

No. 19-1952

IN THE

United States Court of Appeals for the Fourth Circuit

GAVIN GRIMM,

Plaintiff – Appellee,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellant.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION*

**AMICI CURIAE BRIEF OF THE NATIONAL PTA, GLSEN,
AMERICAN SCHOOL COUNSELOR ASSOCIATION, AND NATIONAL
ASSOCIATION OF SCHOOL PSYCHOLOGISTS
IN SUPPORT OF PLAINTIFF - APPELLEE**

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TABLE OF CONTENTS

INTERESTS AND IDENTITIES OF AMICI CURIAE	1
INTRODUCTION	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. RESTROOM AND OTHER IN-SCHOOL DISCRIMINATION SERIOUSLY HARMS TRANSGENDER STUDENTS.....	9
A. Transgender students suffer a variety of harms at school due to mistreatment by others.	11
B. The harms suffered by transgender students impair their educational experiences and outcomes.	13
C. Restroom discrimination severely harms transgender students.	14
II. THE EXPERIENCES OF MANY SCHOOLS ACROSS THE NATION BELIE THE PURPORTED RATIONAL BASES FOR DISCRIMINATION AGAINST TRANSGENDER STUDENTS.....	18
A. Inclusion and non-discrimination work and harm no one.....	19
B. Discrimination against transgender students is based on unfounded fears.	27
CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Board of Educ. of the Highland Local School Dist. v. U.S. Dep’t of Educ.</i> , 208 F. Supp. 3d 850 (S.D. Ohio 2016).....	19
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<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	18, 27
<i>Davis ex rel. Lashonda D. v. Monroe County Bd. of Educ.</i> , 526 U.S. 629 (1999).....	8
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INTERESTS AND IDENTITIES OF AMICI CURIAE

National PTA is a nationwide network of 3.5 million families, students, teachers, administrators, and business and community leaders devoted to making a difference for the education, health, safety and well-being of every child and making every child's potential a reality. National PTA is comprised of 54 state congresses, comprising all 50 states, the District of Columbia, U.S. Virgin Islands, Puerto Rico and the Department of Defense Schools in Europe. Additionally, there are more than 24,000 local PTA units nationwide. PTA serves 16.5 million students across the country.

The overall purpose of PTA is to bring together families, educators and business and community leaders to solve the toughest challenges facing schools and communities and engage and empower families and communities to participate in that mission. PTA helps ensure that all students have what they need to succeed: a high-quality education, safe and healthy environments and access to opportunities. For more than 100 years, PTA has been a powerful voice for all children, a relevant resource for families and communities, and a strong advocate for public education.

GLSEN is a non-profit education organization that works with students, parents, and educators across the country and around the world to make all schools safe and affirming for all students, regardless of sexual orientation, gender identity, or gender expression. Since 1990, GLSEN has partnered with educators,

schools, and districts across the United States to develop, evaluate, and promulgate LGBTQ-supportive policies, programs, and practices for K-12 schools. GLSEN's work has contributed to measurable improvements in the school experience of lesbian, gay, bisexual, transgender, questioning, and queer students in all fifty states, and the organization is now recognized globally as a key contributor to educational access and opportunity for at-risk youth.

GLSEN's expertise and experience informs the work of UN agencies on the Sustainable Development Goals in Education, legislators and policymakers at all levels in the U.S., and individual schools and districts via our chapter network of 45 local chapters in 31 states. GLSEN also conducts quantitative and qualitative research on the experience of LGBTQ students in K-12 schools, and engagement and advocacy in support of a research-based public policy agenda. In addition, GLSEN's student leadership development and student organizing programs have reached hundreds of thousands of students in all fifty states, mobilized via events like GLSEN's Day of Silence and Ally Week or through GLSEN youth summits or student club support programs. Thousands of alumni of GLSEN's student programs have gone on to lives of service, including work as public and elected officials, business leaders and entrepreneurs, and principals, counselors, and teachers.

The **American School Counselor Association (ASCA)** supports school counselors' efforts to help students focus on academic, career and

social/emotional development so they can achieve success in school and are prepared to lead fulfilling lives as responsible members of society. ASCA provides professional development, publications and other resources, research and advocacy to more than 35,000 school counselors around the globe. School counselors promote affirmation, respect, and equal opportunity for all individuals regardless of gender identity or gender expression. School counselors encourage a safe and affirming school environment and promote awareness of and education on issues related to transgender and gender-nonconforming students.

The **National Association of School Psychologists (NASP)** is the world's largest organization of school psychologists, representing more than 25,000 school psychologists throughout the United States and 25 other countries, with members in every state, the District of Columbia, and Puerto Rico. NASP's vision is that all children and youth thrive in school, at home, and throughout life. To that end, NASP empowers school psychologists by advancing effective practices to improve students' learning, behavior, and mental health. NASP supports that all youth have equal opportunities to participate in and benefit from educational and mental health services within schools regardless of sexual orientation, gender identity, or gender expression. Critical to this effort is fostering positive, safe, and affirming school environments.

INTRODUCTION

Amici¹ are a diverse group of national education organizations whose membership and constituents are on the front lines every day, doing the hard work of educating students through academic instruction and support; furnishing counseling and guidance; and providing opportunities for engagement with peers and others. Critical to this educational mission, Amici seek to build and maintain non-discriminatory learning environments for all students, regardless of their backgrounds, characteristics, or experience.

As educators and education supporters, Amici know that restroom discrimination against transgender students hurts kids. Amici have gained extensive, hands-on experience in what policies and practices best serve all students while providing transgender students with full access to a non-discriminatory learning environment. Amici have seen transgender students' capacity for educational success and healthy development when properly supported, and the tragic harms imposed on transgender students when that essential support is denied. This brief shares this experience with the Court.

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici made a monetary contribution to its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(c), all parties consent to the filing of this brief.

As Amici know from their experience, the required use of a separate restroom by transgender students is inhumane and is entirely based on unfounded fears. Such practices are, therefore, inconsistent with established principles requiring equality.

First, as Amici know first-hand, all too common harms occur when transgender students are relegated to the shadows or stigmatized by discrimination. This includes being forced to use a restroom that is not aligned with their gender identity or being shunted to a “special” restroom for transgender students. For example, in those situations, over 40% of transgender students fast, dehydrate, or otherwise force themselves not to use the restroom during the school day. *See* Joseph Kosciw, et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, & Queer Youth in Our Nation’s Schools*, GLSEN (2018) (hereinafter “2017 NSCS”) (42.7% avoid restrooms); *see also* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives*, 19 *Journal of Public Management & Social Policy* 74–75 (2013) (54% of adult transgender students and employees surveyed “reported having some sort of physical problem from trying to avoid using public restrooms”). Transgender students subjected to discrimination also experience elevated levels of severe depression and even suicide. On the other hand, when transgender students are accorded the dignity they deserve (*e.g.*, when

they are addressed with appropriate names and pronouns and use restrooms that conform to their gender identity), transgender students reflect the same, healthy psychological profile as their peers. Lily Durwood et al., *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56 *Journal of the American Academy of Child & Adolescent Psychiatry* 116, 116 (2017).

Second, schools and school districts across the nation have already developed and successfully deployed practical, effective strategies to ensure transgender students receive appropriate support and, ultimately, the educational experiences they need to succeed and live healthy, fulfilling lives. This includes allowing each student to use the restroom that matches their gender identity. The experiences of these schools put the lie to the supposed legitimate justifications for restroom discrimination: preventing students who pretend to be transgender from obtaining access to opposite-gender restrooms and protecting privacy. Consistently, inclusionary restroom policies have been implemented with little controversy, great success, and respect for the human dignity and educational needs of the schools' entire student populations.

Anti-discrimination cases have employed “dispositive realities” to reject “self-fulfilling prophecies” that are “routinely used to deny rights or opportunities.” *United States v. Virginia*, 518 U.S. 515, 543 (1996). Here, the dispositive realities are the successful experiences and practices of Amici and other

educators throughout the nation in implementing inclusionary restroom policies. Appellant’s unsubstantiated prophecies about students pretending to be transgender to gain access to restrooms of the opposite sex cannot prevail at the expense of transgender students’ rights to take advantage of a “state-supplied educational opportunity for which they are fit,” *id.* at 550–551; receive full access to non-discriminatory educational facilities; and live free of stigmatizing and discriminatory practices that cause them deep and enduring harms.

SUMMARY OF ARGUMENT

Harm to transgender students is the core of this case. As educators throughout the country understand, equality requires that public schools cannot prejudicially disfavor groups of boys or girls based on unfounded fears. Rather, schools must help all students understand and achieve their full potential so that they become citizens and workers who are productive, engaged, and fulfilled.

Without a school environment that is authentically welcoming and that honors and protects the dignity and best interests of all students—every one of whom is different in some way—many students are harmed. A school that lacks a culture that embraces safety, respect, and inclusion for all, regardless of background and circumstance, injures the disfavored students. *See* 2017 NSCS.

As set forth in Section I, the discriminatory denial of equal access to restrooms routinely suffered by transgender students like Plaintiff-Appellee Gavin

Grimm causes dire educational and life consequences. Extensive research shows the myriad harms transgender students experience in discriminatory school settings, including when subjected to restroom discrimination. Understanding the severity of these harms is crucial to the Court’s consideration of this case. Indeed, as reflected in Supreme Court cases and U.S. Department of Education policies, the contours of federal non-discrimination law have been shaped to prevent real-world harms experienced by students.²

As set forth in Section II, the purported bases for inflicting severe harms on Mr. Grimm and other transgender students through restroom discrimination are entirely unfounded fears. Educators in many places can and do provide transgender students the inclusive and supportive environment they need—including equal access to restrooms—without any harm to other students. Indeed, schools and districts across the country successfully have implemented restroom policies that neither discriminate against transgender students nor harm others. That record of success undermines any fear of privacy infringements and harassment.

² See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 n.11 (1954) (premising forbidding “separate but equal” on extensive social science research and information); *Davis ex rel. Lashonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (examining the severity of student-on-student harassment sufficient to constitute a Title IX claim on the basis of interference with equal access to educational opportunities); U.S. Dep’t of Education Sexual Harassment Guidance (2001) (explaining in detail, with examples, the harm to students that is an element of federal harassment standards); U.S. Dep’t of Education Racial Harassment Guidance (1994) (same).

ARGUMENT

I. RESTROOM AND OTHER IN-SCHOOL DISCRIMINATION SERIOUSLY HARMS TRANSGENDER STUDENTS.

The serious harms and deprivations transgender students suffer as a result of discrimination are undeniably pertinent to equal protection. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2604, 2606 (2015) (relying on “a grave and continuing harm,” “disrespect,” and “[d]ignitary wounds”); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (relying on “immediate, continuing, and real injuries.”). Likewise, under the Equal Protection Clause, “new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.” *Obergefell*, 135 S.Ct. at 2603. *See also United States v. Windsor*, 133 S.Ct. 2675, 2693, 2696 (2013) (rejecting “tradition” as a rational basis for anti-gay and lesbian discrimination.).

Until June 2017, when he graduated high school, Mr. Grimm was one of the approximately 150,000 transgender students who attend grades K-12 schools throughout America.³ Like other transgender individuals, Mr. Grimm has a gender

³ Transgender persons comprise an estimated 0.6% of the adult United States population (approximately 1.4 million adults 18 or older) and 0.7% of youth ages 13 to 17 (approximately 150,000 youth). Jody L. Herman, et al., *Age of Individuals who Identify as Transgender in the United States*, The Williams Institute (2017); *see also*, Michelle M. Johns, et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, Morbidity

identity that differs from the gender assigned to him at birth. National Association of School Psychologists, Position Statement, *Safe Schools for Transgender and Gender Diverse Students* (2014). Transgender students like Mr. Grimm live in all fifty states and U.S. territories; come from different racial, ethnic, and religious backgrounds; are represented in every socioeconomic level; and attend all variety of K-12 schools.

Listen to transgender student Corey Maison:

We are just like any other kids. We only want people to accept and love us for who we are.

Nicole Pelletiere, *'We're Not a Threat': Transgender Teen Shares Powerful Message on Bullying*, ABC News (Feb. 8, 2017), <http://abcnews.go.com/Lifestyle/threat-transgender-teen-shares-powerful-message-bullying/story?id=39752422>.

Instead,

Corey was bullied for being transgender when she was younger. The first incident was when a child pushed her down a hill covered in frozen ice, causing injuries to Corey's face. Eventually, Corey was moved to another school as a result of the bullying...

"I might look happy now, but I haven't always been...I've known I was different all my life. When I was little I loved to play with dolls and play dress up. I loved painting my nails too. Wearing my mom's high heels was my favorite! But only in the house. Never outside...because I was

and Mortality Weekly Report 68(3) (Jan. 25, 2019) (finding that 1.8% of students across ten states and nine urban school districts identified as transgender).

born a boy. I never had many friends. I didn't fit in with girls, and the boys made fun of me. In 5th grade I was bullied so bad. Almost every day I came home from school crying.... One of the kids told me I should kill myself because no one liked me anyway. He told me no one would miss me if I was dead.

Id.

Corey Maison's experience is all too common. At school, transgender students often suffer a variety of serious harms—emotional and physical—not because they *are* transgender but as a result of *how they are treated because they are transgender*. These students are particularly vulnerable in elementary and secondary school settings, where harms inflicted by peers and adults significantly impede their education and their prospects for leading fulfilling and productive lives. When a school commits or endorses these acts and omissions, it compounds the harms suffered by transgender students, leading often to tragic consequences.

A. Transgender students suffer a variety of harms at school due to mistreatment by others.

As described by Katharine Prescott, who lost her transgender son Kyler to suicide at age 14:

Kyler struggled to be respected and understood at school because of his gender identity. Administrators and teachers clearly were not supportive of his gender identity, and he was misgendered in front of other students on a number of occasions. Because of this, I pulled him out of the traditional classroom and put him in independent study so that he would not be humiliated in this way. Kyler had always loved school, so it was tragic that this basic right to education was infringed upon. Kyler felt stabbed in the heart every time someone would say 'she.' It's really traumatic to keep getting called something you truly feel you're not.

Statement from Katharine Prescott to GLSEN (Feb. 26, 2017) (document on file with undersigned counsel); *see also* GLSEN, *Mother of Trans Student Lost to Suicide and Advocate for Title IX Guidance Release Statement*, GLSEN, <http://www.glsen.org/article/glsen-mother-trans-student-lost-suicide-and-advocate-title-ix-guidance-release-statement> (last visited Nov. 23, 2019); Avianne Tan, *California Mother Appeals for Support for Transgender Teens After Losing Son to Suicide*, ABC News (May 27, 2015), <http://abcnews.go.com/US/california-mother-appeals-support-transgender-teens-losing-son/story?id=31338159>. Kyler’s story is by no means unique. “Schools nationwide are hostile environments for a distressing number of LGBTQ students, the overwhelming majority of whom routinely hear anti-LGBTQ language and experience victimization and discrimination at school.” 2017 NSCS at xviii.

Transgender students too often encounter school experiences that breed life-long mental, emotional, and socio-economic consequences. These consequences are born out of almost all aspects of education, from the bathroom they use, to the name they are called, and how they are treated by peers and officials alike. Indeed, transgender students are subjected to bullying and harassment at alarmingly high rates. *See, e.g.*, 2017 NSCS; Joseph Kosciw, et al., *The Effect of Negative School Climate on Academic Outcomes for LGBT Youth and The Role of In-School Supports*, 12 *Journal of School Violence* 45–63 (2012). School climates

that are unwelcoming or threatening have a direct bearing on students' well-being and safety. *Id.* The 2017 National School Climate Survey found that 82% of LGBTQ students reported being verbally harassed in the last year; 57.3% were sexually harassed; 36.7% were physically harassed; and 16.5% were physically assaulted. 2017 NSCS at 24–26.

Compared to transgender students who did not suffer these negative experiences, transgender students who did were more likely to have attempted suicide (52% compared to 37%), more likely to be in serious psychological distress (47% compared to 37%), and more likely to have been homeless (40% compared to 22%). Sandy James et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality at 5–6, 15 (Dec. 2016), <http://www.ustranssurvey.org/report> (“USTS”).

B. The harms suffered by transgender students impair their educational experiences and outcomes.

The negative experiences transgender students suffer impair their ability to learn and fully participate in school. For example, surveys have found that 34.9% of LGBTQ students report missing at least one school day in the previous month because they felt unsafe at school. *See* 2017 NSCS at 15. Without safe and supportive school environments, transgender students also frequently avoid attending school functions (75.4% report doing so) and participating in extracurricular activities (70.5%). *Id.*

The disruption to education is even worse for those transgender students who are frequently harassed during the school day: 68% of such students reported having missed school because of concerns for their safety. Emily Greytak, et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, GLSEN (2009), <https://www.issuelab.org/resources/1843/1843.pdf>. These more frequently targeted students also have lower grades, are less likely to plan to attend college, and have lower educational outcomes than transgender students who attend safer schools. *Id.* at 25.

C. Restroom discrimination severely harms transgender students.

Transgender students suffer particular harms when they attend schools that force them to use *separate* restrooms or to use restrooms that *do not align* with their gender identity. These harms include stigmatization, loss of educational experiences, and increased risk of harassment and assault.

Transgender students who are denied access to restrooms that align with how they live their lives are frequently singled out for unwanted and harmful attention. In some instances, for example, members of the school community find out that fellow students are transgender only when they are forced to use separate or un-aligned facilities. The stigmatization that results from this separate treatment can have powerfully negative impacts on transgender students' well-being. As the Court below noted, "Mr. Grimm 'soon found it stigmatizing to use a separate

restroom,’ . . . and ‘began to feel anxiety and shame surrounding [his] travel to the nurse's office.’” Order, No. 4-15 Civ. 54, ECF No. 229 (E.D. Va. Aug. 9, 2019) (“Order”) (quoting the Declaration of Gavin Grimm).

Evidence suggests that denying transgender individuals equal access to restrooms causes severe psychological distress often leading to attempted suicide. Max Kutner, *Denying Transgender People Bathroom Access Is Linked To Suicide*, Newsweek (May 1, 2016), <http://www.newsweek.com/transgender-bathroom-law-study-suicide-454185>; Kirsten Clements-Nolle, et al., *Attempted suicide among transgender persons: The influence of gender-based discrimination and victimization*, 51 *Journal of Homosexuality*, 53–69 (2006); see also, Hayley Sutton, *Transgender college students are also more at risk for suicide when denied access to bathrooms aligned with their gender*, 13 *Campus Security Report* 9 (2016). Mr. Grimm unfortunately had a similar experience. Order at 19 (“This stress [of using a separate restroom] ‘was unbearable’ and the resulting suicidal thoughts [Mr. Grimm] suffered led to his hospitalization[.]”)

Requiring transgender students to use separate restrooms commonly imposes significant practical burdens not experienced by their classmates. As in this case, these separate restrooms often are further away from classrooms than the regular student restrooms, which causes transgender students to be late for class, resulting in penalties for tardiness and reduced instructional time. Order at 3 (noting

that Mr. Grimm’s use of a separate restroom caused him to be late to class). Routinely arriving late to class as a result of using the restroom draws unwanted attention, further stigmatizing the transgender student.

The stigma imposed by such discriminatory restrictions on transgender students’ access to restrooms and locker rooms is so deleterious that, for example, 40% of transgender students at times avoid the situation altogether by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the school day even when necessary. 2017 NSCS at 12–13 (42.7% avoid restrooms and 40.6% avoid locker rooms). This behavior, in turn often leads to medical problems and makes it harder to focus on academic learning in school. Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives*, 19 *Journal of Public Management & Social Policy* 74-75 (2013) (54% of survey respondents “reported having some sort of physical problem from trying to avoid using public restrooms”).

Mr. Grimm likewise responded to his denial of equal bathroom access by avoiding bathroom use and suffered both physical and academic consequences as a result. The Court below found that: “Mr. Grimm avoided using restrooms at school and later developed urinary tract infections. Gavin Grimm Decl. ¶¶ 51–52. This caused him to become distracted and uncomfortable in class. *Id.*”

Forcing students to use separate restrooms impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. See Katherine Szczerbinski, *Education Connection: The Importance of Allowing Students to Use Bathrooms and Locker Rooms Reflecting Their Gender Identity*, 36 Child. Legal Rts. J. 153 (2016) (“having separate facilities deprives and further stigmatizes students who want to be in the same facilities as their classmates, ultimately leading to their isolation from peers”).

Requiring a transgender student to use a separate restroom thus deprives that student of equality. That student is branded not just as different but as posing such a danger to other students that she is unfit to share their restrooms. The Supreme Court has rejected time and time again supposedly “separate-but-equal” treatment, including in school facilities. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75 (1998). It does not matter that other students have the option to use the separate restroom. An unconstitutional system of restrooms for “Whites” and “People of Color” would not be rendered constitutional by changing the latter to restrooms for “People of Color and Others Wishing To Join Them.”

II. THE EXPERIENCES OF MANY SCHOOLS ACROSS THE NATION BELIE THE PURPORTED RATIONAL BASES FOR DISCRIMINATION AGAINST TRANSGENDER STUDENTS.

The Supreme Court has held that a rational basis is lacking when a policy is merely based on “vague, undifferentiated fears,” as that would allow “some portion of the community to validate what would otherwise be an equal protection violation.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985). Laws based on “negative attitudes, or fear, unsubstantiated by [properly cognizable] factors” do not pass muster. *Id.* at 448. As Amici know from experience, and as we next demonstrate, Appellant’s purported goals of protecting the privacy of non-transgender students and preventing harassment are based solely on unsubstantiated fears and negative attitudes towards transgender individuals. *See Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 532–33 (3rd Cir. 2018) (rejecting challenge to school board’s inclusive policy because “the appellants’ privacy complaint is not with transgender students’ conduct, but with their mere presence [and] the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces”); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017) (finding a likelihood of success on student’s Equal Protection claim because “the School District’s privacy argument is based upon sheer conjecture and abstraction”); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F.

Supp. 3d 704, 725 (D. Md. 2018) (holding that the school board’s policy was not substantially related to protecting privacy rights because “Defendants are arguing that the presence of M.A.B. in the boys’ locker room—itsself—is what infringes on the privacy rights of other boys.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290 (W.D. Pa. 2017) (acknowledging school’s obligation to protect student privacy but finding that “there is no record evidence that this actually imperiled or risked imperiling any privacy interest of any person.”); *Board of Educ. of the Highland Local School Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d. 850, 874 (S.D. Ohio 2016) (holding equal protection denied as school board had “failed to put forth an ‘exceedingly persuasive justification’ *or even a rational one*, for preventing Jane from using the girls’ restroom.” (Emphasis added).)

A. Inclusion and non-discrimination work and harm no one.

The experience of educators across the country demonstrates that inclusion and non-discrimination can be achieved while protecting the privacy interests of all students. While policies among states and school districts may differ, common across all state and district policies is and must be a commitment to providing a safe and supportive school environment that allows transgender students to pursue their education and thrive without facing the mistreatment, stigmatization, and harms discussed above, including access to facilities that correspond to transgender students’ gender identity.

The experience of Janice Adams, superintendent of the Benicia Unified school district in California, provides an example of how administrators with no prior experiences with transgender students successfully implement inclusive policies:

One day about eight years ago, a mother came to me and asked what I could do to support her child who would be starting kindergarten in the fall. . . . Toni was assigned male at birth, but her parents were considering letting her start school as a girl, which is how she had been identifying for some time.

[. . .]

By far the easiest part of the process was the acceptance by Toni's classmates, who embraced her and affirmed her identity. As we worked to balance the need to educate and inform parents while protecting Toni's right to privacy, I met with a small number of concerned parents individually and attended a parent night facilitated by Gender Spectrum. We provided education regarding transgender children to the school's staff, our administrative team and the governing board. For the most part there was a compassionate response to do the right thing. There were people who struggled with changes we put in place, but we continually focused on supporting Toni and doing what was right.

Janice Adams, Superintendent, Benicia Unified School District in Orr and Baum,

Schools in Transition: A Guide for Supporting Transgender Students in K-12

Schools (2015), [http://hrc-assets.s3-website-us-east-](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf)

[1.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf).

In the instant case, there is no evidence that the school faced any barrier to successfully implementing an inclusive policy. Indeed, as the Court below noted, “it is undisputed that the Board received no complaints regarding any encounter with Mr. Grimm in a restroom.” Order at 22. This is unsurprising since inclusive policies

have been implemented successfully in many schools across the nation and designed by state governments, local municipalities, school districts, and/or schools. *See, e.g.*, Boulder Valley School District, “Guidelines Regarding the Support of Students and Staff Who Are Transgender and/or Gender Nonconforming,” at 1 (May 10, 2016) <https://www.bvsd.org/about/board-of-education/policies/policy/~board/a-policies/post/guidelines-regarding-the-support-of-students-and-staff-who-are-transgender-andor-gender-nonconforming-exhibit> (“[T]he goal is to ensure the safety, comfort, and healthy development of the students who are transgender or gender nonconforming while maximizing the students’ social integration and minimizing stigmatization of the students.”). Typically, inclusive school policies address the following topics: (i) bullying, harassment, and discrimination; (ii) privacy/confidentiality; (iii) media and community communication; (iv) names, pronouns, and school records; (v) access to gender-segregated activities and facilities, including restrooms; (vi) dress code; (vii) student transitions; (viii) training and professional development; and (ix) publication of the policy. GLSEN Model District Policy on Transgender and Gender Nonconforming Students (2016). Optimally, comprehensive policies and practices also include establishing supportive student clubs (*e.g.*, Gay/Straight Alliance Clubs); training supportive educators; implementing inclusive curricula; and adopting, communicating clearly, and enforcing inclusive policies as well. 2017 NSCS at 53–77.

These approaches are informed by decades of research, collaboration with education and mental health professionals, and prior successes in schools across the nation. Notably, similar inclusive approaches to policy and practice have been endorsed by the Amici organizations and other national educational and medical organizations.⁴

A critical non-discrimination policy is to allow transgender students equal access to restrooms that recognizes their gender identity. Many such policies

⁴ *See,*

- The American Academy of Pediatrics at <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPOpposesLegislationAgainstTransgenderChildren.aspx>;
- The American Psychological Association at <http://www.apa.org/pi/lgbt/programs/transgender/>;
- American School Counselor Association at <https://www.schoolcounselor.org/magazine/blogs/may-june-2016/transgender-student-support>;
- The Association for Supervision and Curriculum Development at <http://www.ascd.org/publications/newsletters/education-update/jan16/vol58/num01/Charting-a-Course-to-Transgender-Inclusion.aspx>;
- The National Education Association at https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf;
- The American Federation of Teachers at <http://www.aft.org/node/11195>;
- The National Association of School Psychologists at https://www.nasponline.org/assets/Documents/Research%20and%20Policy/Position%20Statements/Transgender_PositionStatement.pdf;
- National PTA at <http://www.pta.org/newsevents/newsdetail.cfm?ItemNumber=4838>.

allow *any* student to use a private or single-stall facility, rather than forcing transgender students to endure the stigma of being the only students forced to use a separate facility. *See, e.g.*, Charlotte-Mecklenberg Schools (NC), “Supporting Transgender Students” (June 20, 2016) http://dig.abclocal.go.com/wtvd/docs/CMS-supporting-transgender-students-training-final_5599792.pdf; El Rancho Unified School District (CA), “Board Policy 5145: Nondiscrimination/Harassment” (May 20, 2014) http://www.erusd.org/pdf/board_policies/5145_3.pdf. Some also provide transgender students with an *option* to use a private facility (*e.g.*, a school nurse’s restroom), but such policies make clear that transgender students are not *required* to use those alternatives. *Id.* (“The use of such a ‘gender neutral’ restroom shall be a matter of choice for a student and no student shall be compelled to use such restroom.”).

Many policies include provisions stating that any student who is uncomfortable using a shared restroom or other facility—because of concern over unwanted exposure to nudity, religious objections, or other reasons—can choose to use alternative options, such as using a privacy partition or curtain or accessing a single-use restroom. *See, e.g.*, Atherton High School, Jefferson County (KY), “SBDM Council Bylaws & Policies,” at Policy 500 (Oct. 16, 2014) <http://schools.jefferson.kyschools.us/High/Atherton/PDFs/SBDM.pdf> (“[I]f a student desires increased privacy, regardless of the underlying reason, the

administrator shall make every effort to provide the student with reasonable access to an alternative restroom such as a single-stall restroom.”); District of Columbia Public Schools, “Transgender and Gender-Nonconforming Policy Guidance,” at 9 (June 2015) <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf> (“Any student, transgender or otherwise, who has a need or desire for increased privacy, regardless of underlying reasons, also has the right to access a single-use bathroom, such as a staff restroom or the bathroom in the nurse’s office.”).

Thus, schools already implementing inclusive restroom policies have obviated privacy, religious, and other concerns by offering alternative accommodations to any student who objects to or is uncomfortable with sharing restrooms with transgender students. What schools must not do, though, is bootstrap one student’s discomfort or objection into a reason to segregate and stigmatize a transgender student or transgender students generally, especially given the well-documented harms that flow from such differential treatment.

Districts and schools that adopt and implement inclusive policies and practices—including restroom policies—establish physically and psychologically safe schools, resulting in better health and educational outcomes for transgender students. All LGBT students benefit from these approaches, but transgender students benefit even more significantly. Emily A. Greytak, et al., *Putting the “T”*

in “Resource”: *The Benefits of LGBT-Related School Resources for Transgender Youth*, 10 *Journal Of LGBT Youth* 1–2 (2013). In the end, the data is “helping to validate what we know as clinicians, which is that people who are validated and supported in their selfhood are happier, have [fewer] mental health challenges and are more successful. We need to stop making people be who we think they should be and start letting them be who they are.” Interview with Johanna Olson-Kennedy, Medical Director of the Center for Transyouth Health and Development, Children’s Hospital in Los Angeles on NPR, South Carolina Public Radio (March 23, 2016). This link between LGBT-inclusive policies and improved mental health outcomes is supported by analogous research showing that granting the marriage right to same-sex couples has been associated with reduced suicide rates among adolescent sexual minorities. See Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, *JAMA Pediatrics* (Feb. 20, 2017), <http://jamanetwork.com/journals/jamapediatrics/fullarticle/2604258>.

Corey Maison’s school experience was transformed as a result of the implementation of inclusive policies.

“[S]chool now is wonderful,” Maison[’s mother] said. “The staff and students are very accepting. She’s treated just like any of the other girls. She’s allowed to use the girls’ bathroom and locker room, and play on the girls’ sports team and cheer team if she wants to.”



Corey Maison (pictured).

Nicole Pelletiere, *'We're Not a Threat': Transgender Teen Shares Powerful Message on Bullying*, ABC News (Feb. 8, 2017), <http://abcnews.go.com/Lifestyle/threat-transgender-teen-shares-powerful-message-bullying/story?id=39752422>.

Other transgender students report experiencing a similar transformation when their school adopts inclusive policies. For example, when Aidan DeStefano was in 11th grade, he made his gender identity known to officials and students at his high school, who referred to him by his preferred name and pronouns and permitted him to use the bathroom consistent with that identity. He described that experience this way: "I immediately felt different in every part of my life. Schoolwork was easier for me. I felt happier and more myself. . . . By the time I first walked into the boys' bathroom in 12th grade, I was ready. I knew I was a guy, and everyone seemed to support me." Aidan DeStefano, "My School Was Right to Let Me Use the Bathroom Consistent With Who I Am," ACLU (May 25, 2018),

<https://www.aclu.org/blog/lgbt-rights/transgender-rights/my-school-was-right-let-me-use-bathroom-consistent-who-i-am>. Unsurprisingly, DeStefano also reported that these inclusive policies had a positive impact on his educational performance: “In my last semesters of high school, I made the honor roll three times in a row — something I had never achieved before because I had been too distracted and stressed trying to hide who I was.” *Id.*

B. Discrimination against transgender students is based on unfounded fears.

Some—such as Appellant here—have expressed fears that protecting against restroom discrimination would lead to dire consequences. However, neither educators nor courts should defer to a majority’s votes and unfounded fears. *See Cleburne*, 473 U.S. at 448 (“It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.”).

In particular, the widespread, successful, and non-disruptive implementation of inclusive restroom policies in schools every day belies the purported bases for restroom discrimination and exposes them as irrational pretexts. *First*, as shown above, schools around the country have secured equal restroom access for transgender students while protecting the privacy of all students for years. As the Seventh Circuit noted, discriminatory restroom policies “ignore[] the

practical reality of how . . . a transgender boy uses the bathroom: by entering a stall and closing the door.” *Whitaker*, 858 F.3d at 1052; *Evancho v. Pine-Richlands Sch. Dist.*, 237 F. Supp. 3d 267, 291 n.37 (W.D. Pa. 2017) (noting that when a transgender student uses the restroom for his or her gender, “everyone using the toilets in the ‘girls room’ is doing so in an enclosed stall with a locking door, and everyone using the toilets in the ‘boys room’ is doing the same or using a urinal with privacy screens.”)

Second, the experience of these schools and districts contradicts the insupportable claim that transgender-inclusive restroom policies disrupt the school environment. To the point, a 2015 survey of the seventeen largest school districts in the twelve states (plus Washington, DC)⁵ that, at that time, had enacted statewide rules prohibiting discrimination on the basis of gender identity found that “[y]ears after implementing their own anti-discrimination policies, none of the schools have experienced any problems.” Rachel Percelay, *Media Matters*, *17 School Districts Debunk Right-Wing Lies About Protections For Transgender Students* (June 3, 2015), <https://mediamatters.org/research/2015/06/03/17-school-districts-debunk-right-wing-lies-abou/203867>. Specifically, schools implementing inclusive restroom policies have not experienced any problems as a result. *See* Curtis Tate, et

⁵ The survey included the District of Columbia and the following states: California, Colorado, Connecticut, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, Oregon, Washington, and Vermont.

al., *These schools let transgender students use the bathroom, and here's what happened*, Kansas City Star (June 20, 2016), <http://www.kansascity.com/news/politics-government/article84811367.html> (describing that some schools report that adopting inclusive policies “has improved the learning environment”).

Third, some make the fanciful claim that inclusive restroom policies will be exploited by some students who would pretend to be transgender in their schools in order to convince their principal, counselor, and teachers that they should be allowed to use the opposite gender’s restroom. They would then violate school conduct policies and even commit crimes such as voyeurism, sexual assault, or rape. This claim—otherwise known as the “restroom predator myth”—is a baseless scare tactic. As a coalition of over 200 organizations that work with sexual assault and domestic violence victims noted in a joint statement: “Over 200 municipalities and 18 states have nondiscrimination laws protecting transgender people’s access to facilities consistent with the gender they live every day. In some cases, these protections have been in place for decades. These laws have protected people from discrimination without creating harm. *None of those jurisdictions have seen a rise in sexual violence or other public safety issues due to nondiscrimination laws.* Assaulting another person in a restroom or changing room remains against the law in every single state.” National Task Force to End Sexual and Domestic Violence, National Consensus Statement of Anti-Sexual Assault and Domestic Violence

Organizations in Support of Full and Equal Access for the Transgender (April 13, 2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community> (emphasis added).

This myth is especially unfounded in the context of schools, where students attend every school day and are known to school staff. Most inclusive policies include clear procedures for working with transgender students who seek to transition and begin using different restrooms. One common element of such policies is that students “consistently assert” their gender. These widely-adopted policies resolve the red-herring raised by Appellant that inclusive policies would require administrators “to evaluate students’ access to facilities based on relative masculine or feminine traits” which is “classic sex-stereotyping.” Appellant’s Br. at 41. The resolution is clear: Recognize those students who have consistently asserted a gender identity that does not conform to the gender assigned to them at birth. Amici’s experience shows that the myth that students will pretend to be transgender to gain access to the bathroom of the opposite sex—like the nudity and disruption arguments—is utter nonsense.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 25th day of November 2019, I served the foregoing Amici Curiae Brief of the National PTA, GLSEN, American School Counselor Association, and National Association of School Psychologists in Support of Plaintiff - Appellee via the Court's ECF system upon all counsel.

Dated: November 25, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this motion:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in Times New Roman font in a size equivalent to 14 points or larger and,

(ii) complies with the length requirement of Rule 29(a)(5) because it is 6,499 words.

Dated: November 25, 2019

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