

CASE NO. 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, Respondent,

v.

Anoka-Hennepin School District No. 11,

Petitioner.

BRIEF OF AMICUS CURIAE
ANOKA HENNEPIN EDUCATION MINNESOTA, EDUCATION
MINNESOTA, THE NATIONAL EDUCATION ASSOCIATION, AND THE
AMERICAN FEDERATION OF TEACHERS

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AMICI INTEREST, IDENTITY, AND AUTHORITY TO FILE

Amici are local, state, and national labor organizations (“Unions”)¹ of educators, school support personnel, and higher education faculty. Collectively, our members work daily with hundreds of thousands of transgender and gender nonconforming students throughout the United States.

Anoka Hennepin Education Minnesota (AHEM) is the local educators’ union in the Anoka-Hennepin School District. AHEM represents over 2,900 educators employed by the Anoka-Hennepin School District. Not only does AHEM provide services to its members, but it also advocates for policies benefitting all students in the Anoka-Hennepin School District.

Education Minnesota is the leading advocate for public education in Minnesota. Our over 89,000 union members work in pre-K-12 schools and higher education institutions statewide, and include almost all of Minnesota’s K-12 public school teachers; education support professionals; faculty at several university campuses, and community and technical colleges; college students preparing for careers in education; and retired educators who have devoted their lives to students.

The National Education Association (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

¹ Pursuant to Minn. R. Civ. P. 129.03, Education Minnesota, AFT, and NEA certify that (1) no counsel for any party in this action authored this brief, in whole or in part, and (2) no person or entity other than *amici curiae*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

public schools. NEA's members have a variety of experiences with transgender educational policies, and access to sex-segregated facilities in particular.

The American Federation of Teachers, AFL-CIO (AFT) is a labor union that represents 1.7 million pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; nurses and healthcare workers; and early childhood educators. The AFT champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for our students, their families, and our communities.

As advocates for educators who teach, coach, treat, counsel, and mentor transgender students, the Unions have a deep understanding of the impact of the policies and practices under consideration in this case. Consequently, the Unions have a strong interest in ensuring that schools adopt policies that promote the well-being, safety, and dignity of transgender and gender nonconforming students. The Unions also have an interest in protecting the rights of our members—including transgender educators—to work in schools that are inclusive and free from discrimination.

On December 19, 2019, the Unions petitioned this court for leave to participate in this matter as *amicus curiae*. That petition was granted on January 2, 2020.

ARGUMENT

I. School environments can be physically and emotionally dangerous for transgender and gender nonconforming students.

The issues implicated in this litigation impact a substantial number of students. According to the 2016 Minnesota Student Survey, there are more than 2,000 transgender students in schools throughout the state. Minn. Dep't of Educ., *Minnesota Student Survey*, (2016), http://mn.gov/gov-stat/pdf/2017_FACTSHEET_transgender_bullying_statistics.pdf. Troublingly these students show higher rates of internal distress, suicidal ideation and attempts, and rates of bullying. *Id.* Too often, school environments contribute to and compound the difficulties caused by a society that does not understand or validate transgender identities.

The majority of the population is cisgender,² and given this, has never experienced gender dysphoria or other distress related to their gender identity. For transgender individuals, this lack of shared experience, as well as intentional bigotry and discrimination can have deeply negative impacts on learning environments. Bullying and lack of support and affirmation from school administration, staff, and other students can combine to create dangerous environments for transgender students. More than half of transgender students have been physically harassed at school, and forty-four percent have been physically assaulted at school, yet only forty-six percent of those experiencing this

² Denoting or relating to a person whose sense of personal identity and gender corresponds with their birth sex. KC Clements, *What Does It Mean to be Cisgender*, <https://www.healthline.com/health/transgender/what-is-cis#respectfor-others>.

physical violence have reported the harassment to school officials, and only one-third felt that the school responded effectively. Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experience of Transgender Youth in Our Nation's Schools* 18-22 (2009), <https://files.eric.ed.gov/fulltext/ED505687.pdf>. Transgender students from rural areas can face even higher levels of victimization than students in suburban or urban areas. Joseph G. Kosciw et al., GLSEN, *2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, xxvi, (2017) <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

This atmosphere of pervasive bullying and harassment naturally presents a severe impediment to learning, which in turn leads to substantially worse educational outcomes. Seventeen percent of transgender students have reported that they have transferred or quit school because of harassment. Sandy E. James et al., Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 135 (2016); *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://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. Over one third of transgender students had missed a day of school in the previous month, and over 10 percent had missed four or more days in the last month. Joseph G. Kosciw et al., *Id.* at 14. It should go without saying that missing school diminishes a student's educational access. Transgender students subjected to gender-based verbal harassment have, on average, worse grades than their peers. Worse yet, those who face frequent

harassment pursue post-secondary education at lower rates than those who are not harassed. *Id.* at 27. Tragically, transgender students are also at a much higher risk for suicide than their cisgender peers. Grant et al., *Id.*, at 2; James et al., *Id.* at 132. This disturbing national trend is reflected in Minnesota; transgender teens are five times more likely to attempt suicide than cisgender peers. Minnesota Student Survey, *Id.* at 1.

II. Discriminatory policies and settings for transgender students cause harm, and there are no benefits to cisgender students.

Understanding of transgender identities and the importance of inclusion has increased in recent years. 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).

If school districts are permitted to prohibit students from using restrooms or locker rooms consistent with their gender identity, it will 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; that there is something wrong with them; and that their classmates must be protected from them. The necessary consequence of such a holding is to demean and stigmatize transgender students. *Id.* at 2602. The students will suffer psychosocial harms that deprive them of the opportunity to become their best selves, and focus on learning and their education. A report by Gender Spectrum, an organization providing training and advocacy to raise understanding of gender

identity and expression, summarizes the potential harms in stark terms:

The consequences of not affirming a child’s gender identity can be severe, and it can interfere with their ability to develop and maintain healthy interpersonal relationships. In the school context, that distress will also hinder a transgender student’s focus in class and ability to learn. The longer a transgender youth is not affirmed, the more significant and long-lasting the negative consequences can become, including loss of interest in school, heightened risk for alcohol and drug use, poor mental health and suicide.

Gender Spectrum et al., 2015, *Schools in Transition—A Guide for Supporting*

Transgender Students in K-12 Schools 8 (2015)

[https://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-](https://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf)

[Transition-2015.pdf](https://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf). As the Supreme Court has noted, harm in the educational context 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).

When schools deny transgender students access to locker rooms or restrooms in accordance with their gender identity, transgender students often avoid participating in gym class or sports and refrain from using bathrooms altogether. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017) (plaintiff explained that “the denial of access to the boys’ bathroom was causing him harm, as his attempts to avoid using the bathroom exacerbated his vasovagal syncope, a condition that renders [him] susceptible to fainting and/or seizures if dehydrated.”). 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., *Id.* at 228–29. Many transgender people report higher rates of urinary tract infections than the general public. For instance, in a 2013 study conducted by the Williams Institute, 54 percent of transgender respondents reported some sort of health problem related to bathroom avoidance, including dehydration, urinary tract infections, kidney infections and other kidney problems. Jodi L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives* 75 (Jun. 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf>. These issues combined with the high instances of bullying as described in section one can deeply impact a trans student’s ability to engage in their learning environment.

There is 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. In early 2015, Media Matters for America contacted officials at the largest school districts in 12 states with laws protecting transgender students, and not a single one reported “any incidences of harassment or inappropriate behavior” as a result of “allowing transgender students to access facilities they’re comfortable with.” Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections For Transgender Students*, Media Matters for America (Jun. 3, 2015). Nationally, organizations that work against domestic violence and sexual violence are overwhelmingly in support of transgender inclusive policies and practices, including

access to restrooms and locker rooms consistent with one's gender identity.³

Student privacy interests can be addressed without discriminating against transgender students. In schools that permit transgender students to use the facilities consistent with their gender identity, gender-neutral facilities are often 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. If any student is uncomfortable changing or sharing a restroom with a transgender student, that student should be free to use a separate facility. *See, e.g.,* Minn. Dep't of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* (revised Sept. 25, 2017), <https://education.mn.gov/MDE/dse/safe/>. This is a non-discriminatory alternative to Appellant's policy, which is segregating and stigmatizing while offering no substantive benefit.

III. Educators also experience harm when they are forced to implement discriminatory policies and practices.

Students are not the only victims of policies such as the "enhanced-privacy" changing facilities mandated by Appellant District. Educators and other school

³ National Task Force to End Sexual and Domestic Violence Against Women, *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 21 2016), <https://www.endsexualviolence.org/wp-content/uploads/2017/09/STATEMENT-OF-ANTI-SEXUAL-ASSAULT-AND-DOMESTIC-VIOLENCE-ORGANIZATIONS-IN-SUPPORT-OF-EQUAL-ACCESS-FOR-THE-TRANSGENDER-COMMUNITY.pdf>.

employees also experience harm when they are required to implement discriminatory policies that they rarely, if ever, have any role in developing.

In this case, for example, staff initially honored and supported N.H.'s wish to use the boys' locker room until the School Board intervened. "During the period of time N.H. was allowed to use the boys' locker room, he felt well-liked by staff, coaches, and students." (Add. 6.) "But on February 1, 2016, with three swim meets left in the season, the School Board ("Board") for the District overruled CRHS staff and made the discriminatory decision to prohibit N.H. from using the same changing facilities as other boys." (RA001 (Corrected Complaint) ¶ 4.)

Although the School Board temporarily reversed its decision, it later adopted a memorandum on March 22, 2016, that allowed Appellant School Board—not educators—to determine which locker rooms each transgender student would be allowed to use "on a case-by-case basis." (Add. 6, RA027.) In February of 2017, the Board held a closed meeting specifically about which locker room he could use, sending a letter that "recommended" he use the "enhanced privacy" room constructed the previous summer. (Add. 8, RA031.) In the spring of 2017, after N.H. used the boys' locker room during gym class, staff contacted N.H.'s mother to tell her that her son faced the prospect of discipline if he continued using the locker room consistent with his gender identity. (Add. 8.) Although it was Appellant's School Board that had made the decision to discriminate against N.H., it was left to N.H.'s coaches and teachers to break the unfortunate news.

Too often educators are required to enforce needlessly discriminatory policies

by school board members who, unlike educators, lack direct contact or relationships with the students and parents harmed by such policies. Policies that segregate transgender students like N.H. from their peers are not self-executing: they compel individual administrators, educators, and other public school employees to carry them out. Educators suffer both professional and psychological harms when they are forced to watch, and participate in, the stigmatization and degradation that discriminatory policies inflict on children. In many cases, educators bear the heavy burden of balancing their loyalty to their employer and their empathy for marginalized students.

When policies prevent teachers from addressing student needs, teachers no longer have access to the moral rewards of teaching, 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 Ehrich et al., *Ethical Dilemmas: A Model to Understand Teacher Practice*, 17 Teachers & Teaching: Theory & Prac. 173 (2011). This demoralization causes teachers to suffer “depression, discouragement, frustration, and shame,” leaving them “continually frustrated” in their pursuit of good teaching. Santoro, *Id.*, at 17. “Moral injury,” a term first used by military psychologists, is now being used by researchers to describe the harm experienced by educators who witness or participate in school practices at odds with their moral beliefs. Sarah Schwartz, *Teachers Often Experience 'Moral Injury' on the Job, Study Finds*, Education Week (May 23, 2019), http://blogs.edweek.org/teachers/teaching_now/2019/05/moral_injury_teachers.html. Moral injury has led to a dramatic rise in teacher turnover, which is increasingly

depriving America's students of trained and experienced educators.⁴

Even school employees who may support or feel ambivalent about discriminatory policies may be harmed by them. Recent peer-reviewed studies have found that individuals who act with prejudice toward others face negative health outcomes. Mark L. Hazenbuehler, Anna Bellatorre & Peter Muening, *Anti-Gay Prejudice and All-Cause Mortality Among Heterosexuals in the United States*, 104 *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. Hazenbuehler *Id.* at 336. Working in a discriminatory environment can be harmful, even for those who do not directly participate in the discrimination. *Cf.* Lisa Rappaport, *Racism Linked to Mortality Rate 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>.

As noted in the Complaint, “the [Anoka-Hennepin School] Board and the District have a history of anti-LGBTQ actions, which were linked to a rash of student

⁴ According to a 2019 report, 52% of individuals who hold active teaching licenses in Minnesota are not working in classrooms. Wilder Research in collaboration with the Minnesota Professional Educator Licensing and Standards Board, *2019 Biennial Minnesota Teacher Supply and Demand 2* (Jan. 2019), https://mn.gov/pelsb/assets/2019%20Supply%20and%20Demand%20Report_tcm1113-370206.pdf; *see also* Emma Garca and Elaine Weiss, *U.S. Schools Struggle to Hire and Retain Teachers*, Economic Policy Institute (Apr. 16, 2019), <https://www.epi.org/publication/u-s-schools-struggle-to-hire-and-retain-teachers-the-second-report-in-the-perfect-storm-in-the-teacher-labor-market-series/>.

suicides, including by at least four students who were either gay or perceived as gay by other students...” (RA004, ¶ 15.) The trauma of those events has had a deep and lasting impact on many of the District’s educators and other school employees, many of whom wish desperately to see their School Board adopt policies that are more affirming of their LGBTQ students.

IV. All students benefit when school districts implement inclusive and trans-affirming policies.

Allowing students to use restrooms and locker rooms consistent with their gender identity is just one of a host of school policies that have been shown to improve the educational experiences of transgender, gender nonconforming, and cisgender students. In schools with policies that explicitly prohibit anti-LGBTQ bullying, 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)). LGBTQ students have 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).

A task force established by Governor Mark Dayton in 2012 reached similar findings and recommended stronger anti-bullying protections. Governor’s Task Force on the Prevention of School Bullying, *Safe and Supportive Schools: Prevention of School Bullying Task Force Report* 15 (Aug. 1, 2012),

<https://www.leg.state.mn.us/docs/2012/other/120608.pdf>. In 2014, the Legislature passed and Governor Dayton signed the Safe and Supportive Schools Act, which requires every school district in the state to adopt and enforce a comprehensive anti-bullying policy that specifically prohibits bullying on the basis of sexual orientation, gender identity, and gender expression. Act of April 9, 2014, ch. 160, 2014 Minn. Laws 1 (codified as amended at Minn. Stat. § 121A.031 (2018)). In 2017, the Minnesota Department of Education developed a toolkit to assist districts in supporting transgender and gender nonconforming students and working with the broader school community as trans-affirming policies are implemented. *Transgender Toolkit*. Among the Department’s recommendations is to “work with transgender and gender nonconforming students to ensure that they are able to access needed facilities in a manner that is safe, consistent with their gender identity and does not stigmatize them.” *Id.* at 10. Despite this guidance and Appellant District’s own guidelines professing to “minimize stigmatization” of transgender students with respect to locker rooms,⁵ the District’s actions toward N.H. repeatedly singled him out for differential treatment. Resp’t Br. at 3.

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., *Id.* 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

⁵ Appellant’s Br. at 8.

self-esteem, and are bullied at lower rates than peers at other schools. Kosciw et al., *supra*, at 121. The value of inclusive policies for transgender student outcomes is pronounced even in schools that only recently adopted supportive policies. 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.

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. See Nat’l Sch. Climate Ctr., *School Climate Research Summary 2-3* (Aug. 2012), <https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf>.

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).

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.,

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).

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, such as Title IX and women’s athletics, and the Rehabilitation Act and the Individuals with Disabilities in Education Act, see 29 U.S.C. § 701 et seq.; 20 U.S.C. § 1400 et seq.⁶

On the other hand, allowing discrimination against one group infects antidiscrimination efforts against others. 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

⁶ 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> (noting greater academic achievement by female students who participate in athletics); *What Does the Research Say About Inclusive Education?* Wrightslaw (1998-2016), <https://goo.gl/K6TzL6>.

be treated as “less than” as well. The reverse is also true: educators have discussed with us how once their school began adopting LGBTQ-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 accepted at school. The relief requested by N.H. and the other Respondents in this case is not only required by current law; it will benefit the student body as a whole.

V. Making school facilities unavailable to students on the basis of sex is clearly prohibited by the MHRA.

A. The Court should find that discrimination on the basis of an individual’s status as transgender is discrimination on the basis of sex.

The Court should find that segregating school facilities in based on students’ status as transgender constitutes discrimination on the basis of sex in violation of Minnesota Statutes Section 363A.11. Minnesota courts often apply principles developed in Title VII adjudications because of substantial similarities between Title VII and the MHRA.

Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986). This is appropriate in comparing the statutes’ definition of sex. Title VII contains the following definition:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions ...

42 USC § 2000e (k). The definition contained in the Minnesota Human Rights Act traces its lineage to Title VII: “‘Sex’ includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth.” 363A.03, Subd. 42 (2018). The Eighth Circuit has recognized that a sex discrimination claim can be based upon an applicant's

status as transgender. *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012).

Courts have found that discrimination against transgender individuals constitutes discrimination on the basis of sex in the context of anti-discrimination statutes with language that is similar to the MHRA. First, Title IX provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance....” 20 U.S.C. § 1681(a); see also 34 C.F.R. § 106.31(a). In *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047-49 (7th Cir. 2017), cert. dismissed, 138 S. Ct. 1260 (2018), the Seventh Circuit found that a transgender student could bring a sex discrimination claim under Title IX.

Secondly, state courts have also visited this issue under state anti-discrimination laws in a variety of contexts. In a set of facts that are similar to those presently before the Court, a Missouri school district denied a transgender male student access to the boys’ locker room and restroom. See *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019). In *R.M.A.*, the Missouri Supreme Court reversed the dismissal of the plaintiff’s complaint, finding that his allegation that he was male and that this was the reason for the exclusion he had suffered was sufficient to state a claim under the Missouri Human Rights Act. 568 S.W.3d at 426-428. While this precedent is not binding on this Court, it is instructive.

State courts have extended these findings to other contexts, as well. In New Jersey, the Superior Court concluded that discrimination against transgendered persons in

employment is a form of prohibited sex discrimination. *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001). Similarly, in *Hispanic AIDS Forum v. Estate of Bruno*, 839 N.Y.S.2d 691, 696 (N.Y. Sup. Ct. 2007), the court declined to dismiss a complaint alleging that the refusal to rent office space to an organization serving transgender clients was unlawful discrimination on the basis of sex. While these cases are not binding on the Court, they are instructive and offer a roadmap for an interpretive approach that recognizes N.H for who he is.

B. Appellant discriminated against N.H on the basis of sex.

While conceding that no other student raised concerns related to privacy⁷, Appellant acknowledges that N.H. was segregated from his classmates on the basis of his transgender status. The School District treated him differently and prohibited him from using the same space as his classmates because his gender identity differs from his sex assigned at birth.

This case arguably does not implicate sexual orientation as it is defined in Minnesota law. Minn. Stat. § 363A.03, subd. 44 (“‘Sexual orientation’ means . . . having or being perceived as having a self-image or identity not traditionally associated one's biological maleness or femaleness.”). N.H. has not been subjected to segregation and discrimination because he *presents* as stereotypically male. He has been subjected to

⁷ Appellant’s invocation of privacy is somewhat idiosyncratic. The cases that Appellant cites for the proposition that students are entitled to higher levels of privacy, however, primarily arise from involuntary searches of their person. That context is very distinguishable from the voluntary use of a locker room following a non-compulsory extracurricular activity. Furthermore, Appellant’s action did not offer greater privacy for the remainder of students using the locker room; it merely created an exclusion for N.H.

discrimination because Appellant determined he was not sufficiently *biologically* male.

There does not appear to be a dispute about the fact that N.H. is male.⁸ However, neither sex nor gender are binary, nor are they biologically rigid.

Researchers now hypothesize that an individual biological characteristics may differ based upon when an individual initiates the transition from their birth-assigned sex:

The ENIGI researchers hope that the emerging results will help to tease apart some ‘nature versus nurture’ controversies about the differences among genders. People who transition early in life, for instance, might have different brain characteristics from those who transition later, owing to the way their brains are shaped by societal gender roles or biological factors, such as hormones during puberty.

Sara Reardon, *The largest study involving transgender people is providing long-sought insights about their health*, 568 *Nature* 446-449 (2019). Indeed, researchers have found that scans of the brains of a group of transgender boys who had recently begun testosterone treatment showed that their brains look more like those of cisgender boys. Additional research shows that “there is a significant, durable biological underpinning to gender identity.” Denise Grady, *Anatomy Does Not Determine Gender, Experts Say*, *New York Times* (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html>. As a result, professional organizations such as the Endocrine Society have issued guidelines

⁸ Appellant states, “[B]ecause there are no other factual allegations in the complaint regarding the factors N.H. alleges are relevant to his sex (for example, any changes in N.H.’s external anatomy that caused him to be designated as female at birth), and for the sake of clarity, the District refers to N.H. as biologically female and identifying as male. (App. Br. at 3, n. 1). This assertion somewhat explicitly begs the question, insofar as it assumes a fact that does not appear to be in evidence, which is whether N.H. is biologically female.

explaining that gender is biologically based, and should be treated as such by insurers and doctors. Endocrine Soc'y, *Transgender Health, Endocrine Society Position Statement* (Sept. 20, 2017), <https://www.endocrine.org/advocacy/position-statements/transgender-health>. Given this, neither the Appellant nor any other entity subject to the MHRA should be in the business of determining whether an individual is in a particular biological category, especially for the purpose of isolating or stigmatizing an employee, student, or customer.

In short, the MHRA's definition of "sexual orientation," as applied to transgender individuals, is out of step with a modern understanding of what it means to be transgender, because it erases the biological basis for being transgender. Fortunately, this does not require a legislative correction; the MHRA prohibits discrimination on the basis of sex, and that analysis should prevail in this case.

VI. Minnesota Courts should review and reverse the finding in *Goins*.

A. The *Goins* case should have analyzed whether the employer had engaged in discrimination on the basis of sex.

Amici Unions respectfully submit that it is well past time to revisit *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001). In the nearly twenty years that have passed since that time, the general understanding of what it means to be transgender has expanded significantly. *Goins* should be reversed because its analysis harms transgender individuals in a variety of contexts. It harms employees, and Appellant's reliance on the case demonstrates the potential harm it presents should it be applied in other cases, as well.

Other courts have revisited prior case law interpreting anti-discrimination statutes with an eye toward modernity. In *Wilson v. Phx. House*, 42 Misc. 3d 677 (NY. Sup. Ct. 2013), the New York Supreme Court considered a housing discrimination claim under the New York State Human Rights Law when a transgender woman in an in-patient treatment program was subjected to differential rules regarding dress, grooming, and facilities access. The court noted the slow but inexorable shift away from characterizing differences in gender identity as disordered:

As our society evolves, the concept of gender is evolving from a "coercive binary regime" toward a more fluid identification of one's gender, thus moving claims of gender identity disorder and any concomitant claims of disability into a realm of political unacceptability.

Id. at 687. The court further noted that, in cases in which transgender status has not been found to be a suspect class or that discrimination on the basis of an individual's status is not unlawful have been rooted in the view that "gender identity is not immutable but 'chosen.'" *Id.* at 688. The court found conversely, that in the instances in which other courts found that discrimination on the basis of a plaintiff's transgender status was impermissible, it was when those courts acknowledged and understood that gender identity was immutable. *Id.*

Minnesotans, including students, feel increasingly free to live their personal gender identity and to be accepted for who they are. The *Goins* case is now out of step with our understanding of gender identity, as well as our cultural acceptance of difference. Nonetheless, the *Goins* case presently stands for the proposition that

employees – and students, Appellant hopes – can be ostracized and stigmatized in a place that they cannot choose to avoid, namely, their job or their school.

The effect of the *Goins* case, as N.H. experienced, is pernicious. Appellant’s brief concedes that:

While on the swim team, N.H. used the boys’ locker room for nearly the entire season *without incident*. The coach and the student athletes were welcoming and supportive of N.H. N.H. felt well-liked by teaching staff, administrators, swim coaches, and students, and he was doing well academically.

App. Br. 7 (emphasis added). Nevertheless, Appellant wishes to rely on *Goins* to support what was, by its own admission, a solution in search of a problem. As noted herein, and as exemplified in the medical emergency that N.H. experienced as a result of this discrimination, the application of *Goins* has a cost. However, that cost is exacted on a group of individuals to whom the protections of the MHRA very logically extend. Because the *Goins* case invites discrimination, as it did here, and because it no longer reflects a contemporary understanding of what it means to be transgender, it should be abandoned.

There is now a growing consensus among state and federal courts that discrimination against transgender individuals is discrimination on the basis of sex. This body of judicial decisions, supported by extensive social science research, did not exist at the time *Goins* was decided. The Court should take this opportunity to eliminate any remaining uncertainty and find that requiring students or employees to use separate restrooms or locker rooms is an unfair discriminatory practice prohibited by the Minnesota Human Rights Act.

CONCLUSION

Appellants seek an order that would allow schools to discriminate against their students on the basis of sex. Such an order would harm transgender students, degrade the school climate for all students, and injure educators themselves. The Unions urge this Court to affirm the lower court's ruling denying Appellant District's motion to dismiss.

Respectfully submitted,

Dated: March 9, 2020

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3. The document is produced with a proportional size 13-point Times New Roman font, and the length of this brief, including footnotes, is 6,087 words, as calculated by the word count of the word-processing software used to prepare the brief. This document was prepared using Microsoft Word 2016.

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