

A19-1944

State of Minnesota
In Court of Appeals

N.H.,

Respondent,

and

Rebecca Lucero,
Commissioner of the Minnesota Department of Human Rights,

Plaintiff-Intervenor,

v.

Anoka-Hennepin School District No. 11,

Appellant.

BRIEF OF AMICUS WORLD WITHOUT GENOCIDE

WORLD WITHOUT GENOCIDE

Tara Kalar (#0394954)
875 Summit Avenue
St. Paul, MN 55105
(612) 670-9912
tara.kalar@mitchellhamline.edu

STINSON LLP

Timothy P. Griffin (#0285717) Andrew
W. Davis (#0386634) 50 South Sixth
Street, Suite 2600
Minneapolis, MN 55402
(612) 335-1500
timothy.griffin@stinson.com
andrew.davis@stinson.com

**AMERICAN CIVIL LIBERTIES
UNION OF MINNESOTA**

Teresa Nelson (#0269736) David P.
McKinney (#0392361)
2828 University Ave. SE, Suite 160
Minneapolis, MN 55414
(651) 645-4097
tnelson@aclu-mn.org dmckinney@aclu-
mn.org

GENDER JUSTICE

Christy L. Hall (#0392627) Jess
Braverman (#0397332)
200 University Ave. W., Suite 200 St.
Paul, MN 55103
(651) 789-2090
christy.hall@genderjustice.us
jess.braverman@genderjustice.us

Attorneys for Respondent

GREENE ESPEL PLLP

Jeanette M. Bazis (#0255646) Katherine
M. Swenson (#0389280) Amran A.
Farah (#0395354)
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbazis@greeneespel.com
kswenson@greeneespel.com
afarah@greeneespel.com

*Attorneys for Appellant
Anoka-Hennepin School District No. 11*

**KEITH ELLISON ATTORNEY
GENERAL STATE OF MINNESOTA**

Rachel Bell-Munger (#0395962)
Assistant Attorney General
445 Minnesota Street, Suite 900 St. Paul,
MN 55101-2127
(651) 757-1272
rachel.bell-munger@ag.state.mn.us

Attorneys for Plaintiff-Intervenor

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

World Without Genocide (“World”) is a nonprofit human rights organization at Mitchell Hamline School of Law with a mission to protect vulnerable people from discrimination and hate; to prevent violence against those who are targeted based on their identity; to support the prosecution of perpetrators of discrimination and hate; and to remember those whose lives have been affected by violence.

World is led by founder and executive director Ellen J. Kennedy, Ph.D. Dr. Kennedy holds doctorate degrees in sociology and in marketing from the University of Minnesota. Dr. Kennedy has lectured at universities around the world and has received local, national, and international awards for her work at World. She is a six-year member of the Edina Human Rights and Relations Commission and a member of the Minnesota State Bar Association Human Rights Committee. World is guided by a Board of Directors comprised of lawyers and law school professors, genocide survivors, and human rights leaders.

World has worked to advance understanding of human rights since its founding in 2006. Human rights are defined by the United Nations Universal Declaration of Human Rights as those rights inherent to all human beings without distinction of any kind, such as race, color, sex, national or social origin, property, language, religion, political or other opinion, birth, or any other status. *Universal Declaration of Human Rights*, G.A. Res. 217A

¹ World certifies that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity contributed monetarily towards its preparation or submission.

(III), UNGAOR, 3rd Sess., Supp. No 13, UN Doc A/810 (1948). Nondiscrimination is a human right. *Id.* at Article 7. As part of its mission, World raises awareness about the persecution of groups based on their status as members of protected classes and advocates for policies to end discrimination and violence based on membership in a protected class.

World has been successful in taking action on a number of human rights issues in Minnesota. Specifically, World led the passage of resolutions of support of United States Senate ratification of the United Nations Convention on the Elimination of Discrimination against Women (“CEDAW”) in Minneapolis, St. Paul, Edina, Richfield, Duluth, and Red Wing, and at the Minnesota State Bar Association and the Minnesota Nurses Association. World also authored and advocated for a bill at the Minnesota State Legislature that designates every April as Genocide Awareness Month, which passed and was signed into law by Governor Mark Dayton in 2013, and World initiated similar successful legislation in two other states. World led successful divestment efforts from companies complicit in funding the Darfur genocide for the pension fund of the State of Minnesota with a law passed in 2008; and for the contracting practices in the cities of Edina, Hopkins, Minneapolis, Red Wing, Virginia, Winona, and St. Paul, and the Minnesota State Bar Association. In addition, World hosts programs, law school courses, and exhibits that highlight human rights issues. Over the past ten years, World has offered 554 programs, including 73 Continuing Legal Education (“CLE”) courses, to more than 47,000 people in Minnesota.

In addition to local efforts, World advocates at the national level for human rights

protections in the law. Recently, World advocated for the reauthorization of the Violence Against Women Act (“VAWA”) and for legislation to end the conflicts in Darfur, Myanmar, South Sudan, and Syria.

This appeal raises important legal issues regarding the application of human rights in public schools. Respondent N.H. was excluded from the boys’ locker room based on gender identity. Respondent’s Br. at 14. At its core, this case is about dehumanizing transgender students and repackaging discrimination as protection. International human rights law and sociological studies do not support the conduct of the Appellant District. Separate is not equal. World advocates for policies that foster inclusion rather than exclusion, isolation, and separation, which stoke the flames of insidious hate. Given its mission and expertise, World has a strong interest in this case and offers a global perspective on human rights law and sociological research.

ARGUMENT

This case presents an important opportunity to address the human rights implications of the District’s actions towards N.H. The decision turns on whether the anti-discrimination provisions of the Minnesota Human Rights Act, and the equal protection rights afforded by the Minnesota Constitution, extend to and include transgender students’ use of school facilities consistent with their gender identity. Respondent’s Br. at 1.

As laid out by the Yogyakarta Principles that were developed by a consortium of human rights groups, “Each person’s self-defined gender identity is integral to their

personality and is one of the most basic aspects of self-determination, dignity, and freedom.” Conference of International Legal Scholars, Yogyakarta, Indonesia, Nov. 6-9, 2006, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), <http://www.yogyakartaprinciples.org/> (last visited March 4, 2020), Principle 3. In short, human rights law and sociological research support extending human rights protections to N.H. as it is fundamental to self-determination, dignity, and freedom.

I. FOLLOWING *GOINS V. WEST* OFFENDS BASIC NOTIONS OF HUMAN RIGHTS.

In 2001, *Goins* held that “the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender.” *Goins v. West*, 635 N.W.2d 717 (2001). As the Respondent argued, *Goins* was decided based on historical social norms rather than the plain language of the MHRA. Respondent’s Br. at 26. Specifically, *Goins* stands for two things: 1) In an employment setting, it is the traditional and accepted practice to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender. *Goins*, 635 N.W.2d at 723. And 2) A transgender employee must establish eligibility to use the bathroom that aligns with their gender identity. *Id* at 725 (“Thus, to meet that burden, *Goins* must establish that she was eligible to use the restrooms that West designated for use according to biological gender”). Here, the District constructed a separate restroom and changing facility that it determined N.H. must use. Appellant’s Br. at 25. The District argues that its approach “would allow the District to take into account, for example, whether a transgender student

had undergone medical treatments or procedures that might be relevant to the appropriate location for the student to change clothes or shower.” Appellant’s Br. at 29. The separation causes psychological harm akin to the discrimination identified as insidious by *Brown v. Board of Education*, 347 U.S. 483 (1954) and binding human rights law.

A. The “enhanced privacy” changing areas are separate and unequal in violation of *Brown v. Board of Education*.

The social issue in the present case mirrors a time in the twentieth century in which people were provided facilities based on race under the ‘separate but equal’ doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld the constitutionality of racial segregation.

In 1954, the U.S. Supreme Court, in *Brown v. Board of Education*, overturned *Plessy v. Ferguson*. In *Brown v. Board of Education*, the Supreme Court recognized that psychological harm that resulted from separate facilities,

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Id. at 494. The Supreme Court further recognized that separation based solely on race generates a “feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* The law requires that transgender students be provided facilities that are equal. Respondent’s Br. at 20. The parallel here is

all too obvious: as with the impact recognized by the court in *Brown v. Board of Education*, the biological distinction denotes inferiority, affects educational and mental development, and deprives transgender students of the benefits they would receive from being in a fully integrated school system that values and treats all students equally – not separately.

i. Transgender students endure globally recognized sociological impacts when forced to use separate facilities.

United Nations (“U.N.”) treaty entities have concluded that transgender youth frequently experience harassment and violence from classmates and teachers. *See* Katarina Tomasevski (Special Rapporteur on the Right to Education), *Reports of the Special Rapporteur on the right to education*, ¶ 75, U.N. Doc. E/CN.4/2001/52 (Jan. 11, 2001), and Munoz Villalobos (Special Rapporteur on the Right to Education), *Girls’ Right to Education*, ¶ 113, U.N. Doc. E/CN.4/2006/45 (Feb. 8, 2006); U.N. Hum. Rts. Comm., *Concluding Observations on Mexico*, ¶ 21, U.N. Doc. CCPR/C/MEX/CO/5, (Apr. 7, 2010); *Report of the Independent Expert for the United Nations Study on Violence Against Children*, ¶ 52, U.N. Doc. A/61/299 (Aug. 29, 2006). Further, U.N. entities recognize that isolation and stigma may generate self-esteem and depression and contribute to children being forced out of school and, in extreme cases, committing suicide. *See* Tomaveski, *Report of the Special Rapporteur on the right to education, supra* at ¶ 113; Radhika Coomaraswamy (The Special Rapporteur on Violence Against Women, Its Causes And Consequences), *Report of the Special Rapporteur on violence against women*, ¶ 1508 U.N. Doc. E/CN.4/2003/75/Add.1 (Jun. 1, 2003); Committee on the Rights of the Child, General Comment No. 20, ¶ 133, U.N. Doc. CRC/C/GC/20 (December 6, 2016).

U.N. entities have expressed concern about the impact of discrimination in schools on the ability of gender non-conforming people to access education. *See* Human Rights Committee, Concluding Observations on Mexico, *supra* at ¶ 21; Committee on Economic, Social and Cultural Rights, Concluding Observations on Poland, ¶ 12-13 U.N. Doc. E/C.12/POL/CO/5 (Feb. 12, 2009); Committee on the Rights of the Child, General Comment No. 3, ¶ 8 U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003); No. 13, ¶¶ 60 and 72 (g), U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011); No. 20, *supra* at ¶¶ 33-34; Committee on the Rights of the Child, Concluding Observations on New Zealand, ¶ 25, U.N. Doc. CRC/C/NZL/CO/3-4 (Apr. 11, 2011); Slovakia, ¶¶27-28, U.N. Doc. CRC/C/SVK/CO/2 (Jul. 10, 2007); and Malaysia, ¶ 31, U.N. Doc. CRC/C/MYS/CO/1 (Jun. 25, 2007). In addition, the International Labour Organization found that discrimination in education can have a life-long impact in terms of the ability to thereafter find gainful employment. International Labour Organization, Results of the ILO’s PRIDE Project, “Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work”, (2016) at p. 2, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_481575.pdf. (last visited March 4, 2020)

The United Nations appointed a Special Rapporteur on the human right to safe drinking water and sanitation in 2008. The Special Rapporteur specifically concluded that transgender people face discriminatory barriers in accessing the bathroom and recommended that States take all necessary measures to remove barriers and ensure that everyone is able to use the facility corresponding with gender identity. Catarina De

Albuquerque (The Special Rapporteur on The Human Right to Safe Drinking Water and Sanitation), *Reports of the Special Rapporteur on the human right to safe drinking water and sanitation*, ¶ 40, U.N. Doc. A/HRC/21/42 (July 2, 2012); *Report of the Special Rapporteur on the human right to safe drinking water and sanitation*, Hum. Rgts. Coun., ¶¶ 9, 30, 31, 48, U.N. Doc. A/HRC/33/49 (July 26, 2016).

B. Quite plainly, applying the social norms found in *Goins* offends the basic human right to be free from discrimination.

The Universal Declaration of Human Rights (“UDHR”), adopted by the General Assembly of the United Nations in 1948 following the Holocaust of World War II, sets forth aspirational fundamental human rights to be universally protected for all people, everywhere. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948). Article I established that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” *Id* at Art. I. The Universal Declaration of Human Rights upholds the belief that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” *Id*. Discrimination is prohibited based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Id*. The Universal Declaration of Human Rights was never intended to impose binding obligations on states; it was intended as a common standard of achievement for people of all nations. Eleanor Roosevelt, Chairman of the Comm'n on Human Rights,

Statement to the General Assembly (Dec. 9, 1948); Joseph L. Kunz, *The United Nations Declaration of Human Rights*, 43 *Am. J. Int'l L.* 316, 321-22 (1949).

In the same vein, the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, imposes negative obligations on participating states from discriminating on the basis of sex and ensures freedom from “torture, or...cruel, inhuman or degrading treatment,” and ensures “the right to liberty and security of person.” International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171 (ratified June 8, 21992) (hereinafter “ICCPR”) at Art. 22(1). While the right to be free from discrimination applies to the states generally, the prohibition against discrimination based on sexual orientation applies to “any field regulated and protected by public authorities.” U.N. Hum. Rts. Comm., *Non-discrimination*, General Comment No. 18, (37th Sess. 1989). Discrimination “should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” *Id.* Because the ICCPR has been ratified by the United States, the ICCPR has the same force and effect as a federal statute under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. (“all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”), *see also Whitney v. Robertson*, 124 U.S. 190, 194, 8 S. Ct. 456, 31 L. Ed. 386 (1888).

Other treaties have alluded to a state’s obligation to prohibit discrimination, though

they have not been ratified by the United States. The International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC), all contain nondiscrimination provisions. International Covenant on Economic, Social, and Cultural Rights, Art. 12, opened for signature Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), 19 I.L.M. 33 (1980); The United Nations Convention on the Rights of the Child of November 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989). In the same year that *Goins* was decided, the three United Nations Committees that monitor implementation of the respective treaties- the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination Against Women; and the Committee on the Rights of the Child - took the official position that discrimination against sexual minorities violates human rights obligations under treaties administered by the respective Committees. U.N. Hum. Rts. Comm., Working Group on Arbitrary Detention, Opinion No. 7/2002 (Sept. 3, 2001) ¶¶ 27-28 (Egypt); see Holning Lau, Note, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. Chi. L. Rev. 1689, 1701-02 & n.84 (2004). Because the United States is a signatory to but has not ratified those Treaties, the United States has an obligation under customary international treaty law to “refrain from acts which would defeat the object and purpose of [those] treat[ies].” *Vienna Convention on the Law of Treaties (Treaty Convention)*, May 23, 1969, 1155

U.N.T.S. 331, at 331.

Under these obligations, States must refrain from interfering in the enjoyment of rights, prevent abuses, monitor, investigate, and combat abuses when they occur, and provide a remedy to the victim. *Id.* In this context, it must be ensured that a transgender person has the right to be free from discrimination based on sexual orientation. *See* Minn. Stat. § 363A.03, subd. 44. An argument can be made that separating a transgender student and providing facilities based on biological body parts violates the non-discrimination prohibitions guaranteed under these Treaties. The universal right to be free from discrimination based on sexual orientation is at stake, or at least is put into question, if *Goins* is followed.

C. Morality does not define human rights protections.

The District argument implies the immorality of a biological female utilizing the changing facility of a biological male. Appellant's Br. at 29. The District's implied moral argument has no place in human rights law. Discrimination is all too often cloaked by morality arguments.

It is true that transgender rights are not universally viewed and accepted as human rights. There are states that continue to criminalize the status of transgender people. Morality exceptions have been used to justify systemic discrimination against classes of persons defined as sexual "deviants" in the form of regulation of sexual practices, for example, laws prohibiting masturbation, fornication, oral or anal intercourse, and other sexual practices. *See* Comm. on Econ., Soc. & Cultural Rts., U.N. GAOR, 13th Sess., 46th

mtg, ¶¶ 44-50, U.N. Doc. E/C.12/1995/SR.46 (Dec. 5, 1995); U.N. Hum. Rts. Comm., General Comment No. 28: Equality of Rights Between Men and Women, ¶ 24, CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (“Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”); Comm. on the Elimination of Discrimin. Against Women, Gen. Recommendation No. 21: Equality in Marriage and Family Relations, ¶ 14, U.N. Doc. HRI/GEN/1/Rev.1, at 90 (July 29, 1994); see also *Regina v. Butler*, [1992] 1 S.C.R. 452, 454 (Can.) (restrictions on free speech justified as necessary to protect women from degrading and dehumanizing pornographic treatment). Homosexuality remains punishable by death in Iran, Sudan, Saudi Arabia, and Yemen. Cassola, A., Heymann, J., Latz, I., Raub, A., *Protections of Equal Rights across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions*, 28 Yale J.L. & Feminism 149 (2016-2017).

However, as cultural attitudes towards transgender people shift towards supporting equal human rights and offering human rights protections when those rights are denied, legal protections have expanded in lockstep. As of 2020, twenty-two countries have adopted legislation comprehensively prohibiting discrimination based on sexual orientation including Argentina, Australia, Brazil, Canada, Costa Rica, Denmark, Finland, France, Hungary, Iceland, Ireland, Israel, Luxembourg, Mexico, Namibia, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, and Sweden. Anti-Discrimination Act 48 of 1977, Part 4C (Australia); So Paulo Lei No. 10.948, de 5 nov. 2001, art. 1

(Brazil); Loi de 6 nov. 2001 (France); Loi de 1 ao t 2000 (France); Human Rights Act 1993, § 21(1)(m) (New Zealand); *El Al Isr. Airlines Ltd. v. Danilowitz*, [1994] IsrSC 48(5) 749 (Isr. Sup. Ct.). Bolivia, Ecuador, Fiji, Malta and the UK have explicitly guaranteed protections on the basis of sexual orientation and gender identity in their constitutions. *See* Cassola, et. al, *Supra* at 158.

This is consistent with the evolution of gay rights in the United States. Same-sex marriage was prohibited throughout the United States until 2015. *See Obergefell v. Hodges*, 576 U.S. ___ (2015). As attitudes toward homosexuality changed, the law evolved to reflect changes in the attitudes involving increasing acceptance of gay marriage. Pew Research Center, *Attitudes on Same-Sex Marriage* (May 14, 2019) at <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage> (last visited March 4, 2020). The National Transgender Law Center has analyzed US states' policies regarding transgender rights and concluded that 24 states, the majority and including some of the most populous, provide protections for transgender people to a large degree, a significant movement in protections over the past decade. Transgender Law Center, *Snapshot: LGBTQ Equality by State* at <https://transgenderlawcenter.org/equalitymap>. (last accessed on March 4, 2020)

Where morality is balanced against human rights, a state is bound to protect the rights of its people afforded by the law over the application of a morality exception. In the words of former U.N. Secretary Ban Ki-moon, “But let there be no confusion: where there is tension between cultural attitudes and universal human rights, rights must carry the day.”

U.N. Secretary-General Ban Ki-moon, Human Rights Day on December 9, 2010, Ford Foundation event entitled, "Speak Up, Stop Discrimination."

II. TRANSGENDER PEOPLE FACE DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY.

A protected class is an identifiable group with a history of purposeful, unequal treatment or political powerlessness. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo.1982). Data suggest that transgender people are discriminated against due to gender identity; a 2015 United Nations report found that 76 countries retain laws to criminalize people based on sexual orientation or gender identity. Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*; ¶ 44, U.N. Doc. A/HRC/29/23 (May 3, 2015).

A. Organizations recognize that transgender people have been vulnerable to a history of purposeful, unequal treatment, or political powerlessness.

The Southern Poverty Law Center ("SPLC"), which monitors hate and extremist groups throughout the United States and is a national leader in public interest litigation, has long recognized the disparate treatment of LGBT people. The SPLC identifies a long list of organized anti-LGBT hate groups throughout the U.S.² Southern Poverty Law

² The list of anti-LGBT hate groups includes:

Abiding Truth Ministries (Springfield, Massachusetts)
Alliance Defending Freedom (Scottsdale, Arizona)
American College of Pediatricians (Gainesville, Florida)
American Family Association (Franklin, Pennsylvania)
American Family Association (Tupelo, Mississippi)
American Vision (Powder Springs, Georgia)
Americans for Truth About Homosexuality (Naperville, Illinois)
ATLAH World Missionary Church (All The Land Anointed Holy) (New York, New York)

Center, Anti-LGBT, available at <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbt> (last visited on March 4, 2020). Anti-LGBT groups on the SPLC hate list “often link homosexuality to pedophilia, claim that same-sex marriage and LGBT people, in general, are dangers to children, that homosexuality itself is dangerous, support

Bible Believers Fellowship (Worthington, Ohio)
Center for Family and Human Rights (C-FAM) (New York, New York)
Center for Family and Human Rights (C-FAM) (Washington, District of Columbia)
Chalcedon Foundation (Vallecito, California)
Church Militant/St. Michael's Media (Ferndale, Michigan)
Concerned Christian Citizens (Temple, Texas)
Conservative Republicans of Texas (Houston, Texas)
D. James Kennedy Ministries (Fort Lauderdale, Florida)
Faith2Action (North Royalton, Ohio)
Faithful Word Baptist Church (Tempe, Arizona)
Family Research Council (Washington, District of Columbia)
Family Research Institute (Colorado Springs, Colorado)
Family Watch International (Gilbert, Arizona)
Generations (Elizabeth, Colorado)
Heterosexuals Organized for a Moral Environment (H.O.M.E.) (Downers Grove, Illinois)
Illinois Family Institute (Carol Stream, Illinois)
Liberty Counsel (Orlando, Florida)
Mass Resistance (Denver, Colorado)
Mass Resistance (Ft. Worth, Texas)
Mass Resistance (Torrance, California)
Mass Resistance (Waltham, Massachusetts)
Mission: America (Columbus, Ohio)
Pacific Justice Institute (Sacramento, California)
Pass the Salt Ministries (Hebron, Ohio)
Pilgrims Covenant Church (Monroe, Wisconsin)
Probe Ministries (Plano, Texas)
Public Advocate of the United States (Merrifield, Virginia)
Ruth Institute (Lake Charles, Louisiana)
Save California (Sacramento, California)
Stedfast Baptist Church (Fort Worth, Texas)
Stedfast Baptist Church (Jacksonville, Florida)
Sure Foundation Baptist Church (Vancouver, Washington)
The Campus Ministry USA (Terre Haute, Indiana)
The Pray in Jesus Name Project (Colorado Springs, Colorado)
Tom Brown Ministries (El Paso, Texas)
True Light Pentecost Church (Spartanburg, South Carolina)
United Families International (Gilbert, Arizona)
Verity Baptist Church (Sacramento, California)
Warriors for Christ (Martinsburg, West Virginia)
Westboro Baptist Church (Topeka, Kansas)
World Congress of Families/International Organization for the Family (Rockford, Illinois)

the criminalization of homosexuality and transgender identity, and [claim] that there is a conspiracy called the ‘homosexual agenda’ at work that seeks to destroy Christianity and the whole of society.” *Id.* As recently as 2019, the SPLC identified “transphobic rhetoric, some of it violent, [that] appears to be increasing among white nationalists and neo-Nazis as the fight for transgender rights gains visibility and public support.” Southern Poverty Law Center, *White Nationalist Threats Against Transgender People Are Escalating*, available at <https://www.splcenter.org/hatewatch/2019/06/26/white-nationalist-threats-against-transgender-people-are-escalating> . (last visited on March 4, 2020).

The issue is not isolated to the United States. In 2016, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) documented a high prevalence of physical, psychological, and sexual violence, as well as bullying and cyberbullying, against students, based on sexual orientation and gender identity or expression. UNESCO, *School Violence and Bullying: Global Status Report (2017)*, available at <https://unesdoc.unesco.org/ark:/48223/pf0000246970>. (last visited March 4, 2020).

Intergovernmental organizations have made significant efforts to reduce the discrimination and violence facing transgender people. The World Health Organization (“WHO”) took a significant step to address stigma associated with gender diversity with an update to the International Classification of Diseases, 11 (“ICD-11”), the WHO official manual of diagnoses. The update reclassified gender identity disorder, or identifying as transgender in terms of sexuality, as ‘not a mental disorder,’ WHO, *World Health*

Assembly Update (May 25, 2019), available at <https://www.who.int/news-room/detail/25-05-2019-world-health-assembly-update>. Similarly, the Committee on the Rights of the Child has recommended that States take all necessary measures to protect LGBT children and children demonstrating any kind of non-conformist behavior from violence. *See for example*, Committee on the Rights of the Child, Concluding Observations on Iraq, ¶ 28 U.N. Doc. CRC/C/IRQ/ CO/2-4 (March 2, 2015).

In 2016, the U.N. Human Rights Council passed a resolution to appoint an independent expert to investigate the causes of violence and discrimination against people due to their gender identity and sexual orientation, and to discuss with governments how to protect these people. U.N. Hum. Rts. Coun'l, *Protection Against Violence and Discrimination Based on Sexual Orientation And Gender Identity*, ¶3 U.N. Doc. A/HRC/RES/32/2 (June 30, 2016).

The United States' position is inconsistent. While the U.S. has failed to ratify key international human rights treaties such as CEDAW and the Convention on the Rights of the Child and implemented national policies that threaten transgender rights such as exclusion of transgender people from military service, the United States has voted for other measures to protect transgender people. However, at the global level the United States has played a significant role in drafting and supporting international resolutions prohibiting ill-treatment of transgender people. The United States voted in favor of the U.N. Human Rights Council Resolution (L.9/Rev.1) adopted on June 17, 2011. This resolution “expresses [UN] concern at acts of violence and discrimination, in all regions of the world,

committed against individuals because of their sexual orientation and gender identity ...requests the UNHCHR to commission a study ... on how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.” *Id.*

The United States was a leading co-sponsor and voted in support of the U.N.’s second resolution on LGBTQ rights passed on September 26, 2014, the goal of which was to combat violence and discrimination based on sexual orientation and gender identity. Human rights, sexual orientation and gender identity, G.A. Res. 27/32., U.N. GOAR, 27th. Sess., U.N. Doc. A/HRC/RES/27/32 (October 2, 2014).

In 2018, to commemorate International Day Against Homophobia, Transphobia and Biphobia, U.S. Secretary of State Michael R. Pompeo made the following statement:

The United States stands for the protection of fundamental freedoms and universal human rights. Our nation was founded on the bedrock principle that we are all created equal – and that every person is entitled to life, liberty and the pursuit of happiness.

Around the world, far too many governments continue to arrest and abuse their citizens simply for being lesbian, gay, bisexual, transgender or intersex (LGBTI). Fear and bigotry are enshrined in laws that criminalize LGBTI status or conduct in more than 70 countries. In some, being LGBTI is punishable by death.

The United States firmly opposes criminalization, violence, and serious acts of discrimination such as in housing, employment and government services, directed against LGBTI persons... On the International Day Against Homophobia, Transphobia, and Biphobia, the United States stands with people around the world in affirming the dignity and equality of all people regardless of sexual orientation, gender identity or expression, or sex characteristics. Human rights are universal, and LGBTI people are entitled to the same respect, freedoms, and protections as everyone else.

Michael R. Pompeo, Secretary of State, “On the International Day Against Homophobia, Transphobia, and Biphobia,” Washington, D.C. (May 17, 2018).

Though the United States is, at times, inconsistent in its application of LGBTQ policies, it is well-settled that transgender people face purposeful, unequal treatment and have been recognized as a class of people deserving of protection by organizations at all levels.

B. The School District’s solution to repackage discrimination as privacy protection is not narrowly tailored.

Rather than responding to discomfort with exclusion, schools should seek to educate cisgender students (those whose sense of gender identity conforms with their birth sex) about gender variance, building students' empathy for their transgender peers while simultaneously eroding cisgender students' discomfort. This approach--education rather than exclusion--better reflects the civic goals of public education, as it fosters community and understanding in a way that forcing transgender students to avoid bathrooms aligned with their gender never can.

Social science research that examines practices to reduce bias among conflicting groups demonstrates that contact between two groups that have had perceived differences can promote tolerance and acceptance, but only under certain conditions, such as equal status among groups and shared, common goals. This is called "the contact hypothesis," or the intergroup contact theory, originally developed by Gordon Allport Allport, G. W. *The nature of prejudice*. Reading, MA: Addison-Wesley (1954). The premise of the theory is that, under appropriate conditions, interpersonal contact is one of the most effective ways to reduce prejudice between majority and minority group members. If one

has the opportunity to communicate with others, they are able to understand and appreciate differences involving others' way of life. As a result of new appreciation and understanding, prejudice should diminish. Issues of stereotyping, prejudice, and discrimination are commonly- occurring issues between rival groups. Allport's proposal was that properly- managed contact between the groups would reduce prejudice and discrimination and lead to better interactions.

In a meta-analysis of 713 independent samples from 515 empirical studies, the findings show that intergroup contact typically reduces intergroup prejudice. Pettigrew, T. F., & Tropp, L. R. *A meta-analytic test of intergroup contact theory*, *Journal of Personality and Social Psychology*, 90(5), 751–783 (2006). These contact effects typically generalize to the entire outgroup, and the findings emerge across a broad range of outgroup targets and contact settings. Contact theory, which was devised originally for racial and ethnic encounters, can be extended to other groups and, under conditions of shared activities and interests, the result will be a reduction in prejudice between the two groups. The implication is clear: in the face of significant public discrimination and prejudice against transgender people, and particularly against youth, it is critical to fully include, rather than to exclude, transgender youth in school activities. Allport's contact theory is particularly relevant to inclusive education settings, as it supports an equitable school culture, and forms the basis of awareness and education programs.” McKay, C. *The Value of Contact: Unpacking Allport's Contact Theory to Support Inclusive Education*, *PALAESTRA*, Vol. 32, No. 1 pp. 25. (2018).

CONCLUSION

This case provides an important opportunity for this Court to protect human rights for transgender youth. By requiring school districts to allow transgender youth to use facilities that align with their gender identity, the Court puts an end to a policy that entrenches “separate but equal” for a cross-section of Minnesotan youth. Customary law and global and local policies show strong support for the universality of human rights. For these reasons, *amicus curiae* World Without Genocide support Respondent N.H. and respectfully request that the Court affirm the order of the District Court denying the District’s motion to dismiss.

Dated: March 6, 2020

Respectfully submitted,

s/ **Tara Kalar**

TARA KALAR (#0394954)
WORLD WITHOUT GENOCIDE
875 Summit Avenue
St. Paul, Minnesota, 55105
(612) 670-9912
tara.kalar@mitchellhamline.edu

COUNSEL FOR AMICUS CURIAE
WORLD WITHOUT GENOCIDE

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Respectfully submitted,

s/ **Tara Kalar**

TARA KALAR (#0394954)
WORLD WITHOUT GENOCIDE
875 Summit Avenue
St. Paul, Minnesota, 55105
(612) 670-9912
tara.kalar@mitchellhamline.edu

COUNSEL FOR AMICUS CURIAE
WORLD WITHOUT GENOCIDE