No. 22-2927

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

PARENTS DEFENDING EDUCATION,

*Plaintiff-Appellant*,

v.

LINN-MAR COMMUNITY SCHOOL DISTRICT, *et al*.,

*Defendants-Appellees*.

On Appeal from the United States District Court for the Northern District of Iowa
No. 1:22-cv-0078

# BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE


Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
800 South Figueroa Street
Suite 1260
Los Angeles, CA 90017
(213) 382-7600
prenn@lambdalegal.org

Nora Huppert
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
65 E. Wacker Place, Suite 2000
Chicago, IL 60601
(312) 663-4413
nhuppert@lambdalegal.org
kingelhart@lambdalegal.org

*Counsel for Amicus Curiae*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Lambda Legal Defense and Education Fund, Inc. certifies that it is a nonprofit organization, that it has no parent corporation, and that no corporation owns 10% or more of its stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**



**Other Authorities**

## IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has litigated seminal cases regarding the rights of LGBT people to be free from discrimination, harassment, and violence, including where such harms are facilitated by state action. *See, e.g.*, *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001) (lawsuit against sheriff on behalf of family of Nebraska transgender man who was murdered and the subject of the film *Boys Don't Cry*); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (lawsuit on behalf of high school student subjected to anti-gay abuse resulting in a nearly one-million dollar settlement); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (lawsuit on behalf of gay student who was subjected to severe harassment resulting in a nearly half-million dollar settlement). The legal protections relied upon by LGBT people and many others to secure their safety and well-being, however, would be gravely injured if this Court were to embrace the broad legal theories urged by Plaintiff.

---

[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person or entity other than *amicus*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

A school's primary responsibility is to keep all of the students in its care safe from harm. Safety is the foundation on which everything else relies: if students are not safe, then the other goals that a school may have in preparing students for the future become largely meaningless. The sobering reality, however, is that there are many transgender students across the country who cannot even see a future for themselves because of the present-day threats that surround them, whether those threats emanate from their school hallways or, at times, even their own homes.

The overriding obligation of schools to secure the safety of all their students springs from twin duties under the Constitution. First, the Equal Protection Clause forbids the government from turning a blind eye to harassment, whether based on sex, race, religion, or another protected characteristic. Deliberate indifference to severe or pervasive harassment is a form of prohibited discrimination because the government would otherwise deprive the harassed individual of an environment equal to others. Intentional and persistent misgendering is a form of harassment that can have the profound, insidious effect of devaluing the equal dignity of transgender people, and governments at all levels have reasonably adopted policies to address its harm.

Second, the Due Process Clause prohibits the government from placing individuals in state-created danger. Because a pervasive misunderstanding of

transgender people continues to breed widespread hostility and antipathy, a school's disclosure of a student's transgender status to hostile family members without that student's consent can place the student at significant risk of serious harm. Depending on the circumstances at home, a student's relationship with their parents may be shattered beyond repair, and they may reasonably fear for their continued access to basic necessities, their shelter, or even their physical safety. Before taking any action that may expose the student to potentially dire consequences—including the risk of self-harm—schools must retain the latitude to take into account the totality of the circumstances, as they routinely do whenever there is a reasonable fear for the safety of a student regardless of the basis. The safety of transgender students is no exception.

The broad legal theory urged by Plaintiff, however, would tie school officials' hands to respond appropriately to individual circumstances, as required by their constitutional obligations. In its place, Plaintiff would install a rigid constitutional regime in which students could harass their transgender peers with impunity, no matter how catastrophic the consequences, and schools would be forced to automatically out transgender students to their parents, no matter how clear the warning signs of danger. Like other governments, the elected officials of Linn-Mar Community School District, after weighing all relevant considerations, reasonably selected a different path. However this appeal is ultimately resolved,

schools must retain the ability to respect the full range of their constitutional responsibilities and to protect the safety of all students in their care.

## ARGUMENT

### I. Plaintiff's Broad First Amendment Theory Would Require Schools to Ignore Harassment in Violation of the Equal Protection Clause.

#### A. The Equal Protection Clause Requires Schools to Address Known Harassment.

All students have an equal right to access the benefits of public education without enduring unlawful discrimination as the price for receiving their diploma. That right is protected not only by federal statutes like Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibit discrimination based on sex and race, but by the Equal Protection Clause itself. Among other things, these statutory and constitutional protections both prohibit intentional discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005).

Intentional discrimination may take many shapes, including the form of deliberate indifference to harassment. The reason why deliberate indifference to harassment constitutes discrimination is because it deprives the harassed individual of an equal environment that others receive. In the context of employment, for instance, a woman who must repeatedly return to a workplace in which she experiences pervasive harassment because of her sex has been treated worse than a

man who is not forced to experience similar hostility because of his sex. *See Meritor Sav. Bank, VSB v. Vinson*, 477 U.S. 57, 65-67 (1986); *see also Crutcher-Sanchez v. County of Dakota*, 687 F.3d 979, 985-86 (8th Cir. 2012). Likewise, African-American employees who are subject to a racially hostile environment are forced to tolerate materially different working conditions than their peers. *Ellis v. Houston*, 742 F.3d 307, 318-19 (8th Cir. 2014) (affirming constitutional discrimination claim). A hostile environment effectively alters the terms and conditions of employment for affected individuals.

The same principles apply in the context of education. The Supreme Court has recognized that discrimination encompasses a school's deliberate indifference to teacher-on-student harassment, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), as well as student-on-student harassment, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), under Title IX. The Equal Protection Clause itself similarly forbids school officials from remaining deliberately indifferent in the face of harassment based on a protected characteristic. *See Feminist Majority Found. v. Hurley*, 911 F.3d 674, 701-02 (4th Cir. 2018) (collecting cases recognizing equal protection claims brought by students sexually harassed by other students); *cf. KD v. Douglas Cnty. Sch. Dist. No. 001*, 1 F.4th 591, 598 (8th Cir. 2021). Thus, for example, school officials violate equal protection where they fail to take remedial action in response to knowledge that classmates had repeatedly used racial epithets

against a biracial student. *DiStiso v. Cook*, 691 F.3d 226, 245 (2d Cir. 2012) (recognizing that no "teacher could think that a reasonable response to *repeated* complaints of *repeated* student racial name-calling was to do nothing"). As with workplace harassment, a hostile educational environment materially alters the conditions that students must endure in order to access the benefits of education. And a student who is distracted by fears for their safety and well-being is also far less likely to be able to concentrate on the tasks associated with learning.

### B. Misgendering Can Constitute a Form of Severe or Pervasive Harassment.

The intentional misuse of a transgender person's name or pronouns—a practice known as "misgendering"—can inflict profound damage and create a hostile environment that unlawfully deprives the affected individual of equal treatment. As the Supreme Court recognized in *Bostock v. Clayton County*, "it is impossible to discriminate against a person" for being transgender "without discriminating against that individual based on sex." 140 S. Ct. 1731, 1741 (2020).

Across a variety of settings, courts have recognized that deliberately or repeatedly misgendering a transgender person can constitute a form of severe or pervasive harassment. *See, e.g.*, *Hester v. Bd of Educ. of Prince George's Cnty.*, No. TDC-22-0128, 2022 WL 7088293, at *6 (D. Md. Oct. 12, 2022) (holding that deliberate and repeated misgendering of school employee could constitute severe or pervasive harassment based on sex); *Doe v. Penn. Dep't of Corr.*, No. 4:19-CV-

01584, 2022 WL 3219952, at *5 (M.D. Pa. Aug. 9, 2022) (holding that transgender corrections officer could prevail upon equal protection claim based on daily misgendering that created a hostile work environment); *Membreno v. Atlanta Rest. Partners, LLC*, 517 F. Supp. 3d 425, 442 (D. Md. 2021) (holding that plaintiff who was misgendered to other employees could demonstrate hostile work environment); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (holding that repeated misgendering of transgender plaintiff by coworkers supported hostile work environment claim); *Tay v. Dennison*, 457 F. Supp. 3d 657, 683 (S.D. Ill. 2020) (finding that correctional staff constantly and intentionally misgendered plaintiff by referring to her as "mister" and using male pronouns, rising to the level of a constitutional violation). Misgendering deprives transgender people of the basic equal dignity that others routinely receive, and may thus take for granted, in being treated in a manner consistent with their gender.

For example, a Maryland teacher was subjected to relentless harassment after disclosing that she was transgender to her principal. *Eller v. Prince George's Cnty. Pub. Sch.*, 580 F. Supp. 3d 154 (D. Md. 2022). Over the next several years, she endured frequent misgendering by fellow teachers, staff, supervisors, and others. *Id.* at 162. That included being "deliberately referred to as 'he,' 'it,' 'sir,' 'mister,' 'guy in a dress,' and her former name," which undermined her ability to do her job and also resulted in post-traumatic stress disorder. *Id.* at 173-74.

As courts in this circuit have recognized, misgendering cannot simply be categorically brushed aside as "mere name-calling" and can instead rise to the level of actionable discrimination. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *25-26 (D. Minn. Mar. 16, 2015) (recognizing that deliberate misgendering by hospital staff could be objectively offensive behavior); *see also Myers v. Cuyahoga Cnty.*, 182 F. App'x 510, 520 (6th Cir. 2006) ("calling a transsexual or transgendered person a 'he/she' is a deeply insulting and offensive slur, and we agree that using that term is strongly indicative of a negative animus towards gender nonconforming people"). Indeed, misgendering can also be wielded as a tool for harassing someone who is not transgender. *See, e.g.*, *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) (recognizing that gender pronoun usage can give rise to a hostile work environment, such as when a man perceived by coworkers and supervisors as effeminate is called "she" and "her").

While this Court has confirmed that harassment does not need to be "so extreme that it produces tangible effects on … psychological wellbeing" to be actionable, misgendering in fact often leads to such outcomes. *Ellis*, 742 F.3d at 320 (quotes omitted). Research shows that being referred to by the wrong name and pronouns results in psychological distress, including anxiety- and depression-related symptoms. Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 Stigma & Health 53,

59 (2016).

Transgender youth, in particular, experience pervasive misgendering with often devastating consequences. A 2019 survey, for instance, found that nearly 3 in 5 transgender students in Iowa were prevented from using names or pronouns consistent with their gender identity in school. GLSEN, School Climate for LGBTQ Students in Iowa (2019 State Snapshot) (2021), https://tinyurl.com/2ymx9ue2. Strikingly, however, transgender youth whose pronouns are "respected by all or most of the people in their lives attempted suicide at half the rate of those who did not have their pronouns respected." The Trevor Project, *2020 National Survey on LGBTQ Youth Mental Health* 9 (2020), https://perma.cc/MYV9-R696. Similarly, another study found that transgender youth who were able to use names and pronouns corresponding to their gender identity experienced a 29 percent decrease in reported thoughts of suicide and a 56 percent decrease in suicidal behavior. Stephen T. Russell *et al.*, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. Adolescent Health 503 (2018).

Thus, "[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 529 (3d Cir. 2018), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019). The tragic

experiences of countless transgender youth exemplify that reality.

In Virginia, for instance, a fourteen-year-old died by suicide after the student repeatedly was misgendered and "couldn't endure what was going on at school." Karina Bolster, *Nottoway mom claims son committed suicide due to bullying*, NBC12 (May 5, 2022), https://tinyurl.com/4frr9d7t. After the student came out, there was "so much hatred and negativity and intolerance." *Id.* The student was subjected to "endless bullying" that included being taunted, misgendered, and "dead-named," the practice of referring to someone by a former name that they no longer use. *Id.*

In Minnesota, after an elementary school student was outed as transgender on social media, she began to experience misgendering and bullying at school. Kiara Alfonseca, *Mom endures emotional fight after other parents publicly 'out' child as transgender*, Good Morning America (Jan. 18, 2022), https://tinyurl.com/2skxe5u3. At one point, the student "curled up in [their mother's] lap and just started crying" and asked their therapist "Why are people so evil?" *Id.* As a result, the family moved to a new neighborhood and school.

In California, a transgender boy was admitted to a hospital for suicidal thoughts. *Prescott ex rel. Prescott v. Rady Child.'s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1096 (S.D. Cal. 2017). Although hospital staff assured his family that his gender identity would be respected, staff repeatedly misgendered him. One

employee said, "Honey, I would call you 'he,' but you're such a pretty girl." *Id.* at 1097. Following his experience at the hospital, the boy died by suicide.

### C. Plaintiff's First Amendment Theory Would Gut the Ability of Schools to Address the Harassment of Transgender Students.

Confronted with the existential threat that discrimination can pose to transgender young people, schools have reasonably adopted policies to curb its pernicious effects and, in doing so, honor their constitutional obligations to all students. *Cf. Doe*, 897 F.3d at 528 ("transgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination"). But the broad legal theory urged by Plaintiff would decimate the ability of schools to take appropriate remedial action in response to harassment. Indeed, Plaintiff seeks to create a constitutional right to engage in harassing conduct, elevating the purported rights of the harasser over the rights of the harassed.

Although Plaintiff may disavow any such goal, the broad relief it has sought would establish such a constitutional regime. For starters, Plaintiff makes clear that it seeks to enshrine a First Amendment right for any student to "refer[] to another student according to their biological sex rather than their gender identity." Appellant's Br. at 25. That means school officials must tolerate misgendering, even where it is so severe or pervasive that it deprives the harassed student of an equal educational environment. Furthermore, Plaintiff does not merely seek an

injunction against the specific policy at issue, but rather, a legal ruling that affirmatively immunizes all misgendering against any government prohibition. It argues that its alleged injuries are redressable—notwithstanding other civil rights protections that similarly bar misgendering—because those protections are supposedly inferior to its asserted First Amendment right. *Id.* at 26.

While misgendering can be profoundly damaging on its own, Plaintiff's desired ruling would also have other negative consequences. Misgendering can quickly escalate to other forms of harassment, including physical assault. Indeed, the two often go hand-in-hand. *See, e.g.*, Henry K. Lee, *Guilty plea in transgender killing*, San Francisco Chronicle (Feb. 25, 2003), https://tinyurl.com/5dp9nz37. And when a transgender student is intentionally and repeatedly misgendered by a peer in the classroom, but a teacher cannot take the simple and obvious step of prohibiting that conduct in response, they model for all students what type of conduct is acceptable at school. After all, students learn by example. As this Court has observed, when someone in a position of authority fails to take remedial action in response to harassing remarks, that inaction can poison the environment. *Ellis*, 742 F.3d at 320. Here, the all-too-predictable result is a breeding ground for hostility and antipathy towards transgender students.

The First Amendment does not foreclose schools from reasonably choosing a different future for their students. Actions that rise to the level of discrimination

and harassment under the Equal Protection Clause are conduct, not speech. This Court has recognized, for instance, that school harassment policies that prohibit unwelcome "verbal" conduct of a sexual nature "do not target speech but instead prohibit conduct." *Rowles v. Curators of Univ. of Missouri*, 983 F.3d 345, 358 (8th Cir. 2020). And "it has never been deemed an abridgment of freedom of speech … to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *See, e.g.*, *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 62 (2006).

"Speech that rises to the level of harassment—whether based on sex, race, ethnicity, or other invidious premise—and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing."[2] *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001); *accord Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021) (reaffirming that "serious or severe bullying or harassment targeting particular individuals" is subject to school regulation). While the question of

[2] Plaintiff's reliance on *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), for any purported First Amendment right to misgender a student is misplaced. The court did not, for instance, hold that the university professor could refer to a transgender female student as "Mr." in class. To the contrary, it noted that the professor had instead offered to call on the student "using Doe's last name alone." *Id.* at 510.

whether harassment exists in any given case necessarily turns on the totality of the circumstances, *Tuggle v. Mangan*, 348 F.3d 714, 721 (8th Cir. 2003), that case-by-case inquiry would be upended by Plaintiff's First Amendment theory, which seeks to create a constitutional blind spot in which misgendering is categorically exempt from any legal scrutiny.

Notably, this Court has already rejected an objection to the equal treatment of transgender people as a legally cognizable burden. It recognized that a school policy providing a transgender woman with equal access to the women's faculty restroom did not create a hostile working environment for a coworker who objected to the policy. *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002); *accord Doe*, 897 F.3d at 536. The absence of a cognizable burden is especially stark where the objector can take steps to avoid the purported burden. *Cruzan*, 294 F.3d at 984 (noting that objecting teacher could easily avoid using the same restroom as transgender coworker or simply use a gender-neutral restroom instead). Indeed, as the district court here noted, there is no duty for objecting students to interact with transgender students—and if all Plaintiff truly seeks is freedom from "compelled" speech, they already have it: they can choose not to speak to transgender students if that is their prerogative. But the converse is not true: transgender students do not have the freedom to avoid harm if other students have a constitutional right to subject them to harassment.

## II. The Mandatory Outing of All Transgender Students by Schools Would Constitute State-Created Danger under the Due Process Clause.

Misgendering and harassment from other students is not the only harm that school policies protecting transgender students must contemplate. In 2014, a few days after Christmas, a seventeen-year-old transgender girl named Leelah Alcorn slipped out of her family home in Kings Mills, Ohio in the middle of the night, walked a few miles to a nearby highway, stepped into the path of a tractor-trailer, and died. A note published on her Tumblr page explained the anguish that led to her tragic suicide: "when I was 14," she writes, "I learned what transgender meant and cried of happiness." Leelah Alcorn, *Suicide Note,* https://tinyurl.com/5n7cestm (last visited Dec. 12, 2022). "I immediately told my mom, and she reacted extremely negatively, telling me that it was a phase, that I would never truly be a girl, that God doesn't make mistakes, that I am wrong." *Id.* Leelah's mother started taking her to therapists who told her that she was "selfish and wrong and that [she] should look to God for help." *Id.*

Heartbroken by her parents' reaction, Leelah sought acceptance at school, where she received support from her friends. But this step enraged her parents: "[t]hey felt like I was attacking their image," she writes, "and that I was an embarrassment … [s]o they took me out of public school, took away my laptop and phone, and forbid me of getting on any sort of social media, completely isolating me from my friends." *Id.* Leelah lost hope and felt there was "no way out." *Id.*

School policies like the one at issue here provide a framework in which schools, students, and parents can come together to make a case-by-case determinations about appropriate arrangements for transgender students; but they also recognize the importance of confidentiality—as Leelah's experience palpably illustrates. Many educators of transgender students understandably wish to avoid placing their students firmly in harm's way by revealing information likely to ignite a powder keg at home, particularly when those educators know that the student fears exactly that disclosure. But any ruling that would suggest that educators *must* automatically disclose to parents any information or suspicion that their child may be transgender would force educators to out transgender students. Indeed, the relief Plaintiff seeks—an order prohibiting any implementation of the policy at issue, including its confidentiality provisions—would force them to do so even when those educators *know* that it is likely to result in severe physical or psychological harm, including (as reflected in the stories below) when that harm culminates in a suicide attempt or death. *See* App.297, R. Doc. 3-11, at 45.

By prohibiting educators from preserving the confidentiality of information even when they are aware that its release will pose a severe, specific danger to a student, a mandatory outing policy would compel disclosure even in circumstances so shockingly dangerous that they amount to a deprivation of life and liberty in violation of the Due Process Clause: a state-created danger, where "the state acts

affirmatively to place someone in a position of danger that he or she would not otherwise have faced." *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004) (quotes omitted). Such a danger exists where (1) the plaintiff is a member of a limited, precisely definable group; (2) the government's conduct put the plaintiff at significant risk of serious, immediate, and proximate harm; (3) the risk was obvious or known to the government; (4) the government acted recklessly in conscious disregard of the risk; and (5) in total, the government's conduct shocks the conscience. *Id.*; *see, e.g.*, *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990) (finding state-created danger based on affirmative acts by state officials).

### A. Outing Transgender Students to Unsupportive Parents Can Create a Significant Risk of Serious Harm.

Courts have applied the state-created danger doctrine where a state actor releases information that creates or increases a risk of harm, including death. *See, e.g.*, *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006) (police "affirmatively created a danger" that plaintiff "otherwise would not have faced" by informing assailant of an allegation plaintiff had made against him); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998) (by "affirmatively releasing private information from [undercover] officers' personnel files … the City's actions placed the personal safety of the officers and their family members, in serious jeopardy"). For example, just as a police officer "plainly heighten[s] the danger" that a confidential informant faces through the "affirmative act of

releasing [the informant's] statement" to the subject of an investigation, so too may an educator's disclosure to a transgender student's parents increase the danger that student may face, including psychological harm so severe that it ends in the student's death by suicide. *Gatlin ex rel. Gatlin v. Green*, 227 F. Supp. 2d 1064, 1075 (D. Minn. 2002), *aff'd sub nom. Gatlin ex rel. Est. of Gatlin v. Green*, 362 F.3d 1089 (8th Cir. 2004).

It is no flight of fancy to imagine the "significant risk" that can be created where a transgender student is outed to an unsupportive family by a trusted teacher or counselor. *Avalos*, 382 F.3d at 799. As the stories below demonstrate, transgender youth facing down Leelah Alcorn's nightmare of shame, isolation, and a lack of support all too often attempt or die by suicide, which is undoubtedly a "serious … harm." *Id.* A transgender student who had attempted suicide as a result of being outed by school officials, for instance, could subsequently bring a state-created danger claim for the harm they experienced. In fact, the primary state-created danger cases involving suicide "have involved the suicide of minors where school officials or police" bear some kind of responsibility. *Cutlip v. City of Toledo*, 488 F. App'x 107, 115 (6th Cir. 2012); *see also Armijo By & Through Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1264 (10th Cir. 1998); *Sloane v. Kanawha Cnty. Sheriff Dep't*, 342 F. Supp. 2d 545, 553 (S.D.W. Va. 2004) ("When a state actor takes actions … against an emotionally disturbed minor that

the state actor knows will create or substantially enhance the risk that the minor will harm himself … he is subject to liability."). And as the stories below demonstrate, this Court need not look to hypotheticals to understand the potential for extreme psychological harm that arises when transgender youth are outed to hostile family members by educators.

When Dahlia Bekong was a senior in high school, they were open at school about being transgender, but told their teachers and school administrators that it was not safe to use their chosen name and pronouns around their family. Misha Valencia, *Why We Need to Stop Outing LGBTQIA+ Students*, Parents (May 11, 2022), https://tinyurl.com/2n4wk8wz. Despite that explicit warning, a teacher betrayed Dahlia's confidences and outed them during a phone call to their home. *Id.* Dahlia's "parents were really angry and confrontational. They accused me of destroying our family. I didn't feel safe in my own home." *Id.* Their family environment "went from unsupportive to a war zone," and after leaving home to attend college, they are no longer in contact with their parents. *Id.*

Similarly, Richie Pimental of Wisconsin was "outed to [his] parents and humiliated" by school staff when he was thirteen. Ruth Erickson, *Transgender students, parent share personal experiences,* The Chronotype (Oct. 11, 2022), https://tinyurl.com/3nr83tyc. Because of school rules, he was "reported to [his] parents every time [he] wrote [his] name on assignments," which made him feel as

if his "existence was against the school's rules." *Id.* He then stopped coming to school, his grades dropped, and his relationship with his parents became "so incredibly strained that it was hard to even go home at night … [and face] the continuous cycle of seeing how disappointed" they were. *Id.* Although he ultimately survived, the extreme circumstances drove him to develop a plan for suicide because "the idea of being dead put [him] more at peace than the idea of people wishing and wanting me to be someone that [he's] not." *Id.*

Aiden Pogue-Krabacher, a transgender boy and high school freshman at Wilmington High School in Ohio, was outed by his wrestling coach and "publicly humiliated … in front of his classmates with privileged, medical information" about his transgender status. Scott Springer, *Investigation of alleged abuse of Wilmington transgender wrestler continues,* Cincinnati Enquirer (Mar. 2, 2018), https://tinyurl.com/2fsm6vrr. As a result, Aiden's classmates began to bully and threaten him—"the actions of this coach put a target on his back." *Mother in Ohio Fights for her Transgender Son's Freedom in Student Athletics,* Freedom For All Americans, https://tinyurl.com/4d3fm9zd (last visited Dec. 12, 2022).

Blake Brockington received national attention when he was voted homecoming king of his high school in North Carolina in 2014. Mitch Kellaway, *Trans Teen Activist, Former Homecoming King, Dies in Charlotte, N.C.*, Advocate (Mar. 24, 2015), https://tinyurl.com/37zy5e6c. He used the resulting media

attention to spread a message of support and acceptance, and "shared how he had been rejected by his family after coming out as transgender." *Id.* Blake's experience of familial rejection should be exceptional but, unfortunately, it is not: about one third of young transgender people are rejected by family after coming out, and the fear of rejection drives another third to keep their identity secret from their family. Sabra Katz-Wise, et al., *LGBT Youth and Family Acceptance*, 63 Pediatric Clinics of N. Am. 1011 (2016). And familial rejection of transgender people significantly increases the risk of suicide attempts. Augustus Klein & Sarit A. Golub, *Family Rejection as a Predictor of Suicide Attempts and Substance Misuse among Transgender and Gender Nonconforming Adults,* 3 LGBT Health 193 (2016). Here, too, Blake's story was tragically not the exception. He died by suicide barely a year after he was named homecoming king. Kellaway, *supra*.

In 2015, a fifteen-year-old transgender boy from Austell, Georgia named Zander Mahaffey died by suicide, and like Leelah Alcorn he, left behind a suicide note. Zander Mahaffey, *Suicide Note,* https://tinyurl.com/yt8zhje3 (last visited Dec. 12, 2022). "I am a boy, even if the [world] doesn't see me as one," Zander wrote. *Id.* He stated that his "abusive" mother "hurts me … emotionally and mentally" and made him want to attempt suicide. *Id.* And although Zander wrote of his love for his father, that love was tempered by a courageous insistence: "Dad, I'm sorry, but your 'little girl' isn't a little girl. I'm a boy, in my heart." *Id.*

In the midst of Zander's suffering, he found some small measure of support and acceptance among his friends and his teachers, writing "[t]o all my real life friends … [t]o my teachers, to everyone. I'll miss you." *Id.*

Finally, Simon Reichel grew up in Dubuque, barely 50 miles from the Linn-Mar Community School District. Liam Halawith, *'I couldn't stand living in my own skin': Among a nationwide trend of anti-trans legislation, Iowa leads the pack,* The Daily Iowan (Nov. 27, 2022), https://tinyurl.com/56jy7yx9. After coming out as transgender when he was 15 years old, "his parents verbally abused him for being a transgender male and called him the 'antichrist.'" *Id.* Things were slightly better at school, where he received "support from friends and a handful of his Catholic high school faculty members." *Id.* But still, he says, "[b]ack in high school when I was really struggling, I wanted to die … I couldn't stand living in my own skin." *Id.*

Each of these stories reflects the scale and severity of psychological harm that could result from a mandatory outing policy, which would ban educators from preserving the confidentiality of any information that could reveal a student's status as a transgender person, even in contexts where disclosure puts a student's safety at risk. And where an educator fails to preserve confidentiality despite knowing that it will create or increase the risk that this harm comes to pass, that failure constitutes a state-created danger.

### B. A Mandatory Outing Policy Would Compel Disclosure Even in Circumstances that Shock the Conscience.

Consider a transgender student who has, like Leelah and Zander, found support among a few of their friends but who, like Dahlia, lives in fear of their parents finding out that they are transgender. The resulting mental distress leaves the student feeling trapped, resulting in a deep depression and thoughts of self-harm, both of which transgender youth are two to three times more likely to experience. Sari L. Reisner, et. al., *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center: a Matched Retrospective Cohort Study,* 56 J. Adolescent Health 274 (2015). The student's teacher overhears some chatter in the hallway and takes the student aside. Facing disclosure to their parents, the student speaks candidly. "If my parents find out," the student says, "I'll have no way out. I'll have to end it all."

State-created danger would exist where the school official's actions shock the conscience, which includes deliberate indifference under the circumstances presented. In other words, that "an official must be 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Fields v. Abbott*, 652 F.3d 886, 891 (8th Cir. 2011) (quoting *Hart v. City of Little Rock*, 432 F.3d 801, 806 (8th Cir. 2005)). Dahlia Bekong's warning that it is unsafe to tell their parents about their name and pronouns, for instance, could establish awareness of the facts necessary to infer a

substantial risk of serious harm. *Coleman v. Parkman*, 349 F.3d 534, 538 (8th Cir. 2003) ("while obviousness of the risk is not the ultimate inquiry, it may serve as circumstantial evidence that the officials actually knew of the risk.").

Statements about suicide can also make clear to school officials that the involuntary disclosure of a student's transgender status entails a substantial risk of harm. *See, e.g., Olson v. Bloomberg*, 339 F.3d 730, 736 (8th Cir. 2003) (allegation of a "direct, first-hand" communication of a suicide threat to specific defendant was sufficient to show awareness of substantial risk of serious harm); *cf. Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 238 (3d Cir. 2008) (allegation that assailant told defendant 911 dispatchers that he "had nothing left to live for" and that plaintiff would "pay" were sufficient to make dispatchers actually aware of risk). And given the stakes, a teacher who not only ignores a student's specific threat of self-harm, but actively brings about the circumstances that would trigger it, shocks the conscience by any contemporary standard. *See Lewis v. Blue Springs Sch. Dist.*, No. 4:17-CV-00538-NKL, 2017 WL 5011893, at *10 (W.D. Mo. Nov. 2, 2017) ("[school district's] conduct shocks the conscience, inasmuch as the stakes—suicide or attempted suicide by a young student—were extreme, but [district] did nothing to address the bullying [that caused it].")

Finally, where the harm at issue stems from an unsupportive parent or another third party, an official can similarly be deliberately indifferent where they

are aware that releasing information to the parent or third party will create or increase a substantial risk of serious harm but does so anyway. *See Hart v. City of Little Rock*, 432 F.3d 801, 807 (8th Cir. 2005) (crucial question was whether defendant "ever considered, *at the time she processed the request* [for the release of information], whether the information would be disseminated to" the ultimate assailant); *see also Phillips*, 515 F.3d at 238. And while the parents at issue here may never intentionally harm their children, the same is unfortunately not true for all parents. *See, e.g.,* Muri Assunção, *Friends hold vigil for 19-year-old trans woman fatally shot by her father*, New York Daily News (Apr. 5, 2022), https://tinyurl.com/yzndwf7j. The broad legal theory urged by Plaintiff seeks to forbid educators from preserving the confidentiality of transgender students in *all* circumstances, inviting the very real danger that due process protections exist to prevent.

## CONCLUSION

Because Plaintiff's desired ruling would divest school officials of indispensable tools to remedy harassment and to protect the safety of all students, as required by their constitutional commitments, this Court should affirm the district court's denial of the preliminary injunction.

Dated: December 12, 2022

Respectfully submitted,

/s/ Peter C. Renn

Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
800 South Figueroa Street
Suite 1260
Los Angeles, CA 90017
(213) 382-7600
prenn@lambdalegal.org

Kara Ingelhart
Nora Huppert
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
65 E. Wacker Place, Suite 2000
Chicago, IL 60601
(312) 663-4413
nhuppert@lambdalegal.org
kingelhart@lambdalegal.org

*Counsel for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I certify that this amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5). The brief is 6,039 words, excluding any portions exempted by Fed. R. App. P. 32(f).

The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14.

Pursuant to Circuit Rule 28A(h), I certify that the electronically filed version of this brief has been scanned for viruses and found to be virus free.

s/ Peter C. Renn
Peter C. Renn

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on December 12, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Peter C. Renn
Peter C. Renn