colored room is over there." I said: "Well, I'm going to stay here, right here."

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). In the adjoining passage, Dr. King highlighted why this sort of experience was so damaging and painful:

> Segregation not only makes for physical inconveniences, but it does something 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. But in the midst of this, we must maintain a sense of dignity and self-respect.

Ibid. Consistent with Dr. King's observation, *amicus* LDF, in cases as far back as *Brown*, presented evidence demonstrating that segregation—including in restrooms—hurts not just minorities but also majority groups. See R.L. Carter, *The Effect of Segregation and the Consequences of Desegregation: A Social Science Statement*, reprinted in 37 Minn. L. Rev. 427 (1953). See also *Wright* v. *Rockefeller*, 376 U.S. 52, 69 (1964) (Goldberg, J., dissenting) ("[T]he Court's decisions since *Brown* * * * hold that harm to the Nation as a whole and to whites and Negroes alike inheres in segregation.").

Some of the vestiges of segregated bathrooms persist to this day. See, *e.g.*, Barbara Maranzani, *9 Things You May Not Know About the Pentagon*, History.com, Jan. 15, 2013, http://www.history.com/news/9-things-you-may-not-know-about-the-pentagon/ (Pentagon still has twice as many bathrooms as necessary because it was designed to separate Black and white employees). These "vestiges of discrimination—although clearly not the most pressing

problems facing Black citizens today—are a haunting reminder of an all too recent period of our Nation's history." *Rogers* v. *Lodge*, 458 U.S. 613, 632 n.1 (1982) (Stevens, J., dissenting) (noting, almost two decades after the Civil Rights Act of 1964, that "faded paint over restroom doors [at the Burke County, Georgia courthouse] does not entirely conceal the words 'colored' and 'white'").

The injuries arising from segregation remain hard to cure. Even today, "powerful racial stereotype[s]—that of black men as 'violence prone,'" *Buck* v. *Davis*, No. 15-8049, 2017 WL 685534, at *15 (U.S. Feb. 22, 2017), or that "African-American men want to rape white women," *Fulmore* v. *M & M Transp. Servs., Inc.*, No. 1:11-CV-00389, 2014 WL 1691340, at *8 (S.D. Ind. Apr. 29, 2014), have a detrimental effect on the treatment of Black people. See also *Shorter* v. *Hartford Fin. Servs. Grp., Inc.*, No. 3:03-CV-0149, 2005 WL 3536122, at *4 (D. Conn. Dec. 6, 2005).

II. STATE OFFICIALS HAVE INVOKED FEARS ABOUT SEXUAL CONTACT AND PREDATION BASED ON ODIOUS STEREOTYPES TO JUSTIFY RACIAL SEGREGATION AS WELL AS CRIMINALIZATION OF LESBIAN AND GAY INDIVIDUALS.

Misplaced concerns about sexual contact and predation have long been a central dimension of the rationales proffered to justify rules and practices that physically separate people based on class, sex, and race. Today, even in the intimate context of bathing facilities, these rationales and the separations they sought to justify are widely understood to reflect nothing more than discomfort, dislike, and fear, all impermissible bases for government action. In resolving G.G.'s case, this Court should consider how state officials have impermissibly invoked similar anxieties about sexual exploitation in the

context of race-based separation of bathrooms, *infra* § II.A, and swimming pools, *infra* § II.B, interracial marriage, *infra* § III.C, and other laws governing lesbian and gay individuals, *infra* § III.D.

A. Bathrooms

Speculation and stereotypes about sexual contact and disease were used to justify the racial segregation of bathrooms. A 1957 Arkansas newspaper advertisement entitled, "[w]hen you start race-mixing where are you going to stop?" featured the loaded question "[b]ecause of the high venereal disease rate among Negroes * * * [will] white children be forced to use the same rest room and toilet facilities * * * ?" Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 The Ark. Historical Soc'y 42, 52 (2003). Public fliers hawked "uncontested medical opinions" that "girls under 14 year of age are highly susceptible to disease if exposed to the germs through seats, towels, books, and gym clothes." *Id.* at 63-64. When President Franklin Roosevelt eliminated racial segregation in bathrooms, "white female government workers staged a mass protest, fretting that they might catch venereal diseases if forced to share toilets with black women." 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/?utm_term=.089d65aa02f6/.

These beliefs, of course, had no basis in reality. For example, in the landmark case of *Turner* v. *Randolph*, 195 F. Supp. 677 (W.D. Tenn. 1961), Black residents of Tennessee, represented by Thurgood Marshall and others, challenged segregation in public libraries. The City of Memphis responded by voluntarily integrating certain

facilities, but "expressly reserved" the question of "whether [the City] should be required to desegregate restrooms and toilet and lavatory facilities." *Id.* at 678. "In an apparent effort to support [segregation in bathrooms] as a reasonable and valid exercise of the police power, the [City] introduced proof * * * that the incidence of venereal disease is much higher among Negroes * * * than among members of the white race." *Id.* at 679-80. But the court flatly rejected that argument and discarded testimony of state public health officials, finding 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. Moreover, the court reasoned that "in the absence of proof, one would be led to believe that venereal disease would not be expected to occur [differently] to any appreciable extent among" different races. *Ibid.*

Trepidations regarding contact and "contamination" in the small setting of a restroom were also often offered as justifications for segregating these facilities. See, *e.g.*, C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 Rutgers L. Rev. 409, 423 (2009) (discussing privacy, cleanliness and morality rationales for race-based bathroom rules). As one scholar observed, "[t]he point of maintaining racially segregated bathrooms * * * was to make sure that blacks would not contaminate bathrooms used by whites." Richard A. Wasserstrom, *Racism and Sexism, in Race and Racism* 319 (Bernard P. Boxill ed., 2001). See also Griffin, *supra*, 61 Rutgers L. Rev. at 424 (stating that racially segregated facilities "taught both whites and blacks that certain kinds of contacts were forbidden because whites would be degraded by the contact with the

blacks").[6] Such arguments about unduly close contact in bathrooms were plainly pretextual, and vague assertions about discomfort or privacy could hardly justify facially disparate treatment on the basis of sex. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 540-46 (1996).

B. Swimming Pools

Similar sexual fears were invoked in the closely related context of swimming pools. Long before racial separation was deemed "natural" in swimming facilities, sex separation was the norm. "During the nineteenth century, swimming divided along social lines, the most conspicuous being gender." Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* 2 (2007). "Because of [a] combination of factors—bodily exposure, physical contact, and difficulty of surveillance—public officials demanded that males and females swim separately." *Ibid.* Beginning in the 1920s, public officials began to allow men and women to swim together, *id.* at 89, apparently having decided that the privacy and safety concerns that had supported the previous physical-separation rule were not borne out. Yet municipal officials relied on those same invalidated concerns to enforce separation based on race: "When cities permitted males and females to swim together, white swimmers and public officials suddenly attempted to separate blacks from whites." *Id.* at 124.

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[6] Concerns about interpersonal discomfort were also sometimes cloaked in terms of commerce. A Maryland movie theater, which held a long-term lease from the local government, argued that its racially segregated seating and bathrooms were "the only policy [the company] could profitably pursue." *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49, 50 (D. Md. 1960). See also *Robinson* v. *State of Fla.*, 378 U.S. 153, 154 (1964) (business arguing that eliminating the separation rule "would be 'very detrimental to our business' because of the objections of white customers").

As the concerns that prompted sex segregation were recast to justify race-based rules, fears about sexual predation came to the fore. "[N]orthern whites in general objected to black men having the 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." Wiltse, *supra*, at 124; see generally William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. Rev. L. & Soc. Change 583, 588 (2014) ("[S]tereotypes about black cleanliness and black dangerousness—particularly the perceived threat of sexual violence to white women—and the stigma attached to commingling of the races in intimate settings such as swimming pools had produced in whites a deep and visceral aversion to sharing public swimming facilities with blacks.").

In the mid-1950s, the federal district court that upheld Maryland's racial separation of bathing facilities echoed these concerns, observing that the "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 & City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (citation omitted). By contrast, the court took pains to point out that the state parks agency had declined to segregate other facilities within the park, limiting its physical-separation rules to bath houses and beaches and adding that the state itself had "steadily broadened the permissible and customary fields of interracial activities." 123 F. Supp. at 202.

Yet according to the court, swimming facilities and bath houses were a step too far because they "are for all ages, and are practically unsupervised, except by young life guards." *Lonesome*, 123 F. Supp. at 203. The court acknowledged that the separation operated, for the Black plaintiffs, as a barrier to "social integration with white people." *Id.* at 204. The court added: "The natural thing in Maryland at this time—whether at private or public beaches or pools—is for Negroes to desire and choose to swim with Negroes and whites with whites, and for the proprietors of the facilities—whether public or private—to provide separate bathhouses, beaches and pools for the two races." *Id.* at 205.

C. Interracial Marriage

The prospect of interracial marriage was long exploited as the ultimate fear in the Jim Crow era and was closely intertwined with the maintenance of segregated schools and the physical-separation rules imposed on otherwise shared spaces. Indeed, "a primary reason for segregated schooling was to foreclose the interracial intimacy that might be sparked in integrated classrooms." Dorothy E. Roberts, Loving *v.* Virginia *as a Civil Rights Decision*, 59 N.Y.L. Sch. L. Rev. 175, 176 (2014-2015).

The specter of sexual predation ran throughout the discourse around anti-miscegenation laws. The New York Times described as the "ultimate question" of the *Loving* v. *Virginia* case: "Would you like to have your daughter marry a Negro?" Roberts, *supra*, at 188. Contemporaneous news coverage confirmed the intense anxiety around cross-racial sexual contact, especially between Black men and white women. *Id.* at 176 n.6 (quoting a 1961 L.A. Times article: "Miscegenation is a deep-rooted fear and unquestionably one of the foremost concerns of the Southern citizen.").

Loving challenged head-on the deep-rooted stereotypes and fears that underlay this separation and subordination of African Americans in marriage. As the case made its way to this Court, it was clear that the physical division of races was a central legal issue. 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). Likewise, when the Virginia Supreme Court upheld the state ban, it relied primarily on an earlier decision, *Naim* v. *Naim*, which involved an Asian-American and white couple and held 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. *Commonwealth*, 147 S.E.2d 78, 80 (Va. 1966). Virginia defended its ban, *inter alia*, on the grounds that "intermarriage constitutes a threat to society," citing purportedly scientific evidence "that the crossing of distinct races is biologically undesirable and should be discouraged." See Br. of Appellee, *Loving*, 388 U.S. 1, 1967 WL 113931, at *44, 48 (Mar. 20, 1967) (Civ. No. 395). Before this Court, LDF pointed out that "laws against interracial marriage are among the last of such racial laws with any sort of claim to viability. [They] are the weakest, not the strongest, of the segregation laws." Br. of the National Association for the Advancement of Colored People as *Amicus Curiae*, *Loving*, 388 U.S. 1, 1967 WL 113930, at *14 (Feb. 28, 1967) (No. 395).

This 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. *Ibid.* ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."). *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, *Bowers*, 1985 WL 667939 (Dec. 17, 1985) (Civ. No. 85-140). In *Lawrence* v. *Texas*, oral argument featured discussion of whether "a State could not prefer heterosexuals or homosexuals to teach Kindergarten * * * [because of the justification that children would be harmed because they] might be induced to—to follow the path of homosexuality." 2003 WL 1702534 at *20 (2003). See also *Lawrence*, 539 U.S. at 602 (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."). Compare Br. of Pet'r, *Gloucester Cty. School Bd.* v. *G.G.*, 2017 WL 65477, at *37, 40 (filed Jan. 3, 2017) (arguing that some people may exploit transgender bathroom access for "less worthy

reasons," which might create a "hostile environment" for sexual assault victims).

Likewise, rationales offered to support excluding openly gay and lesbian individuals from both military and civil service echoed fears of sexual predation. Arguments expressed the concern that "showering bodies would be subjected to unwanted sexual scrutiny." Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201, 227, 228 (2012). Decades earlier, 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 and 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*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013) (quoting Letter from John W Macy to the Mattachine Society of Washington (Feb. 25, 1966) at 2-4).

As this Court has made clear, dislike of or discomfort around gays and lesbians is not a legitimate justification for discrimination. *Romer* v. *Evans,* 517 U.S. at 631-32. 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). See also *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985).

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 gays and lesbians. This Court must treat the arguments today with similar skepticism.

III. THIS COURT HAS STRUCK DOWN PHYSICAL-SEPARATION RULES THAT IMPERMISSIBLY SOUGHT TO PROTECT SOME INDIVIDUALS FROM PERCEIVED DANGERS OR DISCOMFORT WITH OTHERS.

Viewed more broadly, the bathroom-exclusion rule here 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, *infra* § III.A, workplaces, *infra* § III.B, and housing, *infra* § III.C.

A. Public Recreational Facilities

Local and state governments have imposed group-based restrictions on the use of recreational facilities—like public parks, golf courses, and baseball and football fields, among others—on the grounds of avoiding discomfort or protecting the public.

For example, New Orleans urged that the Court's rationale in *Brown* v. *Board* should not carry over to its 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. 1958), *aff'd*, 358 U.S. 54 (1958). This Court called the argument "completely untenable." *Ibid.* Similarly, lower courts rejected a

number of related physical-separation rules in public recreational facilities.[7]

Notably, when the City of Memphis highlighted safety as the reason for delaying the integration of public parks, this Court refused to accept the purported justification at face value. *Watson* v. *City of Memphis*, 373 U.S. 526, 535-36 (1963) ("It is urged that this proposed segregation will promote the public peace by preventing race conflicts."); see also *id.* at 535 (describing the City's contention 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." *Watson*, 373 U.S. at 536. Indeed, the Court recognized that while the police chief had testified about "general predictions" of threatened violence, he "gave no concrete indication of any inability of authorities to maintain the peace." *Ibid.* The Court also concluded: "There is no indication that there had been any violence or meaningful disturbances when other

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[7] See *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) (rejecting a racial-separation rule on city golf courses); *Ward* v. *City of Miami*, 151 F. Supp. 593 (S.D. Fla. 1957) (finding city law restricting African Americans' use of golf courses to one day per week unconstitutional); *Holley* v. *City of Portsmouth*, 150 F. Supp. 6 (E.D. Va. 1957) (extending a temporary injunction against a city law restricting African Americans' use of golf courses to one day per week); *Moorhead* v. *City of Fort Lauderdale*, 152 F. Supp. 131 (S.D. Fla. 1957), *aff'd*, 248 F.2d 544 (5th Cir. 1957) (rejecting Fort Lauderdale's law that denied access to a public golf course based on race).

recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful." *Ibid.* (footnote omitted). This is especially important in the context of the instant case, where the School Board identified concerns about safety of students, Pet. App. 10a, 26a, but similarly offered no factual evidence whatsoever to support its position.

In addition, the Court in *Watson* observed, "there was no factual evidence to support the bare testimonial speculations that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand." 373 U.S. at 536-37. School officials here, charged already with responsibility for keeping bathrooms safe for their students, have not indicated, other than in a vague, nonfactual manner, that the inclusion of transgender students in the bathrooms that conform to those students' gender identity will unduly tax their ability to perform this function.

More broadly, arguments about danger to and discomfort of the public were also sometimes offered to justify segregation in public swimming facilities, in addition to the sexualized fears discussed above, *supra* § II.[8] But however the rationale was couched, courts

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[8] 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 & City Council of Baltimore City*, 220 F.2d 386, 387 (4th Cir. 1955), *aff'd per curiam*, 350 U.S. 877 (1955). They advanced another discomfort-focused objective as well, urging that "'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

around the country rejected such physical-separation rules. See, *e.g.*, *Willie* v. *Harris Cty.*, 202 F. Supp. 549 (S.D. Tex. 1962) (rejecting racial-separation rule in city parks); *Fayson* v. *Beard*, 134 F. Supp. 379 (E.D. Tex. 1955) (same); *Tate* v. *Dep't of Conservation & Dev.*, 133 F. Supp. 53 (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 others have previously sought to rely on protectionist rationales for physically separating or excluding particular groups of people from certain workspaces. These physical-separation rules have similarly come to be understood as fundamentally impermissible.

This Court has previously expressed skepticism toward, and ultimately rejected, for example, 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.*, 490 U.S. 187 (1991). The purported interest—in protecting the health of women and the children they might have—had the patina of legitimacy. But by examining the rule in context, where others who remained in the space would also be vulnerable to potential injury, the Court recognized that the health and safety rationale could not explain the sex-based exclusion. *Id.* at 198 ("Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the

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group." *Lonesome*, 123 F. Supp. at 202 (D. Md. 1954); see also *ibid.* (expressing concern about "racial feeling" that would result from removing the physical-separation rules).

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.

The Court noted as well that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Johnson Controls*, 490 U.S. at 199. Instead, "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Ibid.*

Additionally, a deeply divided Court grappled with a similar justification in *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), involving a Michigan law that forbade 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 the oversight assured through ownership by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." *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." *Ibid.*

While a majority at the time accepted that argument, the three dissenters were able to see 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 belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being

of women. * * *" *Goesaert*, 335 U.S. at 468 (Rutledge, J., dissenting). Roughly a quarter-century after *Goesaert*, the Seventh Circuit easily invalidated a Milwaukee ordinance that imposed a similar physical-separation rule, prohibiting female employees from sitting at the bar or with male customers at tables. See *White* v. *Fleming*, 522 F.2d 730 (7th Cir. 1975).

In the instant case, although there is evidence of hostility toward G.G. in the physical-separation rule, even if there were not, the facial exclusion of students from bathrooms based on gender likewise amounts to an explicit and impermissible form of discrimination.

C. Residential Restrictions

While arising in somewhat different factual circumstances, the physical separation of homes and neighborhoods based on discomfort with a particular group of people also involves the same underlying principle and, therefore, presents troubling historical parallels. The state applied physical-separation rules at a broader level: instead of separating persons from a given room or facility, it separated them from an entire neighborhood or environment altogether.

For example, in *City of Cleburne*, Texas refused to authorize a group home for people with intellectual disabilities under its zoning regulations. The city permitted many types of group residences to be developed in the area, including boarding, lodging and fraternity and sorority houses as well as hospitals, sanitariums and nursing homes—but it made a special exception for similar homes for "the insane or feeble-minded or alcoholics or drug addicts." 473 U.S. at 436 n.3 (emphasis omitted). For these groups, Cleburne required a special use permit, which had to be renewed annually and could only be

obtained with the signatures of nearby property owners and the approval of the local planning commission. *Ibid.*

When the Cleburne Living Center applied for the special use permit, the City Council refused the request. Like here, the City identified safety as a reason for its insistence on separating people with "mental retardation" from the general population. The Council said it "feared that the students [from a nearby school] might harass the occupants of the [] home" and noted concerns about the home's location on an old flood plain. *City of Cleburne*, 473 U.S. at 449. Moreover, the Council "expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents." *Id.* at 450. It offered another neutral-sounding explanation as well—an interest in "avoiding concentration of population and * * * lessening congestion of the streets."

The Court, however, concluded that the safety concerns did not hold up and that Cleburne was using safety as a legitimate-sounding but unavailing stand-in for "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." *City of Cleburne*, 473 U.S. at 448. See also *id.* at 449 (describing the permit denial as "based on [] vague, undifferentiated fears"). Moreover, the Court examined the Council's specific justifications, and, under rational basis review, could see that while these "wishes or objections of some fraction of the body politic" might be deeply felt, they did not provide a permissible basis for physical separating those with intellectual disabilities from others. *Id.* at 448.[9]

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[9] Much earlier in the 20th century, the Court considered another neighborhood-separation rule that expressly sought to "prevent conflict" and "to preserve the public peace and promote the general welfare." *Buchanan* v. *Warley*, 245 U.S. 60, 70 (1917) (discussing race-

In another prominent housing case involving physical-separation rules, the City of Akron amended its charter to allow private residents to discriminate based on race in home sales notwithstanding the city's fair housing ordinance. *Hunter* v. *Erickson*, 390 U.S. 385 (1969). Although the discrimination in *Hunter* was private—individual homeowners "'had specified they did not wish their houses shown to negroes'"—the city acted, through its charter amendment, to protect that race-based barrier. *Id.* at 387. The City then invoked its constituents' discomfort as a rationale for its action, stressing that the amendment should survive challenge because it involved "the delicate area of race relations." *Id.* at 398. This Court, however, flatly rejected the position that concerns about delicate social relations, however strong they might have been in Ohio in the late 1960s, would be a sufficient reason to permit a rule authorizing physical separation based on race.

Finally, the now widely-discredited decision of *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. There, as is well known, the "twin dangers of espionage and sabotage" were invoked to

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based zoning ordinance). Here, too, the Court recognized the legitimacy of general concerns with safety. *Id.* at 81 (describing the aims of preventing racial conflict and preserving public peace as "desirable" and "important"). However, the Court held that these arguments were insufficient to justify the discriminatory barrier imposed and rejected the government's argument that property values would drop without the ordinance. *Id.* at 82. The Court also observed that the race-based barrier did not provide the protection it purported to offer: "property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results." *Ibid.*

support a rule requiring Japanese-Americans to be forced out of their residences and into internment camps. 323 U.S. 214, 217 (1944). Because those fears were baseless, Mr. Korematsu's conviction was ultimately vacated, Congress awarded reparations, there was an official apology by the President, and an extraordinary confession of error by the United States. 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/ (highlighting the government's failure to "exhibit[] complete candor" and "reli[ance] on gross generalizations").

CONCLUSION

This Court's precedents make clear that the government may not physically separate and restrict individuals only because they are perceived to be different. That is particularly true when the underlying justification is built 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 sow division and effectuate subordination rather than to provide meaningful protection. Such shaky arguments are bound to fail—as this Court has repeatedly recognized in the contexts of racially segregated bathrooms, the criminalization and exclusion of lesbian and gay individuals, and the varied restrictions on African Americans, Asian Americans, women, people with intellectual disabilities and others in public facilities, workplaces, and residential zoning.

Against the backdrop of these decisions, the separation of bathrooms by race is now rightly seen for what it is: immoral, insidious, and unambiguously impermissible.

Even while striving to overcome the enduring vestiges and latest iterations of prejudice, *Brown*, *Loving*, *Obergefell* and other illustrious precedents reaffirm that our nation has a vast capacity to progress: "[W]hat was once a 'natural' and 'self-evident' ordering [of constitutional 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 465 (Marshall, J., concurring). Indeed, not one of the crass, stereotypical predictions about the dangers of racially integrating restrooms—or swimming pools or neighborhoods or beyond—have come to fruition.

Likewise here, concerns about dangers to non-transgender students from the presence of transgender students in the bathrooms are belied both by evidence that transgender students, including G.G., have been using bathrooms without harm to others and by the well-documented harms of discrimination and violence against transgender youth. See, *e.g.*, U.S. Dep't of Health & Human Services, *LGBT Youth: Experiences With Violence*, Nov. 12, 2014, https://www.cdc.gov/lgbthealth/youth.htm/.

Neither the transgender context nor the prospect of momentary public apprehension should dissuade this Court from applying its precedents straightforwardly. Indeed, this Court has rejected the notion that rights are rigidly limited by prior contexts and past prejudices, finding that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied * * * ." *Obergefell*, 135 S. Ct. at 2602 (citing *Loving*, 388 U.S. at 12; *Lawrence*, 539 U.S. at 566-67).

To be sure, there was a time when there was widespread opposition to integration and to the Civil Rights Act, which

a third of all Americans opposed as of 1964. Yet by 2014, a full 81% of Americans believed the passage of the Act was good for the country, with whites approving at 83%. See Roper Center for Public Opinion Research, *Public Opinion on Civil Rights: Reflections on the Civil Rights Act of 1964*, https://ropercenter.cornell.edu/public-opinion-on-civil-rights-reflections-on-the-civil-rights-act-of-1964/. Similarly, public opinion on interracial marriage has shifted dramatically in favor of greater inclusion, as the nation came to embrace the wisdom of *Loving*: in 1958, only 4% of Americans approved of interracial marriage (and therefore 96% disapproved)—whereas by 2013, 96% of adults age 18-29 approved. See Gallup, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958* (July 25, 2013).

Today, our statutes and citizenry alike have a "continuing role in moving the Nation toward a more integrated society," *Inclusive Communities Project*, 135 S. Ct. at 2526. G.G.'s simple plea to be treated equally in the eyes of the law is an important step along that path.

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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