

No. 17-3113

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

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**JOEL DOE**, A Minor,  
by and through his Guardians John Doe and Jane Doe, et al.,  
*Plaintiffs-Appellants*,

v.

**BOYERTOWN AREA SCHOOL DISTRICT**, et al.,  
*Defendants-Appellees*,

and

**PENNSYLVANIA YOUTH CONGRESS FOUNDATION**,  
*Intervenor-Appellee*.

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania, No. 5:17-CV-01249  
Hon. Edward G. Smith, United States District Judge

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**BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS  
CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND  
INTERVENOR-APPELLEE AND AFFIRMANCE**

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**STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)**

Amicus curiae states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 29(C)(1) and Fed. R. App. 26.1, the undersigned counsel for amicus curiae hereby discloses that amicus has no parent corporations and that no corporation directly or indirectly holds ten (10) percent or more of the ownership interest in the amicus.

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amicus files this amicus curiae brief with the consent of all the parties. *See* Fed. R. App. P. 29(a)(2).

This brief is submitted on behalf of the National Education Association (“NEA”). NEA is the nation’s largest professional association representing approximately three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation’s public schools. NEA has a deep and longstanding commitment to ensuring that every child has access to a high-quality public education regardless of background or zip code.

NEA represents education employees that instruct and guide students throughout the school day—from the bus stop to after-school programs and everything in between. NEA has interviewed public school employees from across the country in preparation for this and other amici briefs about this issue. Among these are high school and middle school teachers, as well as school counselors and psychologists. Some of the interviewees work in schools that have adopted inclusive transgender student policies; others work in schools that have not. Collectively, they represent a variety of experiences with transgender educational policies (and access to sex-segregated facilities in particular) and as such have valuable perspectives to share with this Court about the needs of transgender

students, and, indeed, all students, in our nation's schools. This brief reflects both the specific experiences of these employees as well as the views of NEA's membership as a whole.

## ARGUMENT

Transgender students cannot be wished away. Being transgender is innate; not a choice or a fad. Plaintiffs' characterization of being transgender as a "belief," a "grooming" habit, and a "subjective perception" is wrong and offensive. Pls.'- Appellants' Br. 22, 27. Transgender youth, in particular, face difficult obstacles. Being transgender can challenge students' closest relationships, including with their parents and friends; it can subject them to harassment, bullying, and violence; and the social pressure to live according to their birth-assigned sex can be intense. Those profound challenges and pressures can lead to serious psychosocial problems.

But when schools adopt trans-inclusive policies, transgender students are able to thrive. Boyertown has done the right thing in adopting such a policy. Educators and education policy makers understand that schools work best when they fully welcome transgender students into the educational community. A critical aspect of this welcoming environment is allowing transgender students to use sex-segregated facilities such as restrooms that are consistent with their gender identity. When schools adopt policies like Boyertown's, all students benefit because the inclusive

policies have a positive effect on the overall school climate. These policies tell all students that they too are welcome and equal parts of the school community even if they are different.

On the other hand, should this Court grant the Plaintiffs' request and order Boyertown to discriminate against its transgender students, such an order would stigmatize transgender students and deny them equal educational opportunities. And such an order would wound educators themselves because it would conscript them into a discriminatory and harmful scheme too. To force educators to participate in the stigmatization and degradation that discriminatory policies inflict on their students is professionally and psychologically harmful to the educators themselves.

**I. School can be a dangerous and stigmatizing place for transgender students.**

Ninety percent of transgender students have heard derogatory remarks about their gender identity and sexual orientation at school, and 82 percent feel unsafe. Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experience of Transgender Youth in Our Nation's Schools* 10, 14 (2009), <https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>. Over 75 percent of transgender students have been sexually harassed at school, Greytak et al., *supra*, at 21; and 13 percent who were out or perceived as transgender have been sexually assaulted in school, Sandy E. James et al., Nat'l Ctr. for Transgender

Equality, The Report of the 2015 U.S. Transgender Survey 134 (2016),  
<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

More than half have been physically harassed at school, and 44 percent have been physically assaulted at school, yet only 46 percent have reported the harassment to school officials, and only one-third felt that the school responded effectively.

Greytak et al., *supra*, at 18–22. Transgender students from rural areas face even higher levels of victimization than students in suburban or urban areas. Joseph G. Kosciw et al., GLSEN, 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools 71–72 (2008), <https://www.glsen.org/download/file/NDIyMg==>.

This reality reached Boyertown. Joel Doe testified that a peer told a transgender student, “You don’t belong here, you B word.” J.A. 37 (Mem. Op. ¶ 116); J.A. 322 (Hr’g Tr. July 17, 2017). And Jack Jones testified that someone yelled at a transgender boy, “if you don’t have a dick, get the fuck out.” J.A. 1944 (Jack Jones Dep. July 11, 2017).

This kind of pervasive bullying and harassment leads to negative educational outcomes. Seventeen percent of transgender students have reported that they have transferred or quit school because of harassment. James et al., *supra*, at 135; *see also* Jaime M. Grant et al., Nat’l Ctr. for Transgender Equality & Nat’l Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender

Discrimination Survey 3 (2011), <https://goo.gl/U9uhr9>. Almost half have missed school because they feel unsafe. Greytak et al., *supra*, at 14. Transgender students subject to gender-based verbal harassment have, on average, worse grades than their peers, and those who face frequent harassment pursue post-secondary education at lower rates than those who are not harassed. *Id.* at 27. Because of all this, transgender students are at a much higher risk for suicide than their cisgender peers. Grant et al., *supra*, at 2; James et al., *supra*, at 132.<sup>1</sup>

**II. When schools respect transgender students, transgender students are subjected to less bullying and have better outcomes, and all students benefit from a more positive school climate.**

1. Allowing Boyertown's policy to remain in place is critical to the success of transgender students. In schools with anti-LGBT bullying policies, students have better relationships with staff and as a result feel safer in the school. Nat'l Ass'n of Sch. Psychologists & Gender Spectrum, *Gender Inclusive Schools: Policy, Law, and Practice 2* (2016) (citing Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 *J. Youth & Adolescence* 1175 (2010)). LGBT students have

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<sup>1</sup> Even students who are not themselves the victims of bullying but nonetheless witness such bullying face significant negative mental health outcomes. See Ian Rivers et al., *Observing Bullying at School: The Mental Health Implications of Witness Status*, 24 *Sch. Psychol. Q.* 211 (2009); Daniel J. Flannery, Kelly L. Wester & Mark I. Singer, *Impact of Exposure to Violence in School on Child and Adolescent Mental Health and Behavior*, 32 *J. Cmty. Psychol.* 559 (2004).

more academic success at such schools. Stephen T. Russell et al., *Safe Schools Policy for LGBTQ Students*, 24 *Social Policy Report*, no. 4, at 6–7 (2010).

When schools support transgender students who come out and socially transition at school, transgender students feel more included in the school community than those who are closeted. *See* Greytak et al., *supra*, at 30–31. This sense of belonging correlates with higher academic achievement. *Id.* at 29. In short, when transgender students are supported, they have higher grade point averages, better attendance records, increased self-esteem, and are bullied at lower rates than peers at other schools. Kosciw et al., *supra*, at 121.

Educators likewise affirm the reality that transgender-inclusive policies work. Educators described to us how transgender-inclusive policies allow their transgender students to be active and valued participants in the school community who:

- Participate in school government (La Crescenta, California);
- Do not have notable attendance or disciplinary issues (Farmingdale, Maine);
- Participate in school athletic teams (Evanston, Illinois);
- Run for homecoming court (Indianapolis, Indiana); and
- Have supportive peer groups and are academically engaged (Federal Way, Washington).

The value of inclusive policies for transgender student outcomes is pronounced even in schools that only recently adopted supportive policies. An educator in



Rhode Island spoke of a student who was formerly doing poorly in school and feeling suicidal, but now, following the adoption of an inclusive transgender student policy, is on track to graduate. Many educators report students crying tears of joy when their schools adopt inclusive policies because transgender students feel—often for the first time—that they are valued members of the school community.

When transgender students are respected, they are able to engage fully and equitably with the educational experience, and when that happens, transgender students, like all students, are able to thrive.

2. School policies that respect transgender students not only benefit transgender students, but also promote a positive school climate for all students.

School climate—that is, the “product of the interpersonal relationships among students, families, teachers, support staff and administrators” that sets the “norms, values, and expectations that support people feeling socially, emotionally, and physically safe” in school—is a key predictor of student engagement, student mental and physical health, and academic achievement, and is positively correlated with decreased absenteeism, dropout rates, and suspensions.<sup>2</sup>

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<sup>2</sup> See Nat’l Sch. Climate Ctr., School Climate Research Summary 2–3 (August 2012), <https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf>; Nat’l Educ. Ass’n, Research Brief: Importance of School Climate 1 (2013), [https://www.nea.org/assets/docs/15584\\_Bully\\_Free\\_Research\\_Brief-4pg.pdf](https://www.nea.org/assets/docs/15584_Bully_Free_Research_Brief-4pg.pdf); Nat’l Sch. Climate Council, The School Climate Challenge 5 (2007),

The Supreme Court has long understood this intuitively. “[P]ublic education must prepare pupils for citizenship in the Republic[.]” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (internal quotations omitted). “It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” *Id.* A critical component of a healthy school climate is diversity and inclusion: “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotations omitted). Moreover, the “fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.” *Bethel Sch. Dist. No. 403*, 478 U.S. at 681 (internal quotations and citations omitted).

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<http://www.schoolclimate.org/climate/documents/policy/school-climate-challenge-web.pdf>; David Osher et al., *Improving Academic Achievement Through Improving School Climate and Student Connectedness* (Apr. 14, 2009), <https://goo.gl/4nCGPJ>; Adam Voight, Gregory Austin & Thomas Hanson, *A Climate for Academic Success* (2013), <http://files.eric.ed.gov/fulltext/ED559741.pdf>; see also Alex Kajitani, *The #1 Factor That Determines a Toxic or Thriving School Culture*, *EdWeek* (Apr. 27, 2016), <https://goo.gl/6s0q1V>; Taica Hsu, *How I Support LGBTQ+ Students at My School*, *Am. Educator*, Winter 2016-2017, at 20-22, <https://goo.gl/VW7gGM>.

When educators are positive about inclusion and respect all students, students in diverse classrooms have higher academic achievement. *See* Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School- Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 J. Educ. Psychol. 570, 571 (2003); John Rosales, *Positive School Cultures Thrive When Support Staff Included*, NEA Today (Jan. 10, 2017), <https://goo.gl/K2Swud>.

Courts have long understood the vital role that educators and other school employees play in promoting diversity, acceptance, and tolerance. “[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.” *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979). Not just by “the presentation of course materials” but also by “the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities.” *Id.*

When schools adopt transgender-inclusive policies and practices, appropriately respond to bullying, and allow transgender students to be acknowledged in accordance with their gender identity, not only do transgender students feel more welcome, but also the school climate overall is more positive, leading to better outcomes for all students. *See* N. Eugene Walls, Sarah B. Kane & Hope Wisneski, *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 *Youth & Soc’y* 307, 323-25 (2010); *see also* Stephen T. Russell, *Are School*

*Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers' Perspectives*, 54 *J. Sch. Psychol.* 29 (2016).

Students who feel a sense of belonging in school are less likely to have mental health problems and later substance abuse. Lyndal Bond et al., *Social and School Connectedness in Early Secondary School as Predictors of Late Teenage Substance Use, Mental Health, and Academic Outcomes*, 40 *J. Adolescent Health* 357.e9, 357.e16 (2007). And students report “more positive levels of . . . quality of school life in schools that [are] more supportive of cultural pluralism and diversity.” Brand et al., *supra*, at 571.

Inclusive classrooms also reduce prejudice and promote cross-cultural friendships, which later benefit students in the workplace and in their communities. Jeanne L. Reid & Sharon Lynn Kagan, *A Better Start: Why Classroom Diversity Matters in Early Education* 9 (Apr. 2015); *see also* Econ. & Soc. Research Council, *Diversity in Primary Schools Promotes Harmony, Study Finds*, ScienceDaily (July 26, 2008), <https://www.sciencedaily.com/releases/2008/07/080724064835.htm>. Respect for the diversity of students is associated with increased feelings of safety in schools, and there is less bullying in schools with greater student diversity. *See* ScienceDaily, *supra*; Jaana Juvonen, Adrienne Nishina & Sanda Graham, *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 *Psychol. Sci.* 393, 397 (2006).

Students also benefit academically from inclusive settings. *See* Open Soc’y Found., *The Value of Inclusive Education* (Oct. 2015), <https://goo.gl/imqFgK>; Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students With and Without Disabilities and Their Educators*, 20 Remedial & Special Educ. 114, 114 (1999). Once classrooms become fully welcoming of transgender students we can expect noticeable and quantifiable benefits to transgender students and the broader community as well. Examples of the benefits of classroom inclusion and diversity abound in other contexts where such inclusion has a longer history.

Title IX itself provides one of the best examples of the power of equality to promote the common good. Since its enactment over 40 years ago, Title IX has promoted gender inclusivity in school sports, the benefits of which have rippled from the athletic field to the classroom and beyond. *See generally* Nat’l Coal. for Women and Girls in Educ., *Title IX at 40: Working to Ensure Gender Equity in Education* (2012), <http://www.ncwge.org/PDF/TitleIXat40.pdf>. In the past two Olympic Games, U.S. women have brought home more medals than U.S. men, and U.S. women alone won as many medals as any other nation. *See* Greg Myre, *U.S. Women Are the Biggest Winners at the Rio Olympics*, NPR (Aug. 21, 2016), <https://goo.gl/z5FmxN>. Girls who play sports perform better academically and are more likely to graduate high school. Nat’l Coal. for Women and Girls in Educ.,

*supra*, at 10. This increased success goes beyond the classroom: 82 percent of female business executives were on a school sports team. *Id.* at 11. Without Title IX's mandate of inclusivity for women in athletics, women (and the larger community) would not have reaped these benefits.

Since passage of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act, *see* 29 U.S.C. § 701 *et seq.*; 20 U.S.C. § 1400 *et seq.*, decades of research demonstrate that students with and without disabilities likewise benefit from participating in inclusive classrooms. When students with disabilities are educated alongside their non-disabled peers, disabled and non-disabled students score higher on literacy measures, perform better on standardized tests, get better grades, and are more likely to master their individualized education program goals. *See* Kathleen Whitbread, *What Does the Research Say About Inclusive Education?*, Wrightslaw (1998-2016), <https://goo.gl/K6TzL6>; Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?*, 6 *Future Child*. 77, 91 (1996).

Racially and socioeconomically inclusive classrooms also benefit students. The average student from a low-income background who attends a middle-class school—a school where less than 50 percent of the student body is low-income, as measured by free or reduced lunch eligibility—performs better academically than his low-income peers who attend low-income schools. *See* Richard D. Kahlenberg,

*From All Walks of Life: New Hope for School Integration*, Am. Educ., Winter 2012-2013, at 4–5. Classroom activities that call for cooperation between students from diverse backgrounds “promote creativity, motivation, deeper learning, critical thinking, and problem-solving skills.” Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, *How Racially Diverse Schools and Classrooms Can Benefit All Students* 14 (Feb. 2016), <https://goo.gl/FgSseO>.

On the other hand, allowing discrimination against one group infects anti-discrimination efforts against others.<sup>3</sup> Educators understand this instinctively: their classrooms cannot embrace diversity, tolerance, and mutual respect in some ways, but deny it in others and still obtain the benefits of inclusive classrooms. Students who see their transgender peers being treated as “less than” justifiably fear that they one day will be treated as “less than” as well. The reverse is also true: educators have discussed with us how once their school began adopting LGBT-inclusive policies, students with other minority identities, such as those with a disability, non-white ethnicity, or an atypical home life, felt safer and more

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<sup>3</sup> See, e.g., Wanda Cassidy & Margaret Jackson, *The Need for Equality in Education: An Intersectionality Examination of Labeling and Zero Tolerance Practices*, 40 McGill J. Educ. 435, 438 (2005) (“[C]hildren who experience discrimination on the basis of race, gender, class, disability, and/or sexual orientation may suffer from more than one form of discrimination. Those factors can be seen to intersect in ways which compound rather than simply add together in final impact. And, while the child may experience multiple levels of discrimination, multiple levels of protection may not be provided by the school.”).

accepted at school.

**III. The lower court should be affirmed because educational discrimination harms transgender students profoundly, and there are no offsetting benefits to such discrimination.**

1. The Supreme Court has “recogniz[ed] that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

An order prohibiting transgender boys from accessing facilities used by other boys, and prohibiting transgender girls from using facilities used by other girls would send a harmful message to transgender students, their peers, and the broader school community that transgender students are not worthy of society’s equal respect; that they are outcasts and pariahs who ought to be feared; and that their classmates must be protected from them. The “necessary consequence” of such a policy is to demean and stigmatize transgender students. *See id.* at 2602.

NEA members witness how discriminatory policies reflect and promote hostility toward transgender youth. Like Aidan DeStefano and other transgender students in Boyertown, transgender students are frequently allowed to participate equally in school activities by local educators, and they do so—often for some time—without incident. *See* J.A. 32, 85, 86 (Mem. Op. ¶¶ 90, 394, 402) (indicating no incident with a transgender-inclusive policy); J.A. 452 (Hr’g Tr. July 17, 2017)



(“[L]iterally everyone was okay with” DeStefano using the boys’ bathroom and locker room.). But all too often, school officials—prodded by community members who have disdain for or unfamiliarity with transgender individuals—decide to single out the transgender student. The school then denies the student access to facilities and programs that others have access to, telling the student that he is less than others. Scorn and abuse from students and the larger school community often follow. When this happens, transgender students lose more than a “mere affirmation of subjective perceptions about gender[,]” Pls.’-Appellants’ Br. 29; they forever “suffer the stigma of knowing” that in the eyes of their school district and community, they are “somehow lesser[,]” *Obergefell*, 135 S. Ct. at 2600. Accomplishing this through a federal court order would, if anything, be even more harmful.

This type of stigmatization is deeply harmful to transgender students and makes what is already a difficult problem only worse by legitimizing hostility against transgender students.

2. One of our nation’s fundamental guarantees is that students have equal access to educational opportunities regardless of gender differences. *See, e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Title IX promises students of all genders equal educational opportunities. *See*

20 U.S.C. § 1681 *et seq.* “[G]ender must be irrelevant to [educational] decisions.” *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (construing Title VII’s prohibition of discrimination on the basis of sex); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–98 (1979) (concluding that Title VII and Title IX’s prohibition on sex discrimination are construed the same way).

Yet when schools deny transgender students access to locker rooms or restrooms commensurate with their gender identity, transgender students often avoid participating in gym class or sports and refrain from using bathrooms altogether. Bathroom avoidance is a common and deep problem for transgender students and is linked to medical problems and diminished educational outcomes. *See James et al., supra*, at 228–29; *see generally* Laura J. Wernick, Alex Kulick & Matthew Chin, *Gender Identity Disparities in Bathroom Safety and Wellbeing Among High School Students* (Working Paper, Jan. 7, 2017), <https://goo.gl/uTX6fO>.

This reality is confirmed not only by academic studies, but also by the experiences of educators. A Michigan teacher interviewed by NEA shared the story of a transgender student who was denied access to the bathroom commensurate with his gender identity. The student avoids eating breakfast and lunch so that he will not need to relieve himself during the school day. Thirst and hunger make it difficult for him to concentrate. A gender-neutral bathroom in the

office at the other end of the building was made available to him, but using it requires him to out his transgender status to his teachers in order to explain why he will be gone from the classroom for an extended period of time. Like many transgender students, the student is not out to all his peers and teachers and is reluctant to out himself to the entire school community. The student's daily anxiety about being able to satisfy his basic human need to use the bathroom detracts from his education, and he experiences diminished educational performance as a result.

Another interviewed teacher described how, in response to a group of parents complaining about a transgender boy using the boys' bathroom, the school administration required the transgender boy to use the girls' bathroom. But parents and students are also uncomfortable with him using the girls' room, because, by all outward measure, he expresses himself as a boy. DeStefano's testimony evidenced the same problem: when he used the girls' restroom, he got yelled at by female students and teachers, "There's a guy in the bathroom. Why is there a guy in the bathroom[?]" J.A. 448 (Hr'g Tr. July 17, 2017). Unlike DeStefano, however, who was able to use the boys' facilities by virtue of Boyertown's inclusive policy, the other student suffers the cruel fate of being squeezed from both sides and feeling that he belongs nowhere at school. These experiences, sadly, are not unique.

When schools exclude transgender boys and girls from the facilities used by other boys and girls and, thus, single them out for stigmatization and scorn, the

students suffer psychosocial harms that deprive them of the opportunity to become their best selves. This harm cannot be undone on its own. “Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.” *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

Nor does the harm end there. As the Supreme Court has recognized, depriving educational opportunity to any subset of students necessarily harms the broader society.

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. . . . We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

*Id.* at 221.

3. There is absolutely no support for the contention that prohibiting discrimination against transgender students with respect to access to restrooms and locker rooms would put other students at risk. None of the jurisdictions that allow transgender students to use facilities consistent with their gender identity has experienced increased sex crimes as a result of those laws and policies, and victims’ advocacy groups, police departments, and government representatives from these jurisdictions have repeatedly verified this. *See* Brief of Amici Curiae Law Enforcement Officers in Support of Respondent, *Gloucester Cty. Sch. Bd. v.*

*G.G.* (No. 16-273), 2017 WL 836845, at \*3–10 (2017); Brief of Amici Curiae School Administrators from Thirty-One States and the District of Columbia in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.* (No. 16-273), 2017 WL 930055, at \*11–16 (2017); Brief of Anti-Sexual Assault, Domestic Violence, and Gender-Based Violence Organizations As Amici Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, (No. 16-273), 2017 WL 894891, at \*10–14 (2017).

Any assertion that the rights of transgender students must yield because of sexual deviants does not justify animus toward them but is itself another offensive form of discrimination that stigmatizes transgender people. It perpetuates a harmful stereotype that has no basis in fact. Sadly, this fits well into our nation’s shameful history of labeling certain minorities as dangerous—and sexually dangerous in particular—as a justification for their oppression.<sup>4</sup> The reality is that not only do

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<sup>4</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985) (holding that “vague, undifferentiated fears” of people with disabilities could not justify discrimination against them); Ruth Thompson-Miller et al., *Jim Crow’s Legacy: The Lasting Impact of Segregation* 22–23, 89 (2015) (discussing that scores of black men were lynched for crimes ranging from looking at a white woman to alleged rape of a white woman during the Jim Crow era, pursuant to a still-present stereotype that black men are particularly criminal and dangerous for white women); Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative That Gays and Lesbians are Harmful to Children*, 21 *Duke J. Gender L. & Pol’y* 125, 142–52, 161–63 (2013) (discussing how gay rights opponents have historically used a narrative equating homosexuality with pedophilia to defeat proposed anti-discrimination laws, ban gay couples from adopting, attempt to ban gays and lesbians from teaching in public schools, and argue against allowing gay

transgender individuals have no greater proclivity for physical or sexual assault than anyone else, they, in fact, are much more likely to be victims of both physical and sexual assaults. *See, e.g.,* Grant et al., *supra*, at 3 (“Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%).”).

Educators find the idea that boys will pretend to be transgender to engage in sexual ogling of girls to be nonsense. The notion that a teenage boy would come out to his peers and teachers as transgender and face the reactions that such an announcement prompts in order to gain access to the girls’ bathroom to engage in voyeurism is ludicrous. NEA is unaware of any misconduct in a bathroom that is related to or caused by an inclusive transgender policy. The Plaintiffs also admitted that they had never heard of misconduct under the pretense of such a policy. *See* J.A. 62, 67 (Mem. Op. ¶¶ 273, 305) (“Mary Smith could not identify any student

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Boy Scout troop leaders); Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol’y Rev. 201, 219 (2012) (“The fear of sexual predation by Black men toward White women—the familiar stereotype that defined so much of the received understanding of race relations in post-Civil War America—was the dominant justification relied upon by forces opposed to the integration of municipal pools”); Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 Ark. Hist. Q. 42, 43–46, 51–52 (2003) (discussing how white parents’ fears that black boys and girls would harm their daughters was a driving force in the fight against school integration).

who pretends to be transgender so they can use the other sex’s bathrooms or act as a Peeping Tom”; “Macy Roe does not know any student who has pretended to be transgender just to use the locker room or bathroom contrary to their gender at birth or to be a Peeping Tom.”); J.A. 1451–52 (Mary Smith Dep. June 28, 2017); J.A. 1824–25, 1831–32 (Macy Roe Dep. June 29, 2017).

Fortunately, all students’ privacy interests can be addressed without discriminating against transgender students. In schools that permit transgender students to use the facilities commensurate with their gender identity, gender-neutral facilities are commonly open to any student who would rather not use a sex-segregated facility, and installations that increase privacy for everyone in sex-segregated facilities are beneficial to all students. Boyertown has made similar efforts “to reasonably accommodate any uncomfortable student at BASH” by, for instance, making available single-user facilities for any student, regardless of gender identity. J.A. 31–32, n.12 (Mem. Op. ¶¶ 80–86). That said, the majority of out transgender students report that their classmates are supportive of them using facilities consistent with their gender identity. James et al., *supra*, at 137.

#### **IV. Educators themselves are harmed when they are compelled to be instruments of harmful discrimination against their students.**

Finally, educators and other school employees themselves are harmed when schools require them to discriminate against transgender students.

Schools with transgender-discriminatory policies do not discriminate on their

own. Instead, they compel individual administrators, educators, and public school employees to carry out the discriminatory policies. Compelling educators to participate in such a harmful and degrading scheme—a scheme that many educators understand is harmful (and not just to transgender students but to other students and the overall school climate)—wounds the educators. To be forced to watch and participate in the stigmatization and degradation that discriminatory policies inflict is professionally and psychologically harmful to the educators themselves.

When policies prevent teachers from addressing student needs, teachers no longer have access to the moral rewards of being an educator, leading to demoralization. Doris A. Santoro, *Good Teaching in Difficult Times: Demoralization in the Pursuit of Good Work*, 118 *Am. J. Educ.* 1, 1-2, 11-12 (2011); see also Lisa C. Ehrich et al., *Ethical Dilemmas: A Model To Understand Teacher Practice*, 17 *Teachers & Teaching: Theory & Prac.* 173 (2011). And this demoralization causes teachers to suffer “depression, discouragement, frustration, and shame,” leaving them “continually frustrated” in their “pursuit of good teaching.” Santoro, *supra*, at 17. On the other hand, “[t]he moral rewards of teaching are activated when educators feel that they are doing what is right in terms of one’s students, the teaching profession, and themselves.” *Id.* at 2.

Even school employees who support discriminatory policies may be harmed.



Recent peer-reviewed studies have found that individuals who act with prejudice towards others face negative health outcomes. Mark L. Hatzenbuehler, Anna Bellatorre & Peter Muennig, *Anti-Gay Prejudice and All-Cause Mortality Among Heterosexuals in the United States*, 104 Am. J. Pub. Health 332, 332, 335 (2014); Yeonjin Lee et al., *Effects of Racial Prejudice on the Health of Communities*, 105 Am. J. Pub. Health 2349, 2352–53 (2015). Those who engage in discrimination experience more anger and stress, and frequently deal with this anger and stress by engaging in unhealthy coping mechanisms. Hatzenbuehler, *supra*, at 336. And working in a discriminatory environment can be harmful, even for those who do not directly participate in the discrimination. *Cf.* Lisa Rapaport, *Racism Linked to Mortality for Both Blacks and Whites in U.S.*, Reuters (Sept. 18, 2015), <https://www.reuters.com/article/us-health-racism-mortality/racism-linked-to-mortality-for-both-blacks-and-whites-in-u-s-idUSKCN0RI2DQ20150918>; *see also* Lee et al., *supra*, at 2353.

## CONCLUSION

For the foregoing reasons, NEA urges the Court to affirm the lower court's ruling in all respects.

Respectfully submitted,

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## COMBINED CERTIFICATIONS

1. Pursuant to L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.
2. I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,334 words from the Introduction and Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
3. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.
4. Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the electronic Brief for Amicus Curiae National Education Association has been filed with the Court in both electronic and paper form, and that the text of the electronic brief is identical to the text in the paper copies.
5. Pursuant to L.A.R. 31.1(c), I hereby certify that a computer virus detection program was run on the electronic version of this Brief for Amicus Curiae National Education Association and that no virus was detected. The virus detection program utilized was CylancePROTECT.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system, as all counsel are filing users.

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