

No. 18-13592-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DREW ADAMS,

Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
Case No. 3:17-cv-00739-TJC-JBT

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

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STATEMENT OF THE ISSUES

Whether the St. Johns County School Board's policy is subject to heightened scrutiny on the basis of transgender status independently of whether it also triggers heightened scrutiny on the basis of sex.

INTEREST OF *AMICI CURIAE*¹

Amici curiae are 15 scholars of demographics, economics, law, psychology, political science, public health, public policy, and other disciplines. Many *amici* are affiliated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. *Amici* have conducted extensive research and authored numerous studies regarding the transgender population in the United States, and/or have deep experience with law and policy affecting transgender people. The appended list of scholars identifies each of the *amici*.

Many *amici* have testified as expert witnesses in federal district courts, and have submitted *amicus curiae* briefs on related issues in the

¹*Amici* certify that no counsel for either party authored this brief in whole or in part, and that no party or other person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. Fed. R. App. P. 29(c)(5). All parties consent to the filing of this brief. Fed. R. App. P. 29(a).

various courts of appeals and the U.S. Supreme Court. In *Obergefell v. Hodges*, the Supreme Court expressly relied on Williams Institute research, 135 S. Ct. 2584, 2600 (2015) (citing Brief of Gary J. Gates as *Amicus Curiae*). So have other federal courts. *See, e.g., Baskin v. Bogan*, 766 F.3d 648, 663, 668 (7th Cir. 2014).

As scholars who specialize in issues related to transgender people, *amici* have a substantial interest in this matter and are uniquely suited to offer their expertise to this Court. *Amici* present recent statistical, demographic, and historical evidence, along with scholarly research, to establish that transgender status should be considered a suspect classification for purposes of Fourteenth Amendment equal-protection analysis. *Amici* believe that their expertise and the research presented herein will aid the Court in evaluating whether the School Board's policy of denying transgender students the ability to use the bathroom that accords with their gender identity deprives the students of equal protection.

BACKGROUND

The term "transgender" generally "describes individuals whose current gender identity is not fully congruent with their assigned sex at

birth.”² “Gender identity refers to a person’s internal sense of belonging to a gender” and their “potential affiliation with a gender community[.]”³ According to several *amici*’s analyses of data collected by the Centers for Disease Control and Prevention (“CDC”), 0.6% of the U.S. adult population (approximately 1.4 million adults) identifies as transgender;⁴ younger adults appear more likely to identify as transgender than older people,⁵ which may be related to decreased stigma within that younger population. Between 0.7% and 2% of teens identify as transgender.⁶

²Gender Identity in U.S. Surveillance Group, The Williams Institute, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys*, at ix (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf>.

³*Id.*; Doc. 192 at 7; Doc. 119-1 at 6.

⁴Flores et al., The Williams Institute, *How Many Adults Identify as Transgender in the United States?* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

⁵Herman et al., The Williams Institute, *Age of Individuals Who Identify as Transgender in the United States* 4 (2017) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>.

⁶*Id.*; Johns et al., Centers for Disease Control and Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Abuse, Suicide Risk, and Sexual Risk Behaviors Among High School Students*, *Morbidity & Mortality Weekly Report* 68 (Jan. 25, 2019) [“*Transgender Identity*”].

The past decade has seen a marked increase in the visibility of transgender people in the media and in society in general.⁷ Although only a small subset of the U.S. population, the transgender population reflects society at large in many respects. For example, transgender people are residents of every state, racially and ethnically diverse, and citizens and immigrants; many are parents, and many are religious.⁸

Yet, research shows that “[t]ransgender people face systematic oppression and devaluation as a result of social stigma attached to their gender nonconformity.”⁹ With respect to the educational context in particular (and as discussed more fully below, *see pp. 17-21, infra*), discrimination and harassment of transgender students in schools are

⁷*See, e.g.*, James et al., Nat’l Ctr. for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 18-19 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [“USTS”].

⁸*See id.* at 53-59; Flores et al., The Williams Institute, *Race and Ethnicity of Adults Who Identify as Transgender in the U.S.* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf>; Stotzer et al., The Williams Institute, *Transgender Parenting: A Review of Existing Research* (2014), <http://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014>.

⁹Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 *Am. J. Pub. Health* 943, 943 (2013) [“*Stigma*”].

pervasive. In grades K-12, transgender students experience high rates of verbal and physical harassment.¹⁰ Victimization of middle and high school students based on their gender expression correlates with higher rates of depression, lower grade point average, and a lower likelihood that a student will pursue higher education.¹¹ Seventeen percent of transgender respondents to one national study left school as a result of discrimination and harassment.¹²

As discussed in detail below, a body of research provides extensive data on the pervasiveness of discrimination and its effects on transgender people's economic condition, education, health, and welfare—all of which

¹⁰See, e.g., *Transgender Identity* at 67, 69; USTS at 132-34; Reisner et al., *Gender Minority Social Stress in Adolescence: Disparities in Adolescent Bullying and Substance Use by Gender Identity*, 52 *J. Sex Research* 243 (2015); Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf ["NTDS"]

¹¹Kosciw et al., *The 2017 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools* 50-51 (2018), <https://www.glsen.org/sites/default/files/GLSEN%202017%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf> ["NSCS"].

¹²USTS at 135.

support the Court’s application of heightened scrutiny to government classifications on the basis of transgender status.

SUMMARY OF ARGUMENT

The Constitution guarantees all people equal protection of the laws. Government actions that divide people along “suspect” (or “quasi-suspect”) lines, or that target certain groups, deserve heightened judicial scrutiny. The Supreme Court has considered two main factors that trigger heightened scrutiny: whether the targeted group (1) has experienced a history of discrimination and (2) faces discrimination based on stereotyped characteristics not truly indicative of the abilities of the group’s members to contribute to society. The Court has also occasionally considered whether the group (3) lacks the capacity adequately to protect itself within the political process and (4) shares definite characteristics that distinguish it as a discrete minority group.

Amici agree with Appellee that the School Board’s policy of preventing transgender students from using the bathroom of the gender with which those students identify discriminates on the basis of sex *and* on the basis of transgender status. This brief addresses the second basis (transgender status). Each of the factors the Supreme Court considers

demonstrates that laws and government policies that classify students on the basis of transgender status trigger heightened scrutiny, independent of whether they are also classifications based on sex.

First, overwhelming evidence shows that transgender people have long been the victims of public and private discrimination. For decades, federal, state, and local government policies have discriminated against transgender people. Transgender people also have been mistreated by the justice system—as civil litigants and criminal defendants, as prisoners, and as victims of crimes that transgender people suffer at disproportionately high rates. Studies show that discrimination also permeates many other aspects of transgender peoples’ lives, including at school and work and in health care, housing, and public accommodations. In turn, transgender people suffer high rates of poverty, unemployment, criminal victimization, and a range of physical and mental health conditions.

Second, courts and scholars agree that being transgender bears no relation to a person’s ability to contribute to society.

Third, the transgender population—a small minority group in our society—lacks political power to protect itself within the political process.

Transgender people face discriminatory laws and a majority of states refuse to extend anti-discrimination protections to transgender people—all of which is exacerbated by the small number of openly transgender individuals holding elected office.

Fourth, between 1.5 and 2 million adults and youth in the United States identify as transgender, and they share definite characteristics that distinguish them as an identifiable, discrete minority group.

Because all four considerations support the same conclusion, this Court should hold that laws like the School Board’s policy trigger heightened scrutiny on the basis of transgender status independently of whether they also trigger heightened scrutiny on the basis of sex.

ARGUMENT

GOVERNMENT POLICIES THAT CLASSIFY ON THE BASIS OF TRANSGENDER STATUS TRIGGER HEIGHTENED JUDICIAL SCRUTINY INDEPENDENT OF WHETHER THEY ALSO CLASSIFY ON THE BASIS OF SEX.

The constitutional guarantee of equal protection “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202,

216 (1982)). The Constitution forbids classifications that are “arbitrary or irrational” as well as those that reflect “a bare *** desire to harm a politically unpopular group.” *Id.* at 446-47 (citation omitted). Courts presume the validity of most government classifications, which are generally upheld if “rationally related to a legitimate state interest”; however, that “general rule gives way *** when a statute classifies” groups that have historically been subject to discrimination or “impinge[s] on personal rights protected by the Constitution.” *Id.* at 440. Thus, laws that discriminate based on a “suspect” classification (such as race) or a “quasi-suspect” classification (such as sex) receive heightened judicial scrutiny. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

Following Supreme Court precedent holding that “sex-based discrimination is subject to intermediate scrutiny,” this Court has held that heightened scrutiny applies to “discriminati[on] against [a transgender person] on the basis of his or her gender non-conformity.” *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). The Seventh Circuit (along with numerous district courts) have reached the same

conclusion. *See, e.g., Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050-52 (7th Cir. 2017).¹³

Amici agree with *Glenn* that discrimination against transgender people is a form of sex discrimination. *See Glenn*, 663 F.3d at 1317. In addition, classifications that target transgender people trigger heightened scrutiny because, in the United States, transgender people have experienced a history of discrimination, *see City of Cleburne*, 473 U.S. at 440-41, and such discrimination is based on “stereotyped characteristics not truly indicative” of the group’s abilities, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*).

The Court’s two other, non-dispositive considerations are also satisfied. Transgender people have “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), and they lack the capacity

¹³The School Board attempts to distinguish *Glenn*, arguing that “there is no evidence that Adams was treated differently because of his failure to conform to gender norms.” Initial Brief of Appellants at 31. *Glenn* forecloses that argument: “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” *Glenn*, 663 F.3d at 1316.

adequately to protect themselves within the political process, *Bowen*, 483 U.S. at 602. *Cf. Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (applying heightened scrutiny to sexual orientation discrimination and recognizing that “[i]mmutability and lack of political power are not strictly necessary factors to identify a suspect class.”), *aff’d*, 133 S. Ct. 2675 (2013). No single factor is dispositive, *Murgia*, 427 U.S. at 321, and the presence of any one of these factors is a signal that the classification is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,” *Plyler*, 457 U.S. at 216 n.14.

A. Transgender People Have Experienced A Long History Of Discrimination That Adversely Impacts Their Health And Well-being.

In light of their expertise, *amici* believe courts have correctly concluded that transgender people have long faced, and continue to face, widespread discrimination, harassment, and violence. “[T]here is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare.” *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.* (“*Highland*”), 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); *Adkins*

v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (that “transgender people have suffered a history of persecution and discrimination *** is not much in debate”) (internal quotation marks omitted); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (“transgender people have been the subject of a long history of discrimination that continues to this day”); *see also Whitaker*, 858 F.3d at 1051 (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”). That discrimination is well-documented in academic research, and it has been linked to serious deleterious consequences for the health and well-being of transgender people.

1. *Discrimination by federal and state governments.*

Federal law. Both historically and recently, federal laws and policies have targeted transgender people for unfavorable treatment. In 1988, Congress excluded “transvestites” from the Fair Housing Act.¹⁴ Both the Americans with Disabilities Act and the Rehabilitation Act expressly exempt “transvestism,” “transsexualism,” and “gender identity

¹⁴Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause* (“Bare Desire”), 57 B.C.L. Rev. 507, 527-29 (2016), <http://lawdigitalcommons.bc.edu/bclr/vol57/iss2/4> [*Bare Desire*].

disorders not resulting from physical impairments” from the conditions protected by the laws.¹⁵ In a more recent example, in 2017, President Trump announced a blanket ban on transgender people serving the military,¹⁶ and had to refine that ban after courts preliminarily enjoined it.¹⁷

State law. State and local laws have long sought to punish transgender people. Beginning in the nineteenth century, many cities enacted laws criminalizing cross-dressing,¹⁸ leading to arrests and prosecutions. *People v. Archibald*, 296 N.Y.S.2d 834, 836 (App. Div. 1968)

¹⁵42 U.S.C. § 12211(b); 29 U.S.C. § 705(20)(F); *see also* Pub. L. No. 102-569, 106 Stat. 4344 (1992); *Bare Desire* at 529-40.

¹⁶*See, e.g.*, Diamond, *Trump to reinstate US military ban on transgender people*, CNN (July 26, 2017), <https://www.cnn.com/2017/07/26/politics/trump-military-transgender/index.html>.

¹⁷*See, e.g.*, Cooper et al., *Trump Approves New Limits on Transgender Troops in the Military*, The New York Times (March 24, 2018), <https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html>. The Supreme Court recently lifted injunctions against the ban and allowed it to take effect. Liptak, *Supreme Court Revives Transgender Ban for Military Service*, The New York Times (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html>.

¹⁸Ballard, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 Cardozo J.L. & Gender 775 (2012); *see also* Capers, *Cross Dressing and the Criminal*, 20 Yale J.L. & Human. 1, 8-9 (2008).

(affirming conviction of a transgender defendant under vagrancy law that forbids a person from “being *** disguised in a manner calculated to prevent his being identified”); *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (holding Houston ordinance unconstitutional as applied to transsexuals that criminalized “dress[ing] with the designed intent to disguise his or her true sex as that of the opposite sex”). Many of these anti-cross-dressing laws were held unconstitutional or repealed, *see, e.g., City of Columbus v. Rogers*, 324 N.E.2d 563, 565 (Ohio 1975),¹⁹ though others were not.²⁰ Regardless, the mere presence of these laws on the books had the effect of demeaning transgender people and sweeping them into the criminal justice system.

Even today, the majority of states do not expressly prohibit discrimination in employment (public and private), public accommodations, and other settings on the basis of gender identity.²¹

¹⁹Eskridge, *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 861-62 (1997).

²⁰*Id.* at 862 & n.197.

²¹As of January 2019, 20 states and D.C. prohibit gender identity discrimination in employment and housing, and 19 states and D.C. prohibit such discrimination in public accommodations. *See* Movement Advancement Project, Non-Discrimination Laws,

Only 17 states (plus D.C.) extend hate-crime protections to transgender victims.²²

A variety of state laws explicitly target transgender individuals for disfavored treatment. In 2016, North Carolina and Mississippi each adopted legislation targeting transgender people.²³ Even after North Carolina repealed that portion of its statute, it left in place another portion preventing localities from prohibiting gender identity discrimination within their jurisdictions.²⁴ Arkansas also enacted a law that prohibits local governments from passing anti-discrimination laws

http://www.lgbtmap.org/equality-maps/non_discrimination_laws (toggle between employment, housing, and public accommodations tabs).

²²Movement Advancement Project, Hate Crime Laws, http://www.lgbtmap.org/equality-maps/hate_crime_laws.

²³Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 2016-3 (H.B. 2) (“HB2,” forbidding transgender people from using single-sex facilities matching gender listed on birth certificate); Protecting Freedom of Conscience From Government Discrimination Act, 2016 Miss. Laws ch. 334c, § 2(c) (permitting discrimination on belief that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth”).

²⁴See, e.g., Kralik, “*Bathroom Bill*” *Legislative Tracing: 2017 State Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>; Hanna et al., *North Carolina repeals “bathroom bill,”* CNN (March 30, 2017), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>.

after Fayetteville enacted an ordinance to protect LGBT people from discrimination.²⁵ The Arkansas Supreme Court subsequently struck down the Fayetteville ordinance.²⁶

Beyond such facially discriminatory laws, many laws disparately impact transgender people. For example, voter-identification laws risk disenfranchising transgender individuals who face administrative obstacles in obtaining adequate identification that reflects their correct gender identity. In 2018, researchers estimated that the strictest of these laws (requiring government-issued photo identification) threatened to disenfranchise 78,300 transgender people in eight states.²⁷

2. *Discrimination in the judicial system and by law enforcement.*

Transgender people also have suffered discrimination in the judicial system. In one large survey of transgender people, 24% of

²⁵The Intrastate Commerce Improvement Act, Act 137 of 2015, codified at Ark. Code Ann. § 14-1-401 to -403 (Supp. 2015).

²⁶*Protect Fayetteville v. City of Fayetteville*, 2017 Ark. 49 (2017) (striking down Fayetteville ordinance protecting individuals' choice of sexual orientation and gender identity).

²⁷Herman & Brown, The Williams Institute, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2018 General Election* (2018), at 4, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Voter-ID-Laws-2018.pdf>.

respondents reported being denied equal treatment by a government agency or official, including 13% by a judge or court official.²⁸

In family law proceedings, transgender litigants have been mistreated and deprived of fundamental rights. Courts have refused to recognize transgender people's marriages, *see, e.g., Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); denied their inheritance from deceased spouses, *see, e.g., In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); and revoked parental rights, *see, e.g., Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986).

Other courts have used disrespectful and degrading language about transgender litigants. One federal court justified discrimination against a transgender woman by stating she “disguised himself as a person of a different sex” and “pretends to be a woman.” *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *28 (E.D. La. Sept. 16, 2002). Another court likened a transgender litigant to a man trying to change himself “into a donkey.” *Ashlie v. Chester-Upland*

²⁸NTDS at 133.

Sch. Dist., No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *14 (E.D. Pa. May 9, 1979).

Courts have at times humiliated transgender people who petitioned for legal name changes, which is supposed to be a routine administrative process. In one case, a judge likened transgender people to “gargoyles,” and then characterized a transgender person’s name-change petition as a request “to lend the dignity of the court and the sanctity of the law to [a] freakish rechristening” that would “pervert the judicial process.” *In re Petition of Richardson to Change Name*, 23 Pa. D. & C. 3d 199, 201 (1982); *see also In re Harvey*, No. CV-2011-1075, slip op. at 1, 5, 6 (Dist. Ct. Okla. Sept. 2, 2011) (rejecting name change as “fraudulent”). Other courts have questioned transgender litigants’ commitment to living as a particular gender, *In re Harris*, 707 A.2d 225, 228 (Pa. Super. Ct. 1997); permitted name changes only by transgender people who have had sex-reassignment surgery, *In re Anonymous*, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968); and expressed concern that changing one’s name to correspond with the person’s gender identity would constitute fraud, *In re Eck*, 584

A.2d 859, 860-61 (N.J. Super. Ct. App. Div. 1991). In 2018, an Ohio judge refused to grant name changes for three transgender teens.²⁹

Transgender prisoners have historically suffered discrimination as well. They have been incarcerated in facilities inconsistent with their gender identities, *see, e.g., Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002), and have been denied appropriate medical treatment (such as access to hormone therapy) or even gender-appropriate clothing and grooming items, *Long v. Nix*, 86 F.3d 761, 766 (8th Cir. 1996); *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1292 (N.D. Fla. 2018); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *1 (E.D. Mo. Feb. 9, 2018). Incarcerated transgender people also face high levels of sexual abuse in prison from prison staff and other inmates.³⁰

Transgender people also report high levels of harassment and abuse by law enforcement officers. In the U.S. Transgender Survey

²⁹*See, e.g., Paul, An Ohio judge blocked transgender teens' new names, so they set out to change the system*, The Washington Post (Aug. 14, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/08/14/an-ohio-judge-blocked-transgender-teens-new-names-so-they-set-out-to-change-the-system/?utm_term=.70a7c78cb01f.

³⁰Beck, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12—Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates (2014)*, http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

(“USTS”)—the largest survey of transgender adults to date—58% of respondents who interacted with law enforcement in the prior year reported negative treatment, 20% reported verbal harassment or disrespect, and 4% reported being physically attacked.³¹

3. *Discrimination in education*

Transgender students face pervasive discrimination in the educational context. “[G]ender-nonconforming youth reported that school was the location of their first experience of physical victimization more than any other context.”³² In one study of school counselors, social workers, and psychiatrists, nearly half (49%) believed that transgender students would feel unsafe in their schools,³³ and more than 70%

³¹USTS at 186.

³²Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 *Developmental Psychology* 1580, 1582 (2010) (examining adolescent gender nonconformity and depression) (citing D’Augelli et al., *Childhood gender atypicality, victimization, and PTSD among lesbian, gay, and bisexual youth*, *Journal of Interpersonal Violence*, 21 *Journal of Interpersonal Violence* 1462-82 (2006)).

³³GLSEN, et al., *Supporting safe and healthy schools for lesbian, gay, bisexual, transgender, and queer students: A national survey of school counselors, social workers, and psychologists* (2019), at 14, https://www.glsen.org/sites/default/files/Supporting%20Safe%20and%20Healthy%20Schools%20-%20A%20Report%20on%20Mental%20Health%20Professionals%20%26%20LGBTQ%20Youth_0.pdf.

perceived that students were bullied because of their gender expression.³⁴

These perceptions are borne out by studies of students. In a large recent CDC study of students in 10 states and 9 large urban school districts, 35% of transgender students reported being bullied, 27% felt unsafe at or traveling to school, 24% responded that they had been threatened or injured with a weapon at school, and another 24% reported that they had been forced to have sexual intercourse—all within the 12 months preceding the survey.³⁵

Similarly, the National School Climate Survey (“NSCS”) found, based on a large sample of LGBTQ youth and young adults, that 83% of transgender respondents experienced harassment or physical assault and reported feeling unsafe at school due to their gender expression.³⁶ Among all respondents, more than 87% reported hearing negative remarks specifically about transgender people (*e.g.*, “tranny” or “he/she”); 46% heard them often or frequently.³⁷ Over two-thirds of students (71%)

³⁴*Id.* at 16.

³⁵*Transgender Identity* at 69.

³⁶NSCS at 93-94.

³⁷*Id.* at 18, 20.

heard negative comments about a student's gender expression from school staff or teachers.³⁸

Other studies are consistent with these findings. For example, in the USTS, respondents who were open about their transgender status at school (or those perceived to be transgender by others at school) reported high rates of verbal harassment (54%), physical attack (24%), and sexual assault (13%) in grades K-12.³⁹ Seventeen percent of those respondents left school because of the mistreatment.⁴⁰

In the NSCS, students who experienced more severe harassment and discrimination based on their gender expression were less likely to plan college, vocational, or trade school attendance, compared with those who had experienced less severe victimization (10% vs. 5%), were three times more likely to have missed school in the previous month, and had lower grade point averages.⁴¹ Nearly 23% of transgender students actually changed schools because of safety concerns due to their gender

³⁸*Id.* at 19-20.

³⁹USTS at 132-34.

⁴⁰*Id.* at 135.

⁴¹NSCS at 46-47.

identity.⁴² Students subject to more severe victimization had significantly lower self-esteem and substantially higher rates of depression.⁴³ Harassment also affects students who attend post-secondary institutions. Twenty-four percent of respondents to the USTS reported verbal, physical, or sexual harassment at post-secondary institutions.⁴⁴ Harassment was so severe that nearly one in six respondents (16%) left school.⁴⁵

Indeed, for teenagers in particular—*i.e.*, the group affected by the School Board’s policy—long-term data has found gender nonconformity to be “a strong predictor of depressive symptoms beginning in adolescence,” and “[p]hysical and emotional bullying and abuse *** accounted for much of this increased risk.”⁴⁶ In the recent CDC study, during the preceding 12 months, 53% of transgender students reported

⁴²*Id.* at 97.

⁴³*Id.* at 50-51.

⁴⁴USTS at 136.

⁴⁵*Id.*

⁴⁶Roberts et al., *Childhood Gender Nonconformity, Bullying Victimization, and Depressive Symptoms Across Adolescence and Early Adulthood: An 11-Year Longitudinal Study*, 52 *J. Am. Acad. Child Adolesc. Psychiatry* 143 (2013) (examining long-term data regarding correlations between gender nonconformity and depressive symptoms).

feeling sad or hopeless, 44% had considered suicide, and 35% had attempted suicide.⁴⁷ Those numbers are consistent with a 2018 study finding that the attempted suicide rate rose to over 50% for female to male transgender adolescents aged 11-19.⁴⁸

4. *Discrimination in the workplace.*

Overwhelming evidence documents pervasive and persistent discrimination against transgender workers. In the USTS, 27% of respondents who held or applied for a job reported that their gender identity or expression had led to them not being hired, being denied a promotion, or being fired *during the previous year*.⁴⁹ Fifteen percent reported experiencing verbal harassment, physical attack, or sexual assault in the workplace in the past year, while 23% reported negative actions at work such as being told to present as the wrong gender to keep a job, being removed from direct contact with clients, or having private

⁴⁷*Transgender Identity* at 69.

⁴⁸Toomey et al., *Transgender Adolescent Suicide Behavior*, 142 *Pediatrics* 1 (2018) (examining suicide prevalence among different adolescent gender identity groups).

⁴⁹USTS at 150-51.

information shared.⁵⁰ More than half the respondents with a job reported that they were forced to hide their gender identity in the past year.⁵¹

Employment discrimination contributes to high rates of unemployment or underemployment among transgender people: 15% of USTS respondents reported being unemployed, three times the national average.⁵² Transgender people of color had even higher unemployment rates: 20% of black respondents and 21% of Latino and multiracial respondents were unemployed.⁵³

Many transgender people also live in poverty. The poverty rate for USTS respondents (29%) was double the poverty rate for U.S. adults overall (14%).⁵⁴ Nearly one-quarter (22%) of USTS respondents reported annual earnings of under \$10,000—a percentage significantly higher than the 15% of the general population with such low incomes.⁵⁵ Even those transgender individuals with higher incomes reported lower household incomes than the general population: 62% had incomes under

⁵⁰*Id.* at 153-54.

⁵¹*Id.* at 154.

⁵²*Id.* at 140.

⁵³*Id.*

⁵⁴*Id.* at 144.

⁵⁵*Id.* at 142.

\$50,000 per year (compared to 38% of the general population),⁵⁶ while only 15% reported earning more than \$100,000 (compared to 31% of the general population).⁵⁷ These figures are consistent with a forthcoming study by several *amici* finding “evidence that—compared with cisgender men—transgender individuals report significantly lower employment rates, lower household incomes, [and] higher rates of poverty[.]”⁵⁸

5. *Discrimination in housing, public accommodations, and health care.*

Discrimination against transgender people also extends to other important aspects of life, including housing, public accommodation, and healthcare.⁵⁹ Thirty percent of transgender respondents to the USTS reported homelessness, including 12% within the prior year.⁶⁰ Nineteen percent of NTDS respondents reported being denied a home or apartment, and 11% reported being evicted because of their gender

⁵⁶*Id.* at 143-44.

⁵⁷*Id.* at 144.

⁵⁸Carpenter et al., *Transgender Status, Gender Identity, and Economic Outcomes in the United States* 31-32 (forthcoming 2019) (on file with counsel).

⁵⁹USTS at 178; NTDS at 106-13.

⁶⁰USTS at 178.

identity, in their lifetimes.⁶¹ Another recent study found that lesbian, gay, bisexual, and transgender youth had a 120% increased risk of experiencing homelessness compared to youth who identified as heterosexual and cisgender.⁶²

In addition, 44% of transgender NTDS respondents reported having been denied equal treatment or service at least once at a place of public accommodation (e.g., retail stores, hotels and restaurants, doctors' offices, etc.).⁶³ In the USTS, 14% of respondents reported similar experiences *in the past year*.⁶⁴ More than half of NTDS respondents reported being verbally harassed, and 8% reported being physically attacked or assaulted in a place of public accommodation.⁶⁵

Finally, transgender people face significant hurdles to accessing health care: 19% of NTDS respondents reported that they were denied

⁶¹NTDS at 106-13.

⁶²Dworsky et al., *Missed opportunities: Youth homelessness in America*. National estimates, Chapin Hall at the University of Chicago (2017), at 13, <http://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf>

⁶³NTDS at 124-35.

⁶⁴USTS at 213-14.

⁶⁵NTDS at 126-28.

care, 28% reported being verbally harassed in a doctor's office, emergency room, or other medical setting, and 50% met health care providers who were ignorant of basic aspects of transgender health and had to be educated about the patient's special healthcare needs.⁶⁶

6. *Discrimination against transgender people is linked to adverse health and well-being consequences.*

Transgender people face high levels of stigma, discrimination, and violence. In 2009, Congress recognized that over 400 people were murdered due to anti-transgender bias in the preceding decade.⁶⁷ In 2017 and 2018, 29 and 26 transgender people were murdered respectively.⁶⁸ Transgender individuals also suffer “a high prevalence of sexual assault and rape starting at a young age.”⁶⁹ Forty-seven percent of USTS respondents reported having been sexually assaulted at some point in their lifetime—10% within the prior year.⁷⁰ Moreover,

⁶⁶*Id.* at 72-76.

⁶⁷H.R. Rep. No. 111-86, at 11 (2009).

⁶⁸Human Rights Campaign, *A National Epidemic: Violence Against the Transgender Community in 2018* (“Violence”), <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2018>.

⁶⁹Stotzer, *Aggression and Violent Behavior* 14, at 170–72 (2009) [“Aggression”].

⁷⁰USTS at 205-06; *see also* *Aggression* at 170-72 (citing Clements-Nolle et al., *Attempted suicide among transgender persons: The influence*

transgender victims of sexual assault rarely report the crimes. In one study, 83% of victims of sexual assaults had not reported the incidents to the police.⁷¹ Mistrust of police (as noted above) likely contributed to the lack of reporting.⁷²

The violence, discrimination, and stigma that transgender people face—such as being assaulted, losing a job, or being evicted for being transgender—negatively impact their health and well-being. Indeed, a body of research associates the stigma and discrimination that transgender people experience with “minority stress” that causes a variety of negative effects on transgender people’s health and well-being and that is associated with well-documented health disparities facing this population.⁷³

of gender-based discrimination and victimization, *Journal of Homosexuality*, 51(3), 53-69 (2006)).

⁷¹*Aggression* at 173.

⁷²*Id.* at 176.

⁷³*See, e.g.,* Hendricks & Testa, *A conceptual framework for clinical work with transgender and gender nonconforming clients: An adaptation of the minority stress model*, *Professional Psychology Research and Practice* 43(5), 460 (2012); Bockting et al., *Adult development and quality of life of transgender and gender nonconforming people*, *Current Opinion in Endocrinology, Diabetes, and Obesity*, 23(2), 188-97 (2016); *Stigma* at 943-51.

For example, among NTDS respondents, 35% of those who suffered harassment or discrimination reported using drugs or alcohol to cope.⁷⁴ Similarly, one-third of USTS respondents reported a negative experience with healthcare providers within the prior year,⁷⁵ with such experiences often leading transgender people to postpone medical care.⁷⁶ Recent data from California confirms the NTDS's findings, adding that transgender individuals are significantly more likely than cisgender individuals to have physical, mental, or emotional conditions, and are three times more likely to delay medical care or "not get the medicine at all."⁷⁷ Transgender people are also recognized as the most at-risk population for HIV/AIDS; the stigma, discrimination, and other challenges described above are associated with increased HIV risk.⁷⁸

⁷⁴NTDS at 44.

⁷⁵USTS at 96-97.

⁷⁶NTDS at 76; USTS at 96, 98.

⁷⁷Herman et al., The Williams Institute, *Demographic and Health Characteristics of Transgender Adults in California: Findings from the 2015-2016 California Health Interview Survey* (October 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/CHIS-Transgender-Adults-Oct-2017.pdf>.

⁷⁸CDC Issue Brief, *HIV and Transgender Communities* (2016), <https://www.cdc.gov/hiv/pdf/policies/cdc-hiv-transgender-brief.pdf>.

An alarming 40% of transgender people have reported a suicide attempt—a rate nearly ten times higher than the national average of nearly 5%.⁷⁹ Moreover, 82% of USTS respondents reported having seriously considered suicide at some point in their lives, including 48% in the prior year alone.⁸⁰ The high prevalence of suicide attempts is associated with discrimination: NTDS respondents who had lost a job due to discrimination, were unemployed, suffered abuse (particularly physical abuse) in school, or performed sex work had a higher prevalence of suicide attempts than respondents who had not experienced such discrimination.⁸¹

B. Being Transgender Bears No Relationship To A Person’s Ability To Contribute To Society.

The other significant factor in the Court’s heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that “frequently bears [a] relation to ability to perform or contribute to society.” *City of Cleburne*, 473 U.S. at 440-41

⁷⁹USTS at 114.

⁸⁰*Id.* at 112-14.

⁸¹NTDS at 45, 65; Hass et al., The Williams Institute, *Suicide Attempts among Transgender and Gender Non-Conforming Adults* 11 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

(quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.)). But unlike non-suspect traits like intelligence or physical disability, *see id.*, courts have consistently held that transgender status “bears no relation to ability to contribute to society,” *Adkins*, 143 F. Supp. 3d at 139; *see also Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749-50 (E.D. Va. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017); *Highland*, 208 F. Supp. 3d at 874. Like the court in *Adkins*, *amici* are “not aware of any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society.” *Adkins*, 143 F. Supp. 3d at 139. In fact, many transgender people, despite the societal obstacles in front of them, have gone on to become pioneers of business, science, and other fields.

C. The Remaining Considerations Further Demonstrate That Transgender Status Is A Suspect Classification Deserving of Heightened Scrutiny.

The remaining two considerations—the lack of political power and status as a discrete minority group—also support the conclusion that transgender status is a suspect classification.

Lack of political power. As a small minority comprising just 0.6% of the total adult population, it stands to reason that transgender people lack political power to fully protect themselves in the political process against a hostile majority. *Grimm*, 302 F. Supp. 3d at 750 (“[T]here can be no doubt that transgender individuals are a minority and are politically powerless, comprising just a fraction of the population and frequently subjected to discriminatory federal policies and state laws.”); *M.A.B.*, 286 F. Supp. 3d at 721 (citing small population size, lack of transgender elected officials, and need for courts to block laws targeting transgender people).

One significant indicator of lack of political power is the scarcity of openly transgender elected or appointed officials. There are no openly transgender members of the United States Congress or federal judiciary. *See Adkins*, 143 F. Supp. 3d at 140. Until 2016, an openly transgender person had never been sworn in as a legislator at the state or federal level.⁸² 2017 saw the election of the first openly transgender person to be

⁸²*LGBT legislators*; Cleis Abeni, *Our 18 Greatest Allies for Trans Equality in Office*, The Advocate (Feb. 25, 2016), <http://www.advocate.com/transgender/2016/2/25/our-18-greatest-allies-trans-equality-office>; Carol Robinson, *It's Final: Laughton Resigns State*

elected to a state legislature,⁸³ and 2018's elections added a further three transgender state representatives.⁸⁴ *Amici* are aware of only eleven elected positions of government held by transgender individuals at all political levels,⁸⁵ a tiny portion of the many thousands of federal, state, and local officeholders.

Status as a discrete minority group. As noted, approximately 0.6% of the U.S. adult population, and between 0.7% and 2% of youth, identifies as transgender. Courts and scholars agree that the transgender population is a “discrete” minority group that self-identifies according to a distinguishing characteristic: a lack of congruence between their gender identity and their assigned sex at birth. *Lyng*, 477 U.S. at

Rep Seat, Nashua Patch (Nov. 20, 2012), <http://patch.com/new-hampshire/nashua/it-s-final-laughton-to-resign>.

⁸³See, e.g., May, *Danica Roem, Andrea Jenkins, more: Is this election a moment for the transgender community?*, USA Today (Nov. 8, 2017), <https://www.usatoday.com/story/news/nation-now/2017/11/08/election-moment-transgender-community/843385001/>.

⁸⁴Victory Fund, LGBTQ Victory Fund: Results 2018, <https://victoryfund.org/results2018/>.

⁸⁵See, e.g., Ford, *Meet the 8 transgender candidates who won elections on Tuesday, Think Progress* (Nov. 9, 2017), <https://thinkprogress.org/transgender-election-victories-56c7b9ad06de/>; Victory Fund, LGBTQ Victory Fund: Results 2018, <https://victoryfund.org/results2018/>.

638; *see Adkins*, 143 F. Supp. 3d at 139 (“transgender status is a sufficiently discernible characteristic to define a discrete minority class”); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (gender identity is “so fundamental” to identity that individuals “should not be required to abandon” it), *overruled on other grounds, Thomas v. Gonzalez*, 409 F.3d 1777 (9th Cir. 2005). Indeed, as already discussed (*see Section A, supra*), the group’s distinguishing characteristic “calls down discrimination when it is manifest.” *Adkins*, 143 F. Supp. 3d at 139-40 (finding this factor relevant because transgender people “face backlash in everyday life when their status is discovered”) (citing *Windsor*, 699 F.3d at 183). This factor, too, thus weighs in favor of finding that transgender status is a suspect classification.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court apply heightened scrutiny to the School Board’s policy of denying transgender students the ability to use the bathroom matching their gender identity, independent of whether that policy reflects a sex-based classification.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a) and 32(a)(7)(B) because this brief contains 6,424 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Century Schoolbook.

February 28, 2019

/s/ James E. Tysse

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