

No. 16-273

IN THE
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G. BY HIS NEXT FRIEND AND MOTHER,
DEIRDRE GRIMM,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

**AMICI CURIAE BRIEF OF SCHOLARS WHO
STUDY THE TRANSGENDER POPULATION IN
SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*

Amici curiae are 60 scholars of demographics, economics, law, psychology, political science, public health, public policy, and other disciplines. Many of them are affiliated with the Williams Institute, an academic research center at the UCLA School of Law dedicated to the study of sexual orientation and gender identity law and policy. *Amici* have conducted extensive research and authored numerous studies regarding the transgender population in the United States. Individual *amici* are identified in the Appendix.¹

Many of the individual *amici* have testified as expert witnesses in federal district courts and/or have appeared as an amicus in this Court and in other courts on related issues. This Court and federal appellate and district courts have expressly relied on research from the Williams Institute. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015); *Baskin v. Bogan*, 766 F.3d 648, 663, 668 (7th Cir. 2014); *Campaign for S. Equality v. Bryant*, 64 F. Supp. 3d 906, 943 n.42 (S.D. Miss. 2014), *aff'd*, 791 F.3d 625 (5th Cir. 2015); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 763-64 (E.D. Mich.), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* 135 S. Ct. 2584 (2015).

As scholars who specialize in issues related to transgender people, *amici* have a substantial interest

¹ Pursuant to Rule 37.6, *amici* state that no one other than *amici's* counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Rule 37.3(a), Petitioners have filed with this Court a blanket letter of consent for filing of *amicus* briefs, and Respondent has given written consent, to be filed with this Court, for the filing of this brief.

in this matter. In this brief, *amici* present social science and other research describing the demographics of the transgender population and the pervasive discrimination and stigmatization transgender people face on account of their non-conformity to gender norms. Of particular relevance to the matter before the Court, *amici* present research finding that discrimination against and stigmatization of transgender students in schools is pervasive, can negatively impact their equal access to education, and can threaten their future economic prospects, physical health, and emotional well-being.

Amici believe that the research and data presented herein and *amici's* academic expertise will aid the Court in evaluating why school policies that treat transgender students inconsistent with their gender identities is discrimination on the basis of sex prohibited under Title IX. As also shown below, by interpreting Title IX in this manner, the Court may avoid serious constitutional questions under the Equal Protection Clause of the U.S. Constitution. Although such questions are not directly before this Court at this time, their presence in the underlying complaint and in other cases challenging similar school polices should inform the Court's construction of Title IX.

BACKGROUND

Over the past two decades, researchers have made great progress in ascertaining the demographics and experiences of the transgender population.²

² See, e.g., James et al., Nat'l Ctr. for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 44-45 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [hereinafter "USTS"]; Williams Inst., *Gender Identity in U.S. Surveillance*

According to several *amici*'s analysis of data managed by the Centers for Disease Control and Prevention, the United States is home to approximately 1.55 million transgender people, including approximately 206,000 young adults (aged 18-24) and 150,000 youth (aged 13-17).³ Transgender people live in every state and other U.S. jurisdictions. Virginia – where this case originates – is home to approximately 38,650 transgender people, including approximately 9,300 young adults and youth.⁴ Younger people are somewhat more likely to identify as transgender than older adults: transgender people represent 0.50% of

Grp., *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* ix (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf> [hereinafter *Best Practices*].

As reflected in the research and the Respondent's brief, the term "transgender" generally describes individuals whose gender identity does not correspond with their sex assigned at birth. See, e.g., Am. Psychological Ass'n ("APA"), *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychol. 832, 832, 862 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf> [hereinafter *APA Transgender Guidelines*];

³ Flores et al., Williams Inst., *How Many Adults Identify as Transgender in the United States?* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [hereinafter *How Many Identify*]; Flores et al., Williams Inst., *Age of Individuals Who Identify as Transgender in the United States* 4 (2017), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf> [hereinafter *Age Report*]. Cf. Wilson et al., Williams Inst., *Sexual and Gender Minority Youth In Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, 36-37 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

⁴ See *How Many Identify*, *supra* note 3, at 3-4; *Age Report*, *supra* note 3, at 4-5.

the U.S. population aged 65 and older, 0.58% of the U.S. population aged 25 to 64, 0.66% of young adults, and 0.73% of youth.⁵

Although a small proportion of the U.S. population, transgender people reflect the general population in many respects. They are racially and ethnically diverse; nationally and in Virginia, transgender adults are more likely to be a racial/ethnic minority than the general adult population.⁶ They are military personnel and veterans,⁷ inventors and entrepreneurs,⁸ religious leaders and political organizers,⁹ assembly workers and medical

⁵ *Age Report*, *supra* note 3, at 4.

⁶ See Flores et al., Williams Inst., *Race and Ethnicity of Adults Who Identify as Transgender in the U.S.* (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf>.

⁷ Gates & Herman, Williams Inst., *Transgender Military Service in the United States* 4 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf> (estimating that 15,500 transgender individuals are serving on active duty or in the Guard or Reserve forces; approximately 134,300 transgender individuals are veterans or military retirees; and transgender individuals are twice as likely as other adults to have served); see also Dawson, *Transgender, at War and in Love*, N.Y. Times (June 4, 2015), <https://www.nytimes.com/video/opinion/100000003720527/transgender-at-war-and-in-love.html>.

⁸ *E.g.*, Miller, *The Trans-Everything CEO*, N.Y. Mag. (Sept. 7, 2014), <http://nymag.com/news/features/martine-rothblatt-trans-gender-ceo/>.

⁹ *E.g.*, Kong, *Meet the Trans Women of Color Who Helped Put Stonewall on the Map*, Mic (June 25, 2016), <https://mic.com/articles/121256/meet-marsha-p-johnson-and-sylvia-rivera-transgender-stonewall-veterans#.6mnvQ5Aru>; Anderson, *The Christian Church Continues to Spurn Transgender Clergy*, Vice

professionals,¹⁰ artists and entertainers,¹¹ academics and public servants,¹² and many other things.¹³ They are U.S. citizens and immigrants.¹⁴ They span the

(June 25, 2015), https://www.vice.com/en_us/article/the-christian-church-continues-to-spurn-transgender-clergy-456.

¹⁰ Mickens, *Transgender Lives: Your Stories*, N.Y. Times, <http://www.nytimes.com/interactive/projects/storywall/transgender-today/stories/mykel-mickens> (last visited Jan. 23, 2017); Zezima, *Meet Rachel Levine, one of the very few transgender public officials in America*, Wash. Post (June 1, 2016), <http://wpo.st/Q4nP2>.

¹¹ See, e.g., *25 Transgender People Who Influenced American Culture*, Time (May 29, 2014), <http://time.com/130734/transgender-celebrities-actors-athletes-in-america/>.

¹² See, e.g., Keen, *An Exclusive Interview With Kim Coco Iwamoto*, Hawaii News Now, <http://www.hawaiinewsnow.com/story/5676068/an-exclusive-interview-with-kim-coco-iwamoto> (last visited Jan. 23, 2017); Press Release, Office of Mayor Edward B. Murray, *Mayor Appoints Director of New Office of Labor Standards* (May 29, 2015), <http://murray.seattle.gov/mayor-appoints-director-of-new-office-of-labor-standards/>; Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phillis Fyre*, N.Y. Times (Aug. 29, 2015), http://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html?_r=0; Teo, *Transgender professor advocates for women in science*, Stanford Daily (Oct. 4, 2013), <http://www.stanforddaily.com/2013/10/04/transgender-professor-advocates-for-women-in-science/>.

¹³ See, e.g., *Transgender Lives: Your Stories* (N.Y. Times), <http://www.nytimes.com/interactive/projects/storywall/transgender-today/> (last visited Jan. 30, 2017); Tannehill, *The Top 50 successful transgender people you should know*, LGBTQ Nation (Jan. 12, 2017) <http://www.lgbtqnation.com/2017/01/top-50-successful-transgender-americans-know/>.

¹⁴ See, e.g., USTS, *supra* note 2, at 58.

political spectrum.¹⁵ They have a diverse array of religious and spiritual identities.¹⁶ They have varying sexual orientations.¹⁷ They are parents, and they are people’s children.¹⁸

Despite the many contributions transgender people make to our families, communities, and larger society, “[t]ransgender people face systematic oppression and devaluation as a result of social stigma attached to their gender nonconformity.”¹⁹ Two large national surveys – the 2011 National Transgender Discrimination Survey (NTDS) and the 2015 U.S. Transgender Survey (USTS) – provide data on the pervasiveness of discrimination and its effects

¹⁵ See, e.g., Rude, *The truth about transgender Republicans*, Daily Dot (Apr. 29, 2015), <http://www.dailydot.com/layer8/transgender-republican-bruce-jenner/>.

¹⁶ See, e.g., USTS, *supra* note 2, at 54.

¹⁷ See APA Transgender Guidelines, *supra* note 2, at 835-36; Herman, *LGB within the T: Sexual Orientation in the National Transgender Discrimination Survey*, in *Trans Studies: Beyond Hetero/Homo Normativities* (Martinez San-Migules & Tobias ed. 2016); USTS, *supra* note 2, at 59.

¹⁸ See, e.g., Stotzer et al., Williams Inst., *Transgender Parenting: A Review of Existing Research* (2014), <http://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014>; Conant, *I am Nine Years Old: Children Across the World Tell How Gender Affects Their Lives*, Nat’l Geographic, Jan. 2017, at 31-47; Heniz, *Rethinking Gender*, Nat’l Geographic 50, 50-51, 56, Jan. 2017; Plaschke, *Transgender Teenage Ballplayer as Santa Monica Prep School Spreads Message of Hope and Acceptance*, L.A. Times (Apr. 10, 2016), <http://www.latimes.com/sports/la-sp-transgender-baseball-plaschke-20160410-column.html>.

¹⁹ Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 Am. J. of Pub. Health 943, 943 (2013) [hereinafter *Stigma*].

on transgender people's education, future economic prospects, and health.²⁰

According to the recent USTS, 77% of respondents who were out or perceived as transgender in grades K-12 had negative experiences at school from being transgender, such as being verbally harassed or physically or sexually assaulted.²¹ The NTDS likewise found alarming rates of school-place harassment and assault both nationally²² and specifically among Virginia respondents.²³

As one USTS respondent recounted:

I was constantly bullied and physically assaulted by my classmates. Teachers would often see it happen and make no move to intervene. The harassment continued, and eventually I had to change high schools three times, each time just as bad as the last, until I finally gave up on public schools.²⁴

Another USTS respondent described abuse so persistent – including being “hit by soda cans, spit

²⁰ See Grant et al., Nat'l Ctr. for Transgender Equality & Nat'l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 32-46 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [hereinafter NTDS]; USTS, *supra* note 2.

²¹ USTS, *supra* note 2, at 130-135.

²² NTDS, *supra* note 20.

²³ Nat'l Ctr. for Transgender Equality & Nat'l Gay & Lesbian Task Force, *Findings of the National Transgender Discrimination Survey: Virginia Results* 1 http://www.transequality.org/sites/default/files/docs/resources/ntds_state_va.pdf [hereinafter Virginia NTDS Results]. State-level results from the USTS are not yet available.

²⁴ USTS, *supra* note 2, at 134.

balls, and paper airplanes of hate mail” – that the respondent avoided the school bus and restrooms from fear for personal safety.²⁵ Nearly one-sixth of USTS respondents who were out as transgender in grades K-12 left school because of harassment.²⁶

These findings are consistent with other research showing that transgender youth face pervasive harassment at school,²⁷ as well as violence and abuse generally, including “a high prevalence of sexual assault and rape starting at a young age.”²⁸ Research likewise shows high rates of discrimination and victimization at secondary schools.²⁹

As these studies reflect, discrimination and stigmatization impair many transgender students’

²⁵ *Id.*

²⁶ USTS, *supra* note 2, at 132; *cf.* Srabstein & Piazza, *Public Health, Safety and Educational Risks Associated with Bullying Behaviors in American Adolescents*, 20 *Int. J. Adolescent Med. Health* 223 (2008) (documenting drop out rates and other negative effects from bullying).

²⁷ *See, e.g.,* Collier et al., *Sexual Orientation and Gender Identity/Expression Related Peer Victimization in Adolescence: A Systematic Review of Associated Psychosocial and Health Outcomes*, 50 *J. Sex Research* 299 (2013); McGuire et al., *School climate for transgender youth: a mixed method investigation of student experiences and school responses*, 39 *J. Youth Adolesc.* 1175 (2010); Greytak et al., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools* (2009).

²⁸ *E.g.,* Stotzer, *Violence against Transgender People: A Review of United States Data*, 14 *Aggression and Violent Behavior* 170, 172 (2009).

²⁹ *See, e.g.,* USTS, *supra* note 2, at 9, 136; Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 *J. Homosexuality* 1 (2016) (collecting studies).

equal access to education. Because educational attainment (especially high school completion) is a significant determinant of economic status and health across the life course, harassment and discrimination of transgender people at school reduces economic prospects and increases risk of homelessness and other negative outcomes.³⁰

Overwhelming research also shows that stigma and mistreatment – not the fact of being transgender – result in transgender individuals experiencing disproportionately high rates of depression, anxiety, and other psychological distress.³¹ Fully 82% of transgender people responding to the USTS seriously considered killing themselves at some point in their lives, with nearly half (48%) considering suicide in the previous year.³² Among respondents who had attempted suicide, more than a third (34%) made their first attempt at age 13 or younger; three-quarters did so before age 18.³³ Other research

³⁰ *E.g.*, USTS, *supra* note 2, at 137; NTDS, *supra* note 20, at 32-33, 46; Brown & Taylor, *Bullying, Education and Earnings: Evidence from the National Child Development Study*, 27 *Econ. Educ. Rev.* 387 (2008); *Stigma*, *supra* note 19, at 943.

³¹ *See, e.g.*, Hendricks & Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 *Prof. Psych.: Research & Practice* 460, 465 (2012) (“Study after study has demonstrated that trans individuals are subject to negative life events directly related to their gender variance and that these events have potentially dire mental health effects”); *Stigma*, *supra* note 19, at 948; USTS, *supra* note 2, at 3, 103; White Hughto, et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 *Soc. Sci. & Med.* 222 (2015).

³² USTS, *supra* note 2, at 112-14.

³³ *Id.* at 115.

confirms that transgender people who experience discrimination and gender-related abuse in their youth have higher rates of major depression and suicidality during adolescence.³⁴

Research has shown, however, that creating a supportive environment that treats transgender people consistent with their gender identity can ameliorate these negative outcomes. Transgender people who are accepted and supported at home, in school, and in their community report greater feelings of safety and lower rates of negative outcomes, including lower rates of mental distress, homelessness, and suicide.³⁵

SUMMARY OF ARGUMENT

This Court has long recognized that education is “perhaps the most important function of [the] state,” as it provides “the very foundation of good citizenship” and is “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The lessons children learn at school – about themselves and how

³⁴ See, e.g., NTDS, *supra* note 20, at 45; Hendricks & Testa, *supra* note 31, at 465-66; Clements-Nolle et al., *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 J. of Homosexuality 53, 61-65 (2006); Nuttbrock et al., *Psychiatric Impact of Gender-Related Abuse Across the Life Course of Male-to-Female Transgender Persons*, 47 J. Sex. Res. 12 (2010); Grossman & D’Augelli, *Transgender Youth: Invisible and Vulnerable*, 51 J. of Homosexuality 111, 124 (2006).

³⁵ See, e.g., APA Transgender Guidance, *supra* note 2; USTS, *supra* note 2, at 76; *Stigma*, *supra* note 19; Heniz, *supra* note 18; Plaschke, *supra* note 18; McGuire, *supra* note 27.

to treat others – can “affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494. A school can teach a transgender student like G.G. self-confidence and dignity, and help him become an entrepreneur, scholar, scientist, or civic leader. Conversely, harassment and discrimination against transgender students in schools, including treating them inconsistently with their gender identities, can cause substantial harm and impair their access to equal education.

For reasons well-developed in the brief of Respondent, the Court should hold that discrimination against transgender students on the basis of their transgender status is a form of discrimination “on the basis of sex” prohibited by Title IX. We write separately to highlight that a wide variety of research from the social sciences and other disciplines confirm that discrimination against transgender students is often, if not always, due to their nonconformity to gender norms, and that such discrimination can deny transgender students the benefits of education, compromise their physical and mental health, and negatively affect their future opportunities – precisely what Title IX is designed to fight against.

A further reason to interpret Title IX to prohibit discrimination against transgender students is that by doing so, the Court would avoid a serious constitutional question. Public school policies that treat transgender students inconsistently with their gender identities violate not only Title IX but the Equal Protection Clause as well. Transgender people plainly meet the requirements for suspect-class status. The approximately 1.55 million transgender people in the United States share characteristics that distinguish them as an identifiable, discrete minority group, and overwhelming evidence demonstrates that

transgender people have long been the victims of public and private discrimination permeating all aspects of life. Moreover, transgender people are a small minority group that lacks political power to protect themselves within the political process, and the discrimination they face bears no relation to their ability to contribute to society. As a result, state action targeting transgender individuals should be subject to heightened judicial scrutiny.

While these constitutional issues are not directly before the Court at this time, the underlying complaint in this case and similar cases pending at lower courts contain Equal Protection claims. *See, e.g., Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-cv-1537, slip op. at 36-40 (W.D. Pa. Feb. 27, 2017) (EFC Doc. 76) (holding transgender students likely to succeed on their equal protection claims and granting preliminary injunction); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-CV-943-PP, 2016 WL 5239829, at *4 (E.D. Wis. Sept. 22, 2016) (same), *appeal filed, Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-3522 (7th Cir. Sept. 26, 2016). Thus, the well-established canon of statutory construction to avoid serious constitutional questions provides further justification for interpreting Title IX to prohibit schools from discriminating against transgender students, including by treating them inconsistently with their gender identities.

ARGUMENT

**I. RESEARCH CONFIRMS THAT
DISCRIMINATION AGAINST
TRANSGENDER STUDENTS IS
DISCRIMINATION ON THE BASIS OF SEX
UNDER TITLE IX**

Respondent's Brief fully explains why, as a matter of statutory interpretation, discrimination against transgender students is discrimination based on sex and thus prohibited by Title IX. *Amici* do not seek to repeat those arguments here but write to amplify how the research described above supports the proper interpretation of the statutory text. *See supra* pp. 6-10.

First, the research confirms that discrimination against transgender students is, as a factual matter, discrimination based on sex. Transgender people face pervasive discrimination based on “their *gender nonconformity*”³⁶ – *i.e.*, people’s “incorrect assumption that gender identity automatically aligns with sex assigned at birth,” such that variance is viewed as unhealthy or pathological.³⁷ Consistent with the understanding of sex and gender discrimination identified in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in Burrage v. United States*, 134 S. Ct. 881 (2014), and other authorities (*see Resp. Br. at 35-36*), discrimination against transgender people manifests precisely

³⁶ *Stigma, supra* note 19, at 943 (emphasis added).

³⁷ APA Transgender Guidelines, *supra* note 2, at 835, 838, 840; *see also, e.g.*, Hendricks & Testa, *supra* note 31, at 462, 465-66; Stotzer, *supra* note 28, at 170 (“Transgender people face violence because of their gender nonconformity.”).

because transgender people challenge sex and gender norms by not presenting or acting in conformity with the norms and stereotypes associated with their sex assigned at birth.³⁸ As a result, transgender people not only face “enacted stigma” (actual experiences of rejection and discrimination), but they may also internalize that stigma, devaluation, and fear of rejection, exacerbating the psychological distress. *See supra* at 6-10; *cf. Brown*, 347 U.S. at 494 & n.11 (citing studies on effects of prejudice and discrimination on development).

Second, research confirms that discrimination against transgender students is a “comparable evil” prohibited by Title IX. *See Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998)). As with women at the time Title IX was passed, transgender individuals face “persistent, pernicious discrimination” that serves to “perpetuate second-class citizenship.” *Cf.* 118 Cong. Rec. 5803, 5804 (1972) (Sen. Bayh, discussing purpose of Title IX). As described above, research finds that many transgender people are unable to access equal educational opportunities because of harassment, discrimination, and even violence – with discrimination in education compounding discrimination in the workforce, housing, and other areas of life.³⁹ With respect to restroom

³⁸ *See, e.g.*, USTS, *supra* note 2, at 132-134; NTDS, *supra* note 20, at 2-8, 33-39, 50-60 (describing manifestations of discrimination and harassment in school and work settings); *cf. Levi & Redman, The Cross-Dressing Case for Bathroom Equality*, 34 Seattle L. Rev. 133, 151-58, 164-70 (2009) (explaining how bathroom laws targeting transgender people, like anti-cross-dressing laws of old, are rooted in desire to enforce sex and gender norms).

³⁹ *See supra* at 6-10; *cf. Rao, Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from*

access specifically, transgender students who are prohibited from using (or experience problems accessing) restrooms consistent with their gender identity report greater absenteeism, poorer performance in school, withdrawing from public spaces and events, physical health impacts (such as bladder infections and kidney problems), and mental health impacts (including increased risk of suicide).⁴⁰ All of the foregoing amply supports this Court interpreting Title IX to prohibit discrimination against transgender students based on their gender identity, transgender status, or gender nonconformity.

II. THIS COURT SHOULD INTERPRET TITLE IX TO PROHIBIT DISCRIMINATION AGAINST TRANSGENDER STUDENTS SO AS TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS UNDER THE EQUAL PROTECTION CLAUSE

A well-established canon of statutory construction is that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades*

Bullying and Harassment Using Title IX, 28 Wis. J.L. Gender & Soc’y 245 (2013); Skinner-Thompson & Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 Wis. J.L. Gender & Soc’y 271, 296-99 (2013).

⁴⁰ See, e.g., Herman, *Gendered Restrooms and Minority Stress*, 19 J. Pub. Mgmt. & Soc. Pol’y 65 (2013); Seelman, *supra* note 29 (finding that transgender people who had been denied access to college bathrooms that matched their gender identity were 1.5 times more likely to have attempted suicide than those who were not denied bathroom access, even controlling for other forms of victimization).

Council, 485 U.S. 568, 575 (1988). Thus, in evaluating whether Title IX protects transgender students from discrimination, this Court may also consider and should acknowledge the serious constitutional problems under the Equal Protection Clause that school policies that discriminate against transgender students raise.

The Equal Protection Clause prohibits governmental classifications that are “arbitrary or irrational” as well as those that reflect “a bare . . . desire to harm a politically unpopular group.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985). The general rule that classifications need only be “rationally related to a legitimate state interest,” “gives way . . . when a statute classifies” groups that have been historically subject to discrimination or “impinge[s] on personal rights protected by the Constitution.” *Id.* at 440. Where the law discriminates based on “suspect” classifications, such as race, or “quasi-suspect” classifications, such as gender, it is subject to heightened judicial scrutiny. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

This Court’s jurisprudence identifies various factors in determining whether classifications are suspect. They include whether the class has “obvious, immutable, or distinguishing characteristics that define them as a discrete group;” whether the group has experienced a history of discrimination; whether the group lacks the ability to protect itself within the political process; and whether the discrimination is based on “stereotyped characteristics not truly indicative” of the group’s abilities. *Id.*; *City of Cleburne*, 473 U.S. at 441-42.

All of these considerations indicate that the Court should review state action that discriminates against transgender people with heightened scrutiny. *See*

Evancho, No. 2:16-cv-01537, slip op. at 25-26. Thus, school policies that discriminate against transgender students raise serious constitutional questions, including whether such policies are motivated by irrational fears and improper animus. *See also Whitaker*, 2016 WL 5239829, at *4 (“[T]he defendants have articulated little in the way of a rational basis for the alleged discrimination.”). Respondent’s brief addresses the discriminatory intent of the policy at issue. Resp. Br. at 33-38. *Amici* below focus on demonstrating why state action targeting transgender people should be subject to heightened scrutiny, thus helping clarify for the Court the constitutional issues that may be avoided by ruling for Respondent here.

A. The Transgender Population Is An Identifiable, Discrete Minority Group

As described above in the Background section, transgender people in the United States are a “discrete” minority group identifiable according to a distinguishing characteristic: a lack of congruence between their gender identity and their assigned sex at birth. *See supra* pp. 3-4; *see also Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (“transgender status is a sufficiently discernible characteristic to define a discrete minority class”). That “transgender status is a sufficiently discernible characteristic” is also reflected in the fact that transgender people “face backlash in everyday life when their status is discovered.” *Adkins*, 143 F. Supp. 3d at 139-40 (citing *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012)).

B. Transgender People Have Long Faced Pervasive Discrimination In All Domains Of Life

“[T]here is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare.” *Bd. of Educ. v. U.S. Dep’t of Educ.*, No. 2:16-CV-524, 2016 U.S. Dist. LEXIS 131474, at *58 (S.D. Ohio Sept. 26, 2016); *accord Adkins*, 143 F. Supp. at 139 (stating that “transgender people have suffered a history of persecution and discrimination . . . is not much in debate”); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society today is well-documented.”).

For decades, laws have expressly discriminated against transgender people. For example, at local levels, city ordinances long criminalized cross-dressing to enforce gender norms, effectively sweeping transgender people into the criminal justice system.⁴¹ Some legislatures continue to exclude gender identity discrimination from anti-discrimination and hate-crime laws, even while extending protection based on sexual orientation.⁴²

⁴¹ See, e.g., *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (involving 53 people arrested under Houston ordinance criminalizing “dress[ing] with the designed intent to disguise his or her true sex as that of the opposite sex”); *People v. Archibald*, 296 N.Y.S.2d 834, 836 (App. Div. 1968) (per curiam) (affirming conviction of transgender defendant); Levi & Redman, *supra* note 38 (discussing history of cross-dressing ordinances and case law).

⁴² As of March 2017, 20 states and D.C. prohibit gender identity discrimination in employment and housing, and 19 states and D.C. prohibit such discrimination in public accommo-

As recently as last year, North Carolina and Mississippi adopted legislation expressly targeting transgender people.⁴³ Transgender individuals have also faced discrimination in the court system, including, for example, denial of parental and familial rights, as well as being cruelly mocked and discriminated against in the context of name-change petitions.⁴⁴

dations. Thus, 30 states do not prohibit gender identity discrimination in employment and housing, and 31 states do not prohibit gender identity discrimination in public accommodations. Two states that do not prohibit gender identity discrimination in employment, housing, and public accommodations (Wisconsin and New Hampshire) do prohibit sexual orientation discrimination in such settings. *See* Movement Advancement Project, *Non-Discrimination Laws*, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (toggle between employment, housing, and public accommodations tabs).

⁴³ Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 2016-3 (H.B. 2) (“HB2,” forbidding transgender people from using single-sex facilities matching their gender identity); Protecting Freedom of Conscience From Government Discrimination Act, 2016 Miss. Laws ch. 334 (H.B. 1523), § 2(c) (permitting discrimination on belief that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth”).

⁴⁴ *See, e.g., Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986) (terminating parental rights for seeking to assume a female identity), *overruled by In re Termination of Potential Rights as to N.J.*, 8 P.3d 126 (Nev. 2000); *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (reversing custody grant due to parent’s transgender status); *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *11 n.39, 28 (E.D. La. Sept. 16, 2002) (asserting that transgender litigant was just “impersonating” a woman and “pretend[ing]” to “disguise himself”); *In re Petition of Richardson to Change Name*, 23 Pa. D. & C.3d 199, 199, 201 (1982) (calling transgender people “gargoyles,” characterizing name-change petition as a “freakish rechristening”),

In addition to de jure discrimination, transgender people face discrimination and stigma in vital areas of life, as explained in the Background and further below, and which is linked to deleterious consequences for health and well-being.

1. Discrimination In Education, Housing, Public Accommodations, And Healthcare

The Background recounts some of the research showing discrimination against transgender students in education. *See supra* pp. 6-10. Discrimination against transgender people in housing and public accommodations is widespread as well. As documented in the USTS and NTDS, for example, many transgender people report being denied a home or apartment or evicted due to their transgender status and an increased likelihood of homelessness.⁴⁵ Transgender people are frequently denied equal treatment or service and/or verbally harassed at places of public accommodation (*e.g.*, retail stores, hotels and restaurants, doctors' offices, hospitals, etc.).⁴⁶

declined to follow, In re McIntyre, 715 A.2d 400, (Pa. 1998); *Ashlie v. Chester-Upland Sch. Dist.*, No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *14 (E.D. Pa. May 9, 1979) (comparing transgender litigant to man trying to change himself "into a donkey").

⁴⁵ USTS, *supra* note 2, at 175-78; Bradford et al., *Experiences of Transgender-Related Discrimination and Implications for Health: Results from the Virginia Transgender Health Initiative Study*, 103 Am. J. Pub. Health 1820 (2013).

⁴⁶ USTS, *supra* note 2, at 214; *see also* Reisner et al., Fenway Health, *Discrimination and Health in Massachusetts: A Statewide Survey of Transgender and Gender Nonconforming Adults* 16 (2014); Bradford, *supra* note 45.

Transgender people also face significant hurdles in accessing health care. In the USTS, for example, one in three respondents reported negative experiences in seeking medical care within just the prior year, such as healthcare providers who were unaware of basic aspects of transgender health or who asked invasive questions about the person's transgender status unrelated to his or her reason for visiting.⁴⁷ Nearly one in four USTS respondents reported that they had avoided seeking necessary healthcare from fear of being mistreated.⁴⁸ As one respondent explained:

Multiple medical professionals have misgendered me, denied to me that I was transgender or tried to persuade me that my trans identity was just a misdiagnosis of something else, have made jokes at my expense in front of me and behind my back, and have made me feel physically unsafe. I often do not seek medical attention when it is needed, because I'm afraid of what harassment or discrimination I may experience in a hospital or clinic.⁴⁹

2. Discrimination In The Workplace

Overwhelming evidence documents pervasive discrimination against transgender people in the

⁴⁷ USTS, *supra* note 2, at 97; *see also, e.g.*, Virginia NTDS Results, *supra* note 23, at 2; Reisner, *supra* note 46, at 20; Lambda Legal, *When Health Care Isn't Caring: Transgender and Gender-nonconforming People* (2009), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_transgender-and-gender-nonconforming-people.pdf.

⁴⁸ USTS, *supra* note 2, at 98.

⁴⁹ *Id.* at 96.

workplace.⁵⁰ For example, among USTS respondents, 27% of those who held or applied for a job reported being fired, denied a promotion, or not hired because of their gender identity or expression *in just the prior year*, while 15% reported being verbally harassed, physically attacked, or sexually assaulted.⁵¹

Transgender people also face high unemployment rates. Fifteen percent of USTS respondents reported being unemployed, more than triple the national unemployment rate at the time of the survey.⁵² Unemployment rates were even higher for transgender people of color: 35% of Middle Eastern respondents, 20% of Black respondents, and 21% of Latino respondents were unemployed.⁵³

Connected to discrimination, unemployment, or under-employment, many transgender people are living in poverty. Twelve percent of USTS respondents reported earning less than \$10,000 annually – a rate three times that of the U.S. population at the

⁵⁰ See, e.g., Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People*, 45 Loyola L. Rev. 715 (2012); Sears et al., Williams Inst., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/12_SpecificExamples.pdf; Bradford, *supra* note 45; NTDS, *supra* note 20, at 50-70; Virginia NTDS Results, *supra* note 23, at 1.

⁵¹ USTS, *supra* note 2, at 148, 150-53.

⁵² *Id.* at 140; see also Sears & Mallory, Williams Inst., *Documented Evidence of Employment Discrimination and its Effects* (2011), <http://williamsinstitute.law.ucla.edu/research/workplace/documented-evidence-of-employment-discrimination-its-effects-on-lgbt-people/>.

⁵³ USTS, *supra* note 2, at 141.

time of the survey.⁵⁴ Even those USTS respondents with income above \$10,000 per year reported lower household incomes than the general population: 62% had household incomes under \$50,000 per year (compared to 38% of the general population),⁵⁵ while only 15% reported earning more than \$100,000 per year (compared to 31% of the general population). Nearly one third (29%) of respondents were living in poverty compared to the 14% national average.⁵⁶

These figures are consistent with a forthcoming study by several *amici*, based on representative data from 27 states, finding “clear evidence that self-identified transgender individuals have significantly lower employment rates and household incomes and significantly higher poverty rates than non-transgender individuals.”⁵⁷ The study concludes that transgender adults suffer a “household income penalty” equivalent to 12% of annual household income.⁵⁸

3. Greater Likelihood Of Facing Violence And Discriminatory Treatment By Law Enforcement

Transgender people face high levels of physical violence. In 2013 alone, the National Council of Anti-Violence Programs reported 13 hate-motivated

⁵⁴ *Id.* at 142.

⁵⁵ *Id.* at 144.

⁵⁶ *Id.*

⁵⁷ Carpenter et al., *Transgender Status, Employment, and Income* 9 (forthcoming 2017) (on file with counsel).

⁵⁸ *Id.*

murders of transgender women.⁵⁹ In its 2009 report in support of Local Law Enforcement Hate Crimes Prevention Act of 2009, Congress recognized that over 400 people were murdered due to anti-transgender bias in the preceding decade, including 21 in 2008 alone.⁶⁰ As explained in the Background, transgender individuals suffer high rates of sexual violence, yet they rarely report the crimes, often from fear of mistreatment by the police and others.⁶¹

Indeed, respondents to the USTS reported high levels of harassment, abuse, or neglect by law enforcement officers. Of respondents who had interacted with law enforcement officers in the year before the survey, well over half (58%) reported negative treatment, 20% reported verbal harassment or disrespect, and 4% reported being physically attacked by officers.⁶² In some cases, police officers were unwilling to assist transgender people who had been the victim of crimes. One respondent described her encounter with law enforcement:

I was found in a ditch after being brutally raped for three days. I was taken to an ER. There I met an officer who told me I deserved it for

⁵⁹ Nat'l Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, at 8, 22–23 (2014), http://avp.org/storage/documents/2013_ncavp_hvreport_final.pdf.

⁶⁰ H.R. Rep. No. 111-86, at 11 (2009).

⁶¹ Stotzer, *supra* note 28, at 172-73.

⁶² USTS, *supra* note 2, at 186; *see also* Mallory et al., Williams Inst., *Harassment by Law Enforcement Officers in the LGBT Community* (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>.

attempting to be a woman and should have died. He also refused to take a report.⁶³

Fifty-seven percent of respondents admitted being uncomfortable approaching the police for assistance.⁶⁴

C. Transgender People Lack The Ability To Eliminate Discrimination Through The Political Process

As a minority comprising just 0.6% of the total adult population, transgender people lack political power to protect themselves in the political process against a hostile majority. *Bd. of Educ.*, 2016 U.S. Dist. LEXIS 131474, at *59-60 (finding transgender community politically powerless “as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings”); *see also Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989-90 (S.D. Ohio 2013) (citing “small population size” as factor establishing powerlessness of gays and lesbians), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Further evidence that transgender people lack political power is reflected by the lack of openly transgender elected or appointed political officials. In *Adkins*, the court recognized the absence of openly transgender members of the United States Congress or federal judiciary. 143 F. Supp. 3d at 140. A recent study found only three openly transgender elected officials serving nationwide, all at local levels, and

⁶³ USTS, *supra* note 2, at 201.

⁶⁴ *Id.* at 185.

that very few transgender people have ever even been candidates.⁶⁵

Although there are no conclusive answers as to why transgender individuals are underrepresented in elected and appointed office, research suggests that an enormous hurdle is getting transgender candidates – who may have to overcome fears of violence, discrimination, or backlash – to run.⁶⁶ Transgender individuals also may lack the support needed to get elected if political parties and influential donors do not believe transgender candidates can win elections or are otherwise reluctant to give their support to transgender candidates.

Transgender people's political power is also undermined by laws requiring voters to have a certain form of identification in order to vote. These laws risk disenfranchising many transgender individuals, who face administrative obstacles to obtaining identification that reflects their correct gender identity. According to one recent study, the strictest of these voter-identification laws may have disenfranchised over 34,000 transgender people in eight states in the November 2016 general election.⁶⁷

⁶⁵ See Casey & Reynolds, *Standing Out: Transgender and Gender Variant Candidates and Elected Officials Around the World*, app. 2 (2015), <http://www.lse.ac.uk/InternationalInequalities/pdf/Standing-Out.pdf>.

⁶⁶ *Id.* at 19-21.

⁶⁷ Herman, Williams Inst., *Potential Impact of Voter Identification Laws on Transgender Voters in the 2016 General Election* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Voter-ID.pdf>.

D. Being Transgender Is Not An Indication Of A Person's Ability To Contribute To Society

The final factor in determining whether a classification demands heightened scrutiny is whether the group in question is distinctively different from other groups in a way that “bears [a] relation to ability to perform or contribute to society.” *City of Cleburne*, 472 U.S. at 440-41. Being transgender does not.

As explained in the Background, transgender people contribute to the workplace and our society in countless ways unrelated to their gender identity, including as CEOs, soldiers, scholars, health care workers, and parents, among others.⁶⁸ As *Adkins* recently explained:

Some transgender people experience debilitating dysphoria while living as the gender they were assigned at birth, but this is the product of a long history of persecution forcing transgender people to live as those who they are not. The Court is not aware of any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society.

143 F. Supp. 3d at 139; *see also Bd. of Educ.*, 2016 U.S. Dist. LEXIS 131474, at *59.

Given the opportunity to be who they are, transgender individuals can thrive. Yet the research also shows that discrimination and stigma threatens transgender kids' education, economic prospects,

⁶⁸ *See supra* notes 7-18; Sears et al., Williams Inst., *Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace* (2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/4_PerformanceInWorkplace.pdf.

health, and well-being. Schools should support and protect their students, rather than perpetuate discrimination and its effects. As explained above, discrimination against transgender students is prohibited by the plain language of Title IX. Independently, such discrimination demands heightened scrutiny under the Equal Protection Clause, and the serious constitutional questions it raises confirms the proper interpretation of the statute.

CONCLUSION

For these reasons and those in Respondent's brief, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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APPENDIX

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