

October 11, 2022

ATTORNEY GENERAL RAOUL JOINS COALITION TO PROTECT ACCESS TO GENDER-AFFIRMING CARE

Chicago — Attorney General Kwame Raoul joined a coalition of 18 attorneys general in filing an amicus brief to fight health care discrimination against transgender people.

[The brief](#) supports a group of transgender individuals or parents of transgender individuals who have been denied coverage for gender-affirming care under the North Carolina State Health Plan for Teachers and State Employees. It was filed in *Kadel v. Folwell*, a case pending in the U.S. Court of Appeals for the Fourth Circuit.

“Transgender people deserve access to gender-affirming care, and I am committed to fighting against health care discrimination,” Raoul said. “I will continue to work with my fellow attorneys general to support the rights of transgender people and oppose efforts that jeopardize the safety and health of the LGBTQ+ community.”

Raoul and the coalition argue that the Fourth Circuit should affirm a lower court ruling which determined that the North Carolina State Health Plan for Teachers and State Employees’ denial of medically necessary, gender-affirming care violates the Equal Protection Clause of the U.S. Constitution. The brief argues that discrimination against transgender people violates the Equal Protection Clause because it constitutes discrimination based on sex.

The amicus brief notes the efforts that states joining the filing have made to protect transgender health care rights, including prohibiting health care discrimination based on transgender identity and ensuring that state employee healthcare plans cover medically necessary gender-affirming care. These policies have categorically improved the well-being of transgender people and reduced the risk of suicide, substance abuse and depression, without significantly increasing premium costs or expenses to insurers and plan sponsors.

Today’s brief is Attorney General Raoul’s latest action to defend the rights of transgender and LGBTQ+ people. In August, [Raoul joined two separate coalitions](#) of attorneys general supporting LGBTQ+ students against discrimination in the classroom, filing legal briefs opposing an Indiana school district’s efforts to bar a transgender student from using the restroom consistent with the student’s gender identity, and against Florida’s controversial “Don’t Say Gay” law, which limits classroom discussions and has serious implications for LGBTQ+ students. He also [joined a coalition of attorneys general](#) opposing an Alabama law that criminalizes evidence-based and medically accepted gender-affirming care for transgender youth

Joining Attorney General Raoul in filing the brief are the attorneys general of California, Colorado, Delaware, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and the District of Columbia.

22-1721

United States Court of Appeals for the Fourth Circuit

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK; JULIA MCKEOWN;
MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents;
SAM SILVAINE; DANA CARAWAY,

Plaintiffs-Appellees,

v.

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina;
DEE JONES, in her official capacity as Executive Administrator of the
North Carolina State Health Plan for Teachers and State Employees,

Defendants-Appellants,

NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES;
STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY,

Defendants.

On Appeal from the United States District Court
for the Middle District of North Carolina
No. 1:19-cv-00272

**BRIEF FOR STATES OF NEW YORK, CALIFORNIA, COLORADO,
DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND,
MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY,
NEW MEXICO, OREGON, RHODE ISLAND, VERMONT,
AND WASHINGTON, AND THE DISTRICT OF COLUMBIA
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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INTERESTS OF AMICI CURIAE

The States of New York, California, Colorado, Delaware, Hawai‘i, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia file this brief as amici curiae in support of appellees. Amici strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to healthcare. Accordingly, amici have adopted laws and policies aimed at combatting discrimination against transgender people who seek access to healthcare—including policies that guarantee nondiscriminatory insurance coverage of gender-affirming medical care. Amici are also committed to supporting their transgender employees and the transgender family members of their employees. To that end, amici’s state employee healthcare plans uniformly cover medically necessary, gender-affirming care.

Amici have a strong interest in this case. Among other things, amici recognize that discrimination based on transgender status—especially in access to healthcare—causes tangible economic, emotional, and health harms to valued members of our communities. Amici also have a substantial interest in ensuring that the Equal Protection Clause is properly

applied to protect transgender Americans from stigma and discrimination. Amici's experience demonstrates that protecting access to gender-affirming care improves health outcomes for our transgender residents at little cost to the public fisc.

ARGUMENT

POINT I

AMICI PROTECT ACCESS TO GENDER-AFFIRMING HEALTHCARE BASED ON WELL-ACCEPTED MEDICAL STANDARDS

Amici's laws protect their transgender residents by increasing their access to healthcare, not by denying it. Lack of access to healthcare for transgender individuals results in devastating and tangible economic, emotional, and health consequences. Accordingly, many of the amici have worked to ensure that their residents have access to gender-affirming healthcare and to allow doctors to practice medicine in adherence both to well-accepted medical standards and to our anti-discrimination laws. In amici's experience, these laws and policies protect state residents without harm to the public fisc and without the administrability challenges suggested by appellants.

A. Discrimination Against Transgender People in Access to Healthcare Significantly Harms Amici and Their Residents.

Transgender people face significant barriers to receiving both routine and transition-related care, including lack of adequate insurance coverage, provider ignorance about the health needs of transgender people, and outright denial of services.¹ Denial of access to medically necessary care has serious consequences for transgender residents and public health generally. Transgender people with gender dysphoria often suffer from severe distress due to the stigma associated with their gender identity.² Among transgender people, there are higher rates of suicidal thoughts and attempts than in the overall U.S. population.³ The risks are

¹ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 93 (Nat'l Ctr. For Transgender Equal. 2016) ([internet](#)); see also Morning Consult & The Trevor Project, *How COVID-19 Is Impacting LGBTQ Youth* slide 25 (2020) ([internet](#)). (For sources available online, full URLs appear in the Table of Authorities. All URLs were last visited on October 7, 2022.)

² See James et al., *supra*, at 103.

³ Ann P. Haas et al., Am. Found. for Suicide Prevention & Williams Inst., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 2* (2014) ([internet](#)).

especially high among transgender youth.⁴ If unaddressed, gender dysphoria can impact quality of life, cause fatigue, and trigger decreased social functioning.⁵ Those suffering from gender dysphoria have an increased risk of HIV and AIDS due to inadequate access to care.⁶

Access to gender-affirming healthcare and other medical interventions that improve mental health are especially important to transgender and nonbinary minors, who already experience additional stresses stemming from discrimination, harassment, and stigma experienced in their daily lives.⁷ The Centers for Disease Control and Prevention has

⁴ See, e.g., *id.*; Cal. Dep't of Ins., File No. REG-2011-00023, Economic Impact Assessment: Gender Nondiscrimination in Health Insurance 10 (Apr. 13, 2012) ([internet](#)) (“A recent systematic review of largely American samples gives a suicide attempt rate of approximately one in every three individuals with higher rates found among adolescents and young adults.”).

⁵ See Emily Newfield et al., *Female-to-Male Transgender Quality of Life*, 15 *Quality of Life Rsch.* 1447 (2006) ([internet](#)).

⁶ See Ctrs. for Disease Control & Prevention, *HIV and Transgender People* (Apr. 2022) ([internet](#)).

⁷ “People who identify as transgender have higher rates of mental health complications than those in the general population due to stigma and discrimination. In addition to a higher prevalence of mental health issues, transgender people typically experience barriers to healthcare, such as refusal of care, violence, and a lack of provider knowledge. This suggests that these experiences, and not being transgender itself, may predict and contribute towards mental health difficulties.” Louise

(continued on the next page)

found that transgender students are more likely to report feeling unsafe at or going to and from school, being bullied at school, being threatened or injured with a weapon at school, being forced to have sex, and experiencing physical and sexual dating violence.⁸ About 23.8 percent of transgender students reported being threatened or injured with a weapon at school, for example, compared with 6.4 percent of cisgender boys and 4.1 percent of cisgender girls.⁹ Transgender students who experienced higher levels of victimization due to their gender identity were three times more likely to have missed school in a given month than other students.¹⁰ Transgender youth whose restroom and locker room use was restricted were more likely to experience sexual assault compared with

Morales-Brown, *What to Know About Mental Health Among Transgender Individuals*, Med. News Today (May 20, 2021) ([internet](#)).

⁸ 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*, 68 *Morbidity & Mortality Wkly. Rep.* 67, 69 (2019) ([internet](#)).

⁹ *Id.*

¹⁰ Movement Advancement Project & GLSEN, *Separation and Stigma: Transgender Youth and School Facilities* 4 (2017) ([internet](#)).

those without restrictions.¹¹ These harms have been further exacerbated by the COVID-19 pandemic and the limited availability of healthcare resources.¹² Indeed, about 34 percent of transgender and nonbinary youth reported that the pandemic has been “[m]uch more stressful” compared with 20 percent of cisgender heterosexual youth.¹³

B. Amici’s Laws and Policies Promote Access to Gender-Affirming Medical Care Based on Established Medical Standards.

Given the significant adverse consequences described above, amici have enacted laws and regulations explicitly prohibiting insurers from discriminating against medically necessary, transition-related care in their insurance policies. These protections increase access to healthcare for transgender individuals by barring discriminatory health insurance coverage that contravenes both best medical practice and legal standards prohibiting discrimination on the basis of gender identity.

¹¹ Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, Pediatrics, June 2019, at 1 ([internet](#)).

¹² See Off. for C.R., U.S. Dep’t of Educ., *Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students* iv, 27-30 (2021) ([internet](#)).

¹³ Morning Consult & The Trevor Project, *supra*, at slide 20.

Since 2012, at least 24 States and the District of Columbia have prohibited health insurance discrimination against transgender people.¹⁴ In New York, for example, laws and regulations ensure that transgender patients are not denied or limited coverage for care that is ordinarily available.¹⁵ In 2014, the New York State Department of Financial Services (NYDFS) confirmed that New York law prohibits health plans subject to its jurisdiction from denying “medically necessary treatment otherwise covered by a health insurance policy or contract . . . solely on the basis that the treatment is for gender dysphoria.”¹⁶ In 2019, NYDFS reconfirmed that “New York state law prohibits discrimination based on sexual

¹⁴ Movement Advancement Project, *Healthcare Laws and Policies: Nondiscrimination in Private Insurance and Bans on Transgender Exclusions* (updated June 22, 2022) ([internet](#)).

¹⁵ *See, e.g.*, N.Y. Ins. Law §§ 2607 (prohibiting issuers from refusing to issue insurance policy or contract, or cancel or decline to renew such policy or contract, because of the sex of the applicant or policyholder, and defining sex to include transgender status), 3243, 4330 (prohibiting discrimination in health insurance policies or contracts because of sex, and defining sex to include transgender status); 11 N.Y.C.R.R. § 52.72 (same); 18 N.Y.C.R.R. § 505.2(*l*) (expanding Medicaid coverage for gender-affirming care).

¹⁶ NYDFS, Ins. Circular Letter No. 7, Health Insurance Coverage for the Treatment of Gender Dysphoria (Dec. 11, 2014) ([internet](#)).

orientation, gender identity or expression, or transgender status.”¹⁷ And in 2021, NYDFS announced that insurance carriers in New York, including some that previously excluded some or all gender-affirming treatments, were complying with the new requirements to provide coverage for all gender-affirming treatments for gender dysphoria.¹⁸

Likewise, in 2012, the California Insurance Commissioner adopted regulations prohibiting private insurers from denying coverage for medically necessary “services related to gender transition . . . including but not limited to hormone therapy” if the same services are available when unrelated to gender transition.¹⁹ And in 2014, the Massachusetts Division of Insurance issued guidance stating that “denial of coverage for medically necessary treatment based on an individual’s gender identity or gender dysphoria by any [insurance] Carrier is sex discrimination that is prohi-

¹⁷ NYDFS, Ins. Circular Letter No. 8, Discrimination Based on Sexual Orientation, Gender Identity or Expression, or Transgender Status (July 23, 2019) ([internet](#)).

¹⁸ Press Release, NYDFS, *NYS Office of Mental Health and Department of Financial Services Announce NY Insurance Carriers Complying with State Requirements to Provide Coverage for All Gender-Affirming Treatments* (June 29, 2021) ([internet](#)).

¹⁹ Cal. Code Regs. tit. 10, § 2561.2(a)(4)(A), (b).

bited under Massachusetts law.”²⁰ Many other States’ laws, regulations, and guidance likewise prohibit insurers from gender identity discrimination in healthcare.²¹

²⁰ Mass. Off. of Consumer Affs. & Bus. Regul., Div. of Ins., Bulletin 2014-03, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services 1 (June 20, 2014) ([internet](#)). The Massachusetts Division of Insurance reaffirmed this guidance in 2021. *See* Mass. Off. of Consumer Affs. & Bus. Regul., Div. of Ins., Bulletin 2021-11, Continuing Applicability of Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Gender Affirming Care and Related Services (Sept. 9, 2021) ([internet](#)).

²¹ *See, e.g., District of Columbia:* D.C. Code § 31-2231.11(c); D.C. Dep’t of Ins., Sec. & Banking, Bulletin 13-IB-01-30/15, Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression (revised Feb. 27, 2014) ([internet](#)). **Hawai‘i:** Haw. Rev. Stat. Ann. §§ 431:10A-118.3(a), 432:1-607.3, 432D-26.3. **Illinois:** Ill. Admin. Code tit. 50, § 2603.35; Ill. Dep’t of Hum. Rts. et al., *Guidance Relating to Nondiscrimination in Healthcare Services in Illinois* (June 26, 2020) ([internet](#)); Ill. Dep’t of Ins., Bulletin 2020-16, Health Insurance Coverage for Transgender, Nonbinary, and Gender Nonconforming Individuals, and for Individuals of All Sexual Orientations (June 15, 2020) ([internet](#)). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 285(9)(G); Me. Rev. Stat. Ann. tit. 24-A, § 4320-L. **Maryland:** Md. Code Ann., Ins. § 15-1A-22(d). **New Jersey:** N.J. Stat. Ann. §§ 17B:26-2.1ii, 17B:27-46.1oo, 26:2J-4.40, 52:14-17.29x. **New Mexico:** N.M. Off. of Superintendent of Ins., Bulletin 2018-013, Transgender Non-Discrimination in Health Insurance Benefits (Aug. 23, 2018) ([internet](#)). **Vermont:** Vt. Dep’t of Fin. Regul., Ins. Bulletin 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care (revised June 12, 2019) ([internet](#)); Dep’t of Vt. *(continued on the next page)*

Consistent with their support of transgender rights, many amici's state employee healthcare plans include coverage for medically necessary, gender-affirming healthcare.²² For example, the New York State Health Insurance Program, which serves more than 1.2 million state and local government employees, retirees, and their families,²³ covers medically necessary, gender-affirming surgery and other associated procedures.²⁴ The California Public Employees' Retirement System (CalPERS), which provides health coverage to the more than 1.5 million members and their families,²⁵ covers these procedures as well.²⁶

Health Access, Medical Policy, Gender Affirmation Surgery for the Treatment of Gender Dysphoria (last reviewed Nov. 1, 2019) ([internet](#)). **Washington:** Wash. Rev. Code Ann. § 48.43.0128(3); Wash. Admin. Code § 284-43-5151; Letter from Mike Kreidler, Wash. Ins. Comm'r, to Health Ins. Carriers (June 25, 2014) ([internet](#)).

²² See Transgender Legal Def. & Educ. Fund, *State Employee Health Plans: States with No Exclusions* ([internet](#)).

²³ N.Y. State Dep't of Civ. Serv., *New York State Health Insurance Program* ([internet](#)).

²⁴ N.Y. State Dep't of Civ. Serv., *Empire Plan Report* (Oct. 2019) ([internet](#)).

²⁵ CalPERS, *About CalPERS: Facts at a Glance for Fiscal Year 2020-21* ([internet](#)).

²⁶ Bloomberg L., *CalPERS Says It Will Add Coverage for Transgender Medical Services* (July 2, 2013) ([internet](#)).

Amici's laws and policies are rooted in well-established medical standards recognizing that medical necessity determinations are properly grounded in evidence-based medicine.²⁷ For example, the New York State Office of Mental Health issued a memorandum in 2020 requiring New York-regulated insurance policies to develop evidence-based and peer-reviewed criteria to be used when making medical necessity determinations for the treatment of gender dysphoria, and to submit those criteria to the Office of Mental Health for review and approval.²⁸ The Minnesota Department of Commerce applies to insurers the medical standards set forth by the World Professional Association for Transgender Health (WPATH), an international professional association that provides evidence-based standards of care for transgender people.²⁹ A California opinion

²⁷ See World Pro. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 14 (ver. 7, 2012) ([internet](#)).

²⁸ N.Y. State Off. of Mental Health, Mem. to Plan Adm'rs, Clinical Review Criteria for the Treatment of Gender Dysphoria (Mar. 18, 2020) ([internet](#)).

²⁹ See Maximus Ctr. for Health Dispute Resolution, Appeal Determination in File No. MN2014-0075 (Aug. 11, 2014) ([internet](#)); see also Minn. Dep't of Com., Admin. Bulletin 2015-5, Gender Identity Nondiscrimination Requirements 2 (Nov. 24, 2015) ([internet](#)) ("Determination of
(continued on the next page)

letter about coverage for transgender minors expressly cites to the WPATH standards as well.³⁰ Massachusetts similarly recommends insurance carriers “consult the most up-to-date medical standards set forth by nationally recognized medical experts in the transgender health field, including but not limited to those issued by the” WPATH.³¹

Many other amici similarly follow established medical standards.³²

The District of Columbia, for example, has instructed that determina-

medical necessity and prior authorization protocols for gender dysphoria-related treatment must be based on the most recent, published medical standards set forth by nationally recognized medical experts in the transgender health field.”).

³⁰ Cal. Dep’t of Ins., Legal Op., Permissibility of Denial of Coverage Based Solely on Age for Female-to-Male Chest Reconstruction Surgery as Part of a Treatment for Gender Dysphoria 4-5 (Dec. 30, 2020) ([internet](#)).

³¹ Mass. Off. of Consumer Affs. & Bus. Regul., Bulletin 2021-11, *supra*, at 2.

³² *See, e.g., Colorado*: 3 Colo. Code Regs. § 702-4:4-2-62; Press Release, Colo. Dep’t of Regul. Agencies, *Division of Insurance Announces a New Resource for LGBTQ Coloradans* (June 1, 2020) ([internet](#)). **District of Columbia**: D.C. Dep’t of Ins., Sec. & Banking, Bulletin 13-IB-01-30/15, *supra*, at 3-4. **Maine**: Press Release, GLBTQ Legal Advocs. & Defs., *EqualityMaine, Maine Transgender Network, GLAD and Maine Women’s Lobby Announce Health Coverage for Transgender Individuals Under MaineCare* (Oct. 3, 2019) ([internet](#)). **Minnesota**: Minn. Dep’t of Com., Admin. Bulletin 2015-5, *supra*, at 2. **New York**: NYDFS, Ins. Circular Letter No. 7, *supra*. **Oregon**: Or. Health Auth., *Prioritized List: Guideline for Gender Dysphoria, Frequently Asked Questions* (last updated
(continued on the next page)

tions of “medical necessity” for insurance coverage purposes “must also be guided by providers in communication with individual patients” in accordance with established standards.³³ Washington forbids insurers from “deny[ing] or limit[ing] coverage for gender affirming treatment” when it is medically necessary and “prescribed in accordance with accepted standards of care.”³⁴ California encourages health insurance companies to evaluate coverage criteria for gender-affirming care “to avoid needlessly delaying and interfering with medical care recommended by a patient’s doctor.”³⁵

Taken together, these laws and policies reflect amici’s core commitment to protecting the equality of all people, regardless of their gender

Mar. 2019) ([internet](#)). **Rhode Island:** R.I. Off. of the Health Ins. Comm’r, Health Ins. Bulletin 2015-3, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression 1 (Nov. 23, 2015) ([internet](#)).

³³ D.C. Dep’t of Ins., Sec. & Banking, Bulletin 13-IB-01-30/15, *supra*, at 4.

³⁴ Wash. Rev. Code Ann. § 48.43.0128(3)(a).

³⁵ Press Release, Cal. Dep’t of Ins., *Commissioner Lara Takes Proactive Step to Ensure Transgender Youth Have Access to Gender-Affirming Medical Care for Gender Dysphoria* (Dec. 30, 2020) ([internet](#)).

identity, and ensuring that people with gender dysphoria are not denied necessary healthcare.

C. Amici's Laws and Policies Have Improved Health Outcomes for Transgender People at a Negligible Cost to the States.

Amici's laws and policies have improved health outcomes for transgender people at negligible cost to States. The benefits of access to health-care coverage for transgender people include, among other things, reduced suicide risk, lower rates of substance use, and increased adherence to HIV treatment.³⁶ And studies overwhelmingly show that mental health for transgender minors especially improves when they have access to early treatment. A 2021 survey of nearly 12,000 transgender and nonbinary youth found that, for youth under the age of 18, use of gender-affirming

³⁶ See *id.*; Erin Digitale, *Better Mental Health Found Among Transgender People Who Started Hormones as Teens*, Stanford Med. News Ctr. (Jan. 12, 2022) ([internet](#)) (“Transgender adults who started gender-affirming hormone therapy as teens had better mental health than those who waited until adulthood or wanted the treatment but never received it”); Arjee Restar et al., *Gender Affirming Hormone Therapy Dosing Behaviors Among Transgender and Nonbinary Adults*, *Humans. & Soc. Scis. Commc'ns*, Sept. 7, 2022, at 1, 2 ([internet](#)) (“[H]ormone use has been shown to significantly improve psychological functioning and quality of life, reduce suicidal attempts and ideations, promote body satisfaction, and decrease gender dysphoria and is therefore considered medically necessary for many trans people.”).

hormone therapy was associated with 39 percent lower odds of recent depression and 38 percent lower odds of attempting suicide in the past year compared to youth who wanted, but did not receive, such therapy.³⁷

At the same time, an economic impact analysis of California’s 2012 regulation found that removing transgender exclusions had an “immaterial” effect on premium costs, leading the California Department of Insurance to conclude that “the benefits of eliminating discrimination far exceed the insignificant costs.”³⁸ Similarly, in 2016, a study supported by the Massachusetts Group Insurance Commission found that the benefits of gender-affirming medical treatment outweigh the costs, noting that “these

³⁷ Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 *J. Adolescent Health* 643, 643 (2021) ([internet](#)); *see also* Jack L. Turban et al., *Access To Gender-Affirming Hormones During Adolescence and Mental Health Outcomes Among Transgender Adults*, *PLOS One*, Jan. 12, 2022, at 1, 8 ([internet](#)) (“After adjusting for demographic and potential confounding variables, access to [gender-affirming hormones] during adolescence (ages 14–17) was associated with lower odds of past-month severe psychological distress . . . , past-year suicidal ideation . . . , past-month binge drinking . . . , and lifetime illicit drug use . . . when compared to access to [gender-affirming hormones] during adulthood.”).

³⁸ Cal. Dep’t of Ins., *Economic Impact Assessment*, *supra*, at 8-9.

additional expenses hold good value for reducing the risk of negative endpoints—HIV, depression, suicidality, and drug abuse.”³⁹

POINT II

THE DISCRIMINATORY COVERAGE EXCLUSION VIOLATES THE EQUAL PROTECTION CLAUSE

The district court correctly determined that the North Carolina State Health Plan for Teachers and State Employees (Plan) violates the Equal Protection Clause because it denies medically necessary, gender-affirming care on the basis of sex. As the district court explained, the exclusion “facially discriminate[s] based on sex and transgender status,” and is therefore subject to heightened scrutiny, because it “necessarily rests on a sex classification.” (Mem. Op. & Order (Op.) at 16-17, 42 (Aug. 10, 2022), Dist. Ct. ECF No. 261 (quotation marks omitted).) The Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and this Court in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), have found that discrimination based on transgender status is necessarily

³⁹ William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 J. Gen. Internal Med. 394, 394 (2016) ([internet](#)).

sex discrimination “because it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex,” *Bostock*, 140 S. Ct. at 1741; *accord Grimm*, 972 F.3d at 616. Here, the exclusion discriminates against transgender individuals because it fails to cover medically necessary treatments on the sole basis that those services relate specifically to the person’s transgender status or are treatment for a gender dysphoria diagnosis. The exclusion also “overtly discriminates against members for ‘failing to conform to the sex stereotype propagated by the [Plan]’ by denying coverage on the basis of sex. (Op. at 42.)

Harkening back to “a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of” the Supreme Court, *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964)), appellants’ argument boils down to the assertion that the Plan does not discriminate on the basis of sex or transgender status because its “coverage exclusion applies to all Plan members” (Br. for Appellants (Br.) at 23). But that is not the relevant inquiry. For example, Virginia’s ban on interracial marriage in *Loving* applied equally to all Virginians. Yet the Supreme Court struck

it down because even if it applied equally, it impermissibly and unjustifiably “rest[ed] solely upon distinctions drawn according to race.” *Loving*, 388 U.S. at 10-11. Similarly, the school board in *Grimm* argued that its policy requiring students to use restrooms that match their biological gender did not violate equal protection because it “applie[d] to everyone equally.” 972 F.3d at 609. The Court rejected this argument, reasoning that it was like “saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race.” *Id.*

The reasoning of *Loving* and *Grimm* directly applies here. As the district court explained, while the coverage exclusion may exist for all Plan members, the only individuals impacted by the coverage exclusion are transgender members. (Op. at 43.) This is clear from the plain language of the exclusion, which speaks in gendered terms, excluding “[t]reatments or studies leading to or in connection with *sex* changes or modifications and related care.” (*Id.* at 41-42 (quotation marks omitted).) The exclusion therefore draws an invidious distinction based on sex that must survive heightened scrutiny. *See Grimm*, 972 F.3d at 608 (explaining that

heightened scrutiny applied to policy that could not “be stated without referencing sex” (quotation marks omitted)).

The Supreme Court’s decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), does not alter this conclusion. In *Geduldig*, the Supreme Court held that a disability insurance program did not discriminate based on sex “by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth.” *Id.* at 492, 494. Unlike in *Geduldig*, the Plan does not make distinctions based on conditions or diagnoses but based on “*treatments* that lead to or are connection to *sex* changes or modifications.” (Op. at 47.) The exclusion of pregnancy as a compensable disability is not the same as the exclusion of a medically necessary treatment solely on the grounds that it is gender-affirming when the same treatment is approved for cisgender members. As explained above, the latter exclusion is transgender discrimination, which the Supreme Court has held is necessarily sex discrimination. *See Bostock*, 140 S. Ct. at 1741. Because the exclusion here specifically excludes coverage for treatment that is medically necessary for transgender individuals when it approves

such coverage for cisgender plan members,⁴⁰ it discriminates on the basis of transgender status, and therefore on the basis of sex. *See id.*; *see also Grimm*, 972 F.3d at 608.

Because the Plan’s coverage exclusion is subject to heightened scrutiny, appellants were required to establish that the exclusion is “substantially related to a sufficiently important government interest.” *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). As the district court also correctly determined, they failed to do so. Putting aside that a State may not “protect the public fisc by drawing an invidious distinction between classes of its citizens,” *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974), the exclusion does not provide the Plan with any significant cost savings (*see Op.* at 48 (explaining that the “estimated \$300,000–\$900,000 saved by the exclusion per year pales in comparison to [the Plan’s] billion-dollar cash balance and saves each of

⁴⁰ For example, as the district court explained, “puberty suppressing medication may be covered if medically necessary” but “a transgender boy will not receive coverage for such medication—even if medically necessary—because, in the language of the Plan, it would ‘change or modify’ his physiology in a way that does not match his female biological sex.” (*Op.* at 42 (citing Third Suppl. Decl. of Amy Richardson at 4-22 (Feb. 2, 2022), Dist. Ct. ECF No. 201-1).)

the Plan's 740,000 members about one dollar each"). This accords with amici's experience in funding medically necessary, gender-affirming healthcare for their own state employees and their dependents.

Nor did appellants show that the coverage exclusion was justified because it protects the public from purportedly ineffective medical treatments. The district court correctly excluded the bulk of appellants' proposed expert testimony on this point as unreliable or irrelevant, and appellants' remaining evidence was insufficient to meet their burden at summary judgment. (Op. at 49.) As explained above, amici's overwhelming experience shows that gender-affirming healthcare improves healthcare outcomes among transgender people with minimal cost to the state. See *supra* at 14-16. And as the district court observed, the Plan may tailor concerns about medically unnecessary or harmful treatments by denying coverage only for such care. (Op. at 51.) There is no justification for the Plan's blanket refusal to cover medically necessary, gender-affirming healthcare.

Finally, the Court should also reject appellants' argument that the district court's permanent injunction is impermissibly vague. The district court enjoined appellants "from enforcing the Plan's exclusion" and

ordered them to “reinstate coverage for ‘medically necessary services for the treatment of gender dysphoria.’” (*Id.* at 67, 72.) There is nothing vague about this language, and the administrators of amici’s state employee health plans would have no difficulty in interpreting it. Indeed, as already noted, amici already offer coverage for medically necessary services for the treatment of gender dysphoria. See *supra* at 7-10. In any event, the district court’s order explains clearly what is required of appellants—because the Plan covered medically necessary treatment for gender dysphoria in 2017, which was the last uncontested status between the parties, the district court directed appellants to “reimpos[e] the 2017 rule.” (Op. at 67.) Appellants cannot explain how the Plan is unable to offer the same coverage that it did in 2017. As appellants concede (Br. at 9), coverage decisions under the Plan are made by the Plan’s third-party administrator and pharmacy benefit manager, who both were able to make the necessary coverage decisions in 2017 (*see* Op. at 66).

CONCLUSION

The Court should affirm the decision below.

Dated: New York, New York
October 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,492 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

*/s/ Kelly Cheung*_____



August 5, 2022

ATTORNEY GENERAL RAOUL JOINS COALITIONS PROTECTING RIGHTS OF LGBTQ+ STUDENTS

Legal Briefs Seek to Protect Transgender Rights, Oppose Florida's "Don't Say Gay" Law

Chicago — Attorney General Kwame Raoul joined two separate coalitions of attorneys general supporting LGBTQ+ students against discrimination in the classroom, filing legal briefs opposing an Indiana school district's efforts to bar a transgender student from using the restroom consistent with the student's gender identity and against Florida's controversial "Don't Say Gay" law, which limits classroom discussions and has serious implications for LGBTQ+ students.

"Across the country, we are seeing increased attacks on the rights of LGBTQ+ youth," Raoul said. "Discrimination has no place in the classroom – period. I will continue to work with fellow attorneys general from across the country to stand up for the rights of all students and will vehemently oppose unjust policies that jeopardize the education and emotional and physical well-being of LGBTQ+ students."

Raoul joined a coalition of 22 attorneys general in filing an amicus brief in the case *A.C. v. Metropolitan School District of Martinsville* opposing the Indiana school district's efforts to bar a 13-year-old transgender male student from using the boys' restroom. [The brief](#) — filed in the U.S. Court of Appeals for the 7th Circuit — argues for the court to affirm a lower court ruling requiring the Metropolitan School District of Martinsville to allow the student to use the boys' bathroom.

Raoul and the coalition argue that preventing a transgender student from using a school restroom consistent with the student's gender identity violates Title IX of the Education Amendments of 1972 by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. The amicus brief also points out that inclusive policies that maintain sex-segregated spaces while permitting transgender people to use a facility that aligns with their gender identity help to ease the stigma transgender people often experience, with positive effects for their educational and health outcomes. The attorneys' general amicus brief demonstrates that protecting transgender people from discrimination yields broad benefits without compromising privacy or safety, and that nondiscriminatory restroom policies produce important benefits and pose no safety concerns.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont and Washington.

Raoul also joined a separate coalition of 16 attorneys general opposing Florida's recently-enacted "Don't Say Gay" law which prevents classroom discussion of sexual orientation or gender identity, posing a serious threat to LGBTQ+ students and families. Florida's new law outlaws "classroom instruction" on sexual orientation or gender identity in kindergarten through the third grade, while also requiring the state education agency to write new classroom instructions for standards that must be followed by fourth through 12th grade teachers. The new law does not, however, define many of its key terms like "classroom instruction." Out of an abundance of caution, Florida instructors have already begun censoring themselves, as the law allows a parent to bring a civil claim against a school district to enforce its vague prohibitions.

[Raoul and the coalition argue in their brief](#) that the Florida law is extreme and causes significant harms to students, parents, teachers and other states. The coalition notes non-inclusive educational environments have severe negative health impacts on LGBTQ+ students, resulting in increased rates of mental health disorders and suicide attempts. These harms extend to youth not just in Florida but throughout the country.

A group of students, parents, teachers, and organizations challenged the new law in federal district court, seeking to prevent its enforcement and alleging that it violates, among other things, the Equal Protection Clause and the First Amendment.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York and Oregon.

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August 17, 2022

ATTORNEY GENERAL RAOUL JOINS COALITION OPPOSING ALABAMA ATTACK ON TRANSGENDER YOUTH

Chicago — Attorney General Kwame Raoul today joined a coalition of 21 attorneys general opposing an Alabama law that criminalizes evidence-based and medically accepted gender-affirming care for transgender youth.

[In their brief before the appellate court](#), Raoul and the coalition highlight the extreme harms of Alabama’s intrusions on medical decisions that should be made between doctors and patients and their parents. The new Alabama law, which was preliminarily blocked by the district court, makes it a felony – punishable by up to 10 years in prison and a fine of up to \$15,000 – for any person to assist transgender youth in Alabama in accessing gender-affirming care, including puberty blockers and hormone therapy.

“Instead of ensuring critical health care access for transgender youth, this new law criminalizes their existence, marking just the latest in a string of attacks against LGBTQ+ youth across the country,” Raoul said. “I will continue to work with fellow attorneys general to support the rights of transgender youth and oppose efforts that jeopardize the safety and health of the LGBTQ+ community.”

Signed into law on April 8, Alabama’s new law is part of a dangerous, nationwide assault on the rights of transgender people to live with dignity, free from discrimination, and have equal access to health care. Alabama’s categorical ban on gender-affirming health care for transgender youth ignores broad medical consensus, interferes with medical decisions that providers reach with individual patients and their families, and violates the Equal Protection Clause of the U.S. Constitution. The law specifically targets transgender youth, ignoring the use of the exact same type of medical interventions as treatment to reinforce the gender an individual was assigned at birth. For instance, the new law permits doctors to prescribe testosterone for a cisgender male teen suffering from delayed pubertal development, but makes it a felony for a transgender male teen to access the same treatment.

Discrimination and exclusion on the basis of transgender status can cause direct economic, emotional and health harms, including an increased risk of depression, anxiety, substance abuse, and suicide. In contrast to Alabama, the coalition states have adopted laws and policies to combat discrimination against transgender people in health care, including policies that guarantee non-discriminatory insurance coverage of gender-affirming medical care for transgender youth. These efforts result in better health outcomes for transgender youth and help safeguard their physical, emotional, and financial well-being.

In the amicus brief, Raoul and the coalition explain how the new law:

- Directly harms transgender teens living in and traveling to Alabama and imposes spillover harms on other states, including on Illinoisans attending Alabama universities.
- Exacerbates the effects of discrimination and inadequate access to health care for transgender teens.
- Discriminates based on sex, ignores medical standards, and interferes with decisions made between doctors and their patients.
- Directly violates equal protection by prohibiting only transgender youth from taking certain medications
- In contrast, policies like those in amici states that ensure access to gender-affirming medical care have improved health outcomes for transgender people and are based on well-established medical standards.

Today’s brief is Attorney General Raoul’s latest action to defend the rights of transgender and LGBTQ+ youth. Earlier this month, [Raoul joined two separate coalitions](#) of attorneys general supporting LGBTQ+ students against discrimination in the classroom, filing legal briefs opposing an Indiana school district’s efforts to bar a transgender student from using the restroom consistent with the student’s gender identity, and against Florida’s controversial “Don’t Say Gay” law, which limits classroom discussions and has serious implications for LGBTQ+ students.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and the District of Columbia.

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22-1786

**United States Court of Appeals
for the Seventh Circuit**

A.C., a minor child by his next friend, mother and legal guardian, M.C.,
Plaintiff-Appellee,

v.

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE and FRED KUTRUFF,
in his official capacity as Principal of John R. Wooden Middle School,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District
of Indiana, Indianapolis Division District Court No. 1:21-cv-2965-TWP-MPB,
The Honorable Tanya Walton Pratt, Chief Judge

**BRIEF FOR STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,
NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON,
PENNSYLVANIA, RHODE ISLAND, AND VERMONT, AND
THE DISTRICT OF COLUMBIA, AS AMICI CURIAE
IN SUPPORT OF APPELLEE**

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INTERESTS OF THE AMICI STATES

The States of New York, Washington, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Vermont, and the District of Columbia, file this brief as amici curiae in support of plaintiff-appellee A.C. *See* Fed. R. App. P. 29(a)(2).

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including equal access to school restrooms. Discrimination on the basis of one's transgender status causes tangible economic, educational, emotional, and health harms. To prevent these injuries, the amici States have adopted policies aimed at combating discrimination against transgender people. Amici submit this brief to describe their experiences with administering such policies—including policies that maintain gender-segregated restrooms while allowing transgender students to use such restrooms on an equal basis with other students of the same sex. As amici's experiences show, ensuring transgender people have access to public facilities consistent with their gender identity—including access to common restrooms—benefits all, without compromising safety or privacy, or imposing significant costs.

The amici States also share a strong interest in seeing that federal law is properly applied to protect transgender people from discrimination. This appeal does not challenge the authority of a school district to assign bathrooms based on sex, although that is how the Metropolitan School District of Martinsville (District) and its amici characterize the issue. *See* Appellants' Br. (Br.) at 10-18; Amicus Br. of Ind. & 20 Other States (Ind. Br.) at 3-6. Rather, this case challenges the District's policy excluding a transgender male student, A.C., from the boys' bathroom based on his sex assigned at birth, despite A.C. taking medication to suppress menstruation, being known in Indiana state records by a traditionally masculine name, and being referred to as "he" or "him," even by school officials. *See* Br. at 6 n.3. The District's policy violates Title IX of the Education Amendments of 1972 by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. Further, because the policy fails to advance any legitimate interest such as protecting public safety or personal privacy, its only function is to stigmatize a particular group, which violates equal protection.

ARGUMENT

I. PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS WIDE SOCIETAL BENEFITS WITHOUT COMPROMISING THE PRIVACY OR SAFETY OF OTHERS

Over 1.6 million people in the United States—including approximately 300,000 youth between the ages of thirteen and seventeen—identify as transgender.¹ Transgender people have been part of cultures worldwide “from antiquity until the present day.”² They contribute to our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers, lawyers, nurses, and doctors.

Unfortunately, transgender people often experience discrimination that limits their ability to realize their potential. To combat such discrimination, States began providing civil rights protections for transgender people nearly a quarter century ago. Today, at least twenty-two States and the District of

¹ Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (Williams Inst. 2022) (internet). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on August 2, 2022.)

² American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014) (internet); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015) (internet).

Columbia,³ and at least 225 local governments,⁴ offer express protections against discrimination based on gender identity in areas such as education, housing,

³ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov't Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawaii:** Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas:** Kansas Hum. Rts. Comm'n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court's Bostock Decision* (Aug. 21, 2020) (internet) (advising that Kansas laws prohibiting discrimination based on “sex” in “employment, housing, and public accommodation” contexts “are inclusive of LGBTQ and all derivatives of ‘sex’”). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov't § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing); Md. Code Ann., Educ. § 26-704 (schools). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education). **Nevada:** Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *id.* § 10:5-12 (public accommodations, housing, employment); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law §§ 291, 296 (education,

(continued on the next page)

public accommodations, and employment.⁵ The experiences of amici States and other jurisdictions show that policies and practices that ensure equal access to public facilities for transgender people—including access to common restrooms consistent with their gender identity—promote safe and inclusive school environments that benefit all.

employment, public accommodations, housing). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *id.* § 49.60.030(1)(a)-(e) (employment, public accommodations, real estate transactions, credit transactions, and insurance transactions); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

⁴ Human Rts. Campaign, *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity* (internet) (current as of January 28, 2021).

⁵ The U.S. Supreme Court has confirmed that longstanding federal law similarly prohibits employment discrimination based on gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender counterparts.⁶ In the 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked.⁷ More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and approximately one in eight (13%) reported being sexually assaulted.⁸ Another 2015 survey showed that three-fourths of transgender students felt unsafe at school because of their gender expression.⁹ More than a quarter of transgender respondents to a survey of LGBTQ teenagers in December 2016 and January

⁶ Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xxvii, 93 (GLSEN 2020) (internet); see also Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (GLSEN 2009) (internet).

⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131-35 (Nat'l Ctr. for Transgender Equal. 2016) (internet).

⁸ *Id.* at 132-33.

⁹ Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 84-85 (GLSEN 2016) (internet).

2017 reported being bullied or harassed within the past thirty days.¹⁰ As a consequence of this violence and harassment, transgender students surveyed in 2019 reported feeling less connected to their schools, and had less of a sense of belonging, than other students.¹¹

Discrimination against transgender youth—including denial of access to appropriate restroom facilities—can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹² Respondents to the 2015 USTS who reported negative experiences in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.¹³ Transgender people attempt suicide at a rate nearly nine times that of the general population.¹⁴ And a 2016 study found that transgender people who had been denied access to bathroom facilities were approximately 40% more likely to have

¹⁰ Human Rts. Campaign Found., *Human Rights Campaign Post-Election Survey of Youth 8* (2017) (internet).

¹¹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 95.

¹² *Id.* at 52, 54.

¹³ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁴ *Id.* at 114.

attempted suicide than were other transgender people.¹⁵ Similarly, a 2021 study found that denial of access to bathroom facilities significantly increased the odds of transgender and/or nonbinary youth reporting depressive mood and attempting suicide—one in three youths who faced bathroom discrimination reported a suicide attempt in the past year.¹⁶

Suicide is not the only health risk faced by transgender youth. For example, the district court found that A.C. “sometimes tries to go the entire day without using the restroom at all,” despite the physical discomfort it causes and serious health consequences that could result. *See A.C. ex rel. M.C. v. Metropolitan Sch. Dist.*, No. 21-cv-2965, 2022 WL 1289352, at *2 (S.D. Ind. Apr. 29, 2022). Research shows that A.C.’s experience is not unique. More than four in five (82.1%) of the transgender students surveyed in one study had avoided school restrooms because they felt unsafe or uncomfortable.¹⁷ And 54% of respondents in another study of transgender people reported negative health

¹⁵ Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. of Homosexuality 1378, 1388 tbl. 2 (2016) (internet).

¹⁶ Myeshia Price-Feeney et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. of Adolescent Health 1142 (2021) (internet).

¹⁷ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 97 fig. 3.8.

effects from avoiding public restrooms, such as kidney infections and other kidney-related problems.¹⁸

Discrimination in school settings also negatively affects educational outcomes. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.¹⁹ Discriminatory school climates have also been found to exacerbate absenteeism. As the district court found here, the District's policy barring A.C. from using the boys' restroom caused him to be late for class, disrupted his ability to focus in school, worsened his anxiety and depression, made him feel isolated, and made "being at school painful." *See A.C.*, 2022 WL 1289352, at *2, *7 (quotation marks omitted). And a 2019 survey of LGBTQ students found that those who had experienced discrimination in their schools

¹⁸ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 75 (2013) (internet); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 600, 603, 617 (4th Cir.) (transgender boy suffered painful urinary tract infection after being denied access to boys' restrooms at school), *reh'r'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Adams ex rel. Kasper v. School Bd.*, 318 F. Supp. 3d 1293, 1307 & n.28 (M.D. Fla. 2018), *aff'd*, 3 F.4th 1299 (11th Cir.), *and reh'r'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

¹⁹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; *see also* Greytak et al., *Harsh Realities*, *supra*, at 25, 27 fig. 15 (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

based on their sexual orientation or gender identity were almost three times as likely to have missed school in the month before the survey because they felt unsafe or uncomfortable (44.1% vs. 16.4%).²⁰

Such discrimination inhibits transgender students' ability to learn, to the detriment of the broader community because education advances more than the private interests of students: it prepares young people to contribute to society socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

B. The Amici States' Experiences Confirm That Protecting Transgender People from Discrimination Yields Broad Benefits Without Compromising Privacy or Safety, or Imposing Significant Costs.

As noted above, at least twenty-two States and 225 localities expressly provide civil rights protections to transgender people, and those protections often include requirements that transgender people be allowed to use restrooms consistent with their gender identity. Contrary to the claims of the District (*see* Br. at 10-18) and its amici (*see* Ind. Br. at 3-6), these protections wholly comply with laws, such as Title IX, that allow segregating restrooms by sex, *see* 20 U.S.C. § 1686. These policies maintain sex-segregated spaces while allowing transgender people to use a facility that aligns with their gender identity—

²⁰ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 49.

thus helping to ease the stigma transgender people often experience, with positive effects for their educational and health outcomes. Such policies promote compelling interests in “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984). And those policies do so without threatening individual safety or privacy, or imposing significant costs.

1. Nondiscriminatory restroom policies produce important benefits and pose no safety concerns.

Supportive educational environments increase success rates for transgender students. Data from one national survey show that more-frequently harassed transgender teenagers had significantly lower grade-point averages than other transgender students.²¹

Policies supporting transgender students, including by allowing them to use common restrooms consistent with their gender identity, also can reduce the health risks facing those students. For example, California adopted protections against gender-identity discrimination in schools to address harms suffered

²¹ Greytak et al., *Harsh Realities*, *supra*, at 27 fig. 15.

by transgender students, including students not drinking and eating during the school day to avoid restroom use.²²

In States allowing transgender students to use bathrooms corresponding to their gender identity, public schools have reported no instances of transgender students harassing others in restrooms or locker rooms.²³ Indeed, the experiences of school administrators in thirty-one States and the District of Columbia show that public safety concerns are unfounded, as are concerns that students will pose as transgender simply to gain improper restroom access.²⁴ The District's speculation (Br. at 2-3, 16) that student safety will suffer if transgender people are treated fairly is thus contrary to the actual experiences of States and localities where nondiscrimination has long been the law.²⁵

²² See Assemb. B. 1266, 2013-2014 Sess. (Cal. 2013) (internet); Assemb. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 5-6, 7 (internet); see also Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Texas Trib. (June 14, 2016) (internet).

²³ Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan (Sept. 1, 2016) (internet).

²⁴ Br. of Amici Curiae Sch. Adm'rs from Thirty-One States & D.C. in Supp. of Resp't ("School Adm'rs Br.") at 14-16, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

²⁵ Indeed, a survey of the largest school districts in twelve States with gender identity protections found that, years after implementing protections, "none of the schools have experienced any problems." Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, Media Matters for Am. (June 3, 2015) (internet) (largest school districts in 12 States with gender-identity protection laws); see Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for Am. (Mar. 19, 2014) (internet) (law
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For instance, a former county sheriff noted that Washington State has protected transgender people from discrimination for a decade “with no increase in public safety incidents as a result”; he emphasized “that indecent exposure, voyeurism, and sexual assault[] are already illegal, and police use those laws to keep people safe.”²⁶ In 2013, the Los Angeles Unified School District—the second largest school district in the country, with more than 600,000 K-12 students²⁷—reported to the California Legislature that the district had “no issues, problems or lawsuits as a result of [a 2004] policy” allowing students to use restrooms corresponding to their gender identity.²⁸ And the Massachusetts Chiefs of Police Association and Massachusetts Majority City Chiefs expressed that allowing people to use public bathrooms consistent with their gender

enforcement officials, government employees, and advocates for sexual assault victims); Luke Brinker, *California School Officials Debunk Right-Wing Lies About Transgender Student Law*, Media Matters for Am. (Feb. 11, 2014) (internet) (six of California’s largest school districts, including two that have had antidiscrimination policies for more than a decade); see also Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 Sexuality Rsch. & Soc. Pol’y 70 (2019) (internet) (comparing criminal incident reports in localities with and without gender identity inclusive public accommodations nondiscrimination laws in Massachusetts).

²⁶ David Crary, *Debate Over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib. (May 10, 2016) (quotation marks omitted) (internet).

²⁷ Los Angeles Unified Sch. Dist., *District Information, About the Los Angeles Unified School District* (internet).

²⁸ S. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 8 (internet).

identity “improve[s] public safety.”²⁹ Meanwhile, in Texas, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those cities’ policies allowing transgender people to use restrooms consistent with their gender identity.³⁰

2. Nondiscriminatory restroom policies neither compromise personal privacy nor require significant expenditures.

Contrary to the claims of the District (*see, e.g.*, Br. at 10-18) and its amici (*see* Ind. Br. at 12-13), the amici States’ experiences show that nondiscriminatory policies have neither generated privacy issues nor imposed substantial costs on schools. The risk that students will see others’ intimate body parts, or have their intimate body parts seen by others, is not presented by ordinary restroom use. And in any event, concerns about the presence of others (whether or not transgender) can be addressed—and are being addressed—by increasing privacy options for all students, without singling out transgender people for stigmatizing differential treatment.

²⁹ Letter from William G. Brooks III, Mass. Chiefs of Police Ass’n, & Bryan A. Kyes, Mass. Majority City Chiefs, to Sen. William N. Brownsberger & Rep. John V. Fernandes, Joint Comm. on the Judiciary (Oct. 1, 2015) (internet).

³⁰ Carlos Maza & Rachel Percelay, *Texas Experts Debunk the Transgender “Bathroom Predator” Myth Ahead of HERO Referendum*, Media Matters for Am. (Oct. 15, 2015) (internet); *see also, e.g.*, Fox News, *Manafort on Trump’s Fight to Rally GOP, Defeat Democrats; Gov. McCrory on Showdown Over NC’s Transgender Bathroom Law* (Jan. 23, 2017) (internet) (no known cases of people in North Carolina committing crimes in bathrooms under the cover of protections provided to transgender people).

School districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. In Washington State, where school districts are required to “allow students to use the restroom that is consistent with their gender identity consistently asserted at school,” schools must provide “[a]ny student—transgender or not—who has a need or desire for increased privacy, regardless of the underlying reason,” with “access to an alternative restroom (e.g., staff restroom, health office restroom).”³¹ This gives all students with privacy concerns “the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”³²

Similar provisions apply to locker rooms. Students in Washington are allowed to participate in physical education and athletic activities “in a manner that is consistent with their gender identity.”³³ But rather than segregating transgender students, additional privacy is provided for any student who desires

³¹ Susanne Beauchaine et al., *Prohibiting Discrimination in Washington Public Schools* 30 (Wash. Off. of Superintendent of Pub. Instruction 2012) (internet); see also Washington State Hum. Rts. Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-Segregated Facilities* 3 (2016) (internet) (businesses need not “make any [structural] changes” or “add additional facilities,” but “are encouraged to provide private areas for changing or showering whenever feasible” and “may wish to explore installing partitions or curtains for persons desiring privacy”); Wash. Rev. Code Ann. § 28A.642.080 (requiring implementation by January 31, 2020).

³² Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30.

³³ *Id.*; Washington Interscholastic Activities Ass’n, *2021-2022 Handbook* 36 (2021) (internet).

it, regardless of the underlying reason, by providing “a reasonable alternative changing area, such as the use of a private area (e.g., a nearby restroom stall with a door), or a separate changing schedule.”³⁴

At least twelve other States and the District of Columbia offer similar guidance to help schools maximize privacy while complying with laws prohibiting gender-identity discrimination—for instance, by offering privacy curtains and separate restroom and changing spaces to all who desire them.³⁵ None of

³⁴ Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30-31; see also Providence Pub. Sch. Dist., *Nondiscrimination Policy: Transgender and Gender Expansive Students* p. 4 (internet) (student uncomfortable with gender-segregated facility may use “a safe and non-stigmatizing alternative,” such as a privacy partition or separate changing schedule).

³⁵ **California:** California Sch. Bds. Ass’n, *Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities 2* (2014) (internet). **Colorado:** Colorado Ass’n of Sch. Bds. et al., *Guidance for Educators Working with Transgender and Gender Nonconforming Students* 4-5 (internet). **Connecticut:** Connecticut Safe Sch. Coal., *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws* 9-10 (2012) (internet). **Illinois:** Illinois Dep’t of Hum. Rts., *Non-Regulatory Guidance: Relating to Protection of Transgender, Nonbinary, and Gender Nonconforming Students Under the Illinois Human Rights Act* 6-7 (2021) (internet); Illinois State Bd. of Educ., *Non-Regulatory Guidance: Supporting Transgender, Nonbinary and Gender Nonconforming Students* 10-11 (2020) (internet); Affirming & Inclusive Schs. Task Force, *Strengthening Inclusion in Illinois Schools* 19-21 (2020) (internet). **Maryland:** Maryland State Dep’t of Educ., *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* 13-14 (2015) (internet). **Massachusetts:** Massachusetts Dep’t of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment* (Oct. 28, 2021) (internet). **Minnesota:** Minnesota Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* 10 (2017) (internet). **New Jersey:** New Jersey State Dep’t of Educ., *Transgender Student Guidance for School Districts* 7 (2018) (internet). **New York:** New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School* (continued on the next page)

these solutions requires remodeling or restructuring restrooms, or otherwise investing in costly facility upgrades. As a spokeswoman for Texas’s Clear Creek Independent School District confirmed, that district, like many others, “ha[s] been successful in balancing the rights of all students without issue and offer[s] restrooms, showers and changing areas for students seeking privacy, regardless of their gender or gender identity.”³⁶ The experiences of school administrators in dozens of States across the country confirm that such policies can be implemented fairly, simply, and effectively.³⁷

Inclusive policies such as these maintain gender-segregated spaces. For example, the District of Columbia expressly requires that businesses “provide access to and the safe use of facilities that are segregated by gender” where

Environment for Transgender and Gender Nonconforming Students 9-10 (2015) (internet). **Michigan:** Michigan Dep’t of Educ., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* 5-6 (2016) (internet). **Oregon:** Oregon Dep’t of Educ., *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* 10-11 (2016) (internet). **Rhode Island:** Rhode Island Dep’t of Educ., *Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students* 8-9 (2016) (internet). **Vermont:** Vermont Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* 6, 8 (2017) (internet). **District of Columbia:** District of Columbia Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance* 9 (2015) (internet).

³⁶ Ura, *For Transgender Boy*, *supra* (quotation marks omitted).

³⁷ See School Adm’rs Br. at 17-21, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

nudity in the presence of others is customary, while also making accommodations for transgender individuals to use the facility “that is consistent with that individual’s gender identity or expression.”³⁸ And New York’s guidance for school districts explains how schools have accommodated transgender youth and “foster[ed] an inclusive and supportive learning environment,” while maintaining sex-segregated spaces.³⁹ Contrary to the arguments advanced by the States supporting the District (Ind. Br. at 3-6), inclusive policies are thus entirely consistent with the provisions of Title IX permitting schools to maintain sex-segregated facilities.⁴⁰

In fact, it is discriminatory restroom policies rather than inclusive ones that raise privacy concerns, notwithstanding the concern expressed by the social worker at A.C.’s school to the contrary. *See* Br. at 5. Such policies are more likely to create a needless risk of violence against transgender people, whose physical appearance may diverge from their sex assigned at birth and who therefore are likely to be perceived as using the “wrong” restroom.⁴¹ In short,

³⁸ D.C. Mun. Regs. tit. 4, § 805.

³⁹ New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*, *supra*, at 10.

⁴⁰ *See* 20 U.S.C. § 1686; 34 C.F.R. § 106.33 (2022).

⁴¹ *See* James et al., *2015 U.S. Transgender Survey*, *supra*, at 225-27; *see also* Matt Pearce, *What It’s Like to Live Under North Carolina’s Bathroom Law If You’re Transgender*, L.A. Times (June 12, 2016) (internet).

policies like the one at issue here, which bar transgender individuals from using a restroom that aligns with their gender identity, are more likely to pose safety and privacy concerns than inclusive policies.

II. TITLE IX AND THE EQUAL PROTECTION CLAUSE PROHIBIT THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

The District and its amici mischaracterize the central issue in this case as whether sex-segregated bathrooms violate the Equal Protection Clause or Title IX. A.C. has never disputed a school's authority to separate bathrooms by sex. Rather, the key question in this case is instead whether "the alleged facts, if true, raise a plausible [inference] that [the District] discriminated against [A.C.] on the basis of sex?" *A.C.*, 2022 WL 1289352, at *3 (quotation marks omitted). Relying on this Court's precedent in *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the district court correctly answered that question in the affirmative. *See* 858 F.3d 1034 (7th Cir. 2017). As the court properly determined, "discrimination against a person on the basis of their transgender status constitutes discrimination based on sex," and A.C. was likely to succeed on his claims that he had been discriminated against based on his sex. *A.C.*, 2022 WL 1289352, at *3, *6.

The district court correctly applied *Whitaker* as the controlling precedent. There is no meaningful difference between the facts in *Whitaker* and those presented here. The plaintiffs in both cases are transgender male students who

were designated female at birth. Both plaintiffs were diagnosed with gender dysphoria and were under medical care to suppress developing female secondary sex characteristics. Both plaintiffs consistently presented as boys for four years prior to suing their respective schools for denying them access to the boys' restrooms. And both plaintiffs experienced similar harms from that denial, such as missing class time and experiencing anxiety, depression, and stigmatization. Indeed, for a time, both boys defied school orders and used the boys' restrooms with no complaints from students. *Compare Whitaker*, 858 F.3d at 1040-42, 1052, *with A.C.*, 2022 WL 1289352, at *1-2.

The similarities between *Whitaker* and the current case also extend to the defendant school districts' positions. For example, in neither case did the defendant school district present any evidence that the presence of a transgender boy in the boys' bathroom threatened, much less violated, the privacy rights of other students. *Whitaker*, 858 F.3d at 1052; *A.C.*, 2022 WL 1289352, at *7. Given such similar facts between the two cases, the district court properly applied *Whitaker* in holding that A.C., like the plaintiff in *Whitaker*, had demonstrated a likelihood of success on the merits of his claim that the District discriminated against him on the basis of sex in violation of Title IX and the Equal Protection Clause. *A.C.*, 2022 WL 1289352, at *6; *see Whitaker*, 858 F.3d at 1050, 1054. The District plainly and unlawfully discriminates based on sex because it does not and cannot explain its reasons for excluding A.C. from using

the bathrooms that align with his gender identity without referencing A.C.'s "biological sex" or conformity with it. *See Whitaker*, 858 F.3d at 1049, 1051; Br. at 8.

Consistent with *Whitaker*, other courts, including the Supreme Court in *Bostock v. Clayton County*, have found that gender identity discrimination is necessarily sex discrimination.⁴² *See* 140 S. Ct. at 1741-42, 1745-47; *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing cases). As the Supreme Court explained, discriminating against a person for being transgender is sex discrimination because "[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. For example, a person who is discriminated against for identifying as female simply because she was identified as male at birth is necessarily being discriminated against based on sex—i.e., she would not be treated differently than other females if not for the fact that her designated sex at birth was male. *Id.* In reaching its conclusion, the Supreme Court acknowledged that "transgender status" is a distinct concept from "sex," but observed that sexual harassment and discrimination based on

⁴² When determining whether conduct constitutes discrimination based on sex under Title IX, courts routinely look to and apply case law interpreting Title VII. *See, e.g., Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636, 651 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

motherhood are also distinct concepts that, unquestionably, still qualify as sex discrimination. *Id.* at 1742, 1746-47.

Applying much the same reasoning as in *Bostock*, courts have correctly recognized that Title IX's bar against sex discrimination prohibits policies that, like the District's policy here, bar transgender students from using the bathroom that aligns with their gender identity. As these courts have correctly explained, the discriminator is necessarily referring to an individual's sex assigned at birth to deny access to a bathroom that aligns with their gender identity. *See Grimm*, 972 F.3d at 616-19; *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir.) (transgender students' use of sex-segregated spaces that align with their gender identity does not violate Title IX rights of cisgender students), *cert. denied*, 141 S. Ct. 894 (2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).⁴³ Thus, a policy that denies a transgender boy, for example, access to the boys' bathroom violates Title IX's prohibition against sex discrimination because it treats the transgender boy differently than other students who

⁴³ *See also N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 563-64 (Minn. Ct. App. 2020) (considering Title IX precedents to interpret Minnesota anti-discrimination statute).

identify as boys, simply because of the sex they were assigned at birth. The district court did not err in reaching the same conclusion here.

The District's policy needlessly denies A.C. something most people take for granted: the ability to use a public restroom consistent with one's lived experience of one's own gender. The policy singles out transgender students like A.C. and forces them either to forgo restroom use or to choose between two other detrimental options: using common restrooms corresponding to their sex assigned at birth or using special single-user restrooms (i.e., those with no specific gender designation). The first option contravenes a core aspect of transgender people's identities, subjects them to potential harassment and violence, and violates medical treatment protocols. The second option stigmatizes the person—like “outing” individuals as transgender in settings where they could be exposed to danger or prefer to keep that information private—assuming that single-user restrooms are even available and equally convenient.⁴⁴ See *A.C.*, 2022 WL 1289352, at *7.

⁴⁴ The same concerns are not posed by the privacy-enhancing measures described above (see *supra* at 15-17), which are available to all students who desire additional privacy. Such measures do not single out or stigmatize transgender students, and thus do not force students into the untenable choice presented by the kind of policy at issue here.

Contrary to the arguments of the District (*see, e.g.*, Br. at 10-14) and its amici (*see, e.g.*, Ind. Br. at 3-6), there is no regulatory basis for such stigmatizing discrimination. In permitting “separate toilet, locker room, and shower facilities on the basis of sex,” 34 C.F.R. § 106.33, Title IX’s implementing regulation does not require segregation of the enumerated facilities exclusively on the basis of “biological sex” (*see, e.g.*, Br. at 21-22, 24). Neither Title IX nor its implementing regulations define “sex” in terms of biological sex. In fact, as courts have uniformly recognized, “sex” incorporates gender identity (*see supra* at 21-22), and Title IX’s statutory language broadly prohibits discrimination on the basis of sex—including gender identity, 20 U.S.C. § 1681(a). The District’s interpretation of 34 C.F.R. § 106.33 is accordingly unreasonable and must fail. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) (“[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated.”); *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 134 (1936) (a regulation that “operates to create a rule out of harmony with the statute” is “a mere nullity”). Title IX and its implementing regulations require the District to forgo discrimination against students based on transgender status, regardless of whether they are in a classroom, bathroom, or other location at school. As the amici States’ successful experiences demonstrate (*see supra* at 10, 17-18), schools may continue to have sex-segregated restrooms while allowing transgender students to use the bathroom that matches their gender identity.

And under those circumstances, female students still use the girls' restrooms and male students still use the boys' restrooms.

For similar reasons, the District's bathroom policy contravenes the Equal Protection Clause. The Supreme Court has long made clear that equal protection prohibits government policies that serve only to express "negative attitudes" "or fear" toward people viewed as "different." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 68 (2001) (the Equal Protection Clause bars a decision built on stereotypes and a "frame of mind resulting from irrational or uncritical analysis"). The policy at issue here falls squarely into this category.

As the district court noted,

[w]hile A.C. has provided evidence of the harm he will likely suffer, the School District's alleged potential harm is unsupported. No student has complained concerning their privacy. The School District's concerns with the privacy of other students appears entirely conjectural. No evidence was provided to support the School District's concerns, and other courts dealing with similar defenses have also dismissed them as unfounded.

A.C., 2022 WL 1289352, at *7 (citing *Whitaker*, 858 F.3d at 1052; *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1041 (S.D. Ind. 2018)).

And while the district court acknowledged "that the public interest favors

furthering individual privacy interests, the Court does not believe that granting A.C. access to the boys' restrooms threatens those interests." *Id.* at *8. See *supra* at 10-19.

In contrast, the full evidentiary record shows that the harm the policy causes to A.C. is real. The District's policy stigmatizes A.C., "worsens the anxiety and depression" that he already feels because of his gender dysphoria, and "makes being at school painful" and isolating. *A.C.*, 2022 WL 1289352, at *7 (quotation marks omitted). A.C.'s mother worries about the emotional harm to A.C. and "the possible medical risks associated with him trying not to use the restroom during school." *Id.* "Like other courts recognizing the potential harm to transgender students," the district court found "no reason to question the credibility of A.C.'s account and that the negative emotional consequences with being refused access to the boys' restrooms constitute irreparable harm that would be difficult—if not impossible—to reverse." *Id.* (quotation marks omitted). Under well-established constitutional analysis, such discrimination cannot withstand any level of equal protection scrutiny.

CONCLUSION

This Court should affirm the decision below.

Dated: New York, New York
August 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,442 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ Kelly Cheung

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's CM-ECF system on August 2, 2022.

Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

Dated: New York, New York
August 2, 2022

/s/ Mark S. Grube

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

EQUALITY FLORIDA, et al.,

Plaintiffs,

v.

FLORIDA STATE BOARD OF
EDUCATION, et al.,

Defendants.

Case No. 4:22-cv-134-AW-MJF

**BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF
NEW JERSEY, CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND,
MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW YORK,
AND OREGON AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS**

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INTRODUCTION AND INTEREST OF AMICI

The District of Columbia and the States of New Jersey, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, and Oregon (collectively, “Amici States”) file this brief as amici curiae in support of Plaintiffs in their opposition to the motions to dismiss.

The responsibility for public education lies with the states, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), and encompasses several “important” duties, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). One is to “prepare[] students for active and effective participation in [our] pluralistic . . . society.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality op.). Another is to “protect” students from harm. *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021). As the Supreme Court has explained, states must perform these educational duties “within the limits of” the Constitution. *Barnette*, 319 U.S. at 637.

In carrying out those duties, Amici States work to create an educational environment that is inclusive of everyone—including those who identify as LGBTQ. Indeed, Amici States strongly support the right of LGBTQ people to feel welcomed and to be treated equally in the school community. And we have sought to make curricular decisions that embrace, rather than stifle, the free expression of students

and teachers. Thus, Amici States have an interest in the protection of LGBTQ students, parents, and teachers, and we can offer expertise in education policy.

Amici States' experiences make clear that Florida's recent actions are far outside the bounds of ordinary educational decision-making. The challenged Act, H.B. 1557, flatly bans "[c]lassroom instruction . . . on sexual orientation or gender identity" in kindergarten through third grade. Act of Mar. 28, 2022, § 1, 2022 Fla. Sess. Law Serv. Ch. 2022-22 (West) (codified at Fla. Stat. § 1001.42(8)(c)(3)). For all other students, the Act prohibits such instruction if not "in accordance with state standards." *Id.* These standards, however, may not exist for another year, and there is no limit to how restrictive they might be. *See id.* § 2. The Act also subjects schools to liability for any violation by granting parents a cause of action for damages and attorney fees. *Id.* § 1.

All of those aspects of the law make it a radical outlier. Indeed, no other state educational law sweeps as broadly as Florida's or targets the LGBTQ community in the same way. That undermines any genuine assertion that the Act furthers educational goals. Said another way, the Act's "unusual character" provides an additional indication that the Act is constitutionally suspect. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)); accord *United States v. Alvarez*, 567 U.S. 709, 722 (2012) ("[T]he sweeping, quite unprecedented reach of the statute puts it in conflict with the First

Amendment.”). Moreover, Amici States’ own evidence reveals the “immediate, continuing, and real injuries” the Act will inflict, and those harms “outrun and belie any legitimate justifications.” *Romer*, 517 U.S. at 635. In light of the serious constitutional issues raised by Florida’s extreme approach, Plaintiffs’ allegations that Florida’s law is unconstitutional are more than sufficient to survive a motion to dismiss.

SUMMARY OF ARGUMENT

I. Amici States’ experiences reveal that the Act lacks a legitimate pedagogical purpose, rendering it constitutionally suspect. Amici States’ policies allow educators to address LGBTQ issues, and these policies demonstrate that there is no legitimate reason to ban mentioning them. Amici States also ordinarily leave educational decisions to schools and teachers, rather than allowing schools to be haled into court over even minor instructional choices. Florida has chosen a starkly different path. It stands alone in its censorship of instruction related to LGBTQ issues and in its imposition of legal liability on school districts that do not censor LGBTQ issues. All the while, there are ways to address Florida’s alleged concern in ensuring parental input in education without targeting a minority group. The experience of Amici States thus makes clear that Florida’s approach is an unreasonable way to advance the state’s professed interests. Indeed, the fact that the

Act so departs from other states' approaches provides further indication that it is not motivated by legitimate pedagogical goals.

II. The Act will stigmatize and harm LGBTQ youth in Florida and Amici States. Research shows that a failure to provide LGBTQ-inclusive classroom instruction adversely affects LGBTQ students' mental health and learning outcomes, and that it results in increased anti-LGBTQ bias. Further, the harms stemming from Florida's law will extend beyond Florida's borders. The Act will harm children from Amici States but who will be placed with families in Florida pursuant to the Interstate Compact for the Placement of Children ("ICPC"). And Amici States will need to devote resources to counteract the Act's harmful effects, including by increasing funding for programs that work to ensure the health and well-being of LGBTQ students in Amici States.

ARGUMENT

I. Amici States' Experiences Undermine Florida's Contention That Its Extreme Act Has A Legitimate Pedagogical Purpose.

Florida contends that the Legislature had "legitimate pedagogical concerns" when it enacted H.B. 1557. State Defs.' Mot. to Dismiss & Inc. Mem. of L. ("Fla. Br.") 3 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)). But Amici States' experiences undermine Florida's assertions that the Act has a legitimate pedagogical purpose and that it is reasonably related to any such purpose. *See Fla. Br.* 34-38. To pass constitutional muster, Florida must show—at least under

the First Amendment—that the Act is “reasonably related to legitimate pedagogical concerns.” *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1213-14 (11th Cir. 2004) (per curiam); *see Searcey v. Harris*, 888 F.2d 1314, 1320 (11th Cir. 1989) (applying same test to a restriction by a school on non-student speech). That inquiry is fact-intensive and thus unsuitable for resolution at the motion-to-dismiss stage. Florida cannot justify its law with bare assertions; rather, factual development is necessary to determine whether the law is constitutional. *See Bishop v. Aronov*, 926 F.2d 1066, 1070-71 (11th Cir. 1991) (“[A] correct legal analysis must predicate proper explication of the constitutionally pivotal facts.”); *Searcey*, 888 F.2d at 1322 (“We cannot *infer* the reasonableness of a regulation [restricting speech in school] from a vacant record.”).¹

¹ Florida ignores much of this on-point Eleventh Circuit precedent directly addressing restrictions on speech in school, instead relying on out-of-circuit case law and claiming that subsequent Supreme Court decisions have abrogated Eleventh Circuit case law. *See Fla. Br.* 31-38. But this Court is “not at liberty to disregard binding case law that is so closely on point,” unless it has been “directly overruled”—which none of the above cases have. *Fla. League of Pro. Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996). Further, Florida points to no decision where a district court has dismissed a challenge to a speech regulation without any factual development. *See Bishop*, 926 F.2d at 1070-71 (stressing the importance of factual support for a defendant’s restriction on speech in school); *Searcey*, 888 F.2d at 1321-22 (same); *Arce v. Douglas*, 793 F.3d 968, 976-77 (9th Cir. 2015) (holding that district court erred, in challenge under the Equal Protection Clause to curriculum law, by granting summary judgment on a limited record, thereby preventing plaintiffs from presenting evidence regarding legislative intent).

Moreover, Florida’s attempt to justify the Act with bald assertions unsupported by facts is especially unpersuasive because the Act’s plain terms are highly unusual and stand in stark contrast to other states’ educational policies. As explained below, Amici States’ educational policies include and protect LGBTQ people, equip teachers to address LGBTQ topics (while accommodating parental choices), and leave educational decisions to school communities, not courts. Amici States’ experiences thus show that states have an interest in including—rather than excluding—LGBTQ people. Further, when it comes to LGBTQ issues in schools, Amici States’ policies show that Florida’s resort to restricting speech and subjecting schools to litigation is extreme and unreasonable.

A. Unlike Florida’s Act, Amici States’ education policies serve the legitimate pedagogical purpose of including and protecting LGBTQ people.

Recognizing that LGBTQ Americans “cannot be treated as social outcasts or as inferior,” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018)), Amici States’ policies foster an educational environment that is inclusive and respectful of LGBTQ people. As a general matter, most states do not single out LGBTQ people or issues for disfavored treatment, and many have inclusive or affirming education policies. Deborah Temkin, et al., *Most State Policies That Address LGBTQ+ Students in Schools Are Affirming, Despite Recent Trends Toward*

Exclusion, Child Trends (Mar. 22, 2022), <https://tinyurl.com/3atccep3>. Amici States have advanced LGBTQ inclusivity and protections in schools in a few key ways.

Most fundamentally, Amici States protect LGBTQ students by statute, regulation, and agency action. Amici States prohibit discrimination in schools on the basis of sexual orientation or gender identity.² We also prohibit bullying on the basis of sexual orientation or gender identity, or require or urge schools to adopt policies to that effect.³

Amici States also recognize the indisputable fact that LGBTQ people are part of American life and therefore include LGBTQ experiences and contributions in history and social studies education. By statute, seven Amici States have

² See, e.g., Cal. Educ. Code §§ 200, 220; Conn. Gen. Stat. § 10-15c(a); D.C. Code § 2-1402.41(1); 775 Ill. Comp. Stat. §§ 5/1-103(O-1), 5/5-101(A)(11), 5/5-102(A); Mass. Gen. Law ch. 76, § 5; Md. Code Regs. §§ 13A.01.06.03(B)(5)(d), (j), 13A.01.06.04; Mich. C.R. Comm’n, *Interpretive Statement 2018-1* (May 21, 2018), <https://tinyurl.com/yckmrn3z>; Minn. Stat. §§ 363A.03(44), 363A.13(1); Nev. Rev. Stat. §§ 388.132(6)(a), 651.070; N.J. Stat. Ann. §§ 10:5-4, 10:5-5(I); N.Y. Exec. Law § 296(4); Or. Rev. Stat. § 659.850; Movement Advancement Project, *Equality Maps: Safe Schools Laws*, <https://tinyurl.com/3hn9hh8r> (“nondiscrimination” tab) (compiling laws of all states) (last visited Aug. 3, 2022).

³ See, e.g., Cal. Educ. Code § 234.1(a)-(c); Conn. Gen. Stat. § 10-222d(a)(1), (b); D.C. Code §§ 2-1535.01(2)(A)(i), 2-1535.03; 105 Ill. Comp. Stat. § 5/27-23.7(a); Mass. Gen. Law ch. 71, § 37O(d)(1), (3); Md. Code Ann., Educ. §§ 7-424.1, 7-424(a)(2)(i)(1), (b)(1); Mich. State Bd. of Educ., *Model Anti-Bullying Policy* (Dec. 8, 2020), <https://tinyurl.com/mmtsrt3>; Minn. Stat. § 121A.031(2)(g), (3); Nev. Rev. Stat. §§ 388.122(1)(c), 388.133; N.J. Stat. Ann. §§ 18A:37-14, 18A:37-15; N.Y. Educ. Law § 12(1); 8 N.Y.C.R.R. § 100.2(jj)(2), (3)(i); Or. Rev. Stat. §§ 339.351(3), 339.356; Movement Advancement Project, *supra* (“anti-bullying” tab) (compiling laws for all states).

promulgated history or social studies curricular requirements relating to LGBTQ Americans. Cal. Educ. Code § 51204.5; Colo. Rev. Stat. § 22-1-104(1)(a); Conn. Gen. Stat. § 10-25b(b); 105 Ill. Comp. Stat. § 5/27-21; Nev. Rev. Stat. § 389.061(1)(b); N.J. Stat. Ann. § 18A:35-4.35; Or. Rev. Stat. § 329.045(1)(b)(B)(vi) (effective 2026). Other Amici States have undertaken similar efforts to update curricular standards to include LGBTQ people. *E.g.*, D.C. State Bd. of Educ., Soc. Studies Standards Advisory Comm., *Social Studies Standards Guiding Principles* 8 (Dec. 16, 2020), <https://tinyurl.com/3a6s68yh>. Still others encourage and allow teachers to provide lessons that comprehensively cover the American experience, including that of LGBTQ people. *See, e.g.*, Me. Dep’t of Educ., *LGBTQ+ Studies*, <https://tinyurl.com/2p9793vf> (last visited Aug. 3, 2022) (listing resources for teachers); Mass. Dep’t of Elementary & Secondary Educ., *Defending Democracy at Home: Advancing Constitutional Rights, Obergefell v. Hodges (2015) Same-Sex Marriage* (Oct. 2018), <https://tinyurl.com/2zh9p3ej> (providing a model lesson plan on the history of *Obergefell v. Hodges*, 576 U.S. 644 (2015), to teach students about constitutional rights and the judiciary). At bottom, these efforts aim to “offer[] public school students a more accurate, complete, and equitable picture of American society,” Ill. Inclusive Curriculum Advisory Council, *Inclusive Curriculum Implementation Guidance: Condensed Edition* 1, <https://tinyurl.com/4pn8yt94> (last visited Aug. 3, 2022), and prepare them to live in

the contemporary United States, *Hearing on H.B. 6619 Before the Joint Comm. on Educ.*, 2021 Sess. 1 (Conn. 2021) (statement of Rep. Geoff Luxenberg), <https://tinyurl.com/2rsxc7fs>.

In addition to teaching academic subjects, states have an “interest in preparing children to lead responsible, healthy lives.” *Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491, 497 (D. Conn. 2002), *aff’d*, 332 F.3d 134 (2d Cir. 2003). To that end, an increasing number of schools have established health instruction to ensure that all students, including LGBTQ students, have the information necessary about their health. *See* Heather Steed, et al., *Only 17 States and DC Report LGBTQ-Inclusive Sex Ed Curricula in at Least Half of Schools, Despite Recent Increases*, Child Trends (Oct. 6, 2021), <https://tinyurl.com/58zpj9kw> (“From 2016 to 2018, 27 states and the District of Columbia reported increases . . . in the percentage of schools offering sex-ed materials that are inclusive of LGBTQ youth.”).

Instead of including LGBTQ people in the school community, however, Florida’s Act excludes them, thereby running counter to constitutional principles. States have a “legitimate . . . interest in seeking to eradicate bias against same-gender couples,” and other LGBTQ people, “and to ensure the safety of all public school students.” *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008). As Amici States’ efforts reflect, LGBTQ people are part of American history and society, and “in the preparation of students for citizenship,” it is “entirely rational” for schools to

include their experiences in an age-appropriate manner. *Id.* at 95. It is not a legitimate pedagogical interest, however, to exclude the entire class of LGBTQ people and their experiences from the education provided by public schools by censoring discussion about their identities.

B. Instead of censoring or restricting speech like Florida, Amici States equip educators to address LGBTQ topics.

While Florida’s law sweeps broadly in its censorship or restriction of LGBTQ topics, Amici States approach these issues in more tailored and effective ways. The experience of other states reflects that Florida’s severe approach to LGBTQ issues is unjustifiable and thus violative of the First Amendment. *See Searcey*, 888 F.2d at 1322 (“It is the total banning of a group . . . that we find to be unreasonable.”); *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1525 (11th Cir. 1989) (considering, when upholding the removal of texts from a required reading list, that they “have not been banned from the school” and “[n]o student or teacher is prohibited from assigning or reading these works or discussing the themes contained therein in class or on school property”).⁴

⁴ Although Florida tries to narrow the Act’s reach to cover only, essentially, lessons given by teachers, *see* Fla. Br. 15-21, the Act uses broad terms lacking precise definitions. “[T]he many ambiguities concerning the scope of [the Act’s] coverage render it problematic for purposes of the First Amendment.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Indeed, despite what Florida now claims, the Act’s broad, vague prohibitions have already chilled expression. *E.g.*, Lori Rozsa, *Florida Teachers Race to Remake Lessons as DeSantis Laws Take Effect*, Wash.

At the outset, Amici States—and, in fact, all states aside from Florida—do not generally ban entire topics from discussion in schools. Until recently, “there [was] no state that actually [had] a ‘don’t say gay’ law—one that explicitly prohibits teachers from discussing homosexuality at all.” Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 Colum. L. Rev. 1461, 1469 (2017). Put simply, Florida’s effort to censor LGBTQ topics is “sweeping, [and] quite unprecedented.” *Alvarez*, 567 U.S. at 722.

Amici States, by contrast, have codified protections for the free exchange of ideas in schools. The District of Columbia, for instance, protects a student’s “right to voice his or her opinions.” 5-E DCMR § 2401.2. Likewise, Connecticut’s Code of Professional Responsibility for Teachers states that teachers shall “[e]ngage students in the pursuit of truth, knowledge and wisdom and provide access to all points of view” and “[n]urture in students lifelong respect and compassion for themselves and other human beings regardless of . . . sexual orientation.” Conn. Agencies Regs. § 10-145d-400a(b)(1)(B), (C).

Moreover, Amici States understand that the way to address LGBTQ-related topics that inevitably arise in schools is to equip teachers and schools to handle them directly and compassionately. For example, it is understandable that “questions arise

Post (July 30, 2022); <https://tinyurl.com/you4ue5z5>; Brooke Migdon, *Florida’s ‘Don’t Say Gay’ Law Takes Effect Today. Its Impact Is Already Being Felt*, Changing Am. (July 1, 2022), <https://tinyurl.com/bs92arsc>.

for . . . school staff when considering the best supports for transgender and gender nonconforming students.” Vt. Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* 1 (Feb. 23, 2017), <https://tinyurl.com/243yhrax>. Thus, states have issued guidance to schools to address these questions rather than restrict what teachers can say.⁵ Such guidance can helpfully identify example scenarios a teacher or administrator may encounter,

⁵ E.g., Cal. Dep’t of Educ., *Legal Advisory Regarding Application of California’s Antidiscrimination Statutes to Transgender Youth in Schools* (Sept. 16, 2021), <https://tinyurl.com/mr282sf9>; Cal. Dep’t of Educ., *Frequently Asked Questions - School Success and Opportunity Act (AB 1266)* (Sept. 16, 2021), <https://tinyurl.com/2t4ncmsd>; Conn. State Dep’t of Educ., *Guidance on Civil Rights Protections and Supports for Transgender Students: Frequently Asked Questions* (Sept. 2017), <https://tinyurl.com/24vuawfy>; D.C. Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance* (June 2015), <https://tinyurl.com/tatd3ncu>; Ill. State Bd. of Educ., *Non-Regulatory Guidance: Supporting Transgender, Nonbinary, and Gender Nonconforming Students* (Mar. 1, 2020), <https://tinyurl.com/2p8ehwz6>; Md. State Dep’t of Educ., *Providing Safe Spaces for Transgender and Gender Non-conforming Youth: Guidelines for Gender Identity Non-discrimination* (Oct. 2015), <https://tinyurl.com/48by45jn>; Mass. Dep’t of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment* (Oct. 28, 2018), <https://tinyurl.com/2p836nrh>; Mich. State Bd. of Educ., *Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* (Sept. 14, 2016), <https://tinyurl.com/yetpukkh>; Minn. Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* (Sept. 25, 2017), <https://tinyurl.com/zr6r3j89>; Nev. Dep’t of Educ., *Supporting Sex/Gender Diverse Students*, <https://tinyurl.com/3sv5tyrp> (last visited Aug. 3, 2022); N.J. Dep’t of Educ., *Transgender Student Guidance for School Districts*, <https://tinyurl.com/2evmmuj6> (last visited Aug. 3, 2022); Or. Dep’t of Educ., *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* (May 5, 2016), <https://tinyurl.com/36ecxvuf>.

such as when a student begins to dress in a gender-nonconforming way, and explain best practices. *See, e.g.,* Haw. Dep’t of Educ., *Guidance on Supports for Transgender Students* 6-11 (July 25, 2016), <https://tinyurl.com/3bra5kjin>; N.Y. State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students* 5-10 (July 2015), <https://tinyurl.com/2p8mk97k>.

Amici States also invest in training for educators so they can meet the needs of LGBTQ students, parents, and teachers. California’s recent budget allocated “\$3 million for LGBTQ cultural competency training for public school teachers.” Jo Yurcaba, *California Budget Includes \$3 Million to Train Teachers on LGBTQ Issues*, NBC News (July 16, 2021), <https://tinyurl.com/mrx84bnb>. Nevada requires that teachers “receive annual training concerning the requirements and needs of persons with diverse gender identities or expressions.” Nev. Admin. Code § 388.880(2)(a). And Michigan developed a workshop for educators on LGBTQ issues. Mich. Dep’t of Educ., *Creating Safe Schools for Sexual Minority Youth*, <https://tinyurl.com/4yesvp2e> (last visited Aug. 3, 2022).

All these efforts comport with the constitutional principle of a “free exchange” of ideas. *Mahanoy*, 141 S. Ct. at 2046. Yet Florida’s Act seeks to remove LGBTQ-related topics from schools entirely or otherwise restrict them because—purportedly—these are sensitive issues for some. Fla. Br. 35. As federal courts in

Florida have acknowledged, however, the way to approach such issues is not to censor them but to equip educators to address them. *See Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359, 1370 (N.D. Fla. 2008) (“If the schools are to perform their traditional function of inculcating the habits and manners of civility, . . . they must be allowed the space and discretion to deal with the nuances.” (internal quotation marks omitted) (quoting *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996))). Although Florida’s justifications may “sound in a desire to avoid the discomfort and unpleasantness of tolerating a minority of students whose sexual identity is distinct from the majority,” “[e]nsuring that this minority of students are afforded meaningful expression secures the precept of freedom . . . exalted by the founders.” *Gonzalez through Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008); *see also Gay-Straight All. of Yulee High Sch. v. Sch. Bd. of Nassau Cnty.*, 602 F. Supp. 2d 1233, 1237 (M.D. Fla. 2009). Indeed, Florida’s approach stands outside “a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society.’” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022) (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

C. Florida stands apart from states by subjecting school communities to costly litigation for their legitimate instructional choices.

States typically set education policy at a general level and leave particular instructional decisions to districts, schools, and teachers, in collaboration with parents. *See, e.g., Milliken v. Bradley*, 418 U.S. 717, 741 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools”); *Ambach v. Norwick*, 441 U.S. 68, 78 (1979) (“[T]eachers by necessity have wide discretion over the way the course material is communicated to students.”); Cal. Educ. Code § 60000(b) (recognizing that “specific choices about instructional materials need to be made at the local level”); Minn. Stat. § 120B.021(2)(b)(2) (providing that statewide academic standards must “not require a specific teaching methodology or curriculum”). Indeed, “local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process.” *Milliken*, 418 U.S. at 741-42. But Florida bucks this “tradition,” *id.* at 741, by making such instructional decisions the subject of lawsuits—all purportedly in the name of parental rights, Fla. Stat. § 1001.42(8)(c)(7)(b)(II) (granting parents a cause of action). As Amici States’ experience shows, however, parent perspectives and prerogatives can be reasonably accommodated by teachers and schools without courts being involved at every turn to enforce blanket statewide censorship requirements and speech restrictions.

To begin, Amici States largely place curricular and instructional choices with school boards and other bodies that seek public input, including that of parents. *See, e.g.*, Md. Code Ann., Educ. §§ 4-111 (vesting county school boards with the power to “[e]stablish curriculum guides and courses of study”), 4-112(a) (establishing “citizen advisory committee[s] to advise the [school] board[s]”). For example, Colorado instructs school boards to “convene a community forum on a periodic basis . . . to discuss adopted content standards.” Colo. Rev. Stat. § 22-1-104(3)(a). Similarly, Oregon provides that the state board, in revising content standards, shall “[i]nvolve . . . parents.” Or. Rev. Stat. § 329.045(1)(b)(C) (effective 2026). California, Connecticut, Illinois, Nevada, and New Jersey likewise leave most of the implementation of their inclusive curriculum requirements to local boards. *See* Cal. Dep’t of Educ., *Frequently Asked Questions: Senate Bill 48* (Oct. 8, 2021), <https://tinyurl.com/yc8yhnkh>; Conn. Gen. Stat. § 10-25b(d); Ill. Inclusive Curriculum Advisory Council, *supra*; Nev. Rev. Stat. § 389.061(1); N.J. Stat. Ann. § 18A:35-4.36.

If parental concerns arise over instructional choices, Amici States have developed targeted, cooperative ways to accommodate them. Some Amici States have provided guidance to teachers on how to handle parental perspectives on LGBTQ topics, including sample letters. *See, e.g.*, D.C. Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance*, *supra*, at 31-36; Minn. Dep’t of

Educ., *Toolkit, supra*, at 6-7. Other Amici States allow parents to review curriculum and instructional material. Cal. Educ. Code § 51101(a)(8); Mich. Comp. Laws Ann. § 380.1137(1)(a). Minnesota allows parents who object to certain instruction to “make reasonable arrangements with school personnel for alternative instruction.” Minn. Stat. § 120B.20. Finally, when it comes to the most sensitive topics like health or sex education, 36 states and the District provide some type of parental opt-out option. Guttmacher Inst., *Sex and HIV Education* (Jul. 1, 2022), <https://tinyurl.com/r259h2d2>. Through these mechanisms, teachers and schools can accommodate parental choices.

Instead of these common, conciliatory approaches to parental choices, Florida’s Act subjects schools to costly litigation by permitting parental lawsuits regarding curricular decisions. That approach breaks so significantly from reasonable alternatives that it undermines any claim that it is motivated by a legitimate effort to accommodate parents and their concerns about limiting inappropriate sexual content in schools. The Act subjects school districts to litigation, injunctions, damages, and attorney fees for any violation of its vague provisions banning certain speech. *See* Fla. Stat. § 1001.42(8)(c)(7)(b)(II). Such “[j]udicial interposition in the operation of the public school system,” absent a compelling constitutional reason, is unprecedented. *Epperson*, 393 U.S. at 104; *see Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (Sutton,

J.) (collecting cases rejecting a parental right to direct classroom instruction); Todd A. DeMitchell & Joseph J. Onosko, *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension Over the Right to Direct an Education*, 22 S. Cal. Interdisc. L.J. 591, 622 (2013) (explaining that states have near universally rejected legislative attempts to shift power over curricular decisions away from educators). It is also unneeded: as explained above, several options are available to involve parents in their child's education. Indeed, Florida already provides many of these procedures to parents. Fla. Stat. § 1014.04. Incentivizing litigation against schools is a punitive approach that chills the free exchange of ideas. The Act's drastic approach is thus unreasonable.

* * *

In short, Florida's extreme approach implies the absence of a legitimate pedagogical purpose, rendering its restrictions on speech and targeting of a minority highly suspect. And Amici States' experiences show that reasonable policies are available that include LGBTQ people, foster free speech, and accommodate parents. Florida's turn, instead, to restricting speech and targeting a minority supplies additional evidence of the Act's unconstitutionality. *See Romer*, 517 U.S. at 633. At a minimum, it plainly demonstrates that Florida cannot succeed on its motion to dismiss.

II. Florida’s Act Stigmatizes LGBTQ Youth In Florida, And Its Stigmatic Harms Extend To Amici States.

The harm caused by the challenged Act extends well beyond Florida. By targeting the LGBTQ community, the Act harms children in Amici States, including those who will be placed in Florida pursuant to the ICPC, as well as students who attend school in Florida and then move to Amici States. And Amici States will need to devote resources to mitigate and counteract the harm that the Act is causing to LGBTQ students and others in their States.

A. The Act stigmatizes LGBTQ youth in Florida and Amici States.

The Act stigmatizes LGBTQ youth by prohibiting or limiting the discussion of LGBTQ people in schools. And in so doing, it threatens grave harm to the health and well-being of LGBTQ individuals, their families, and their communities. As study after study has shown, discriminatory social conditions have severe negative health impacts on LGBTQ people, resulting in increased rates of mental health disorders and suicide attempts, especially among LGBTQ youth. *See, e.g.,* What We Know Project, Cornell Univ., *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?* (2019), <https://tinyurl.com/2p84akjn> (summarizing findings of 300 primary research studies, 82% of which “found robust evidence that discrimination on the basis of sexual orientation or gender identity is associated with harms to the health of LGBT

people”). Those harms extend to youth not just in Florida, but throughout the country.

1. Educational decisions that stigmatize LGBTQ youth directly harm mental health and educational outcomes.

As a vulnerable population, LGBTQ youth already face significant hardships. They are particularly likely to experience feelings of sadness and hopelessness, Laura Kann, et al., Ctrs. for Disease Control & Prevention, *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors among Students in Grades 9–12 — United States and Selected Sites, 2015 18* (2016), <https://tinyurl.com/6cyefk2m>, and to be victims of bullying, Madeleine Roberts, *New CDC Data Shows LGBTQ Youth Are More Likely to Be Bullied Than Straight Cisgender Youth*, Hum. Rts. Campaign (Aug. 26, 2020), <https://tinyurl.com/2wu4ajuj>. Increased victimization of LGBTQ students leads to health and suicide risks. Roberts, *supra*. These hardships are evident at the state level, too. For instance, LGBTQ students in Michigan are 2.9 times more likely to be threatened or injured with a weapon at school, 1.9 times more likely to be bullied at school or online, 2.7 times more likely to skip school because they feel unsafe, 1.5 times more likely to get Ds and Fs, and 3.2 times more likely to engage in self-harm behavior. Mich. Dep’t of Educ., *Michigan Department of Education’s Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ+) Students Project at a Glance 1*, <https://tinyurl.com/4jxns374> (last visited Aug. 3, 2022). To take just one of the most troubling examples, 23% of Michigan’s LGBTQ

high school students (13,500 students) attempted suicide in a recent 12-month period. *Id.* That rate is 4.6 times higher than their non-LGBTQ peers. *Id.*

An inclusive school climate, which permits teachers and students to discuss sexual orientation and gender identity, can help reduce the likelihood of these damaging outcomes. Inclusive school climates foster positive learning environments for LGBTQ youth, which are “an important factor in decreasing suicidality among LGBTQ adolescents.” April J. Ancheta, Jean-Marie Bruzzese, & Tonya L. Hughes, *The Impact of Positive School Climate on Suicidality and Mental Health Among LGBTQ Adolescents: A Systematic Review* 10 (Apr. 2021), <https://tinyurl.com/42hmsmdu>. LGBTQ students in schools with inclusive climates are nearly 40% less likely to attempt suicide compared with LGBTQ students who attend schools with non-inclusive climates. Cady Stanton, *As ‘Don’t Say Gay’ and Similar Bills Take Hold, LGBTQ Youths Feel They’re ‘Getting Crushed’*, USA Today (May 9, 2022), <https://tinyurl.com/yckncebt>. They are more likely to feel comfortable speaking to their teachers about LGBTQ-related issues, report less severe victimization based on sexual orientation and gender expression, and are less likely to feel unsafe at school because of their sexual orientation and gender expression. Joseph G. Kosciw, et al., GLSEN, *The 2019 National School Climate Survey: The Experience of Lesbian, Gay, Bisexual, Transgender, and Queer Youth*

in Our Nation's Schools 73-74 (2020) (“Climate Survey”), <https://tinyurl.com/5fmmzv9x>.

LGBTQ-inclusive school climates are also associated with better educational outcomes. When LGBTQ students see themselves reflected in curricula, it creates an affirming learning environment that “may result in increased student engagement and may encourage students to strive academically which, in turn, may yield better educational outcomes.” *Id.* at 74-75. Indeed, LGBTQ students in schools with inclusive curricula achieve a higher GPA than those in schools without inclusive curricula. *Id.* at 75. And LGBTQ students in schools with an LGBTQ-inclusive curriculum are more likely to say they plan to pursue post-secondary education. *Id.*

In light of the benefits of LGBTQ-inclusive curricula, it is no surprise that research also shows that non-inclusive schools—for example, ones that do not incorporate, or that expressly prohibit, discussion of LGBTQ issues within the classroom, as the Act requires—have damaging consequences for LGBTQ youth. As explained above, the absence of an LGBTQ-inclusive climate is strongly correlated with more suicidal ideation, worse educational outcomes, and decreased feelings of safety. LGBTQ students at schools with non-inclusive curricula are also less likely to feel supported by educators and less likely to have access to supportive school clubs, such as Gay-Straight Alliances. GLSEN, *GLSEN Research Brief: Laws Prohibiting “Promotion of Homosexuality” in Schools: Impacts and*

Implications 6-7 (2018), <https://tinyurl.com/47r9yhzc> (“GLSEN Research Brief”).

And at non-inclusive schools, students are “more likely to face harassment and assault at school based on their sexual orientation and gender expression,” *id.* at 3, and are less likely to have the benefit of supportive anti-bullying policies, *id.* at 7.

2. The Act will increase anti-LGBTQ bias.

Laws like the challenged Act that stigmatize LGBTQ people also increase the risk of anti-LGBTQ bias inside and outside the school environment.

For example, LGBTQ students attending schools with non-inclusive curricula are more likely to hear homophobic remarks at school. GLSEN Research Brief 3. By contrast, “attending a school that included positive representations of LGBTQ topics in the curriculum was related to less frequent use of anti-LGBTQ language.” Climate Survey 73; *see also id.* (documenting less frequent usage of negative remarks about sexual orientation, gender identity, and gender expression).

Whether a school has LGBTQ-inclusive policies also correlates with the rate of peer acceptance of LGBTQ students. Non-inclusive schools are less likely to have students who are accepting of LGBTQ people than schools with inclusive climates (39.4% vs. 51.1%). GLSEN Research Brief 3. By contrast, “[t]he inclusion of positive portrayals of LGBTQ topics in the classroom may . . . help educate the general student body about LGBTQ issues and promote respect and understanding of LGBTQ people in general.” Climate Survey 75. Indeed, LGBTQ students who

attend schools with LGBTQ-inclusive curricula are significantly more likely to report that their classmates are somewhat or very accepting of LGBTQ people (66.9% vs. 37.9%). *Id.*

Further, this increased understanding and respect “may lead students in general to speak up when they witness anti-LGBTQ behaviors.” *Id.* Relative to students in schools with anti-LGBTQ curricula, LGBTQ youth in schools with inclusive curricula report that other students are more than twice as likely to intervene most or all of the time when hearing homophobic remarks and negative remarks about gender expression. *Id.*

Notably, the damaging effects of a law prohibiting instruction on LGBTQ issues in schools do not stop at a state’s borders. When a law anywhere sends the message that some members of the community are disfavored, as the Act does, it compounds the stigma associated with being part of that community everywhere. Indeed, evidence suggests that, as with prior laws that victimize particular groups, the Act will adversely affect the mental health of LGBTQ youth in other states. For example, recent debates around laws that target the transgender community adversely affected the mental health of LGBTQ youth nationwide. The Trevor Project, *Issues Impacting LGBTQ Youth: Polling Analysis* 6 (Jan. 2022), <https://tinyurl.com/2xnr9r5t>. Two-thirds of LGBTQ youth reported that the recent debates about state laws restricting the rights of transgender people have negatively

affected their mental health. *Id.* And among transgender and non-binary youth, the effects were even more profound, with 85% reporting harm to their mental health. *Id.* These findings suggest that the Act stigmatizes and poses risk of harm to LGBTQ youth not just in Florida, but also elsewhere, including in Amici States.

B. The Act’s harms extend beyond Florida and will require Amici States to expend additional funds.

In addition to the harms it inflicts on LGBTQ youth in Florida and in Amici States, the Act harms Amici States by requiring them to increase expenditures of state funds to combat bias and protect their most vulnerable residents.

For example, the Act directly implicates Amici States’ interest in protecting at-risk youth who will be placed in Florida pursuant to the Interstate Compact for the Placement of Children. The ICPC—to which Florida and all Amici States are parties—provides for the movement and safe placement of children between states when children are in the state’s custody, being placed for adoption, or being placed by a parent or guardian in a residential treatment facility. Am. Pub. Health Servs. Ass’n, *ICPC FAQ’s*, <https://tinyurl.com/342eej8h> (last visited Aug. 2, 2022). This population includes children in foster care, and recent surveys of children in foster care have revealed a high percentage who identify as LGBTQ. *See, e.g.,* Marlene Matarese, et al., *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care* 6 (2021), <https://tinyurl.com/mp9bmunb> (survey of an Ohio county identifying 32% of foster children to be LGBTQ); Theo G.M. Sandfort,

Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City: Disproportionality and Disparities 5 (2020), <https://tinyurl.com/5e6e59kj> (survey of New York City identifying 34% of foster children to be LGBTQ). Amici States regularly place children in Florida pursuant to the ICPC,⁶ and those children who identify as LGBTQ will be stigmatized by Florida's new law. LGBTQ youth from Florida may also be placed in Amici States under the ICPC, leaving schools and social services agencies in Amici States to address the negative impacts of Florida's law.

State agencies will also need to expend additional resources to address the Act's negative effects on members of their own LGBTQ communities. For example, because the Act stigmatizes and harms LGBTQ people in Amici States, those individuals may require additional mental health services. In light of the "high prevalence of poverty in LGBT communities," state-run programs like Medicaid may bear a substantial share of the burden of addressing the significant mental health consequences stemming from the Act. Kellan Baker, et al., Ctr. for Am. Progress, *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations* (Aug. 9, 2016), <https://tinyurl.com/ytp8apz3>.

⁶ As of April 2022, Amici States have placed over 130 students in Florida through the ICPC this calendar year.

Furthermore, Amici States may need to ensure that the stigma caused by the Act does not spread to their own school environments. As explained, Amici States provide training and assistance to school staff to address bullying, understand LGBTQ issues, and improve the educational climate for LGBTQ youth. The Act's adverse impact on LGBTQ students' mental health will increase the demand for such school-based services. And Amici States' education agencies will need to expand their efforts to address barriers to the well-being and educational success of LGBTQ students.

Finally, Amici States may need to increase funding for nonprofit organizations that provide social services to LGBTQ youth. Amici States recognize the vital role these organizations play in promoting LGBTQ individuals' health and well-being. Massachusetts, for example, funds organizations through its Safe Spaces for LGBTQ Youth program, whose goal is to "promote self-esteem, increase social connectedness and resilience, and decrease risk for suicidal behaviors (and self-harm)." Commonwealth of Mass., *The Safe Spaces for LGBTQIA+ Youth Program Engage Youth Who Are LGBTQIA+*, <https://tinyurl.com/v25hcf86> (last visited Aug. 3, 2022). And New Jersey's Department of Children and Families provides funding and resources to organizations that serve LGBTQ youth, such as HiTops, which provides health services and group support to LGBTQ youth throughout New Jersey. HiTops, *About Us*, <https://tinyurl.com/3bz9n622> (last

visited Aug. 3, 2022). The stigmatic harms stemming from the Act will increase the demand for these organizations' services—and Amici States' funding for them.

CONCLUSION

The Court should deny the motions to dismiss.

Respectfully submitted,

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I hereby certify that on August 3, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

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

PAUL A. EKNES-TUCKER, REV., *ET AL.*,
PLAINTIFFS-APPELLEES,

v.

GOVERNOR OF THE STATE OF ALABAMA, *ET AL.*,
DEFENDANTS-APPELLANTS

**On Appeal from the United States District Court
for the Middle District of Alabama**

No. 2:22-cv-00184-LCB-SRW

Hon. Liles C. Burke, Judge

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INTERESTS OF AMICI CURIAE

Amici Curiae States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia strongly support transgender people’s right to live with dignity, be free from discrimination, and have equal access to healthcare.¹ Discrimination and exclusion on the basis of transgender status cause direct economic, emotional, and health harms including an increased risk of depression, anxiety, substance abuse, and suicide. To support the dignity of transgender people and prevent these injuries, amici States have adopted laws and policies to combat discrimination against transgender people in healthcare, including policies that guarantee non-discriminatory insurance coverage of gender-affirming medical care for transgender minors.²

¹ Amici States submit this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a) and Eleventh Circuit Rule of Practice 29-2 in support of Plaintiffs-Appellees and affirmance of the preliminary injunction.

² *See, e.g.*, Colo. Bull. No. B-4.49 (2013); Conn. Bull. IC-34 (2013); Del. Bull. No. 86 (2016); Haw. HB 2084 (2016); Ill. Bull. 2014-10 (2014); Me. LD 1/SP 10 (2019); Mass. Bull. 2014-03 (2014); Md. Bull. 15-33 (2015); Mich. Bull. 2016-10-INS (2016); Minn. Admin. Bull. 2015-5 (2015); Nev. Bull. No. 15-002 (2015); N.J. 2017 N.J. Laws 176 (2017); N.M. Bull. No. 2018-013 (2018);
(continued...)

These policies assure that amici States do not unduly interfere with decisions made between physicians and their patients when those decisions adhere to evidence-based and medically accepted standards of care. The amici States' experience has proven that our laws and policies result in better health outcomes for our transgender residents and safeguard their physical, emotional, and financial well-being. More generally, amici States have a profound interest in the proper application of the Equal Protection Clause to protect transgender individuals throughout our nation from unconstitutional discrimination, and to mitigate the injuries from such discrimination that transgender individuals have suffered for too long.

Amici States have a strong interest in advocating for the well-being of our residents, including teenagers receiving gender-affirming medical care, who travel to, attend school in, or work in Alabama. If Alabama's law is allowed to take effect, those teenagers in Alabama will face an untenable choice: risk severe criminal penalties for those who provide them with

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N.Y. Ins. Reg. 62 (2018); Or. D.C.B.S. Bull. 2012-1 (2012); R.I. Health Ins. Bull. 2015-3 (2015); Vt. Bull. 174 (2013, revised 2019); Wash. RCW 48.30.300 (2006); D.C. Bull. 13-IB-01-30/15 (2013).

medically necessary puberty blockers or hormone therapies,³ including their parents, or forego medically necessary care and suffer potentially devastating harms to their physical, emotional, and psychological health. In addition to injuries directly inflicted on transgender teens, laws like Alabama's impose costs on state programs that provide gender-affirming care. Amici states' experience has shown that the abrupt termination of gender-affirming healthcare can require state programs to compensate for the disruption by providing different or additional treatments.

SUMMARY OF ARGUMENT

The Alabama Vulnerable Child Compassion and Protection Act (the Act) is an extreme law that harms, not protects, transgender youth.⁴ Alabama's categorical ban on gender-affirming healthcare for transgender individuals under the age of 19 ignores broad medical consensus, interferes with medical decisions that providers reach with individual patients and their families, and violates the Equal Protection Clause. In contrast, the experience of amici States demonstrates that safeguarding access to

³ The District Court referred to puberty blockers and hormone therapies collectively as "transitioning medications." *Eknes-Tucker v. Marshall*, __ F. Supp. 3d __, 2022 WL 1521889, at *2 (M.D. Ala. 2022).

⁴ See S.B. 184, No. 2022-289 (Ala. 2022).

healthcare protects transgender people, their families, and their communities and avoids disrupting doctor-patient decisions. The amici States therefore urge this Court to affirm the preliminary injunction.

ARGUMENT

I. DISCRIMINATION AGAINST TRANSGENDER PEOPLE SIGNIFICANTLY HARMS AMICI STATES AND THEIR RESIDENTS

A. The Act Directly Harms Transgender Teens Traveling to Alabama and Imposes Spillover Costs on Amici States

Denying gender-affirming care harms transgender teenagers, including teenaged residents of amici States who travel to Alabama. Amici States' teenage residents travel to Alabama for school, vacation, and work. For example, the University of Alabama (UA) enrolls 27,750 undergraduate students.⁵ Nearly 68% of UA's students come from out-of-state, including 464 undergraduates from Illinois, 304 from California, 217 from New Jersey, 197 from North Carolina, 181 from New York, and 173 from Pennsylvania.⁶ College freshmen are often 17-18 years old and considered "minors" under the Act. (*See* S.B. 184, ALA. 2022 REG. SESS. § 3(1) (Ala.

⁵ *See* UA Demographics & Diversity Report, College Factual, <https://www.collegefactual.com/colleges/the-university-of-alabama/student-life/diversity/#:~:text=67.63%25%20of%20UA%20students%20come,from%20out%20of%20the%20country> (last visited July 6, 2022).

⁶ *Id.*

2022) (defining “minor” as anyone under age 19). Similarly, events and attractions bring hundreds of thousands of out-of-state visitors, including “minors” under the Act, to Alabama each year.⁷ And approximately 47,000 people work in Alabama but live in a different state.⁸

⁷ Nearly 1.3 million people visit Alabama’s national parks annually, including the Birmingham Civil Rights and Freedom Riders National Monuments. *See* Alabama, National Parks Service, <https://www.nps.gov/state/al/index.htm> (last visited July 6, 2022). Over one million people attend Mobile’s Mardi Gras each year, over 600,000 people visit the U.S. Space and Rocket Center in Huntsville, and over 500,000 people flock to the Robert Trent Jones Golf Trail in Birmingham. *See* Alabama Tourism Department, U.S. Space & Rocket Center is Alabama’s Number One Tourism Attraction (Feb. 5, 2016)

<https://tourism.alabama.gov/2016/02/u-s-space-rocket-center-is-alabamas-number-one-tourism-attraction/>. The SEC Baseball Tournament in Hoover drew nearly 140,000 fans and the Talladega Superspeedway attracted a crowd of 60,000 people for the NASCAR Cup Series Race. *See* Pay Byington, Newsbreak, 2022 SEC Baseball Tournament Drew 140,000 Fans at the Hoover Met, Locks in Event Two More Years (June 1, 2022), <https://www.newsbreak.com/news/2621373376996/2022-sec-baseball-tournament-drew-140-000-fans-at-the-hoover-met-locks-in-event-two-more-years>; Adam Stern, Sports Business Journal, Talladega Sees Strong Crowd for NASCAR Cup (April 25, 2022), <https://www.sportsbusinessjournal.com/Daily/Closing-Bell/2022/04/25/Talladega.aspx>.

⁸ *See* Brian McKenzie, *Out-Of-State and Long Commutes: 2011*, American Community Survey Reports, Table 6, <https://www2.census.gov/library/publications/2013/acs/acs-20.pdf> (last visited July 26, 2022).

Yet the Act would force some transgender college students under age 19 who had been receiving gender-affirming healthcare in amici States to discontinue their prescribed medications while in Alabama. If they continue to take their medication, their providers and parents could risk imprisonment for up to ten years. Teens traveling to Alabama, even on a temporary basis, may lack access to gender-affirming medical care if they are hospitalized for an injury or need to refill a lost prescription. And Amici State's residents working in Alabama, like college students and visitors, would be expected to cease medical treatment.

Denying medically necessary care to transgender teens harms their physical, emotional, and psychological health. *See infra* pp. 7–8 & Part II.C. Many transgender teens suffer from gender dysphoria: the intense, debilitating distress and anxiety that can result from incongruence between a person's gender identity and sex assigned at birth. If unaddressed, gender dysphoria can impact quality of life, cause fatigue, and trigger decreased social functioning, including reliance on drugs and alcohol.⁹ Those harms

⁹ See Emily Newfield et al., *Female-to-Male Transgender Quality of Life*, 15(9) *Quality of Life Research* 1447 (2006), <https://www.ncbi.nlm.nih.gov/pubmed/16758113> (observing that transgender men who received transition-related care reported having a higher health-related quality of life than those who had not).

can also lead to significant economic consequences for transgender individuals. A recent survey shows that over half of transgender people report economic insecurity due to gender identity discrimination.¹⁰

Apart from the direct harms inflicted on amici States' residents in Alabama, the Act threatens spillover effects that extend far beyond Alabama's borders. For example, transgender people who experience income insecurity are more likely to be uninsured and to rely on state-run programs such as Medicaid.¹¹ Thus, state programs are likely to bear the

¹⁰ Sharita Gruberg et al., Ctr. for Am. Progress, *The State of the LGBTQ Community in 2020* (2020), <https://www.americanprogress.org/article/state-lgbtq-community-2020/> (showing more than half [54 percent] of transgender respondents reported that discrimination moderately or significantly affected their financial well-being).

¹¹ Jaime M. Grant et al., Nat'l Ctr. For Transgender Equal. & Nat'l Gay and Lesbian Task Force, *National Transgender Discrimination Survey Report on Health & Health Care* 8 (2010), https://cancer-network.org/wp-content/uploads/2017/02/National_Transgender_Discrimination_Survey_Report_on_health_and_health_care.pdf (23 percent of transgender women and 13 percent of transgender men report relying on public health insurance); *see also* Kellan Baker et al., Ctr. for Am. Progress, *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations* (2016), <https://www.americanprogress.org/article/the-medicaid-program-and-lgbt-communities-overview-and-policy-recommendations/> (“The high prevalence of poverty in LGBT communities, especially among transgender people and LGBT people of color, makes Medicaid a critical program for the health and well-being of LGBT communities.”); Kerith J. Conron & Kathryn K. O’Neill,
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financial burden of addressing the significant consequences that result from denying transgender teenagers medically necessary care.¹²

B. The Act Would Exacerbate the Effects of Discrimination and Inadequate Access to Healthcare Suffered by Transgender Teens

The Act would exacerbate discrimination and harms from inadequate healthcare access already suffered by transgender teens. Transgender people often suffer from severe distress due to the stigma, persecution, and violence inflicted because of their gender identity.¹³ Among transgender people, suicide attempts are nine times more common than in the overall U.S. population (41% versus 4.6%).¹⁴ The risks are especially high among

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Univ. of Cal. Los Angeles, Food Insecurity Among Transgender Adults During the COVID-19 Pandemic 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insecurity-Dec-2021.pdf> (over a quarter of transgender people experience food insufficiency, making it three times as common among transgender people as cisgender (i.e., non-transgender) people).

¹² See, e.g., Wash. Admin. Code § 182-501-0060 (listing program's benefits); Cal. Code Regs. tit. 22 § 51301 *et seq.* (same); N.Y. Comp. Codes R. & regs. tit. 18, § 505.1 *et seq.* (same).

¹³ See Sandy E. James et al., Nat'l Ctr. For Transgender Equal., The Report of the 2015 U.S. Transgender Survey (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

¹⁴ Ann P. Haas et al., Am. Found. For Suicide Prevention & The Williams Inst., Suicide Attempts Among Transgender and
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transgender minors.¹⁵ One study found that 56% of transgender youth reported a previous suicide attempt and 86% reported suicidal thoughts.¹⁶ Bullying significantly contributed to lifetime suicide attempts while a lack of school belonging, familial emotional neglect, and internalized self-stigma contributed to suicidal thoughts.¹⁷

Transgender people also face significant barriers to receiving both routine and gender-affirming care.¹⁸ Access to gender-affirming healthcare

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Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 2 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-GNC-Suicide-Attempts-Jan-2014.pdf>.

¹⁵ See, e.g., *id.*; Ali Zaker-Shahrak et al., Cal. Dep't of Ins., Economic Impact Assessment: Gender Nondiscrimination in Health Insurance 10 (2012), <https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf> (“A recent systematic review of largely American samples gives a suicide attempt rate of approximately one in every three individuals with higher rates found among adolescents and young adults.”).

¹⁶ Ashley Austin et al., Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors, 37 J. of Interpersonal Violence 2696 (2022).

¹⁷ *Id.*

¹⁸ James et al., *supra* note 13, at 93; see also Morning Consult & The Trevor Project, How COVID-19 is Impacting LGBTQ Youth 21 (2020), https://www.thetrevorproject.org/wp-content/uploads/2020/10/Trevor-Poll_COVID19.pdf (finding that 25 percent of trans and nonbinary youth and 25 percent of

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and other interventions that improve mental health are especially important to transgender and nonbinary teenagers, who already experience stress from discrimination, harassment, stigma, and violence in their daily lives.¹⁹

The Centers for Disease Control and Prevention found that transgender students are more likely to report feeling unsafe at or going to and from school, being bullied, threatened, or injured with a weapon at school, being forced to have sex, and experiencing physical and sexual dating violence.²⁰ Transgender students who experienced higher levels of victimization due to their gender identity were three times more likely to have missed school in a given month than other students.²¹ Transgender

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LGBTQ youth overall reported wanting mental health care and not being able to receive it, compared with only six percent of white cisgender heterosexual youth).

¹⁹ “People who identify as transgender have higher rates of mental health complications than those in the general population due to stigma and discrimination.”

²⁰ See Michelle M. Johns et al., U.S. Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students*, 68 Morbidity Mortality Weekly Report 67, 69 (2019), <http://dx.doi.org/10.15585/mmwr.mm6803a3>.

²¹ Movement Advancement Project et al., *Separation and Stigma: Transgender Youth and School Facilities* 4 (2017), <https://www.glsen.org/sites/default/files/2019->

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youth whose restroom and locker room use was restricted to their sex assigned at birth were more likely to experience sexual assault compared to those without such restrictions.²² These harms have been further exacerbated by the COVID-19 pandemic and limited healthcare resources.²³

II. AMICI STATES PROTECT ACCESS TO GENDER-AFFIRMING HEALTHCARE BASED ON WELL-ESTABLISHED MEDICAL STANDARDS

In amici States' experience, ensuring access to gender-affirming healthcare has improved health outcomes for transgender teenagers. Amici States' laws and policies protect transgender teenagers by guaranteeing their access to healthcare, including gender-affirming healthcare. To prevent the direct economic, emotional, and health consequences of excluding individuals from necessary healthcare, amici States ensure that their residents, including transgender teenagers, have access to gender-affirming

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[11/Separation and Stigma 2017.pdf](#).

²² Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, 143 *Pediatrics* 1, 1 (2019), <https://publications.aap.org/pediatrics/article/143/6/e20182902/76816/School-Restroom-and-Locker-Room-Restrictions-and>.

²³ *See generally* U.S. Dep't of Educ., Office for Civil Rights, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students* iv, 27–30 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> (summarizing research findings).

healthcare and allow doctors to practice medicine consistent with well-accepted medical standards and anti-discrimination laws. Robust data confirm that such policies result in better health and economic outcomes.

A. Amici States Have Longstanding Anti-Discrimination Laws and Policies Guaranteeing Access to Gender-Affirming Medical Care

Several amici States explicitly prohibit insurers from excluding gender-affirming care from their insurance policies. These protections increase access to healthcare by barring discriminatory health insurance coverage that contravenes best medical practices. Of particular concern are barriers to healthcare erected against transgender patients for care that is otherwise accessible to cisgender patients. Since 2012, at least 24 States and the District of Columbia have prohibited health insurance discrimination against transgender people.²⁴ These laws promote sound medical practices and increase equity in healthcare.

In California, for instance, longstanding laws and regulations ensure that transgender patients are not denied or limited coverage for care available to others. California's Medicaid program ("Medi-Cal") has

²⁴ Healthcare Law and Policies, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Dec. 23, 2021).

required gender-affirming coverage since 2001.²⁵ In 2012, the California Insurance Commissioner adopted regulations prohibiting private insurers from denying coverage for “services related to gender transition . . . including but not limited to hormone therapy” if the same services are available when unrelated to gender transition.²⁶ The regulation also forbids plans from requiring a premium based on the insured’s identity as a transgender person.²⁷ These rules apply regardless of the beneficiary’s age.

Other amici States are equally committed to treating transgender people with dignity and respect when accessing healthcare, and ensuring that they are not denied needed care. For example, in 2015, the Minnesota Departments of Commerce and Health confirmed that health plans subject to

²⁵ See Cal. Dep’t of Health Care Servs., All-Plan Letter 16-013, Ensuring Access to Medi-Cal Services for Transgender Beneficiaries (Oct. 6, 2016), <http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2016/APL16-013.pdf> (Medi-Cal managed care health plans must provide covered services to all Medi-Cal beneficiaries, including transgender beneficiaries); see also *J.D. v. Lackner*, 80 Cal. App. 3d 90, 95 (1978) (recognizing that gender-affirming care may be medically necessary and ordering Medi-Cal coverage).

²⁶ Cal. Code Regs. tit. 10 § 2561.2, subd. (a), <http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/CDI-Gender-Nondiscrimination-Regulations.pdf>.

²⁷ *Id.*

their jurisdiction may not exclude coverage for gender dysphoria treatment when medically necessary.²⁸ Many of amici States' laws, regulations, and bulletins likewise prohibit insurers from gender identity discrimination in healthcare.²⁹ Taken together, these laws and policies reflect our core

²⁸ Minn. Dep't of Commerce, Admin. Bulletin 2015-5, Gender Identity Nondiscrimination Requirements (2015), <https://mn.gov/commerce-stat/pdfs/bulletin-insurance-2015-5.pdf>.

²⁹ *See, e.g.*, **Connecticut**: Conn. Gen. Stat. § 46a-71(a) (state agency services); Conn. Ins. Dep't, Bulletin IC-34, Gender Identity Nondiscrimination Requirements (Dec. 19, 2013), <https://portal.ct.gov/-/media/CID/BulletinIC37GenderIdentityNondiscriminationRequirementspdf.pdf> (private insurers); **Hawai'i**: Haw. Rev. Stat. § 431:10A-118.3(a) (accident and health or sickness insurance); Haw. Rev. Stat. § 432:1-607.3 (hospital and medical service policies); Haw. Rev. Stat. § 432D-26.3 (health maintenance organization policies); **Illinois**: Ill. Adm. Code, tit. 50, § 2603.35 (health insurance plans); Ill. Dep't of Human Rights, Ill. Dep't of Healthcare and Family Servs., and the Ill. Dep't of Ins., Guidance Relating to Nondiscrimination in Healthcare Services in Illinois (June 26, 2020), <https://www2.illinois.gov/dhr/Documents/Joint%20Nondiscrimination%20Guidance.pdf>; Ill. Dep't of Ins., Bulletin 2020-16, Health Insurance Coverage for Transgender and Gender Nonconforming Individuals (June 15, 2020), <https://insurance2.illinois.gov/cb/2020/CB2020-16.pdf>; **Massachusetts**: Mass. Div. of Ins., Office of Consumer Affairs & Bus. Regulation, Bulletin 2014-03, Guidance Regarding Prohibited Discrimination on the basis of Gender Identity 1 (June 20, 2014), <https://www.mass.gov/doc/bulletin-2014-03-guidance-regarding-prohibited-discrimination-on-the-basis-of-gender-identity/download> (prohibiting private insurers from denying coverage); **New Jersey**: N.J. Stat. Ann. § 26:2J-4.40 (health maintenance organizations); N.J. Stat. Ann. § 17B:26-2.1ii (continued...)

commitment to protecting the equality of all people, regardless of their gender identity, and ensuring that people with gender dysphoria are not denied necessary healthcare.

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(individual health insurance policies); N.J. Stat. Ann. § 17B:27-46.100 (group health insurance policies); N.J. Stat. Ann. § 52:14-17.29x (State Health Benefits Commission contracts); **New York:** N.Y. Comp. Codes R. & Regs. tit. 18 § 505.2(1)(3)-(4) (covering gender-affirming surgery under Medicaid); N.Y. Dep't of Fin. Servs., Ins. Circular Letter No. 7 (2014), https://www.dfs.ny.gov/insurance/circltr/2014/cl2014_07.htm (eliminating exclusions); **Pennsylvania:** Pa. Ins. Dep't., Notice Regarding Nondiscrimination, Notice 2016-05, 46 Pa.B. 2251 (2016), https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pa_bulletin/data/vol46/46-18/762.html (prohibiting discrimination and requiring coverage); Pa. Dep't. of Human Servs., CHIP Transmittal 2016-5 (2016) (eliminating exclusions and requiring coverage); **Vermont:** Vt. Dep't of Fin. Reg., Div. of Ins., Ins. Bulletin No. 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity including Medically Necessary Gender Dysphoria Surgery and Related Health Care 1 (2013), <https://dfr.vermont.gov/sites/finreg/files/regbul/dfr-bulletin-insurance-174-gender-dysphoria-surgery.pdf> (eliminating exclusions); Vt. Dep't of Health Access, Medical Policy re: Gender Affirmation Surgery for the Treatment of Gender Dysphoria 2 (2019), http://vels.staging.vermont.gov/sites/dvha/files/documents/provide_rs/Forms/1gender-affirmation-surgery-w-icd-10-coded-110119.pdf (covering gender-affirming surgery under Medicaid); **Washington:** Wash. Admin. Code § 182-531-1675 (describing Apple Health's "gender dysphoria treatment program"); Letter from Mike Kreidler, Office of the Ins. Comm'r of Wash. State to Health Ins. Carriers in Wash. State (June 25, 2014), <https://www.insurance.wa.gov/sites/default/files/documents/gender-identity-discrimination-letter.pdf>.

Beyond these general protections, some amici States have issued explicit guidance prohibiting insurers from denying minors' treatment for gender dysphoria solely based on age, recognizing the importance of gender-affirming interventions for this vulnerable population.³⁰ The Massachusetts Division of Insurance advises insurers that “[f]or minors seeking access to gender-affirming medical or surgical procedures, [insurance carriers] must undertake case-by-case review of individual circumstances and authorize coverage for these treatments when such treatments are determined to be medically necessary.”³¹ California’s guidance expressly acknowledges the

³⁰ **New York:** N.Y. Comp. Codes R. & Regs. tit. 18 § 505.2(l)(2)(i)-(ii) (hormone replacement therapy for minors); **Oregon:** Or. Health Auth., Prioritized List: Guideline for Gender Dysphoria 1 (2019), <https://www.oregon.gov/oha/HPA/DSI-HERC/FactSheets/Gender-dysphoria.pdf> (approving youth puberty suppression coverage based on “extensive testimony/debate from experts at various public meetings” and “relevant evidence and literature”); **Washington:** Wash. Admin. Code § 182-531-1675(b)(ii) (coverage for puberty suppression); *id.* § 182-531-1675(f) (payment for gender-affirming care for those under 20).

³¹ Gary D. Anderson, Mass. Comm’r of Ins., Bulletin 2021-11, Continuing Applicability of Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Gender Affirming Care and Related Services 3 (2021), <https://www.mass.gov/doc/bulletin-2021-11-prohibited-discrimination-on-the-basis-of-gender-identity-or-gender-dysphoria-including-medically-necessary-gender-affirming-care-and-related-services-issued-september-9-2021/download>.

need for coverage for transgender minors, noting that “[s]ocial stigma, misconceptions about gender dysphoria and its treatment, and outdated medical criteria create barriers to necessary medical care that can lead to tragic results,” especially for transgender youth.³²

B. Amici States’ Policies Are Based on Well-Established Medical Standards and Leave Decisions Made Between Doctors and Their Patients Undisturbed

Amici States’ policies are grounded in well-accepted medical standards of care and designed to respect the doctor-patient relationship. For example, the Minnesota Department of Commerce, which has an external review process for insurance appeals, has ruled that insurers must use medical standards set forth by the World Professional Association for Transgender Health (WPATH), an international professional association that provides evidence-based standards of care for transgender people.³³ Insurers

³² Press Release, Cal. Dep’t of Ins., Commissioner Lara Takes Proactive Step to Ensure Transgender Youth Have Access to Gender Affirming Medical Care for Gender Dysphoria (Dec. 30, 2020), <https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release140-2020.cfm>.

³³ Letter from Lisa K. Maguire, Esq., State Appeals, to Blue Cross Blue Shield Member (Aug. 11, 2014), <https://www.outfront.org/sites/default/files/Dept%20of%20Commerce%20external%20review.pdf> (Overturning denial of coverage as inconsistent with WPATH standards); *see also* Minn. Dep’t of Commerce, Admin. Bulletin 2015-5, *supra* note 28, at 2 (“Determination of medical necessity and prior authorization

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may not substitute their own, more restrictive standards for providing coverage for gender-affirming healthcare.³⁴ A California opinion letter about coverage for transgender minors expressly cites to the WPATH standards as well.³⁵ Massachusetts similarly recommends insurance carriers “consult the most up-to-date medical standards set forth by nationally recognized medical experts in the transgender health field, including but not limited to those issued by the [WPATH].”³⁶ Many other amici States have relied on prevailing professional standards of care set forth by nationally recognized medical experts in crafting laws and guidance on coverage of gender-affirming medical care to treat gender dysphoria.³⁷

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protocols for gender dysphoria-related treatment must be based on the most recent, published medical standards set forth by nationally recognized medical experts in the transgender health field.”).

³⁴ *Id.*

³⁵ Press Release, Cal. Dep’t of Ins., *supra* note 32.

³⁶ Anderson, Bulletin 2021-11, *supra* note 31, at 2.

³⁷ *See, e.g., Colorado*: Colo. Code Regs. § 4-2-62 (prohibiting “[d]en[ial], exclu[sion], or otherwise limit[ing] coverage for medically necessary services, in accordance with generally accepted professional standards of care, based upon a person’s . . . gender identity”); Press Release, Colo. Dep’t of Regulatory Agencies, Division of Insurance Announces a New Resource for LGBTQ Coloradans (Jun. 1, 2020), <https://doi.colorado.gov/press-release/division-of-insurance->

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[announces-a-new-resource-for-lgbtq-coloradans](#); **Connecticut**: Conn. Comm’n On Human Rights And Opportunities, Declaratory Ruling on Petition Regarding Health Insurers’ Categorization of Certain Gender-Confirming Procedures as Cosmetic 9 (2020), https://www.chlpi.org/wp-content/uploads/2013/12/Dec-Rule_04152020.pdf (insurers shall “pay ‘covered expenses’ for treatment provided to individuals with gender dysphoria where the treatment is deemed necessary under generally accepted medical standards”); **District of Columbia**: Chester A. McPherson, D.C. Dep’t of Ins., Bulletin 13-IB-01-30/15, Prohibition of Discrimination in Health Insurance Based on Gender Identity and Expression 3–4 (2014), <https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf> (medical necessity determination requires referring to “recognized professional standard of medical care for transgender individuals” and citing WPATH standards); **Maine**: Press Release, EqualityMaine, Maine Transgender Network, GLAD and Maine Women’s Lobby Announce Health Coverage for Transgender Individuals Under MaineCare, LGBTQ Legal Advocates & Defs. (Oct. 3, 2019), <https://www.glad.org/post/equalitymaine-maine-transgender-network-glad-and-maine-womens-lobby-announce-health-coverage-for-transgender-individuals-under-mainecare/> (criteria for determining medical necessity “will be based on consensus professional medical standards” and citing to WPATH standards); **Minnesota**: Minn. Dep’t of Commerce, Admin. Bulletin 2015-5, *supra* note 28, at 2 (medical necessity “must be based on the most recent, published medical standards set forth by nationally recognized medical experts”); **New York**: N.Y. Dep’t of Fin. Servs., Ins. Circular Letter No. 7, *supra* note 29 (citing the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders’ recognition of gender dysphoria); **Oregon**: Or. Health Auth., Prioritized List: Guideline for Gender Dysphoria, *supra* note 30, at 1 (approving youth puberty suppression coverage based on extensive testimony “from

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Amici States’ policies also recognize that well-established medical standards require individualized determinations of medical necessity based on individual patients’ needs. In contrast to Alabama’s categorical ban on gender-affirming care for anyone under 19, best medical practices require an *individualized* assessment to determine whether—and to what extent—gender-affirming care is medically necessary for an individual patient.³⁸ Accordingly, the District of Columbia, for example, has instructed that determinations of “medical necessity” for insurance coverage purposes

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experts at various public meetings,” “reviewing relevant evidence and literature,” and citing WPATH standards); **Pennsylvania:** Pa. Dep’t. of Human Servs., CHIP Transmittal 2016-5 (2016) (“In determining medical necessity for gender transition services, the Department and CHIP Contractors will utilize [WPATH] Standard of Care as guidelines.”); **Rhode Island:** R.I. Health Ins. Comm’r, Health Ins. Bulletin 2015-3, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression 1 (2015), <http://www.ohic.ri.gov/documents/Bulletin-2015-3-Guidance-Regarding-Prohibited-Discrimination.pdf> (“[A] growing body of scientific and clinical evidence regarding the potential harm to consumers arising from the denial or exclusion of services on the basis of gender identity” prompted reexamination of exclusions); **Washington:** Wash. Rev. Code § 48.43.0128(3) (for health plans issued on or after January 1, 2022, Washington forbids insurers from “deny[ing] or limit[ing] coverage for gender-affirming treatment” when it is medically necessary and “prescribed in accordance with accepted standards of care”).

³⁸ See *infra* notes 60–63 and accompanying text.

“must also be guided by providers in communication with individual patients.”³⁹ Washington forbids insurers from “deny[ing] or limit[ing] coverage for gender affirming treatment” when it is medically necessary and “prescribed in accordance with accepted standards of care.”⁴⁰ California encourages health insurance companies to evaluate coverage criteria for gender-affirming care in order “to avoid needlessly delaying and interfering with medical care recommended by a patient’s doctor.”⁴¹

C. Ensuring Access to Gender-Affirming Medical Care Has Improved Health Outcomes for Transgender People, Including Teenagers

Amici States’ policies ensure that residents have access to these best medical practices, including gender-affirming care, which has improved health outcomes for our transgender teenage residents.

Studies overwhelmingly show that mental health for transgender teenagers improves when they have access to early treatment.⁴² A 2021 analysis of a survey of nearly 12,000 transgender and nonbinary teens and

³⁹ McPherson, Bulletin 13-IB-01-30/15, *supra* note 37, at 4.

⁴⁰ Wash. Rev. Code § 48.43.0128(3).

⁴¹ Press Release, Cal. Dep’t of Ins., *supra* note 32.

⁴² *See* DE80–11:11–16. “DE” refers to “docket entry.” The number immediately following “DE” is the specific entry, and the number following the colon indicates the pin cite based on the ECF-stamped pagination.

young adults found that, for teens under the age of eighteen, use of gender-affirming hormone therapy was associated with 39% lower odds of recent depression and 38% lower odds of attempting suicide in the past year compared to adolescents who wanted, but did not receive, such therapy.⁴³

Another recent study found that for teenagers ages thirteen to twenty, receiving gender-affirming care, including puberty blockers and gender-affirming hormones, was associated with 60% lower odds of moderate or severe depression and 73% lower odds of having suicidal thoughts over a twelve-month follow-up.⁴⁴ Gender-affirming hormone treatment is also associated with a reduction in disordered eating in transgender adolescents.⁴⁵

⁴³ Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 *J. Adolescent Health* 643, 647–48 (2022), <https://doi.org/10.1016/j.jadohealth.2021.10.036>.

⁴⁴ Diana M. Tordoff, et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 *J. Am. Med. Ass’n Network Open* 1, 6 (2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423>.

⁴⁵ Gina M. Sequeira et al., *Impact of Gender Expression on Disordered Eating, Body Dissatisfaction and BMI in a Cohort of Transgender Youth*, 60 *J. Adolescent Health* s87 (2017), <https://doi.org/10.1016/j.jadohealth.2016.10.352>; Jennifer Coelho et al., *Eating Disorder Diagnoses and Symptom Presentation in Transgender Youth: A Scoping Review*, 21 *Current Psychiatry Reps.* 1, 6 (2019), <https://doi.org/10.1007/s11920-019-1097-x>.

Another 2020 study found that transgender adolescents who receive gender-affirming care, including puberty blockers, have fewer emotional and behavioral problems than transgender adolescents who have not received treatment, and that transgender adolescents receiving gender-affirming medical care had similar rates of mental health problems, self-harm, and suicidality as their cisgender peers.⁴⁶ A survey of over 3,500 transgender adults found that individuals who received pubertal suppression during adolescence had almost 20 percent lower odds of lifetime suicidal thoughts compared to individuals who wanted this treatment but did not receive it.⁴⁷

⁴⁶ Anna I. R. van der Miesen et al., *Psychological Functioning in Transgender Adolescents Before and After Gender-Affirmative Care Compared with Cisgender General Population Peers*, 66 *J. Adolescent Health* 699, 703 (2020); see also Jack L. Turban et al., *Access To Gender-Affirming Hormones During Adolescence and Mental Health Outcomes Among Transgender Adults* 17 *PLOS One* 1, 8 (2022), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0261039> (“After adjusting for demographic and potential confounding variables, access to [gender-affirming hormones] during adolescence (ages 14–17) was associated with lower odds of past-month severe psychological distress [...], past-year suicidal ideation [...], past month binge drinking [...], and lifetime illicit drug use [...] when compared to access to [gender-affirming hormones] during adulthood.”).

⁴⁷ Jack L Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 *Pediatrics* 1, 5 (2020), <https://doi.org/10.1542/peds.2019-1725>(adjusted odds ratio = 0.3).

Conversely, withholding or delaying gender-affirming treatment can have negative effects on teens' psychological wellbeing, psychosocial development, and quality of life.⁴⁸ Undergoing puberty that does not align with one's gender identity and developing permanent undesired secondary sex characteristics is "often a source of significant distress" for transgender adolescents.⁴⁹ A 2020 study found that adolescents who begin gender-affirming treatment at later stages of puberty were over five times more likely to have been diagnosed with depression and over four times more likely to have anxiety disorders than adolescents who seek treatment in early puberty.⁵⁰

In addition to improved mental health outcomes, access to gender-affirming treatment improves overall well-being in transgender teenagers and young adults. A longitudinal study that followed transgender adolescents from their intake at a gender clinic into young adulthood found

⁴⁸ DE8-3:20-21; *see also* DE8-1:14, 16, 19-20, 21.

⁴⁹ Ximena Lopez et al., *Statement on Gender-Affirmative Approach to Care from the Pediatric Endocrine Society Special Interest Group on Transgender Health*, 29 *Current Op. Pediatrics* 475, 480 (2017); *see also* DE8-3:13.

⁵⁰ Julia C. Sorbara et al., *Mental Health and Timing of Gender-Affirming Care*, 146 *Pediatrics* 1, 5 (2020), <https://publications.aap.org/pediatrics/article/146/4/e20193600/79683/Mental-Health-and-Timing-of-Gender-Affirming-Care>.

that gender-affirming treatment resulted in significant improvement in global functioning and psychological wellbeing.⁵¹ The study reported that post-treatment, participants had “rates of clinical problems that are indistinguishable from general population samples,” and that their life satisfaction, quality of life, and subjective happiness were comparable to their same-age cisgender peers.⁵² Another study found significant improvement in teens’ self-worth and perceived physical appearance after starting hormone replacement therapy.⁵³ In short, removing discriminatory barriers to healthcare improves health outcomes for transgender residents, especially teenagers.

III. THE ACT DISCRIMINATES BASED ON SEX, IGNORES MEDICAL STANDARDS, AND INTERFERES WITH DECISIONS MADE BETWEEN DOCTORS AND THEIR PATIENTS

A. The Act Violates Equal Protection By Prohibiting Only Transgender Youth From Taking Certain Medications

⁵¹ Annelou L.C. de Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134 *Pediatrics* 696, 702 (2014), <https://doi.org/10.1542/peds.2013-2958>.

⁵² *Id.*

⁵³ Marijn Arnoldussen et al., *Self-Perception of Transgender Adolescents After Gender-Affirming Treatment: A Follow-Up Study Into Young Adulthood*, 9 *LGBT Health* 238 (2022), <https://www.liebertpub.com/doi/epdf/10.1089/lgbt.2020.0494>.

The district court correctly determined that the Act imposes a sex-based classification that violates the Equal Protection Clause because “the Act prohibits transgender minors—and only transgender minors—from taking transitioning medications due to their gender nonconformity.” DE107:22.⁵⁴ That categorical prohibition “places a special burden on transgender minors because their gender identity does not match their birth sex.” *Id.* at 23. And as the district court explained, that classification cannot satisfy intermediate scrutiny because “the State puts on no evidence to show that transitioning medications are ‘experimental’” and because “nothing in the record shows that medical providers are pushing transitioning medications on minors.”⁵⁵ *Id.* at 24.

⁵⁴ As in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–42 (2020), it is unnecessary for this Court to even define “sex” or “gender” in order to conclude that the Alabama statute impermissibly discriminates on the basis of sex, gender, and transgender status. *Accord United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (state laws that discriminate based on “sex” and “gender” subject to heightened scrutiny); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (applying heightened scrutiny where challenged policy “cannot be stated without referencing sex.”).

⁵⁵ The Act fails under any standard of review. Categorically banning all gender-affirming medications for all transgender minors, regardless of their individual circumstances and in defiance of well-established medical standards, is not rationally related to any legitimate government interest.

B. Amici Arkansas's Arguments Lack Merit

Alabama's complete ban on puberty-blockers and hormone therapy for all teenagers (including 18-year-olds)—regardless of their age, maturity, clinical situation, and in contravention of a doctor's evidence-based recommendation—unlawfully deprives some transgender adolescents of necessary gender-affirming healthcare. Some States, led by Arkansas, attempt to support the Act with two primary arguments. Neither has merit.

First, Arkansas asserts that there is an “intensely boiling medical controversy” over the safety and effectiveness of providing puberty blockers and hormone therapies to teenagers. Arkansas Amicus at 4. But Arkansas cites no article, study, or recommendation to substantiate its claim that gender-affirming healthcare for teenagers is *never* appropriate. As Alabama's own expert conceded in the district court, “no country or state in the world categorically bans” transitioning medications for transgender teenagers like the Act. DE107:18. While standards for gender-affirming healthcare are, like all other forms of medical treatment, refined and updated as new evidence becomes available, Arkansas offers no support for its view that gender-affirming care can be categorically banned consistent with medical standards.

Arkansas, moreover, is misleadingly selective about which studies and articles it emphasizes and omits key context from many of the studies it cites.⁵⁶ For example, Arkansas cites a recent *Washington Post* article published by the founding psychologist of the first pediatric transgender clinic in the United States and by a former President of the U.S. Professional Association for Transgender Health to contend that gender-affirming care may be harmful. Arkansas Amicus at 6–7. But that article did not support a ban on all gender-affirming care. It merely urged “comprehensive assessment for all dysphoric youth before starting medical interventions” in accordance with WPATH standards of care.⁵⁷ Indeed, the authors stated that they “enthusiastically support the appropriate gender-affirming medical care

⁵⁶ In another example, Arkansas’s cherry-picked cite regarding the sexual experiences of transgender adults, Arkansas Amicus at 8–9, is contradicted by scientific evidence. *E.g.*, Michael Zaliznyak et al., Effects of Gender-Affirming Hormone Therapy on Sexual Function of Transgender Men and Women, 206 J. of Urology 637, 638 (2021), <https://www.auajournals.org/doi/epdf/10.1097/JU.0000000000002045.06>. Categorical bans on medical treatment cannot be justified by selective and misleading citations.

⁵⁷ L. Edwards-Leeper and E. Anderson, The Mental Health Establishment is Failing Trans Kids, *The Washington Post* (November 24, 2021), <https://www.washingtonpost.com/outlook/2021/11/24/trans-kids-therapy-psychologist>.

for trans youth” and “are disgusted by the legislation trying to ban it.”⁵⁸ The authors further explained that attempts to “deny medical treatment to all transgender young people . . . are unacceptable, and medically unsound.”⁵⁹

Second, Arkansas relies on fears about medical providers failing to comply with standards of care to justify a categorical ban on gender-affirming healthcare. Arkansas asserts that “at many facilities, hormones are provided on demand to children who say they are transgender, without any psychological assessment.” Arkansas Amicus at 2. If true, such a practice would be wholly inconsistent with current standards of care. According to WPATH, mental health professionals working with children and adolescents with gender dysphoria should: (1) “directly assess gender dysphoria in children and adolescents”; (2) “provide family counseling and supportive psychotherapy to assist children and adolescents with exploring their gender identity, alleviating distress related to their gender dysphoria, and ameliorating any other psychosocial difficulties”; and (3) “assess and treat any coexisting mental health concerns of children or adolescents.”⁶⁰ At that

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See The World Professional Organization for Transgender Health: Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People at (continued...)

point, if adolescents are referred for additional physical interventions such as puberty blockers, the “referral should include *documentation of an assessment of gender dysphoria and mental health*, the adolescent’s eligibility for physical interventions (outlined below), the mental health professional’s relevant expertise, and any other information pertinent to the youth’s health and referral for specific treatments” (emphasis added).⁶¹

Moreover, Arkansas’s position ignores a State’s substantial authority to oversee and regulate providers. States have an obligation to ensure that medical providers are following appropriate standards of care and gender-affirming care is subject to oversight like other medical practices. And, in any event, it is plainly overreach to impose a categorical ban of well-established, evidence-based medical treatment to address allegations that some small number of providers do not always follow the standards of care. Amici States rely on their regulators and licensing boards to address improper medical care and prevent harm to their residents. Even Arkansas acknowledges the power of States to address substandard medical care,

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14, available at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf? t=1613669341.

⁶¹ *Id.*

pointing to the overprescribing of opioids. *See* Arkansas Amicus at 17–18. But States did not react to that crisis by completely banning the use of opioids and depriving many patients of medications to manage pain. Instead, as Arkansas concedes, States adopted legislation or regulations to curb the amount of opioids that physicians could prescribe. Arkansas offers no reason to regulate gender-affirming care more stringently and provides no basis for supporting a blanket ban on medical care.

Evidence in the record and amici States’ own experience overwhelmingly shows that transgender teenagers who have access to gender-affirming healthcare experience better health outcomes—including mental health outcomes equivalent to their cisgender peers.⁶² Arkansas’s

⁶² *See, e.g.*, DE78-11:41, 45, 52–55 (discussing studies); DE78-19:14–17 (discussing studies); *see also* Tordoff, *supra* note 44 (gender-affirming care for 13 to 20 year-olds “associated with 60% lower odds of moderate or severe depression and 73% lower odds of suicidality”); Dominic J. Gibson et al., *Evaluation of Anxiety and Depression in a Community Sample of Transgender Youth*, 4(4) *J. Am. Med. Ass’n Open* 1, 1–2 (2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2778206> (finding “no significant group differences in self-reported depressive symptoms, self-reported anxiety symptoms, or parent reported depressive symptoms” among “socially transitioned transgender youth, their siblings, and age- and gender-matched control participants” ages eight to fourteen); Lily Durwood et al., *Social Support and Internalizing Psychopathology in Transgender Youth*, 50 *J. of Youth and Adolescence* 841 (2021), <https://link.springer.com/article/10.1007%2Fs10964-020-01391-y>

(continued...)

arguments that gender-affirming care harms transgender teens mischaracterize the scientific literature and the record below.⁶³

Amici States have taken seriously their obligation to protect transgender youth by ensuring their access to gender-affirming healthcare,

(...continued)

(“Parents who reported higher levels of family, peer, and school support for their child’s gender identity also reported fewer internalizing symptoms.”); Kristina R Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137(3) *Pediatrics* 1, 1 (2016), <https://pubmed.ncbi.nlm.nih.gov/26921285> (“Socially transitioned transgender children who are supported in their gender identity have developmentally normative levels of depression and only minimal elevations in anxiety, suggesting that psychopathology is not inevitable within this group.”).

⁶³ DE62-2:7 (explaining that “the use of puberty blockers to treat gender dysphoria is not research or experimentation”); DE62-2:11 (gender-affirming care is “neither poorly studied nor unproven”); DE62-2:17–18 (describing standards of care for gender dysphoria in teenagers); DE78-19:7–11 (describing standards of care for transgender children, teenagers, and adults); DE78-19:11–13 (discussing harms from untreated gender dysphoria); DE78-19:13–15 (listing health benefits of gender-affirming care); DE78-19:21–27 (contextualizing alleged risks from puberty blockers and hormone replacement therapy); DE62-2:21 (adolescents have sufficient capacity to make informed treatment decisions); DE62-2:22 (fertility planning is part of informed consent); DE78-19:17–21 (rebutting arguments about “detransition,” “social contagion,” and “rapid onset”); DE78-19:15–16 (rebutting arguments concerning 2011 Swedish study); DE78-19:16 (rebutting arguments concerning 2016 Centers for Medicare & Medicaid Services decision).

preventing discrimination against them, and respecting the decisions reached between these patients, their doctors, and their parents. The Alabama law is unconstitutional, puts the well-being and lives of transgender minors at risk, and should be enjoined.

CONCLUSION

The preliminary injunction should be affirmed.

Dated: August 17, 2022 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6477 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14 point Times New Roman font.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

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CERTIFICATE OF SERVICE

I certify that on August 17, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I further certify that four paper copies identical to the electronically filed brief will be mailed to the Clerk of the Court by certified mail.

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August 5, 2022

ATTORNEY GENERAL RAOUL JOINS COALITIONS PROTECTING RIGHTS OF LGBTQ+ STUDENTS

Legal Briefs Seek to Protect Transgender Rights, Oppose Florida's "Don't Say Gay" Law

Chicago — Attorney General Kwame Raoul joined two separate coalitions of attorneys general supporting LGBTQ+ students against discrimination in the classroom, filing legal briefs opposing an Indiana school district's efforts to bar a transgender student from using the restroom consistent with the student's gender identity and against Florida's controversial "Don't Say Gay" law, which limits classroom discussions and has serious implications for LGBTQ+ students.

"Across the country, we are seeing increased attacks on the rights of LGBTQ+ youth," Raoul said. "Discrimination has no place in the classroom – period. I will continue to work with fellow attorneys general from across the country to stand up for the rights of all students and will vehemently oppose unjust policies that jeopardize the education and emotional and physical well-being of LGBTQ+ students."

Raoul joined a coalition of 22 attorneys general in filing an amicus brief in the case *A.C. v. Metropolitan School District of Martinsville* opposing the Indiana school district's efforts to bar a 13-year-old transgender male student from using the boys' restroom. [The brief](#) — filed in the U.S. Court of Appeals for the 7th Circuit — argues for the court to affirm a lower court ruling requiring the Metropolitan School District of Martinsville to allow the student to use the boys' bathroom.

Raoul and the coalition argue that preventing a transgender student from using a school restroom consistent with the student's gender identity violates Title IX of the Education Amendments of 1972 by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. The amicus brief also points out that inclusive policies that maintain sex-segregated spaces while permitting transgender people to use a facility that aligns with their gender identity help to ease the stigma transgender people often experience, with positive effects for their educational and health outcomes. The attorneys' general amicus brief demonstrates that protecting transgender people from discrimination yields broad benefits without compromising privacy or safety, and that nondiscriminatory restroom policies produce important benefits and pose no safety concerns.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont and Washington.

Raoul also joined a separate coalition of 16 attorneys general opposing Florida's recently-enacted "Don't Say Gay" law which prevents classroom discussion of sexual orientation or gender identity, posing a serious threat to LGBTQ+ students and families. Florida's new law outlaws "classroom instruction" on sexual orientation or gender identity in kindergarten through the third grade, while also requiring the state education agency to write new classroom instructions for standards that must be followed by fourth through 12th grade teachers. The new law does not, however, define many of its key terms like "classroom instruction." Out of an abundance of caution, Florida instructors have already begun censoring themselves, as the law allows a parent to bring a civil claim against a school district to enforce its vague prohibitions.

[Raoul and the coalition argue in their brief](#) that the Florida law is extreme and causes significant harms to students, parents, teachers and other states. The coalition notes non-inclusive educational environments have severe negative health impacts on LGBTQ+ students, resulting in increased rates of mental health disorders and suicide attempts. These harms extend to youth not just in Florida but throughout the country.

A group of students, parents, teachers, and organizations challenged the new law in federal district court, seeking to prevent its enforcement and alleging that it violates, among other things, the Equal Protection Clause and the First Amendment.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York and Oregon.

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22-1786

**United States Court of Appeals
for the Seventh Circuit**

A.C., a minor child by his next friend, mother and legal guardian, M.C.,
Plaintiff-Appellee,

v.

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE and FRED KUTRUFF,
in his official capacity as Principal of John R. Wooden Middle School,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District
of Indiana, Indianapolis Division District Court No. 1:21-cv-2965-TWP-MPB,
The Honorable Tanya Walton Pratt, Chief Judge

**BRIEF FOR STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,
NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON,
PENNSYLVANIA, RHODE ISLAND, AND VERMONT, AND
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INTERESTS OF THE AMICI STATES

The States of New York, Washington, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Vermont, and the District of Columbia, file this brief as amici curiae in support of plaintiff-appellee A.C. *See* Fed. R. App. P. 29(a)(2).

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including equal access to school restrooms. Discrimination on the basis of one's transgender status causes tangible economic, educational, emotional, and health harms. To prevent these injuries, the amici States have adopted policies aimed at combating discrimination against transgender people. Amici submit this brief to describe their experiences with administering such policies—including policies that maintain gender-segregated restrooms while allowing transgender students to use such restrooms on an equal basis with other students of the same sex. As amici's experiences show, ensuring transgender people have access to public facilities consistent with their gender identity—including access to common restrooms—benefits all, without compromising safety or privacy, or imposing significant costs.

The amici States also share a strong interest in seeing that federal law is properly applied to protect transgender people from discrimination. This appeal does not challenge the authority of a school district to assign bathrooms based on sex, although that is how the Metropolitan School District of Martinsville (District) and its amici characterize the issue. *See* Appellants' Br. (Br.) at 10-18; Amicus Br. of Ind. & 20 Other States (Ind. Br.) at 3-6. Rather, this case challenges the District's policy excluding a transgender male student, A.C., from the boys' bathroom based on his sex assigned at birth, despite A.C. taking medication to suppress menstruation, being known in Indiana state records by a traditionally masculine name, and being referred to as "he" or "him," even by school officials. *See* Br. at 6 n.3. The District's policy violates Title IX of the Education Amendments of 1972 by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. Further, because the policy fails to advance any legitimate interest such as protecting public safety or personal privacy, its only function is to stigmatize a particular group, which violates equal protection.

ARGUMENT

I. PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS WIDE SOCIETAL BENEFITS WITHOUT COMPROMISING THE PRIVACY OR SAFETY OF OTHERS

Over 1.6 million people in the United States—including approximately 300,000 youth between the ages of thirteen and seventeen—identify as transgender.¹ Transgender people have been part of cultures worldwide “from antiquity until the present day.”² They contribute to our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers, lawyers, nurses, and doctors.

Unfortunately, transgender people often experience discrimination that limits their ability to realize their potential. To combat such discrimination, States began providing civil rights protections for transgender people nearly a quarter century ago. Today, at least twenty-two States and the District of

¹ Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (Williams Inst. 2022) (internet). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on August 2, 2022.)

² American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014) (internet); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015) (internet).

Columbia,³ and at least 225 local governments,⁴ offer express protections against discrimination based on gender identity in areas such as education, housing,

³ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov't Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawaii:** Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas:** Kansas Hum. Rts. Comm'n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court's Bostock Decision* (Aug. 21, 2020) (internet) (advising that Kansas laws prohibiting discrimination based on “sex” in “employment, housing, and public accommodation” contexts “are inclusive of LGBTQ and all derivatives of ‘sex’”). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov't § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing); Md. Code Ann., Educ. § 26-704 (schools). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education). **Nevada:** Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *id.* § 10:5-12 (public accommodations, housing, employment); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law §§ 291, 296 (education,

(continued on the next page)

public accommodations, and employment.⁵ The experiences of amici States and other jurisdictions show that policies and practices that ensure equal access to public facilities for transgender people—including access to common restrooms consistent with their gender identity—promote safe and inclusive school environments that benefit all.

employment, public accommodations, housing). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *id.* § 49.60.030(1)(a)-(e) (employment, public accommodations, real estate transactions, credit transactions, and insurance transactions); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

⁴ Human Rts. Campaign, *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity* (internet) (current as of January 28, 2021).

⁵ The U.S. Supreme Court has confirmed that longstanding federal law similarly prohibits employment discrimination based on gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender counterparts.⁶ In the 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked.⁷ More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and approximately one in eight (13%) reported being sexually assaulted.⁸ Another 2015 survey showed that three-fourths of transgender students felt unsafe at school because of their gender expression.⁹ More than a quarter of transgender respondents to a survey of LGBTQ teenagers in December 2016 and January

⁶ Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xxvii, 93 (GLSEN 2020) (internet); see also Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (GLSEN 2009) (internet).

⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131-35 (Nat'l Ctr. for Transgender Equal. 2016) (internet).

⁸ *Id.* at 132-33.

⁹ Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 84-85 (GLSEN 2016) (internet).

2017 reported being bullied or harassed within the past thirty days.¹⁰ As a consequence of this violence and harassment, transgender students surveyed in 2019 reported feeling less connected to their schools, and had less of a sense of belonging, than other students.¹¹

Discrimination against transgender youth—including denial of access to appropriate restroom facilities—can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹² Respondents to the 2015 USTS who reported negative experiences in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.¹³ Transgender people attempt suicide at a rate nearly nine times that of the general population.¹⁴ And a 2016 study found that transgender people who had been denied access to bathroom facilities were approximately 40% more likely to have

¹⁰ Human Rts. Campaign Found., *Human Rights Campaign Post-Election Survey of Youth 8* (2017) (internet).

¹¹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 95.

¹² *Id.* at 52, 54.

¹³ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁴ *Id.* at 114.

attempted suicide than were other transgender people.¹⁵ Similarly, a 2021 study found that denial of access to bathroom facilities significantly increased the odds of transgender and/or nonbinary youth reporting depressive mood and attempting suicide—one in three youths who faced bathroom discrimination reported a suicide attempt in the past year.¹⁶

Suicide is not the only health risk faced by transgender youth. For example, the district court found that A.C. “sometimes tries to go the entire day without using the restroom at all,” despite the physical discomfort it causes and serious health consequences that could result. *See A.C. ex rel. M.C. v. Metropolitan Sch. Dist.*, No. 21-cv-2965, 2022 WL 1289352, at *2 (S.D. Ind. Apr. 29, 2022). Research shows that A.C.’s experience is not unique. More than four in five (82.1%) of the transgender students surveyed in one study had avoided school restrooms because they felt unsafe or uncomfortable.¹⁷ And 54% of respondents in another study of transgender people reported negative health

¹⁵ Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. of Homosexuality 1378, 1388 tbl. 2 (2016) (internet).

¹⁶ Myeshia Price-Feeney et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. of Adolescent Health 1142 (2021) (internet).

¹⁷ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 97 fig. 3.8.

effects from avoiding public restrooms, such as kidney infections and other kidney-related problems.¹⁸

Discrimination in school settings also negatively affects educational outcomes. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.¹⁹ Discriminatory school climates have also been found to exacerbate absenteeism. As the district court found here, the District's policy barring A.C. from using the boys' restroom caused him to be late for class, disrupted his ability to focus in school, worsened his anxiety and depression, made him feel isolated, and made "being at school painful." *See A.C.*, 2022 WL 1289352, at *2, *7 (quotation marks omitted). And a 2019 survey of LGBTQ students found that those who had experienced discrimination in their schools

¹⁸ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 75 (2013) (internet); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 600, 603, 617 (4th Cir.) (transgender boy suffered painful urinary tract infection after being denied access to boys' restrooms at school), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Adams ex rel. Kasper v. School Bd.*, 318 F. Supp. 3d 1293, 1307 & n.28 (M.D. Fla. 2018), *aff'd*, 3 F.4th 1299 (11th Cir.), *and reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

¹⁹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; *see also* Greytak et al., *Harsh Realities*, *supra*, at 25, 27 fig. 15 (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

based on their sexual orientation or gender identity were almost three times as likely to have missed school in the month before the survey because they felt unsafe or uncomfortable (44.1% vs. 16.4%).²⁰

Such discrimination inhibits transgender students' ability to learn, to the detriment of the broader community because education advances more than the private interests of students: it prepares young people to contribute to society socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

B. The Amici States' Experiences Confirm That Protecting Transgender People from Discrimination Yields Broad Benefits Without Compromising Privacy or Safety, or Imposing Significant Costs.

As noted above, at least twenty-two States and 225 localities expressly provide civil rights protections to transgender people, and those protections often include requirements that transgender people be allowed to use restrooms consistent with their gender identity. Contrary to the claims of the District (*see* Br. at 10-18) and its amici (*see* Ind. Br. at 3-6), these protections wholly comply with laws, such as Title IX, that allow segregating restrooms by sex, *see* 20 U.S.C. § 1686. These policies maintain sex-segregated spaces while allowing transgender people to use a facility that aligns with their gender identity—

²⁰ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 49.

thus helping to ease the stigma transgender people often experience, with positive effects for their educational and health outcomes. Such policies promote compelling interests in “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984). And those policies do so without threatening individual safety or privacy, or imposing significant costs.

1. Nondiscriminatory restroom policies produce important benefits and pose no safety concerns.

Supportive educational environments increase success rates for transgender students. Data from one national survey show that more-frequently harassed transgender teenagers had significantly lower grade-point averages than other transgender students.²¹

Policies supporting transgender students, including by allowing them to use common restrooms consistent with their gender identity, also can reduce the health risks facing those students. For example, California adopted protections against gender-identity discrimination in schools to address harms suffered

²¹ Greytak et al., *Harsh Realities*, *supra*, at 27 fig. 15.

by transgender students, including students not drinking and eating during the school day to avoid restroom use.²²

In States allowing transgender students to use bathrooms corresponding to their gender identity, public schools have reported no instances of transgender students harassing others in restrooms or locker rooms.²³ Indeed, the experiences of school administrators in thirty-one States and the District of Columbia show that public safety concerns are unfounded, as are concerns that students will pose as transgender simply to gain improper restroom access.²⁴ The District's speculation (Br. at 2-3, 16) that student safety will suffer if transgender people are treated fairly is thus contrary to the actual experiences of States and localities where nondiscrimination has long been the law.²⁵

²² See Assemb. B. 1266, 2013-2014 Sess. (Cal. 2013) (internet); Assemb. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 5-6, 7 (internet); see also Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Texas Trib. (June 14, 2016) (internet).

²³ Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan (Sept. 1, 2016) (internet).

²⁴ Br. of Amici Curiae Sch. Adm'rs from Thirty-One States & D.C. in Supp. of Resp't ("School Adm'rs Br.") at 14-16, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

²⁵ Indeed, a survey of the largest school districts in twelve States with gender identity protections found that, years after implementing protections, "none of the schools have experienced any problems." Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, Media Matters for Am. (June 3, 2015) (internet) (largest school districts in 12 States with gender-identity protection laws); see Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for Am. (Mar. 19, 2014) (internet) (law
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For instance, a former county sheriff noted that Washington State has protected transgender people from discrimination for a decade “with no increase in public safety incidents as a result”; he emphasized “that indecent exposure, voyeurism, and sexual assault[] are already illegal, and police use those laws to keep people safe.”²⁶ In 2013, the Los Angeles Unified School District—the second largest school district in the country, with more than 600,000 K-12 students²⁷—reported to the California Legislature that the district had “no issues, problems or lawsuits as a result of [a 2004] policy” allowing students to use restrooms corresponding to their gender identity.²⁸ And the Massachusetts Chiefs of Police Association and Massachusetts Majority City Chiefs expressed that allowing people to use public bathrooms consistent with their gender

enforcement officials, government employees, and advocates for sexual assault victims); Luke Brinker, *California School Officials Debunk Right-Wing Lies About Transgender Student Law*, Media Matters for Am. (Feb. 11, 2014) (internet) (six of California’s largest school districts, including two that have had antidiscrimination policies for more than a decade); see also Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *Sexuality Rsch. & Soc. Pol’y* 70 (2019) (internet) (comparing criminal incident reports in localities with and without gender identity inclusive public accommodations nondiscrimination laws in Massachusetts).

²⁶ David Crary, *Debate Over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib. (May 10, 2016) (quotation marks omitted) (internet).

²⁷ Los Angeles Unified Sch. Dist., *District Information, About the Los Angeles Unified School District* (internet).

²⁸ S. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 8 (internet).

identity “improve[s] public safety.”²⁹ Meanwhile, in Texas, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those cities’ policies allowing transgender people to use restrooms consistent with their gender identity.³⁰

2. Nondiscriminatory restroom policies neither compromise personal privacy nor require significant expenditures.

Contrary to the claims of the District (*see, e.g.*, Br. at 10-18) and its amici (*see* Ind. Br. at 12-13), the amici States’ experiences show that nondiscriminatory policies have neither generated privacy issues nor imposed substantial costs on schools. The risk that students will see others’ intimate body parts, or have their intimate body parts seen by others, is not presented by ordinary restroom use. And in any event, concerns about the presence of others (whether or not transgender) can be addressed—and are being addressed—by increasing privacy options for all students, without singling out transgender people for stigmatizing differential treatment.

²⁹ Letter from William G. Brooks III, Mass. Chiefs of Police Ass’n, & Bryan A. Kyes, Mass. Majority City Chiefs, to Sen. William N. Brownsberger & Rep. John V. Fernandes, Joint Comm. on the Judiciary (Oct. 1, 2015) (internet).

³⁰ Carlos Maza & Rachel Percelay, *Texas Experts Debunk the Transgender “Bathroom Predator” Myth Ahead of HERO Referendum*, Media Matters for Am. (Oct. 15, 2015) (internet); *see also, e.g.*, Fox News, *Manafort on Trump’s Fight to Rally GOP, Defeat Democrats; Gov. McCrory on Showdown Over NC’s Transgender Bathroom Law* (Jan. 23, 2017) (internet) (no known cases of people in North Carolina committing crimes in bathrooms under the cover of protections provided to transgender people).

School districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. In Washington State, where school districts are required to “allow students to use the restroom that is consistent with their gender identity consistently asserted at school,” schools must provide “[a]ny student—transgender or not—who has a need or desire for increased privacy, regardless of the underlying reason,” with “access to an alternative restroom (e.g., staff restroom, health office restroom).”³¹ This gives all students with privacy concerns “the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”³²

Similar provisions apply to locker rooms. Students in Washington are allowed to participate in physical education and athletic activities “in a manner that is consistent with their gender identity.”³³ But rather than segregating transgender students, additional privacy is provided for any student who desires

³¹ Susanne Beauchaine et al., *Prohibiting Discrimination in Washington Public Schools* 30 (Wash. Off. of Superintendent of Pub. Instruction 2012) (internet); see also Washington State Hum. Rts. Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-Segregated Facilities* 3 (2016) (internet) (businesses need not “make any [structural] changes” or “add additional facilities,” but “are encouraged to provide private areas for changing or showering whenever feasible” and “may wish to explore installing partitions or curtains for persons desiring privacy”); Wash. Rev. Code Ann. § 28A.642.080 (requiring implementation by January 31, 2020).

³² Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30.

³³ *Id.*; Washington Interscholastic Activities Ass’n, *2021-2022 Handbook* 36 (2021) (internet).

it, regardless of the underlying reason, by providing “a reasonable alternative changing area, such as the use of a private area (e.g., a nearby restroom stall with a door), or a separate changing schedule.”³⁴

At least twelve other States and the District of Columbia offer similar guidance to help schools maximize privacy while complying with laws prohibiting gender-identity discrimination—for instance, by offering privacy curtains and separate restroom and changing spaces to all who desire them.³⁵ None of

³⁴ Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30-31; see also Providence Pub. Sch. Dist., *Nondiscrimination Policy: Transgender and Gender Expansive Students* p. 4 (internet) (student uncomfortable with gender-segregated facility may use “a safe and non-stigmatizing alternative,” such as a privacy partition or separate changing schedule).

³⁵ **California:** California Sch. Bds. Ass’n, *Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities 2* (2014) (internet). **Colorado:** Colorado Ass’n of Sch. Bds. et al., *Guidance for Educators Working with Transgender and Gender Nonconforming Students* 4-5 (internet). **Connecticut:** Connecticut Safe Sch. Coal., *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws* 9-10 (2012) (internet). **Illinois:** Illinois Dep’t of Hum. Rts., *Non-Regulatory Guidance: Relating to Protection of Transgender, Nonbinary, and Gender Nonconforming Students Under the Illinois Human Rights Act* 6-7 (2021) (internet); Illinois State Bd. of Educ., *Non-Regulatory Guidance: Supporting Transgender, Nonbinary and Gender Nonconforming Students* 10-11 (2020) (internet); Affirming & Inclusive Schs. Task Force, *Strengthening Inclusion in Illinois Schools* 19-21 (2020) (internet). **Maryland:** Maryland State Dep’t of Educ., *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* 13-14 (2015) (internet). **Massachusetts:** Massachusetts Dep’t of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment* (Oct. 28, 2021) (internet). **Minnesota:** Minnesota Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* 10 (2017) (internet). **New Jersey:** New Jersey State Dep’t of Educ., *Transgender Student Guidance for School Districts* 7 (2018) (internet). **New York:** New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School* (continued on the next page)

these solutions requires remodeling or restructuring restrooms, or otherwise investing in costly facility upgrades. As a spokeswoman for Texas's Clear Creek Independent School District confirmed, that district, like many others, "ha[s] been successful in balancing the rights of all students without issue and offer[s] restrooms, showers and changing areas for students seeking privacy, regardless of their gender or gender identity."³⁶ The experiences of school administrators in dozens of States across the country confirm that such policies can be implemented fairly, simply, and effectively.³⁷

Inclusive policies such as these maintain gender-segregated spaces. For example, the District of Columbia expressly requires that businesses "provide access to and the safe use of facilities that are segregated by gender" where

Environment for Transgender and Gender Nonconforming Students 9-10 (2015) (internet). **Michigan:** Michigan Dep't of Educ., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* 5-6 (2016) (internet). **Oregon:** Oregon Dep't of Educ., *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* 10-11 (2016) (internet). **Rhode Island:** Rhode Island Dep't of Educ., *Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students* 8-9 (2016) (internet). **Vermont:** Vermont Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* 6, 8 (2017) (internet). **District of Columbia:** District of Columbia Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance* 9 (2015) (internet).

³⁶ Ura, *For Transgender Boy*, *supra* (quotation marks omitted).

³⁷ See School Adm'rs Br. at 17-21, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

nudity in the presence of others is customary, while also making accommodations for transgender individuals to use the facility “that is consistent with that individual’s gender identity or expression.”³⁸ And New York’s guidance for school districts explains how schools have accommodated transgender youth and “foster[ed] an inclusive and supportive learning environment,” while maintaining sex-segregated spaces.³⁹ Contrary to the arguments advanced by the States supporting the District (Ind. Br. at 3-6), inclusive policies are thus entirely consistent with the provisions of Title IX permitting schools to maintain sex-segregated facilities.⁴⁰

In fact, it is discriminatory restroom policies rather than inclusive ones that raise privacy concerns, notwithstanding the concern expressed by the social worker at A.C.’s school to the contrary. *See* Br. at 5. Such policies are more likely to create a needless risk of violence against transgender people, whose physical appearance may diverge from their sex assigned at birth and who therefore are likely to be perceived as using the “wrong” restroom.⁴¹ In short,

³⁸ D.C. Mun. Regs. tit. 4, § 805.

³⁹ New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*, *supra*, at 10.

⁴⁰ *See* 20 U.S.C. § 1686; 34 C.F.R. § 106.33 (2022).

⁴¹ *See* James et al., *2015 U.S. Transgender Survey*, *supra*, at 225-27; *see also* Matt Pearce, *What It’s Like to Live Under North Carolina’s Bathroom Law If You’re Transgender*, L.A. Times (June 12, 2016) (internet).

policies like the one at issue here, which bar transgender individuals from using a restroom that aligns with their gender identity, are more likely to pose safety and privacy concerns than inclusive policies.

II. TITLE IX AND THE EQUAL PROTECTION CLAUSE PROHIBIT THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

The District and its amici mischaracterize the central issue in this case as whether sex-segregated bathrooms violate the Equal Protection Clause or Title IX. A.C. has never disputed a school's authority to separate bathrooms by sex. Rather, the key question in this case is instead whether "the alleged facts, if true, raise a plausible [inference] that [the District] discriminated against [A.C.] on the basis of sex?" *A.C.*, 2022 WL 1289352, at *3 (quotation marks omitted). Relying on this Court's precedent in *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the district court correctly answered that question in the affirmative. *See* 858 F.3d 1034 (7th Cir. 2017). As the court properly determined, "discrimination against a person on the basis of their transgender status constitutes discrimination based on sex," and A.C. was likely to succeed on his claims that he had been discriminated against based on his sex. *A.C.*, 2022 WL 1289352, at *3, *6.

The district court correctly applied *Whitaker* as the controlling precedent. There is no meaningful difference between the facts in *Whitaker* and those presented here. The plaintiffs in both cases are transgender male students who

were designated female at birth. Both plaintiffs were diagnosed with gender dysphoria and were under medical care to suppress developing female secondary sex characteristics. Both plaintiffs consistently presented as boys for four years prior to suing their respective schools for denying them access to the boys' restrooms. And both plaintiffs experienced similar harms from that denial, such as missing class time and experiencing anxiety, depression, and stigmatization. Indeed, for a time, both boys defied school orders and used the boys' restrooms with no complaints from students. *Compare Whitaker*, 858 F.3d at 1040-42, 1052, *with A.C.*, 2022 WL 1289352, at *1-2.

The similarities between *Whitaker* and the current case also extend to the defendant school districts' positions. For example, in neither case did the defendant school district present any evidence that the presence of a transgender boy in the boys' bathroom threatened, much less violated, the privacy rights of other students. *Whitaker*, 858 F.3d at 1052; *A.C.*, 2022 WL 1289352, at *7. Given such similar facts between the two cases, the district court properly applied *Whitaker* in holding that A.C., like the plaintiff in *Whitaker*, had demonstrated a likelihood of success on the merits of his claim that the District discriminated against him on the basis of sex in violation of Title IX and the Equal Protection Clause. *A.C.*, 2022 WL 1289352, at *6; *see Whitaker*, 858 F.3d at 1050, 1054. The District plainly and unlawfully discriminates based on sex because it does not and cannot explain its reasons for excluding A.C. from using

the bathrooms that align with his gender identity without referencing A.C.'s "biological sex" or conformity with it. *See Whitaker*, 858 F.3d at 1049, 1051; Br. at 8.

Consistent with *Whitaker*, other courts, including the Supreme Court in *Bostock v. Clayton County*, have found that gender identity discrimination is necessarily sex discrimination.⁴² *See* 140 S. Ct. at 1741-42, 1745-47; *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing cases). As the Supreme Court explained, discriminating against a person for being transgender is sex discrimination because "[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. For example, a person who is discriminated against for identifying as female simply because she was identified as male at birth is necessarily being discriminated against based on sex—i.e., she would not be treated differently than other females if not for the fact that her designated sex at birth was male. *Id.* In reaching its conclusion, the Supreme Court acknowledged that "transgender status" is a distinct concept from "sex," but observed that sexual harassment and discrimination based on

⁴² When determining whether conduct constitutes discrimination based on sex under Title IX, courts routinely look to and apply case law interpreting Title VII. *See, e.g., Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636, 651 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

motherhood are also distinct concepts that, unquestionably, still qualify as sex discrimination. *Id.* at 1742, 1746-47.

Applying much the same reasoning as in *Bostock*, courts have correctly recognized that Title IX's bar against sex discrimination prohibits policies that, like the District's policy here, bar transgender students from using the bathroom that aligns with their gender identity. As these courts have correctly explained, the discriminator is necessarily referring to an individual's sex assigned at birth to deny access to a bathroom that aligns with their gender identity. *See Grimm*, 972 F.3d at 616-19; *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir.) (transgender students' use of sex-segregated spaces that align with their gender identity does not violate Title IX rights of cisgender students), *cert. denied*, 141 S. Ct. 894 (2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).⁴³ Thus, a policy that denies a transgender boy, for example, access to the boys' bathroom violates Title IX's prohibition against sex discrimination because it treats the transgender boy differently than other students who

⁴³ *See also N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 563-64 (Minn. Ct. App. 2020) (considering Title IX precedents to interpret Minnesota anti-discrimination statute).

identify as boys, simply because of the sex they were assigned at birth. The district court did not err in reaching the same conclusion here.

The District's policy needlessly denies A.C. something most people take for granted: the ability to use a public restroom consistent with one's lived experience of one's own gender. The policy singles out transgender students like A.C. and forces them either to forgo restroom use or to choose between two other detrimental options: using common restrooms corresponding to their sex assigned at birth or using special single-user restrooms (i.e., those with no specific gender designation). The first option contravenes a core aspect of transgender people's identities, subjects them to potential harassment and violence, and violates medical treatment protocols. The second option stigmatizes the person—like “outing” individuals as transgender in settings where they could be exposed to danger or prefer to keep that information private—assuming that single-user restrooms are even available and equally convenient.⁴⁴ *See A.C.*, 2022 WL 1289352, at *7.

⁴⁴ The same concerns are not posed by the privacy-enhancing measures described above (see *supra* at 15-17), which are available to all students who desire additional privacy. Such measures do not single out or stigmatize transgender students, and thus do not force students into the untenable choice presented by the kind of policy at issue here.

Contrary to the arguments of the District (*see, e.g.*, Br. at 10-14) and its amici (*see, e.g.*, Ind. Br. at 3-6), there is no regulatory basis for such stigmatizing discrimination. In permitting “separate toilet, locker room, and shower facilities on the basis of sex,” 34 C.F.R. § 106.33, Title IX’s implementing regulation does not require segregation of the enumerated facilities exclusively on the basis of “biological sex” (*see, e.g.*, Br. at 21-22, 24). Neither Title IX nor its implementing regulations define “sex” in terms of biological sex. In fact, as courts have uniformly recognized, “sex” incorporates gender identity (*see supra* at 21-22), and Title IX’s statutory language broadly prohibits discrimination on the basis of sex—including gender identity, 20 U.S.C. § 1681(a). The District’s interpretation of 34 C.F.R. § 106.33 is accordingly unreasonable and must fail. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) (“[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated.”); *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 134 (1936) (a regulation that “operates to create a rule out of harmony with the statute” is “a mere nullity”). Title IX and its implementing regulations require the District to forgo discrimination against students based on transgender status, regardless of whether they are in a classroom, bathroom, or other location at school. As the amici States’ successful experiences demonstrate (*see supra* at 10, 17-18), schools may continue to have sex-segregated restrooms while allowing transgender students to use the bathroom that matches their gender identity.

And under those circumstances, female students still use the girls' restrooms and male students still use the boys' restrooms.

For similar reasons, the District's bathroom policy contravenes the Equal Protection Clause. The Supreme Court has long made clear that equal protection prohibits government policies that serve only to express "negative attitudes" "or fear" toward people viewed as "different." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 68 (2001) (the Equal Protection Clause bars a decision built on stereotypes and a "frame of mind resulting from irrational or uncritical analysis"). The policy at issue here falls squarely into this category.

As the district court noted,

[w]hile A.C. has provided evidence of the harm he will likely suffer, the School District's alleged potential harm is unsupported. No student has complained concerning their privacy. The School District's concerns with the privacy of other students appears entirely conjectural. No evidence was provided to support the School District's concerns, and other courts dealing with similar defenses have also dismissed them as unfounded.

A.C., 2022 WL 1289352, at *7 (citing *Whitaker*, 858 F.3d at 1052; *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1041 (S.D. Ind. 2018)).

And while the district court acknowledged "that the public interest favors

furthering individual privacy interests, the Court does not believe that granting A.C. access to the boys' restrooms threatens those interests." *Id.* at *8. See *supra* at 10-19.

In contrast, the full evidentiary record shows that the harm the policy causes to A.C. is real. The District's policy stigmatizes A.C., "worsens the anxiety and depression" that he already feels because of his gender dysphoria, and "makes being at school painful" and isolating. *A.C.*, 2022 WL 1289352, at *7 (quotation marks omitted). A.C.'s mother worries about the emotional harm to A.C. and "the possible medical risks associated with him trying not to use the restroom during school." *Id.* "Like other courts recognizing the potential harm to transgender students," the district court found "no reason to question the credibility of A.C.'s account and that the negative emotional consequences with being refused access to the boys' restrooms constitute irreparable harm that would be difficult—if not impossible—to reverse." *Id.* (quotation marks omitted). Under well-established constitutional analysis, such discrimination cannot withstand any level of equal protection scrutiny.

CONCLUSION

This Court should affirm the decision below.

Dated: New York, New York
August 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,442 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

*/s/ Kelly Cheung*_____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's CM-ECF system on August 2, 2022.

Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

Dated: New York, New York
August 2, 2022

/s/ Mark S. Grube