STATE OF CONNECTICUT
SUPREME COURT

SC 20538

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES
V.
EDGE FITNESS, LLC, ET AL.

AMICUS BRIEF OF GLBTQ LEGAL ADVOCATES & DEFENDERS, LAMBDA LEGAL EDUCATION & DEFENSE FUND, INC., AND CONNECTICUT TRANSADVOCACY COALITION

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STATEMENT OF THE ISSUE

Was it error for the tribunals below to adopt a new, vague and undefined implied "gender privacy" exception to Conn. Gen. Stat. § 46a-64(a) where such exception is not authorized by any statutory language, the interests of privacy that animate the exceptions in Conn. Gen. Stat. § 46a-64(b)(1) are not implicated on the facts of this case, and such an exception would undermine, rather than further, this state's mandate to eradicate discrimination? (Br. at 2-8.)

TABLE OF AUTHORITIES

Cases:

Cases (cont.):

Statutes:

Other Authority:

STATEMENT OF THE INTEREST OF THE AMICI CURIAE

Through strategic litigation, public policy advocacy, and education, *Amicus Curiae* GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV. GLAD was counsel both nationally and in this state in cases establishing marriage equality. *See Obergefell v. Hodges,* 576 U.S. 644 (2015); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135 (2008). It has also litigated precedent-setting cases to establish equality for transgender people, including *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (challenge to exclusion from military), and *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014) (first case from highest state court establishing right of transgender student to use school restrooms consistent with her gender identity).

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in seminal cases regarding the rights of LGBT people. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has also served as counsel of record in precedent-setting cases involving the rights of transgender people, particularly as it pertains to access to sex-specific restrooms or with regards to transgender

people's ability to correct their birth certificates in a manner consistent with their gender identity. *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286 (11th Cir. 2020); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017).

Amicus Curiae Connecticut TransAdvocacy Coalition (CTAC) is a grassroots-oriented 501(c)(3) organization dedicated to making Connecticut a safe and tolerant place for transgender and gender non-conforming individuals. It represents a coalition of individuals and organizations that are committed to effecting social change in Connecticut. CTAC has a long history of advocating with the State to protect the lives of transgender and gender non-conforming people, and has provided education, training, and testimony before the legislature, as well as state agencies and commissions.

ARGUMENT[1]

I. THIS COURT SHOULD REJECT THE NEW, ILL-DEFINED "GENDER PRIVACY" RIGHT CREATED BY THE SUPERIOR COURT BECAUSE IT IS NOT ROOTED IN ANY PRIVACY INTEREST AND RISKS FURTHERING, RATHER THAN ELIMINATING, DISCRIMINATION AND EXCLUSION.

This case involves two fitness facilities that offer a women-only workout area. It presents the question whether this sex segregation may be justified by the creation of a new, general implied "gender privacy" exception to the prohibition of sex discrimination in public accommodations set forth in Conn. Gen. Stat. § 46a-64. As an initial matter, the *Amici* agree with the Plaintiff-Appellant Commission on Human Rights and Opportunities that no such exception exists in the unambiguous statutory text. Nor can such an exception be inferred from the limited, specific exception from the general law carved out by the legislature in § 46a-64(b)(1).[2] To the extent that the concerns of the Superior Court about the need for women-only workout areas can be addressed consistent with Article First, § 20 of the Constitution of the State of Connecticut[3], it is within the province of the legislature to determine whether and how to do so.

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[1] No party or counsel for any party wrote any part of this brief. No party or their counsel contributed to the cost of the preparation or submission of this brief.

[2] Conn. Gen. Stat. § 46a-64(b)(1) provides: "The provisions of this section with respect to the prohibition of sex discrimination shall not apply to (A) the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex or (B) separate bathrooms or locker rooms based on sex."

[3] *See* Conn. Const., Art. 1, § 20 ("No person shall be denied the equal protection of the law nor subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.").

The *Amici* submit this brief to raise broader concerns about the dangers of a judicially created exception to Connecticut nondiscrimination laws based "gender privacy." If this Court were to affirm such an implied gender-based exception, it will create a substantial risk that it will be utilized in other contexts in ways that will predictably undermine the state's nondiscrimination laws.[4]

The problematic nature of this newly fashioned "gender privacy" right begins with the recognition that the interests of privacy are simply not implicated on the facts of this case. Women may have varied reasons to prefer a separate workout space from men: for example, to avoid the male gaze, sexual objectification, or feelings of anxiety or embarrassment. (*See* MOD, 7/23/20; CHRO App. at A-18 through A-19.) *Amici* do not in any way minimize those reactions of women to the exercise facility environment. It strains beyond any reasonable limits, however, to suggest that exercising in a fitness facility in a group setting and in clothing of one's own choice raises similar interests in privacy that can somehow be brought within the legislative intent of § 46(b)(1) which specifies bathrooms and locker rooms as exempt from the prohibition of sex segregation.

Instead, in an attempt to bring a fitness facility within a narrow statutory exception, the Superior Court improperly used "privacy" as a proxy for the discomfort and preference of customers. Regardless of the sincerity and extent of that discomfort, a fitness facility is a

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[4] As organizations dedicated to eradicating discrimination and harassment, *Amici* appreciate the importance of preventing and addressing harassment, including sexual harassment, throughout our society, including in fitness facilities. *Amici* simply posit, however, that the recognition of an ill-defined and implied "gender privacy" exception to the clear statutory command of nondiscrimination on the basis of sex is not the proper solution to these concerns.

setting in which fully clothed people exercise or stand around in a group.[5] With that context properly understood, social discomfort or customer preference are never acceptable as justifications for discrimination. *See Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 586 (6th Cir. 2018) (collecting cases), *aff'd sub nom. Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020). As the Superior recognized:

> Further, there are no circumstances where pure business interests or customer preferences can be used to justify sex based discrimination. We cannot allow customer preferences or prejudices, or purely business interests based on those customer preferences alone, to justify discrimination. These concepts have no anchor in our public accommodation antidiscrimination statute . . . .

(MOD, 7/23/20; CHRO App. at A-22 (footnote omitted).)

This Court should not authorize a statutory exception based on social discomfort or preferences. They are precisely the grounds that have long been used to justify the separation and exclusion of women from male-dominated spaces. *See, e.g., Roberts v. US Jaycees*, 468 U.S. 609, 627-628 (1984) (rejecting the exclusion of women as voting members because women might have different attitudes than men on political issues and their presence would affect the character of the group; noting the "sexual stereotyping" underlying such assumptions); Conn. Gen. Stat. § 52-571d (prohibiting "golf country clubs" from denying membership or limiting use of their facilities based on sex, among other grounds). *See also Sessions v. Morales-Santana*, 198 S. Ct. 1678, 1689 (2017) (noting "an

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[5] The Superior Court distinguishes customer gender preference from "legitimate gender privacy interests" as having an anchor in the Connecticut statute and then conflates the two to justify the women-only space in this case by stating that the "business interests and the customer preferences are evidentiary reflections of the sincerity of the gender privacy concerns at issue in this matter." (MOD, 7/23/20; CHRO App. at A-22 & n.10.) This was error.

era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are"). A fitness facility is a business open to the general public; it is similar in character to scores of other establishments covered by the broad definition of a place of public accommodation.[6] If this Court were to recognize separation justified by gender in a context far afield from the narrowly drawn exceptions in § 46a-64(b)(1), it risks the inference that there are other settings in which exclusion may also be justified by customer demand. Hair salons, swimming pools, restaurants, bars, hotels, or even sporting events, are all settings in which either women or men could raise arguments for gender separated space. Courts would be required to engage in ongoing case-by-case determinations of where to draw the line between a ruling in this case and other businesses asserting grounds for "gender privacy." This will create unpredictability both for entities covered by the law and for consumers protected by it. Moreover, it will undermine the state's mandate of equality of the sexes.

In addition, a ruling upholding the Superior Court's rationale is worrisome because social discomfort under the guise of privacy has been the basis for discrimination against lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. A vague assertion of "privacy," for example, was used as a proxy for mere discomfort with the presence of openly gay men and women in the military. *See, e.g.*, *Able v. United States*, 88 F.3d 1280, 1284-1286 (2d Cir. 1996) (upholding "Don't Ask, Don't Tell" policy that prohibited service by openly gay men and women and noting the provisions of 10 U.S.C. § 654 that based the exclusion on the need for "members of the armed forces involuntarily to accept living

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[6] *See* Conn. Gen. Stat. § 46a-63(1) (public accommodation includes "any establishment which caters or offers its services or facilities or goods to the general public").

conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.").

A new "gender privacy" right that is untethered from statutory text and based on the discomfort of others also risks undermining this state's explicit legislative mandate of equality and inclusion for transgender people.[7] The invocation of "gender privacy" has been relied upon for decades as a guise for the social discomfort of those who objected to the presence of transgender people in gender-separated spaces. *See, e.g.*, *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 613-614 (4th Cir. 2020), as amended (August 28, 2020) (policy denying transgender boy use of boys' restroom is not substantially related to school's interest in protecting student privacy and noting that such objections are based on conjecture and abstraction); *Adams by & through Kasper v. Sch. Bd. of St. John's Cty.*, 968 F.3d 1286, 1299-1300 (11th Cir. 2020) (holding that school policy denying a transgender boy use of the restroom violated federal sex discrimination provisions and rejecting privacy objections as unfounded); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ*, 858 F.3d 1034, 1052 (7th Cir. 2017) (rejecting argument that "[t]he mere presence of a transgender student in the bathroom ... infringes upon the privacy rights of other students.").[8]

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[7] *See* Public Act No. 11-55 (An Act Concerning Discrimination) enacting comprehensive protections against discrimination on the basis of gender identity or expression in employment, public accommodations, housing, credit and education. Even prior to the passage of explicit protections based on gender identity, the Commission on Human Rights and Opportunities recognized early on that state sex discrimination statutes prohibited discrimination against transgender people. *See* Declaratory Ruling on Behalf of John/Jane Doe (Conn. Comm'n Human Rights & Opportunities Nov. 9, 2000, *available at* https://portal.ct.gov/CHRO/Education-and-Outreach/Public/CHRO-Declaratory-Ruling-on-behalf-of-JohnJane-Doe (last visited Mar. 31, 2021).

[8] Two circuits have rejected privacy-related challenges brought by non-transgender students to the shared use of restrooms with transgender students. *See Parents for Privacy*

This Court should deny the use of an implied "gender privacy" exception to justify the use of a separate women-only fitness area, even if there are benign or non-animus -based reasons for doing so. As this Court has explained, "the history of [the equal rights amendment] evidences a firm commitment not only to end discrimination against women, but also to do away with sex discrimination altogether." *Evening Sentinel v. Nat'l Org. for Women*, 168 Conn. 26, 34 (1975). The legislature has crafted a narrow, limited exception to Conn. Gen. Stat. § 46a-64(a). There is no basis to expand the exclusion here. To the contrary, there are serious risks in doing so based on a vague and untethered "gender privacy" rationale.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

AMICI CURIAE, GLGBTQ Legal Advocates & Defenders, Lambda Legal Defense & Education Fund, Inc., And Connecticut TransAdvocacy Coalition,

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v. Barr, 949 F.3d 1210 (9th Cir.), cert. denied, 141 S. Ct. 894 (2020); *Doe v. Boyerstown Area Sch. Dist.*, 897 F.3d 515 (3d Cir. 2018).

CERTIFICATION

Pursuant to Practice Book § 67-2(g), I hereby certify that: (1) the electronically submitted brief was emailed on April 1, 2021, to counsel of record listed below; and (2) that the brief does not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief was sent to the counsel of record listed below on April 1, 2021; (2) that the brief is a true copy of the brief filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief does not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2.

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