CONNECTICUT SUPREME COURT

SC 20538

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
PLAINTIFF-APPELLANT

V.

EDGE FITNESS, LLC, ET AL.
DEFENDANTS-APPELLEES

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT

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Statement of Issues

As set by the Court in its amicus solicitation:

Did the trial court and the Commission on Human Rights & Opportunities hearing officer properly determine that the provision of women-only workout areas by the defendant gyms did not violate General Statutes § 46a-64(a) and its prohibition against sex discrimination in public accommodation?

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Statement of Facts and Proceedings

The ACLU of Connecticut adopts the statement of the case propounded by the plaintiff Commission on Human Rights and Opportunities.[1] The Court invited amicus briefing, and granted blanket leave to file, in an order dated March 2, 2021.

Interests of Amicus Curiae

The ACLU of Connecticut, an affiliate of the national ACLU, is a non-partisan, nonprofit organization that defends, promotes and preserves the civil rights and civil liberties guaranteed by and United States law. The ACLU of Connecticut is an advocate of gender equality and transgender people's rights, and a frequent enforcer of Connecticut's public accommodations laws.

[1]Counsel for amicus curiae ACLU of Connecticut authored the brief in whole. No person or entity other than the ACLU of Connecticut monetarily contributed to the preparation or submission of this brief.

Argument

1. Reversal is required to clarify that the solution to patron-on-patron harassment is for public accommodations operators to stop it, and, to avoid diminishing § 46a-64's protections for gender identity and expression.

This Court teaches that remedial statutes should be construed liberally, but that "provisos and exceptions" to such laws "are to be strictly construed with doubts resolved in favor of the general rule": here, that sex discrimination is forbidden in public accommodations. *Gay & Lesbian Law Students Ass'n v. Bd. of Trustees*, 236 Conn. 453, 473 (1996). The present dispute arrives on appeal after the superior court transposed those familiar interpretive maxims and liberally construed the exemptions to a remedial statute, Conn. Gen. Stat. § 46a-64, in the name of broadening the statute's protective reach. Although the parties and tribunals below addressed the respondent's single-sex workout areas in terms of "customer gender privacy," the concept's application to § 46a-64 in the context of gyms is both inapt and dangerous to other protections. The idea is misplaced on the record in this case because exercising in view of others does not pose a privacy interest so much as it implicates the interest in being free from harassment by other gym users. And, importing the concept of gender privacy into § 46a-64's interpretive case law poses a serious threat to transgender people's equal access to public accommodations. The Court should therefore reverse.

1.1. A generic concern for privacy is an insufficient basis for permitting sex discrimination in gyms open to multiple concurrent patrons.

Attempting to fit a generic right to privacy to the facts of this dispute highlights three reasons why it should not form the basis of the Court's analysis. To begin with,

although the superior court described the privacy interest advanced by the respondent gyms as one against being seen partially clothed or nude, the record shows that the dispute concerns being seen exercising. Exercise in a gym in front of other patrons—of any sex—is not that private; if there were a true privacy interest in not being seen exercising, the workout areas would be reserved for one-at-a-time use. Courts to have examined privacy claims of bathroom and locker room users, for example, have concluded that even those settings do not expose users to intimate subjects. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018) (in citing privacy to justify the exclusion of transgender students from common bathrooms and locker rooms, school district defendant overstated "a very broad right of personal privacy in a space that is, by definition and common usage, just not that private" even in sex-separated facilities); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1052 (7th Cir. 2017) (explaining that the defendant's asserted privacy threat posed by transgender students' use of common bathrooms was not a privacy one because bathrooms involve no exposure to nudity, but was simply an amorphous objection to presence that could be phrased by "any other student who uses the bathroom at the same time" as another); *Adams v. Sch. Bd. of St. Johns County*, 318 F. Supp. 3d 1293, 1314 (M.D. Fla. 2018) (prohibiting transgender students from common bathrooms "does nothing to protect . . . privacy rights" because common bathrooms contain stalls and dividers obviating the need for nudity, and any student affirmatively seeking out nudity would be engaging in voyeurism) (internal quotation omitted), *aff'd*, 968 F.3d 1286 (11th Cir. 2020); *M.A.B. v. Bd. of Educ. of Talbot County*, 286 F. Supp. 3d 704, 725 (D. Md. 2018) ("Defendants do not provide any explanation for why completely barring [a transgender boy] from the boys' locker room protects the privacy of

other boys changing there."); *Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 875 (S.D. Ohio 2016) (turning aside the theory that in a multi-user bathroom, a "'zone of privacy' . . . starts at the door of the restroom, not merely at the stall door"). Additionally, the superior court was incorrect to rely on cases restricting government voyeurism as the basis for holding that patrons of public accommodations have a privacy interest as against fellow patrons. In affirming the hearing officer, the superior court concluded that "gender privacy is . . . a right," Pl.'s App. A15, relying on *Poe v. Leonard*, 282 F.3d 123, 138-9 (2d Cir. 2002). But *Poe* did not create an all-purpose gender privacy right. It held that a Connecticut state police employee who surreptitiously recorded a woman undressing in an otherwise private setting violated the Fourteenth Amendment's right against conscience-shocking deprivations of privacy, in the form of forced exposure of one's naked or semi-naked body. *Id.* at 138-9.

Poe's conclusion, while correct as to government actors, has no role here. This case, unlike *Poe*, does not concern forced exposure or non-consensual surveillance of someone while undressing, but simply working out in view of the other users of a public accommodation while clothed to the degree of one's choosing. And, this case concerns the interactions of private parties (in the form of gym patrons) rather than government employees abusing their authority over members of the public. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1225 n.11 (9th Cir. 2020) (distinguishing *Poe* as involving "an arbitrary privacy intrusion by a law enforcement" employee); *Doe*, 897 F.3d at 532-33 (distinguishing "[c]ases about strip searches and . . . voyeurism" as "wholly unhelpful" to a privacy claim about other users' "mere presence"); *Students and Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *28 (N.D. Ill. Oct. 18, 2016) (explaining that

common usage of areas for changing or toileting "do[] not involve the extreme invasions of privacy that the courts confronted" in government voyeur cases).

1.2. The interest of respondents' women customers lies in freedom from sexual harassment, and any failure by the respondents to protect against such harassment is the proper analytical starting point.

Moreover, the Court should not euphemize the harassment that comprises a persistent, daily limitation on women's lives in Connecticut as a privacy problem. Instead of a privacy against being seen working out by other patrons of the public accommodation, the respondents' customers' interest is better viewed as the right to be free from sexual harassment by other patrons. A small number of this Court's peers have begun to recognize the sex-based exclusion that unchecked patron-on-patron harassment can erect, and have applied their state's public accommodations laws using that framework as to peer-to-peer harassment in schools. *See Doe v. Kansas City Sch. Dist.*, 372 S.W.3d 43, 51-52 (Mo. Ct. App. 2012) (interpreting Missouri public accommodations statute's bar on "direct[] or indirect[]" denial of access based on sex to encompass student-on-student sex harassment) (internal quotation omitted); *L.W. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535, 547 (N.J. 2007) (holding that the broad scope and remedial purpose of New Jersey's public accommodations statute "permits a cause of action against a school district for student-on-student harassment . . . if the . . . failure to reasonably address that harassment has the effect of denying to that student any of a school's accommodations") (internal quotation omitted). *See generally* Miriam A. Cherry, *Exercising the Right to Public Accommodations: The Debate Over Single-Sex Health Clubs*, 52 Me. L. Rev. 97, 144 (2000) (proposing that public accommodations law look to hostile work environment

analysis when addressing patron-on-patron harassment).

Gyms can end the access-limiting effect that patron-on-patron harassment can have on their women customers through other, less restrictive means that do not involve sex discrimination. Such measures include instituting and prominently publicizing a code of conduct and strict zero-tolerance policy on harassment, training staff on harassment prevention, and educating patrons on bystander intervention. They could also create a more welcoming space and increase women's use of gyms by hiring more women trainers, featuring women athletes and patrons in their promotional materials, and conducting targeted advertising. But the idea that the way to insulate women from harassment is to create women-only public accommodations—or that Connecticut law should encompass such an unstated exception—implicates women as the problem, suggesting that their very presence is too tempting for men to resist engaging in bad acts. *See generally, e.g.*, Jessica Valenti, Op-Ed., *How Many Women Have to Die to End 'Temptation'?*, N.Y. Times, Mar. 22, 2021, at A23 (warning against reinforcement of the idea that "[m]ale sexual violence is to be expected," and observing in the wake of the Atlanta spa killing spree that women, in particular women of color, have long "been punished and killed because of men's inability to deal with issues around rejection, desire and shame."). In short, if the respondent gyms here have failed to maintain a public accommodation free from patron-on-patron sexual harassment, the remedy is to require them to do so, and not to bend § 46a 64 to their failures.

1.3. A holding suggesting that working out in front of others implicates gender privacy would invite future harm to § 46a-64's protections for transgender people.

Lastly, the idea that public accommodations operators could use patrons' "gender privacy preference" as a basis to exclude others may pit the sex discrimination prohibition of § 46a-64 against its gender identity or expression protection by implying that a preference to exclude people is a lawful reason to deviate from the blanket nondiscrimination rule. Because it has taught that "a statute is not to be construed so as to thwart its purpose," the Court should avoid an analysis or holding here that opens the door to such arguments. *Narel v. Liburdi*, 185 Conn. 562, 571 (1981).

Over the past five years, a rash of litigation has challenged public schools' bathroom and locker room access policies under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, where those policies treated transgender students equally to their cisgender counterparts. Those Title IX challenges—all of which have been rejected— phrased spurious privacy claims that the mere possibility of transgender people's presence merited their exclusion. *See, e.g.*, Pl.'s Mot. for Preliminary Injunction 20, *Doe v. Boyertown Area Sch. Dist.*, No. 17-cv-1249 (E.D. Pa. May 17, 2017) (relying on *Livingwell (North) Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1289-90 (Pa. Commw. Ct. 1992) and positing cisgender students' privacy interest against having to "seek[] partial shelter behind a curtain or stall door" in bathrooms or locker rooms when there is a possibility that trans people will use the area); Brief of Appellants at 37, *Adams v. Sch. Bd. of St. Johns County*, No. 18-13592 (11th Cir. Feb. 21, 2019) ("[W]hen [the transgender boy plaintiff-appellee] enters a boys' bathroom and there is a biological boy

using the urinal, that biological boy's privacy rights have been violated.").[2] None of these contentions has succeeded in the context of Title IX, and the Court should not now create a toehold of plausibility for them in our public accommodations jurisprudence.

2. Conclusion

The ruling of the superior court should be reversed, and the case remanded for entry of judgment in favor of the Commission.

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[2] *See also, e.g.*, Brief of Appellants at 33, *Parents for Privacy v. Dallas Sch. Dist.*, No. 18-357708 (9th Cir. Nov. 29, 2018) (contending the existence of a right against "find[ing] themselves changing with [trans students] without opportunity to object"); Pl.'s Mot. For Preliminary Injunction 19, *Texas v. United States*, No. 16-cv-54 (N.D. Tex. July 6, 2016) (contending that school changing areas are "unprotected from others who can take advantage of the privacy of these areas to commit untoward acts"); Complaint 195, *North Carolinians for Privacy v. U.S. Dep't of Justice*, No. 16-cv-245 (E.D.N.C. May 10, 2016) (phrasing objections to trans students' presence in common-use areas as "the right to be free from State-compelled risk of intimate exposure of oneself").

Certifications

In conformance with Practice Book § 62-7, I certify that this brief (and any appendix) complies with the applicable rules of Connecticut appellate procedure, that the copy filed with the appellate clerk is a true copy of the one filed electronically, that it does not contain any names or other personal identifying information prohibited from disclosure by law, and that it has been transmitted to the following as of the date of this certification (including to the last known email address of each counsel of record for whom an email address has been provided):

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