

No. 15-2056

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**G.G.**, by his next friend and mother, **DEIRDRE GRIMM**,

*Plaintiff-Appellant,*

v.

**GLOUCESTER COUNTY SCHOOL BOARD**,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Eastern District of Virginia  
Newport News Division

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**BRIEF OF THE NATIONAL EDUCATION ASSOCIATION; AMERICAN  
FEDERATION OF TEACHERS, AFL-CIO; NATIONAL ASSOCIATION  
OF SECONDARY SCHOOL PRINCIPALS; AMERICAN FEDERATION  
OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO;  
SERVICE EMPLOYEES INTERNATIONAL UNION; AND SCHOOL  
SOCIAL WORK ASSOCIATION OF AMERICA AS AMICI CURIAE IN  
SUPPORT OF PLAINTIFF-APPELLANT**

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**STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)**

Amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amici, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 29(a)(4)(A) and Fed. R. App. P. 26.1, the undersigned counsel for Amici hereby discloses that Amici are not publicly held corporations, that Amici have no parent corporations, that no corporation directly or indirectly holds ten (10) percent or more of the ownership interest in the Amici, and that no other publicly held corporation has a direct financial interest in the outcome of the litigation. The case does not arise out of a bankruptcy proceeding.

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici file this amici curiae brief with the consent of all the parties. *See* Fed. R. App. P. 29(a)(2).

This brief is submitted on behalf of the National Education Association (“NEA”); American Federation of Teachers, AFL-CIO (“AFT”); American Federation of State, County, and Municipal Employees (“AFSCME”); National Association of Secondary School Principals (“NASSP”); Service Employees International Union (“SEIU”); and School Social Work Association of America (“SSWAA”).

NEA is the nation’s largest professional association representing approximately three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation’s public schools. NEA has a deep and longstanding commitment to ensuring that every child has access to a high-quality public education regardless of background or zip code.

AFT is a union of 1.6 million professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for students, their families, and our communities. AFT is committed to advancing these principles through community engagement, organizing, collective bargaining, and political activism, and especially through the work that AFT members do every day. At the core of AFT’s commitments to

fairness and democracy is the belief that all students deserve to learn in safe and welcoming schools, regardless of the student's gender identity or expression.

AFSCME is a union comprised of a diverse group of people who share a common commitment to public service. AFSCME's 1.6 million members include workers in both the public and private sectors, and over one hundred thousand members working in public schools. Together, AFSCME and its members advocate for prosperity and opportunity for working families across the nation through the efforts of its approximately 3,400 local unions and fifty-eight councils in forty-six states, the District of Columbia, and Puerto Rico.

NASSP is the nation's leading organization and national voice for school leaders. NASSP has a long history of promoting student equity and advocating for the needs of marginalized populations. As the founder and home of the National Honor Society, NASSP encourages schools to empower students in their learning and amplify student voices.

SEIU represents over 2 million working men and women, including public school bus drivers, janitors, paraprofessionals, and other school support personnel; early learning and child care professionals; higher education faculty members; and health care and property services workers. SEIU's membership is among the most diverse in the labor movement. The union's commitment to equal treatment and justice for all, including transgender individuals, is reflected in its Mission



Statement, which affirms that “we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status.”

SSWAA is the national professional organization for school social workers in school districts across the country. Its members work to enhance the social and emotional growth and academic outcomes of all students and to provide a positive climate for learning. The organization supports school social workers in creating linkages among schools, families, and communities to address barriers to student success. SSWAA members serve the mental health needs of students and families through early identification, prevention, intervention, counseling and support.

All told, Amici represent education employees that interact with students throughout their school days—from the bus stop to after-school programs and everything in between. Amici have interviewed public school employees from across the country in preparation for this and other amici briefs about this issue. Among these are high school and middle school teachers, as well as school counselors and psychologists. Some of the interviewees work in schools that have adopted inclusive transgender student policies; others work in schools that have not. Collectively, they represent a variety of experiences with transgender educational policies (and access to sex-segregated facilities in particular) and as such have valuable perspectives to share with this Court about the needs of

transgender students, and, indeed, all students, in our nation's schools. This brief reflects both the specific experiences of these employees as well as the views of Amici's memberships as a whole.

### **SUMMARY OF ARGUMENT**

Amici write to urge this Court to rule that Title IX and 34 C.F.R. § 106.33 proscribe transgender discrimination and protect the rights of transgender students to use sex-segregated facilities that correspond to their gender identity.

Amici specifically write to make four points.

1. School-based discrimination harms transgender students by stigmatizing them and denying them equal education opportunities. Discrimination against transgender students sends the message that transgender students are not entitled to equal respect, that they should be feared, and that the community must be protected from them. This stigmatization is itself defended by unjustifiable fear and disdain of transgender students, and the fear and disdain in turn fuel harassment, abuse, and even violence directed at transgender students. The harassment, abuse, and violence cause transgender students to quit and miss school, suffer deficient educational outcomes, and even commit suicide.

All this denies equal educational opportunities to transgender students. In particular, denying access to sex-segregated facilities deprives transgender students the opportunity to fully participate in the school experience; such denials often

result in transgender students avoiding using the bathroom altogether at school.

Amici's members witness how bathroom avoidance puts the health and safety of transgender students at risk: it leads transgender students to avoid meals and water (to avoid having to use the restroom), causing fatigue, concentration problems, and various types of urinary infections and other health problems.

2. Laws and school policies that respect and recognize transgender students promote a positive school environment that benefits all students and a discriminatory regime harms and degrades the educational environment for all students. When transgender students are welcomed equally into the school, their educational and personal outcomes improve. And the welcoming and safe school climate fostered by trans-inclusive policies benefits all students: Safe and supportive schools, as educators know, are good for all students.

3. A clear ruling holding that policies that discriminate against transgender students are illegal would clarify the legal duties of schools and education employees, but a contrary ruling would create difficult situations for educators in the real world.

4. Educators themselves are harmed by discriminatory policies like Gloucester's. Compelling educators to enforce discriminatory policies harms educators professionally, personally, and emotionally. Educators are, above all, advocates and protectors of their students. Compelling them to discriminate against and harm

their students runs counter to everything about their personal and professional mission.

### **ARGUMENT**

Transgender students cannot be wished away. Being transgender is not a fad. It is innate; not a choice. Transgender youth, in particular, face difficult obstacles. Being transgender can challenge their closest relationships, including with their parents and friends; it can subject them to harassment, bullying, and violence; and the social pressure to live according to their birth-assigned sex can be intense. Those profound challenges and pressures can lead to serious psychosocial problems.

Given this reality, most educators and education policy makers understand that schools work best when they fully welcome transgender students into the educational community. This means adopting policies that, among other things, allow transgender students to use sex-segregated facilities such as restrooms that are consistent with their gender identity.

Gloucester has chosen a different path. It has chosen to make Gavin's<sup>1</sup> life, and the lives of other transgender students, worse by stigmatizing them, ostracizing them, denying them equal educational opportunities, and pressuring them to deny their very existence.

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<sup>1</sup> Since Gavin has identified himself in public media, Amici refer to him by his name here.

**I. School-based discrimination harms transgender students profoundly because it stigmatizes them and denies them equal educational opportunities.**

1. “The Constitution’s guarantee of equality must at the very least mean that a bare [ ] desire to harm a politically unpopular group cannot justify disparate treatment of that group.” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (internal quotations and citations omitted). The Supreme “Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

Policies such as Gloucester’s send a strong message to Gavin, other transgender students, all students, and the broader school community that transgender students are not worthy of the school community’s equal respect, that they are outcasts and pariahs who ought to be feared by the larger community, and that their classmates must be protected from them. The “necessary consequence” of such policies is to demean and stigmatize transgender students. *See id.* at 2602.

Amici’s members witness how policies like Gloucester’s reflect and promote hostility toward transgender youth. Much like occurred in Gavin’s case, transgender students are frequently allowed to participate equally in school activities by local educators, and they do so—often for some time—without incident. But all too often, school officials—prodded by community members who

have disdain and animosity for transgender individuals—decide to single out the transgender student. The school then denies the student access to facilities and programs that others have access to, telling the student that he is less than others. Scorn and abuse from students and the larger school community often follow. When this happens, transgender students forever “suffer the stigma of knowing” that in the eyes of their school district and community, they are “somehow lesser.” *See id.* at 2600.

This type of stigmatization is deeply harmful to transgender students and makes what is already a difficult problem only worse by legitimizing hostility against transgender students. For too many transgender students, school is a dangerous and stigmatizing place.

- Ninety percent of transgender students have heard derogatory remarks about their gender identity and sexual orientation at school, and 82 percent feel unsafe. Emily A. Greytak et al., GLSEN, Harsh Realities: The Experience of Transgender Youth in Our Nation’s Schools 10, 14 (2009), <https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>.
- Over 75 percent of transgender students have been sexually harassed at school, *id.* at 21, and 13 percent who were out or perceived as transgender have been sexually assaulted in school, Sandy E. James et al., Nat’l Ctr. for Transgender Equality, The Report of the 2015 U.S.

Transgender Survey 135 (2016).

- More than half have been physically harassed at school, and 44 percent have been physically assaulted at school, yet only 46 percent have reported the harassment to school officials, and only one-third felt that the school responded effectively. Greytak, *supra*, at 18–22.
- Transgender students from rural areas face even higher levels of victimization than students in suburban or urban areas. Joseph G. Kosciw et al., GLSEN, 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 71–72 (2008), <https://www.glsen.org/download/file/NDIyMg==>.

This pervasive bullying and harassment leads to negative educational outcomes.

- Seventeen percent of transgender students have reported that they have transferred or quit school because of harassment. James, *supra*, at 135; *see also* Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality & Nat'l Gay and Lesbian Task Force, Injustice At Every Turn: A Report of the National Transgender Discrimination Survey 3 (2011), <https://goo.gl/U9uhr9>.
- Almost half have missed school because they feel unsafe. Greytak, *supra*, at 14.
- Transgender students subject to gender-based verbal harassment have, on

average, worse grades than their peers, and those who face frequent harassment pursue post-secondary education at lower rates than those who are not harassed. *Id.* at 27.

- Because of all this, transgender students are at a much higher risk for suicide than their cisgender peers. Grant, *supra*, at 2; James, *supra*, at 132.<sup>2</sup>

2. One of our nation’s fundamental guarantees is that students have equal access to educational opportunities regardless of gender differences. *See, e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Title IX promises students of all genders equal educational opportunities. *See* 20 U.S.C. § 1681 *et seq.* “[G]ender must be irrelevant to [educational] decisions.” *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (construing Title VII’s prohibition of discrimination on the basis of sex); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–98 (1979) (concluding that Title VII and Title IX’s prohibition on sex discrimination are construed the same way).

Yet when schools deny transgender students access to locker rooms or

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<sup>2</sup> Even students who are not themselves the victims of bullying but nonetheless witness such bullying face significant negative mental health outcomes. *See* Ian Rivers, et al., *Observing Bullying at School: The Mental Health Implications of Witness Status*, 24 Sch. Psych. Q. 211 (2009); Daniel J. Flannery, Kelly L. Wester & Mark I. Singer, *Impact of Exposure to Violence in School on Child and Adolescent Mental Health and Behavior*, 32 J. Cmty. Psych. 559 (2004).



restrooms commensurate with their gender identity, transgender students often avoid participating in gym class or sports and refrain from using bathrooms altogether. Bathroom avoidance is a common and deep problem for transgender students and is linked to medical problems and diminished educational outcomes. *See James, supra*, at 228–29; *see generally* Laura J. Wernick, Alex Kulick & Matthew Chin, *Gender Identity Disparities in Bathroom Safety and Wellbeing Among High School Students* (Working Paper, Jan. 7, 2017), <https://goo.gl/uTX6fO>.

This reality is confirmed not only by Gavin’s experience and academic studies, but also by the experiences of education employees. A Michigan teacher interviewed by Amici shared the story of a transgender student who was denied access to the bathroom commensurate with his gender identity. The student avoids eating breakfast and lunch so that he will not need to relieve himself during the school day. Thirst and hunger make it difficult for him to concentrate. A gender-neutral bathroom in the office at the other end of the building was made available to him, but using it requires him to out his transgender status to his teachers—many transgender students are not out to all their peers and teachers but are known only by their expressed gender—in order to explain why he will be gone from the classroom for an extended period of time. The student’s daily anxiety about being able to satisfy his basic human need to use the bathroom detracts from his

education, and he experiences diminished educational performance as a result.

Another interviewed teacher described how, in response to a group of parents complaining about a transgender boy using the boy's bathroom, the school administration required the transgender boy to use the girl's bathroom. But parents and students are also uncomfortable with him using the girl's room, because, by all outward measure, he expresses himself as a boy. This student suffers the cruel fate of being squeezed from both sides and feeling that he belongs nowhere at school. These experiences, sadly, are not unique.

When schools single out transgender students for stigmatization and scorn, they suffer psychosocial harms that deprive them of the opportunity to become their best selves. This harm cannot be undone on its own. "Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

And such harm spreads to the broader community.

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. . . . We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

*Id.* at 221.

3. On the other hand, in schools where transgender students are respected, they

are subjected to less bullying and have better outcomes. In schools with anti-LGBT bullying policies, students have better relationships with staff and as a result feel safer in the school. Nat'l Ass'n of Sch. Psych. & Gender Spectrum, *Gender Inclusive Schools: Policy, Law, and Practice 2* (2016) (citing Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 *J. Youth & Adolesc.* 1175 (2010)). LGBT students have more academic success than those at schools with negative environments. Stephen T. Russell et al., *Safe Schools Policy for LGBTQ Students*, 24 *Social Policy Report*, no. 4, at 6–7 (2010). And when schools support transgender students who come out and socially transition at school, transgender students feel more included in the school community than those who are closeted. *See* Greytak, *supra*, at 30–31. This sense of belonging correlates with higher academic achievement. *Id.* at 29. In short, when transgender students are supported, they have higher grade point averages, better attendance records, increased self-esteem, and are bullied at lower rates than peers at other schools. Kosciw, *supra*, at 121.

Educators likewise affirm the reality that trans-inclusive policies work. Educators described to us how trans-inclusive policies allow their transgender students to be active and valued participants in the school community who:

- Participate in school government (La Crescenta, California);

- Do not have notable attendance or disciplinary issues (Farmingdale, Maine);
- Participate on school athletic teams (Evanston, Illinois);
- Run for homecoming court (Indianapolis, Indiana); and
- Have supportive peer groups and are academically engaged (Federal Way, Washington).

The value of inclusive policies for transgender student outcomes is pronounced even in schools that only recently adopted supportive policies. An educator in Rhode Island spoke of a student who was formerly doing poorly in school and feeling suicidal, but now, following the adoption of an inclusive transgender student policy, is on track to graduate. Many educators report students crying tears of joy when their schools adopt inclusive policies because when that happens, transgender students feel—often for the first time—that they are valued members of the school community.

When transgender students are respected, they are able to engage fully and equitably with the educational experience, and when that happens, transgender students, like all students, are able to thrive.

## **II. School policies that respect transgender students promote a positive school climate for all students.**

School climate—that is, the “product of the interpersonal relationships among students, families, teachers, support staff and administrators” that sets the “norms, values, and expectations that support people feeling socially, emotionally, and

physically safe” in school—is a key predictor of student engagement, student mental and physical health, and academic achievement, and is positively correlated with decreased absenteeism, dropout rates, and suspensions.<sup>3</sup>

The Supreme Court has long understood this intuitively. “[P]ublic education must prepare pupils for citizenship in the Republic[.]” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (internal quotations omitted). “It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” *Id.* And “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotations omitted). Moreover, the “fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent

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<sup>3</sup> See Nat’l Sch. Climate Ctr., School Climate Research Summary 2-3 (August 2012), <https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf>; Nat’l Educ. Ass’n, Research Brief: Importance of School Climate 1 (2013), [https://www.nea.org/assets/docs/15584\\_Bully\\_Free\\_Research\\_Brief-4pg.pdf](https://www.nea.org/assets/docs/15584_Bully_Free_Research_Brief-4pg.pdf); Nat’l Sch. Climate Council, The School Climate Challenge 5 (2007), <http://www.schoolclimate.org/climate/documents/policy/school-climate-challenge-web.pdf>; David Osher, et al., Improving Academic Achievement Through Improving School Climate and Student Connectedness (Apr. 14, 2009), <https://goo.gl/4nCGPJ>; Adam Voight, Gregory Austin & Thomas Hanson, A Climate for Academic Success (2013), <http://files.eric.ed.gov/fulltext/ED559741.pdf>; see also Alex Kajitani, *The #1 Factor That Determines A Toxic or Thriving School Culture*, EdWeek (Apr. 27, 2016), <https://goo.gl/6s0q1V>; Taica Hsu, *How I Support LGBTQ+ Students at My School*, Am. Educator, Winter 2016-2017, at 20-22, <https://goo.gl/VW7gGM>.

political and religious views, even when the views expressed may be unpopular.” *Bethel Sch. Dist. No. 403*, 478 U.S. at 681 (internal quotations and citations omitted).

When educators are positive about inclusion and respect all students, students in diverse classrooms have higher academic achievement. *See* Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School- Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 *J. of Educ. Psych.* 570, 571 (2003); John Rosales, *Positive School Cultures Thrive When Support Staff Included*, NEA Today (Jan. 10, 2017), <https://goo.gl/K2Swud>.

Courts have long understood the vital role that educators and other school employees play in promoting diversity, acceptance, and tolerance. “[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.” *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979). Not just by “the presentation of course materials” but also by “the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities.” *Id.*

1. When schools adopt trans-inclusive policies and practices, appropriately respond to bullying, and allow transgender students to be acknowledged in accordance with their gender identity, not only do transgender students feel more welcome, but also the school climate overall is more positive, leading to better

outcomes for all students. *See* N. Eugene Walls, Sarah B. Kane & Hope Wisneski, *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 *Youth & Society* 307, 323-25 (2010); *see also* Stephen T. Russell, *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers' Perspectives*, 54 *J. Sch. Psych.* 29 (2016).

Students who feel a sense of belonging in school are less likely to have mental health problems and later substance abuse. Lyndal Bond, et al., *Social and School Connectedness in Early Secondary School as Predictors of Late Teenage Substance Use, Mental Health, and Academic Outcomes*, 40 *J. of Adolesc. Health* 357.e9, 357.e16 (2007). And students report “more positive levels of . . . quality of school life in schools that [are] more supportive of cultural pluralism and diversity.” Brand, *supra*, at 571.

Inclusive classrooms also reduce prejudice and promote cross-cultural friendships, which later benefit students in the workplace and in their communities. Jeanne L. Reid & Sharon Lynn Kagan, *A Better Start: Why Classroom Diversity Matters in Early Education* 9 (Apr. 2015); *see also* Econ. & Soc. Research Council, *Diversity In Primary Schools Promotes Harmony, Study Finds*, ScienceDaily (July 26, 2008), <https://www.sciencedaily.com/releases/2008/07/080724064835.htm>. Respect for the diversity of students is associated with increased feelings of safety in schools, and there is less bullying in more diverse schools. *See* ScienceDaily,

*supra*; Jaana Juvonen, Adrienne Nishina & Sanda Graham, *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 Psych. Science 393, 397 (2006).

Students also benefit academically from inclusive settings. See Open Soc’y Found., *The Value of Inclusive Education* (Oct. 2015), <https://goo.gl/imqFgK>; Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students With and Without Disabilities and Their Educators*, 20 Remedial & Special Educ. 114, 114 (1999). Once classrooms become fully welcoming of transgender students we can expect noticeable and quantifiable benefits to transgender students and the broader community as well. Examples of the benefits of classroom inclusion and diversity abound in other contexts where such inclusion has a longer history.

Title IX itself provides one of the best examples of the power of equality to promote the common good. Since its enactment over 40 years ago, Title IX has promoted gender inclusivity in school sports, the benefits of which have rippled from the athletic field to the classroom and beyond. See generally Nat’l Coal. for Women and Girls in Educ., *Title IX at 40: Working to Ensure Gender Equity in Education* (2012), <http://www.ncwge.org/PDF/TitleIXat40.pdf>. In the past two Olympic games, U.S. women have brought home more medals than U.S. men, and U.S. women alone won as many medals as any other nation. See Greg Myre, *U.S.*



*Women Are the Biggest Winners at the Rio Olympics* (Aug. 21, 2016), <https://goo.gl/z5FmxN>. Girls who play sports perform better academically and are more likely to graduate high school. Nat'l Coal. for Women and Girls in Educ., *supra*, at 10. This increased success goes beyond the classroom: 82% of female business executives were on a school sports team. *Id.* at 11. Without Title IX's mandate of inclusivity for women in athletics, women (and the larger community) would not have reaped these benefits.

Since passage of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act, *see* 29 U.S.C. § 701 *et seq.*; 20 U.S.C. § 1400 *et seq.*, decades of research demonstrates that students with and without disabilities likewise benefit from participating in inclusive classrooms. When students with disabilities are educated alongside their non-disabled peers, disabled and non-disabled students score higher on literacy measures, perform better on standardized tests, get better grades, and are more likely to master their individualized education program goals. *See* Kathleen Whitbread, *What Does the Research Say About Inclusive Education?*, Wrightslaw (1998-2016), <https://goo.gl/K6TzL6>; Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?*, 6 *Future of Children* 77, 91 (1996).

Racially and socioeconomically inclusive classrooms also benefit students. The average student from a low-income background who attends a middle-class

school—a school where less than 50% of the student body is low-income, as measured by free or reduced lunch eligibility—performs better academically than his low-income peers who attend low-income schools. *See* Richard D. Kahlenberg, *From All Walks of Life: New Hope for School Integration*, Am. Educ., Winter 2012-2013, at 4–5. Classroom activities that call for cooperation between students from diverse backgrounds “promote creativity, motivation, deeper learning, critical thinking, and problem-solving skills.” Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, *How Racially Diverse Schools and Classrooms Can Benefit All Students* 14 (Feb. 2016), <https://goo.gl/FgSseO>.

On the other hand, allowing discrimination against one group infects anti-discrimination efforts against others.<sup>4</sup> Educators understand this intuitively: their classrooms cannot embrace diversity, tolerance, and mutual respect in some ways, but deny it in others and still obtain the benefits of inclusive classrooms. Students who see their transgender peers being treated as “less than” justifiably fear that they too will one day be treated as “less than.” The reverse is also true: educators have discussed with us how once their school began adopting LGBT-inclusive

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<sup>4</sup> *See, e.g.*, Wanda Cassidy & Margaret Jackson, *The Need for Equality in Education: An Intersectionality Examination of Labeling and Zero Tolerance Practices*, 40 McGill J. Educ. 435, 438 (2005) (“children who experience discrimination on the basis of race, gender, class, disability, and/or sexual orientation may suffer from more than one form of discrimination. Those factors can be seen to intersect in ways which compound rather than simply add together in final impact. And, while the child may experience multiple levels of discrimination, multiple levels of protection may not be provided by the school.”).

policies, students with other minority identities, such as those with a disability, non-white ethnicity, or an atypical home life, felt safer and more accepted at school.

2. Any assertion that transgender people are violent sexual deviants or that their rights must yield because of sexual deviants does not justify animus toward them but is itself another offensive form of discrimination that stigmatizes transgender people. It perpetuates a harmful stereotype that has no basis in fact. Sadly, this fits well into our nation's shameful history of labeling certain minorities as dangerous—and sexually dangerous in particular—as a justification for their oppression.<sup>5</sup> The reality is that not only do transgender individuals have no greater

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<sup>5</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985) (holding that “vague, undifferentiated fears” of people with disabilities could not justify discrimination against them); Ruth Thompson-Miller et al., *Jim Crow's Legacy: The Lasting Impact of Segregation* 22–23, 89 (2015) (discussing that scores of black men were lynched for crimes ranging from looking at a white woman to alleged rape of a white woman during the Jim Crow era, pursuant to a still-present stereotype that black men are particularly criminal and dangerous for white women); Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children*, 21 *Duke J. Gender L. & Pol'y* 125, 142–52, 161–63 (2013) (discussing how gay rights opponents have historically used a narrative equating homosexuality with pedophilia to defeat proposed anti-discrimination laws, ban gay couples from adopting, attempt to ban gays and lesbians from teaching in public schools, and argue against allowing gay Boy Scout troop leaders); Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 *Harv. L. & Pol'y Rev.* 201, 219 (2012) (“The fear of sexual predation by Black men toward White women—the familiar stereotype that defined so much of the received understanding of race relations in post-Civil War America—was the dominant justification relied upon by forces opposed to the integration of municipal pools”); Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The*

proclivity for physical or sexual assault than anyone else, they, in fact, are much more likely to be victims of both physical and sexual assaults. *See, e.g.*, Grant, *supra*, at 3 (“Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%).”).

There is absolutely no support for the contention that prohibiting discrimination against transgender students would put other students at risk. None of the jurisdictions that allow transgender students to use facilities consistent with their gender identity have experienced increased sex crimes as a result of those laws and policies, and victims’ advocacy groups, police departments, and government representatives from these jurisdictions have repeatedly verified this. *See* Brief of Amici Curiae Law Enforcement Officers in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.* (No. 16-273), 2017 WL 836845, at \*3–10 (2017); Brief of Amici Curiae School Administrators from Thirty-One States and the District of Columbia in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.* (No. 16-273), 2017 WL 930055, at \*11–16 (2017); Brief of Anti-Sexual Assault, Domestic Violence, and Gender-Based Violence Organizations As Amici Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 894891,

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*Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 Ark. Hist. Q. 42, 43–46, 51–52 (2003) (discussing how white parents’ fears that black boys and girls would harm their daughters was a driving force in the fight against school integration).

at \*10–14 (2017).

Educators find the idea that boys will pretend to be transgender to engage in sexual ogling of girls to be nonsense. The notion that a teenage boy would come out to his peers and teachers as transgender and face all that such an announcement is freighted with in order to gain access to the girl’s bathroom to engage in voyeurism is ludicrous. Amici are unaware of any misconduct in a bathroom that is related to or caused by an inclusive transgender policy—and Gloucester fails to point to any specific example.

Fortunately, all students’ privacy interests can be addressed without discriminating against transgender students. In schools that permit transgender students to use the facilities commensurate with their gender identity, gender-neutral facilities are commonly open to any student who would rather not use a sex-segregated facility, and installations that increase privacy for everyone in sex-segregated facilities are beneficial to all students. That said, the majority of out transgender students report that their classmates are supportive. James, *supra*, at 137.

**III. Concluding that Title IX proscribes transgender discrimination would provide administrable rules for education employees; a contrary ruling would create confusion and sow discord.**

Although the Departments of Justice and Education withdrew their guidance explaining that compliance with Title IX requires equal treatment for transgender

students, they did so without directly repudiating the legal conclusions in those documents. *See* Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, Withdrawal of Title IX Guidance (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

1. Amici agree with the legal conclusions in the original Dear Colleague Letter<sup>6</sup> and can tell this Court unequivocally that the interpretation of Title IX found in the now-rescinded Departments of Justice and Education's guidance and the model policies offered therein<sup>7</sup> have been successfully adopted by schools throughout the nation. Indeed, at least fourteen states and the District of Columbia explicitly prohibit gender identity-based discrimination in education.<sup>8</sup> Likewise, numerous

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<sup>6</sup> *See, e.g.*, Nat'l Educ. Ass'n, Legal Guidance on Transgender Students' Rights (June 2016), [https://www.nea.org/assets/docs/20184\\_Transgender%20Guide\\_v4.pdf](https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf).

<sup>7</sup> *See* Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, Transgender Students (May 13, 2016), <https://www.justice.gov/opa/file/850986/download>; Office of Elementary and Secondary Educ., Office of Safe and Healthy Students, U.S. Dep't of Educ., Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

<sup>8</sup> *See* Cal. Educ. Code §§ 220, 221.5(f); Colo. Rev. Stat. §§ 24-34-301, 24-34-601; Conn. Gen. Stat. §§ 1-1n, 10-15c; 775 Ill. Comp. Stat. 5/5-102, 5/5-103(O-1); Iowa Code § 216.9; Me. Rev. Stat. tit. 5, §§ 4553(8)(j), 4553(9-C), 4592; Mass. Gen. Laws ch.76, § 5; Minn. Stat. §§ 363A.03(44), 363A.13; Nev. Rev. Stat. §§ 651.050(3)(k), 651.070; N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l); N.Y. Educ. Law §§ 11(6), 12; Or. Rev. Stat. §§

school districts and individual schools have adopted policies that protect the rights of transgender students and create safe learning environments.<sup>9</sup> These policies protect

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174.100(7), 659.850; Vt. Stat. Ann. tit. 9, §§ 4501(1), 4502; Wash. Rev. Code § 28a.642.010; D.C. Code § 2-1402.4(1); *see also* Del. Code Ann. tit. 6, § 4503 (prohibiting gender-identity based discrimination in places of public accommodation); N.M. Stat. Ann. § 28-1-7(f) (same); R.I. Gen. Laws § 11-24-2 (same).

<sup>9</sup> *See e.g.*, Boulder Valley Sch. Dist., Guidelines Regarding the Support of Students and Staff who are Transgender and/or Gender Nonconforming (2016), <https://www.bvbsd.org/policies/Policies/AC-E3.pdf>; Anchorage School District, Administrative Guidelines: Working with Transgender and Gender Nonconforming Students and Employees (2015), [http://img.ccrd.clearchannel.com/media/mlib/608/2015/08/default/transgender\\_policy\\_0\\_1440016299.pdf](http://img.ccrd.clearchannel.com/media/mlib/608/2015/08/default/transgender_policy_0_1440016299.pdf); Chicago Public Schools, Guidelines Regarding the Support of Transgender and Gender Nonconforming Students (2016), <http://www.vgonline.org/wp-content/uploads/2017/01/6-VGV-Board-Approved-Policy-on-Support-of-Transgender-and-Gender-Non-conforming-Students.pdf>; District of Columbia Public Schools, Transgender and Gender-Nonconforming Policy Guidance (2015), <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf>; El Rancho Unified School District, Transgender and Gender-Nonconforming Students (AR 5145.3) (2014), [http://www.erusd.org/pdf/board\\_policies/5145\\_3.pdf](http://www.erusd.org/pdf/board_policies/5145_3.pdf); Kansas City 33 School District (MO), Prohibition Against Discrimination, Harassment and Retaliation (Transgender and Gender Nonconforming Employee and Students) (2013), [http://www.kcpublicschools.org/cms/lib6/MO01001840/Centricity/Domain/1292/2016-2017\\_Student\\_Handbook\\_and\\_Code\\_of\\_Conduct\\_FINAL.pdf](http://www.kcpublicschools.org/cms/lib6/MO01001840/Centricity/Domain/1292/2016-2017_Student_Handbook_and_Code_of_Conduct_FINAL.pdf); Los Angeles Unified School District (CA), Transgender Students – Ensuring Equity and Nondiscrimination (2014), <http://site.ausd.net/modules/groups/homepagefiles/cms/1414168/File/AB%201266/Transgender%20Policy%20Bulletin%20-01-27-14.pdf>; Cumberland School Department (RI), Policy Affecting Students Who Identify as Transgender or Gender Non-conforming (J-23) (2016), <http://www.cumberlandschools.org/system/files/J-23%20Transgender%2526GenderNon-ConformingPolicy-AP%203.24.16.pdf>.

the rights of transgender students by, among other things, ensuring that transgender students are allowed to use sex-segregated facilities consistent with their gender identity and that students are referred to by names and pronouns consistent with their gender identity.

2. On the other hand, a decision holding that transgender students are not categorically protected by Title IX would sow confusion and discord in public schools.

Even if lawyers and judges can draw a line between transgender discrimination and sex-stereotyping discrimination as some courts have tried to do—and we believe that such a line is illusory—educators and public school employees find such line drawing impossible to apply in the real world.

Educators face this real problem today. Suppose one student harasses a transgender student. Title IX is violated “when peer harassment based on . . . sex . . . is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”

*See, e.g.*, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter, Harassment and Bullying 8 (Oct. 26, 2010),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

Should the Court conclude that transgender discrimination is prohibited sex discrimination under Title IX, the teacher’s duty is clear: address and report the



harassment. But if the Court were to adopt the view of a minority of the lower courts—that Title IX may prohibit some but not all forms of discrimination against transgender students—teachers would be left in the lurch. What are their duties to transgender students and when are they triggered? Must teachers parse the harasser's motivation to determine whether the harassment is motivated by sex stereotypes or transgender animus?

A clear ruling holding that transgender discrimination violates Title IX will go a long way toward clarifying which duties public school districts, educators, and other school employees have to transgender students. A contrary ruling would only muddle their duties.

#### **IV. Educators themselves are harmed when they are compelled to be instruments of harmful discrimination against their students.**

Finally, educators and other school employees themselves are harmed when schools require them to discriminate against transgender students.

Schools like Gavin's do not discriminate on their own. Instead, they compel individual administrators, educators, and public school employees to carry out the discriminatory policies. Compelling educators to participate in such a harmful and degrading scheme—a scheme that many educators understand is harmful (and not just to transgender students but to other students and the overall school climate)—wounds the educators. To be forced to watch and participate in the stigmatization and degradation that discriminatory policies inflict is professionally and

psychologically harmful to the educators themselves.

When policies prevent teachers from addressing student needs, teachers no longer have access to the moral rewards of being an educator, leading to demoralization. Doris A. Santoro, *Good Teaching in Difficult Times: Demoralization in the Pursuit of Good Work*, 118 Am. J. Educ. 1, 1-2, 11-12 (2011); *see also* Lisa C. Ehrich, Megan Kimber, Jan Millwater & Neil Cranston, *Ethical Dilemmas: A Model To Understand Teacher Practice*, 17 Teachers & Teaching: Theory & Practice 173 (2011). And this demoralization causes teachers to suffer “depression, discouragement, frustration, and shame,” leaving them “continually frustrated” in their “pursuit of good teaching.” Santoro, *supra*, at 17. On the other hand, “[t]he moral rewards of teaching are activated when educators feel that they are doing what is right in terms of one’s students, the teaching profession, and themselves.” *Id.* at 2.

Even school employees who support discriminatory policies may be harmed. Recent peer-reviewed studies have found that individuals who act with prejudice towards others face negative health outcomes. Mark L. Hatzenbuehler, Anna Bellatorre & Peter Muennig, *Anti-Gay Prejudice and All-Cause Mortality Among Heterosexuals in the United States*, 104 Am. J. Pub. Health 332, 332, 335 (2014); Yeonjin Lee, et al., *Effects of Racial Prejudice on the Health of Communities*, 105 Am. J. Pub. Health 2349, 2352–53 (2015). Those who engage in discrimination

experience more anger and stress, and frequently deal with this anger and stress by engaging in unhealthy coping mechanisms. Hatzenbuehler, *supra*, at 336. And working in a discriminatory environment can be harmful, even for those who do not directly participate in the discrimination. *Cf.* Lisa Rapaport, *Racism Linked to Mortality for Both Blacks and Whites in U.S.*, Reuters (Sept. 18, 2015); *see also* Lee, *supra*, at 2353.

### CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse the dismissal of Gavin's Title IX claim and the denial of his motion for preliminary injunction.

Respectfully submitted,

/s/ Eric A. Harrington

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,463 words from the Introduction and Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Eric A. Harrington

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