

No. 26-286

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*In the Supreme Court of the United States*

OLYMPUS SPA, ET AL.,

PETITIONERS

v.

ANDRETA ARMSTRONG, EXECUTIVE DIRECTOR OF THE  
WASHINGTON STATE HUMAN RIGHTS COMMISSION, ET  
AL.,

RESPONDENTS

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

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**BRIEF OF FORMER PENNSYLVANIA  
HIGH SCHOOL STUDENTS AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

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## INTERESTS OF AMICI CURIAE<sup>1</sup>

Amici Curiae are former students from several school districts in Pennsylvania who experienced the nonconsensual violation of bodily privacy and a sexually harassing environment when their schools began allowing access to student locker rooms and restrooms based on self-professed gender identity rather than objective, biological sex. Amici describe the impact of policies that resulted in seeing the unclothed bodies of opposite-sex classmates, sometimes including their genitalia, without warning and without consent. These policies also permitted opposite-sex classmates to view *them* undressed and without consent.

Amici share their stories to provide perspective to the Court. They implore this Court to uphold the rights of entities like Olympus Spa to preserve bodily privacy on the basis of biological sex to prevent what happened to them—bodily privacy violations and sexual harassment.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than amici curiae or their counsel contributed money intended to fund preparation or submission of this brief. All parties were given timely notice of amici's intent to file.

## SUMMARY OF THE ARGUMENT

Expectations of sex-based intimate privacy are not narrow-minded, prudish, hateful, or superficial; rather they are innate, instinctively protective and part of our human experience. Amici recount their experiences with the unexpected and startling intrusions on their intimate bodily privacy by individuals of the opposite sex to enable the Court to understand why this issue is so important.

For context, a study of the history of civilization and particularly the industrialization of our modern society is helpful because it reveals that our expectations of bodily privacy reach back in time and are deeply rooted in this Nation's history. Moreover, they exemplify the rights and liberties that this Court identified as "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Washington v. Glucksberg*, 521 U.S. 702, 721–722 (1997) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Through the ages and across cultures, human civilizations have instinctively protected personal bodily privacy by guarding against unwanted exposure of one's own body and unwanted views of another's exposed body. Sex segregation of spaces where exposure is inevitable reflects this instinctive protection by acknowledging and respecting the anatomical differences between the sexes. From the bathhouse traditions of the medieval times through our modern age, sex separation in changing and bathroom spaces has been the definitive means of ensuring bodily privacy, even as the need for such facilities evolved and expanded over time. With the

industrialization of our society, the need for sex-separated toileting spaces became more urgent as society changed and as women began to enter the workforce and engage in public life. In what would become an early feminist issue, women fought hard for their own sex-separated private toileting and intimate spaces. Since that time, our laws and jurisprudence have served to further embed these rights, expanding and clarifying them in different contexts.

## ARGUMENT

### **I. Amici recount their experiences to illustrate the consequences that flow when sex-based bodily privacy is violated.**

The United States of America has always acknowledged rights of intimate bodily privacy. Today, simple courtesies found in daily experience, such as a knock on the door or posted notice by custodial staff before entering facilities of the opposite sex, demonstrate the respect Americans show for privacy. So, when laws like the Washington Law Against Discrimination are wielded to attack our most basic norms and expectations of bodily privacy, the resulting distress is sudden and shocking. Unsuspecting individuals are manipulated into nonconsensual surrender of their bodily privacy rights. By requiring either subjection to unwanted exposure to and by members of the opposite sex or surrender of the use of such space altogether, these laws virtually colonize same-sex spaces by the intrusion of opposite-sex bodies. Such laws impose the

very trauma that sex segregation was meant to protect against.

Lilyana Williams, Dean Lewis, Megan Miller, and M.M.<sup>2</sup> experienced this kind of exploitation firsthand as Pennsylvania students. Their school's gender-identity policies mandated abolition of sex-segregated bathroom and changing facilities in favor of access based on gender identity. This resulted in the actual or potential nonconsensual exposure of students' bodies to the opposite sex. For these students, seeing and being seen by members of the opposite sex in this setting violated their expectations of bodily privacy and caused distress and humiliation.

Lilyana Williams entered her senior year in high school as captain of the girls' track and field team. That year, the school permitted a male athlete to join the girls' team, and Lilyana found herself at the center of a team crisis as she and her teammates struggled with confusion, frustration, and discomfort over the loss of fairness and privacy in their own spaces. As team captain, Lilyana felt compelled to take on the role as advocate for her entire team. She faced open hostility and public criticism for her opposition to this invasion by a boy of the girls' team and private spaces. In time, her courage and leadership inspired school officials, parents, and community members to stand with her to defend the rights of female athletes. Through their efforts, the school board eventually adopted a policy requiring athletes to compete based on their biological sex.

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<sup>2</sup> Some of these individuals use pseudonyms to protect themselves against additional harassment and ridicule because of the stand they have taken.

Lilyana celebrates this Court's decision in *West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026), as vindication of the fairness she fought for.

Despite this victory, Lilyana still bears the trauma of the ordeal. She explains: "When people ask me what affected me most during that season, they often assume my answer is the competition. It isn't. The greatest loss wasn't a race. It wasn't a medal. It was something far more fundamental: the loss of privacy in a place where every girl should be able to expect it, without question."

Lilyana reflects on the sanctity and dignity of female-only spaces. "A locker room is more than just four walls. It is one of the few spaces reserved exclusively for women and girls, a place where teammates change clothes without fear, celebrate victories, encourage one another through defeats, laugh, cry, and build friendships that often last a lifetime. It is a place where vulnerability is protected, not exploited, because everyone shares the same expectation of privacy. For our team, everything changed almost instantly when that expectation was suddenly shattered."

She reflects on the impact: "As captain, I was proud of my team. Not because of our hard work, dedication, or accomplishments, but because of how we cared for each other through the friendships we had developed both on and off the field. Our team truly felt like family. But when a boy showed up on our team uninvited, the camaraderie we had built together disappeared, almost overnight."

For Lilyana, this was an irreparable loss: “I have never felt more disconnected from a group of people I had previously viewed as sisters. The locker room grew quiet. Conversations stopped. Laughter faded.” She was also acutely aware that some school officials had essentially abandoned them. “No one wanted to acknowledge the obvious, but every one of us felt it. We were uncomfortable, we were confused, and perhaps most painfully, we realized that the adults responsible for protecting us had decided our discomfort was a price worth paying. No one warned us. No one asked if we were okay. We were simply forced to undress in front of a confused boy every day and pretend that nothing had changed.” But for Lilyana and her teammates, “everything had changed. Many [girls] stopped changing in the locker room altogether. Instead, they changed in porta-potties outside, sacrificing their dignity and comfort because the one place designed to provide privacy no longer did. That was our reality.”

Lilyana does not view her advocacy as political, but as a matter of practical fairness. “This should never have been a controversial issue. Girls deserve fair competition. Girls deserve privacy. Girls deserve adults who have the courage to protect them. And children struggling with their identity deserve compassion rooted in truth, not the false promise that their reality can be rewritten. When we teach a generation that fairness is negotiable, that privacy is optional, and that speaking obvious truth is somehow an act of cruelty, we are not creating a more compassionate society, we are creating one where the rights of women and girls become conditional.”

Lilyana and her teammates know what it feels like to have one's privacy treated as optional, one's concerns dismissed, and one's dignity sacrificed for the sake of someone else's feelings. She concludes: "No young woman should ever have to fear that the very adults entrusted with protecting her will instead ask her to surrender her own boundaries. Women's privacy is not a privilege to be granted when convenient. It is a right that flows from our inherent dignity. It should never have to be negotiated, apologized for, or defended. Young women deserve to grow up knowing that their voices matter, that their boundaries will be respected, and that the spaces created for them will remain theirs. I continue to speak out, not because I enjoy controversy, but because I am compelled to defend truth, fairness and dignity for the next generation of girls."

When Megan Miller entered high school at age 15, she began her third year on the cross-country team. On her first day of practice for the new season, she and several teammates arrived early to get changed for practice. They assumed they were alone in the locker room until an unknown student emerged from a bathroom stall. Given the small size of the town and school team, Megan was puzzled to see someone she did not recognize in the locker room with the team. She became uneasy as she observed this student's build, height, mid-length hair, and male features but told herself that perhaps she was mistaken—that he may be just a flat-chested girl. After all, he was wearing women's athletic clothing. As this student positioned himself at a locker directly across from Megan, they were in direct view of each other.

Throughout practice, the coaches made no attempt to acknowledge or introduce the new teammate, a silence that was unsettling. At the end of practice, when the team gathered and the student spoke, all doubt as to his sex was erased. A male had joined the female team and was present in the locker room as they dressed.

Megan was shocked and felt betrayed by those in authority. Afterward, she found it difficult to trust her teachers and school administrators. It was clear to her that her own rights and her desire to control and protect her own bodily privacy didn't matter. Her rights had been erased. Even the intervention by her parents and others to address the matter with the school fell on deaf ears. School administrators dismissed their concerns as "making something out of nothing." Megan felt angry and mistreated and quit the team after that year. Meanwhile, this boy continued to use the girls' locker room and restroom. Megan recalls "how uncomfortable it was when he would walk toward us."

The sudden and unwanted intrusion of a male into the female team and locker room did not just affect Megan as a student. She carries the impact of the violation even as an adult, always wary and alert when walking into "women's" spaces. She states, "Women in America should not feel unsafe in women's public restrooms or private spaces." Megan fears not only for her own safety, but for all girls and women who will be unexpectedly exposed to males and exploited under similar policies.

This experience of humiliation and trauma is not limited to females. Dean Lewis was a junior in high

school, changing for gym in the boys' locker room, when he glanced behind him to see a female student standing behind him in a sports bra—a girl he had known since middle school. He recounts his “confusion, anxiety, and humiliation,” as he hastily dressed and rushed out of the locker room. He and several other boys immediately requested an appointment with their principal. They conveyed how uncomfortable and offensive it was to change clothes, shower, and use toilets and urinals with a girl in the boys' space. However, the principal made clear that the girl would continue to use the boys' locker room and admonished the male students to “make it as natural as possible.” For Dean, accepting this intrusion as “natural” was not possible.

Dean's parents contacted the school to intervene on his behalf, but school officials maintained their stance. When Dean refused to use the locker room under the school's terms, the school gave him two options: change clothes in a single-use bathroom or accept a lower gym grade for noncompliance. Dean recalls “this was a huge violation of my privacy and safety.”

Having exhausted all other options, Dean and his parents decided to litigate his school's denial of his sex-based privacy rights. Despite Dean's anonymity in the case, many in the school openly attributed the lawsuit to him. He became the target of hateful comments and rumors and was frequently summoned to the principal's office for false accusations. On one occasion, he was ordered to empty his pockets and backpack in front of his mother, who was called into the school. Fearing the relentless psychological and

social stress would negatively affect his graduation, Dean finished his junior year of high school and decided to finish his schooling at an online charter school. He mourns the loss of his senior year. “I was extremely disappointed to lose my senior year at my local high school. I missed my prom, and many other senior year events.”

Dean lost far more than a sense of normalcy and completion of his high school experience. He reflects on the privacy violations in the boys’ locker room: “Allowing men/boys and women/girls to use whichever bathroom, locker room, or other intimate sex-designated location they please, erodes a child’s sense of physical and psychological safety because it makes it easier for misconduct to occur. Children need a sense of safety and security.”

M.M. was a young woman with special needs who was enrolled in a school district’s work program for special-needs students. When a male identifying as a female entered the girls’ restroom, a group of confused special-needs girls waited outside. Those girls who chose to enter were forced to leave the girls’ bathroom to accommodate the comfort of the transgender-identifying male. Later, after her mother intervened, M.M. was told by the school that she could choose to share the girls’ bathroom with the boy or use the nurse’s bathroom. Being forced to make this choice caused M.M. anxiety and emotional distress. Instead of protecting M.M. and the other vulnerable young women, the school district cancelled their rights to accommodate this male. This matter continues today as a Title IX complaint.

As these amici have recounted, the vivid, real-time nature of these nonconsensual violations of their bodily privacy cannot be retracted or easily erased. They remain a permanent part of their lives, with lasting consequences of a loss that cannot be recovered.

**II. Sex-based separation in intimate settings reflects an expectation of personal bodily privacy that is deeply rooted in the human experience.**

**A. Civilizations and cultures throughout history have recognized and protected bodily privacy in intimate settings.**

A study of history and early cultures reveals a fundamental consciousness and respect for bodily privacy based on the distinct biological differences between the sexes. Ancient literature records the instinctive aversion to having one's nakedness unexpectedly and suddenly exposed. See Genesis 3:7 (biblical account of Adam and Eve in the Garden of Eden, feeling shame at their nakedness and covering themselves). Indeed, one cannot view classical art forms without noting how many fig leaves or loincloths were strategically placed over both male and female genitals to preserve intimate modesty. See Sarah Bond, *Medieval Censorship, Nudity And The Revealing History of the Fig Leaf*, Forbes (Oct. 27, 2017), <https://perma.cc/ZTM5-FP4W>.

Societal recognition of bodily privacy has evolved throughout the ages, offering increasing opportunities for sex-segregated spaces as public

facilities were modernized and expanded to meet changing needs and expectations. Public bathhouses of the medieval period reflect this progression.

As early as 300 BC, the Romans established public bathhouses that became models for bathhouse culture around the world, including hammams, public baths of the eastern Mediterranean. Suemedha Sood, *The origins of bathhouse culture around the world*, BBC (Nov. 30, 2012), <https://perma.cc/6M7S-VFED>.

Dating back to the medieval period, hammams refined public bathing by providing sex-segregated bathing for men and women either in separate spaces or by assigning men and women separate bathing times. See Elizabeth Williams, *Baths and Bathing Culture in the Middle East: The Hammam*, The Metropolitan Museum of Art (Oct. 1, 2012), <https://perma.cc/2TXZ-25N9>.

In America's founding period, warm mineral waters known as healing springs offered fashionable bathing for both men and woman. In the late 1700s, the famous West Virginia Berkely Springs, still active today, offered separate bathing times for men and women. This practice preceded the construction of formal bathhouses with dressing rooms. Jeanne Mozier, *The Early Days of Bath*, Berkeley Springs, <https://perma.cc/Z3R5-A7P6>. As early as 1761, Warm Springs Bath Houses of Virginia offered a simple wooden bathhouse for men, later adding one for women in the early 1800s. Va. Dep't of Hist. Res., *Warm Springs Bath Houses*, VLR Online (July 18, 2023), <https://perma.cc/9Q68-KS8V>. See also W. Burlette Carter, *Sexism in the "Bathroom Debates"*:

*How Bathrooms Really Became Separated by Sex*, 37  
Yale L. & Pol'y Rev. 227, 270–272 (2018) (Carter).

While bathhouses provide concrete, cross-cultural examples of how bodily privacy was historically treated, classical literature and art offer additional insights. Roman statesman and philosopher Cicero, in his 44 BCE treatise *De officiis*, wrote the following on modesty and indecency:

Nature seems to have had a wonderful plan in the construction of our bodies.\* \* \* [T]he parts of the body that are given us only to serve the needs of Nature and that would present an unsightly and unpleasant appearance she has covered up and concealed from view.\* \* \* [A]ll right-minded people keep out of sight what Nature has hidden and take pains to respond to nature's demands as privately as possible[.] \* \* \* To perform those functions—if only it be done in private—is nothing immoral; but to speak of them is indecent. And so neither public performance of those acts nor vulgar mention of them is free from indecency.

Cicero, *De officiis*, 128–129 (Walter Miller trans., 1913), <https://perma.cc/N8UV-U7WR>.

Our modern culture has always recognized an instinctive sense of privacy and protection for the intimate parts of our bodies. In the 20th century, anthropologist Mary Douglas likened this bodily privacy to social boundaries, classification, and social order and characterized the body as “a model which can stand for any bounded system. Its boundaries can represent any boundaries which are threatened or

precarious.” Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo*, 116 (1966). She also observed that bodily openings represent sites of vulnerability. See *id.* at 122.

These time-honored cultural, literary, and artistic icons of history provide just a glimpse into the way that the intimate parts of our bodies have been viewed through the centuries. All reflect respect and accommodation for personal bodily privacy and specifically genitalia.

**B. The consistent expectation of sex-based intimate privacy in Anglo-American culture has produced new demands for such privacy, as the context, particularly as it relates to women’s roles in society, has changed.**

An historical perspective of bodily privacy in the Anglo-American world can be gained through a study of the evolution of the bathroom, both public and private. Whereas public bathhouses provided community space for bathing in early times, society’s provision for managing human excrement was more random through the 19th century. The industrialization of England and America, and particularly the changing roles of women in society, dictated the changes that ensued. During this period, feminists of the 19th and 20th centuries, both in England and America, fought hard for women’s private spaces and protection against unwanted invasions of intimate bodily privacy.

In mid-19th century England, only wealthy people used chamber pots that their servants emptied

into latrines. Average folk did not have that luxury and had no choice but to use the outdoors to relieve themselves. Men could easily relieve themselves in the street and in back alleys. Women, however, could not take care of those same necessities without lifting their skirts or removing some of their clothing. This inconvenience might not have posed a significant problem around the home, as one could presumably choose to be as private as the environment and space allowed. But as life for women changed and expanded beyond the home, so did their needs. Access to facilities in which to privately perform bodily functions was most basic to the participation of women in public spaces. See Leah Broad, *Why toilets were a feminist issue*, Substack (June 5, 2022), <https://perma.cc/QN6X-9JCX>.

In England, with the opening of the London Underground Railway in 1863, new employment opportunities emerged for women who were willing to travel away from home. However, the absence of toileting spaces presented an obstacle. As women became more mobile and active in society, their demand for public toilets became one of the earliest feminist issues—a demand by women for private spaces designated for women. See Robert Baker, *Of Moral Reform and Equal Rights to Respectable Peeing*, MIT Press Reader (Apr. 16, 2021), <https://perma.cc/F3UF-QQ6U>.

The Ladies Sanitary Association of London, which was founded in 1857 to campaign for public toilets for women, became a force for change. See Claudia Elphick, *The History of Women's Public Toilets in Britain*, Hist. UK (Aug. 24, 2018),

<https://perma.cc/9CRN-8QW5>. While women's voices and opinions were afforded little attention in the writings of the day, some men championed their cause. Renowned Irish playwright and author George Bernard Shaw was a vocal advocate for women. In the early 1900s, Shaw penned an essay entitled "The Unmentionable Case for Women's Suffrage" in which he wrote that the denial of public toilets for women was, as Baker quotes in his article, just another example of inequitable treatment that resulted in "the exclusion of women from public life." Baker, *supra*. Shaw characterized that exclusion as "not only an injustice \* \* \* but an abomination." *Id.*

The American bathroom as we know it today had its humble beginnings as an outdoor earthen pit that was enclosed in a private closet. This closet was commonly called a "privy," a term defined in Samuel Johnson's 1773 Dictionary of the English Language as meaning "private, not publick, assigned to secret uses." See *privy*, *Samuel Johnson's Dictionary* (1773), <https://perma.cc/29QY-NUFT>.

The term comes from the French "prive" and the Latin "privatus," both meaning private and implying a zone of safety and seclusion for uses within its space. See *privy*, Am. Heritage Dictionary of the Eng. Language, Harper Collins (5th Ed. 2022), <https://perma.cc/W9LT-D5US>. The privy preceded the water closet.

Public bathrooms were scarce in early America. Men were much more likely to use the convenience of the outdoors to relieve themselves. But for women, that option was neither convenient nor discrete. "As women pressed forward with the right to leave their

homes and participate in public life, the lack of safe, public bathrooms thus became a civil rights issue for women.” Carter, 37 Yale L. & Pol’y Rev. 253. Contrary to arguments that sex-segregated spaces were designed to patronize women and perpetuate antiquated views of their roles in public life, these spaces were demanded by women in the name of equality and dignity. See Sara Evans, *Women in American Politics in the Twentieth Century*, Hist. Now, The Gilder Lehrman Inst. of Am. Hist. (Spring 2006), <https://perma.cc/5TDN-EJ9M>.

During the Industrial Revolution, large numbers of women were entering the workplace, usually factories, “in a world in which women were economically, socially, and politically restricted and stereotyped.” Carter, 37 Yale L. & Pol’y Rev. 281. They were subject to the control and authority of men—authority often wielded in the form of sexual harassment and violence. Early labor laws mandating sex-separation in bathrooms and other areas of close workplace proximity were a direct response to these problems, many of which were documented in factory inspection reports and the newspapers of the day. See *id.* at 281-287.

The demand for private, sex-based intimate facilities continued throughout the 20th century as the roles of women in the workforce and in public life continued to evolve. As recently as 1991, law professor Taunya Lovell Banks wrote “parity would require that facilities be constructed to accommodate the real, but different, needs of each sex.” Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 Berkeley Women’s L. J. 263, 280 (1990–1991) <https://perma.cc/TRB4-WVPT>; see also Sheila

Jeffreys, *The politics of the toilet; A feminist response to the campaign to “degender” a women’s space*, 45 *Women’s Stud. Int’l F.* 42, 46 (2014), <https://perma.cc/V8XF-924D>. (“[W]omen’s toilets were created out of a recognition that they were essential to women’s equality”).

Historically, the solution for accommodating women has never been to allow both sexes to access the same facilities; rather the solution has been to provide adequate facilities for both men and women, according to their individual needs. Not until the emergence of the gender ideology movement and its demand for access to privacy facilities based on subjective identity rather than biology was this questioned.

**C. Today, sex-based bodily privacy, in spaces where clothing is removed, still matters for the same reasons.**

In the push for the elimination of sex disparities through the Equal Rights Amendment, the issue of sex-based private spaces like bathrooms and locker rooms was often debated. Then prominent feminist lawyer and professor of law at Columbia University, Ruth Bader Ginsburg, addressed the issue bluntly and unequivocally in a 1975 article she wrote for the *Washington Post*. “Separate spaces for [men and women] to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle.” Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, *Wash. Post*, Apr. 7, 1975, at A21. She went on to

explain that the “potty issue” was really no issue at all, because the ERA would *require* “provision of public sanitary facilities for both sexes when the presence of such facilities is related to the exercise of some other right, such as the right to be free from discrimination in employment.” *Ibid.*

In the post-modern feminist movement, even the successful legal challenge to Virginia Military Institute’s (VMI) males-only admission policy recognized the distinctive need for sex-based privacy. *United States v. Virginia*, 518 U.S. 515, 551 n.19 (1996) (“Admitting women to the Virginia Military Institute would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements”). Biological reality dictated this accommodation. Indeed, but for the relatively recent emergence of gender ideology, bodily privacy based on this reality has always been understood.

### **III. Our laws and jurisprudence have secured the expectation that sex-separated intimate bodily privacy is a constitutional right.**

This Court has established that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and are ‘implicit in the concept of ordered liberty[.]’” *Washington v. Glucksberg*, 521 U.S. at 721. (citations omitted). The expectation of control over one’s personal and intimate bodily privacy as well as the right to be free from unwanted exposure to the intimate body parts of the opposite sex have long been part of our American understanding of ordered liberty. Moreover, these

rights have been clarified and cemented through our Nation's laws and jurisprudence.

**A. Our enactment of laws over many decades reflects society's expectations for bodily privacy and protection against unwanted bodily exposure by others.**

Implicit in our laws protecting bodily privacy is a recognition that injury is suffered when the zone of expected bodily privacy is non-consensually violated. This has been reflected in decades of advancements in understanding the societal implications of sexual assault, sexual harassment, and domestic violence, most often by men against women. Inherent in these efforts, according to the Women's Law Project, was the "growing understanding that unwanted and unconsented to bodily invasion is the core wrong that sex crimes laws must address." Carol E. Tracy, et al., *Rape and Sexual Assault in the Legal System*, Women's L. Project 1, 1 (2012), <https://perma.cc/JQY7-CKS7>. In this report, nonconsensual bodily invasion was defined, in part, as follows:

Sexual exposure crimes may include forced viewing of a body part or of sexual activity. \* \* \* These crimes involve sexual acts in public or exposure of genitals in a public place or where other persons are present[.] \* \* \* These statutes may also include conduct in which the offender causes someone to expose him/herself.

*Id.* at 31. Recognizing the injury that occurs with forced bodily exposure, the "exposure" offenses of

voyeurism and exhibitionism have been “criminalized in some form for centuries and continue to be a presence in most modern criminal codes.” Stuart P. Green, *To See and Be Seen: Reconstructing the Law of Voyeurism and Exhibitionism*, 55 Am. Crim. L. Rev. 203, 205 (2018). These “offenses mark out, and mutually reinforce, the borders of [our] \* \* \* understanding of what is public and what is private.” *Ibid.* “The public-private boundary faces in two directions, \* \* \* keeping disruptive material out of the public arena and protecting private life from the crippling effects of the external gaze” *Ibid.* (quoting Thomas Nagel, *Concealment and Exposure*, 27 Phil. & Pub. Aff. 3, 17 (1998)).

Many of the bodily privacy laws in existence today protect women, children, and the vulnerable. But now, with the emergence of gender identity ideology, decades of advancements risk being lost. And while many will now argue that gender ideology renders sex-separation prudish and obsolete, one need only look as far as the current crime statistics for sexual assault, domestic violence, and the recent #MeToo movement to understand that the problems faced by women in decades past still exist today. See Nat’l Sexual Violence Res. Ctr., <https://perma.cc/W43E-WJ97>; see also Stacey Plaisance, *Rates of sexual harassment and assault nationwide still high after #MeToo movement*, Tul. Univ. (Sept. 16, 2024), <https://perma.cc/HHF7-MWJV> (2024 survey reported that most women (82%) have experienced sexual harassment or assault in their lifetime).

We are not presuming or arguing that trans-identifying individuals possess ill intent in entering

opposite-sex spaces. Rather, we are arguing that cancelling privacy rights based on distinctions in anatomy would erase boundaries that have served to protect women, children, and the vulnerable from those who seek to cause harm. After all, a man can attempt to “transition” to a female identity, but he cannot, under any circumstance change his biology or his male sex.

**B. Our modern jurisprudence reflects society’s expectation that the right to control one’s own bodily exposure and be free from non-consensual bodily exposure by the opposite sex is a right of constitutional dimension.**

Perhaps no court has summed up bodily privacy as succinctly as the Ninth Circuit in *York v. Story*, 324 F.2d 450 (1963), where a woman sued three police officers for taking and distributing nude photographs of her after she reported an assault. “We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.” *Id.* at 455.

Following the Ninth Circuit’s decision, other courts recognized a privacy right in one’s partially clothed or unclothed body. The Second Circuit in *Poe v. Leonard*, 282 F.3d 123 (2002) recognized “a constitutional right to privacy \* \* \* in one’s unclothed body.” *Id.* at 136, 138–139. The Sixth Circuit ruled similarly in *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 499 (2008), holding that children have a

constitutional right to bodily privacy that protects their unclothed bodies from being viewed by members of the opposite sex.

In a case brought by one of the amici in this brief, the Third Circuit recognized a constitutional right to “privacy in a person’s unclothed or partially clothed body.” *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527 n.53 (2018) (citing *Brannum*, 516 F.3d at 498). The interest is so strong that it is even preserved for prisoners. *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980) (female inmates had a privacy interest in not being seen completely or partially unclothed by male guards).

Even in the context of the Fourth Amendment where there is a governmental interest in policing contraband, strip searches—including strip searches of someone of the *same* sex—are limited due to “reasonable societal expectations of personal privacy.” *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374–375 (2009).

On these principles rests “society’s undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation[.]” *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). That is why “same-sex restrooms [and] dressing rooms” are allowed “to accommodate privacy needs” and why “white only rooms,” which have no basis in bodily privacy, are illegal. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). Indeed, females “using a women’s restroom expect[] a certain degree of privacy from \* \* \* members of the opposite sex.” *State v. Lawson*, 340 P.3d 979, 982 (Wash. App. 2014). The

real anatomical differences between the sexes—relevant in places where we disrobe—is the only appropriate justification for separating groups of people. See *Chaney*, 612 F.3d at 913.

Just as “[s]ports are different from, say, a typical employment or educational opportunity where equal protection often may require that the government generally treat an individual *without regard to the individual’s sex*,” *West Virginia v. B.P.J.*, 146 S. Ct. at 2376, so are intimate spaces where individuals remove clothing and expose intimate parts of their body. The inherent “physical differences between men and women are enduring”, *id.* at 2367 (quoting *U.S. v. Virginia*, 518 U.S. at 533), therefore, “sex-based classification is justified as a constitutional matter[.]” *Id.* at 2380.

The inherent physical differences between the sexes have, since the founding of our country, formed the foundation for the bodily privacy that is part of our ordered liberty as Americans. These biological differences do not disappear upon one’s declaration of an identity that is different than one’s sex. As this Court has stated, these differences are enduring. And because they are enduring, sex-based classification for ensuring bodily privacy in intimate spaces transcends all other subjective classifications, including “identity.” Accordingly, it is essential that this Court preserve this constitutional right and rule that no state can simply legislate these rights away by choosing to cancel classification based on biological reality to accommodate “identity.”

## CONCLUSION

This Court should grant certiorari as various fundamental rights have been undermined by Washington State's actions.

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