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,

vs.

Anoka-Hennepin School District No. 11,

Appellant.

BRIEF OF AMICUS CURIAE VIVIAN FISCHER AND MAX PENTELOVITCH

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AMICI IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus Max Pentelovitch ("Max") was assigned female sex at birth,[2] but has identified as a boy since middle school, has been known by the name ("Max") since late middle school, and is known as a boy at his public school in a Hennepin County suburb of Minneapolis. Max's pronouns are "he" and "him." *Amicus* Vivian Fischer ("Vivian") is a practicing family medicine physician and integrative health and wellness coach who has treated many transgender individuals over the twenty-five year course of her medical career. Vivian is Max's mother.[3]

Just as Respondent N.H. was not allowed to use the boys' locker room in his school, Max is not allowed to use the boys' restrooms in his school despite the fact that Max's school district has adopted a policy that it will "provide all students with access to facilities that align with students' gender identity."[4] Because Max does not identify as a girl, Max does not use the girls' restroom facilities. The only accommodations provided by the school

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[1] Pursuant to Minn. R. Civ. App. P. 129.03, the undersigned counsel certify that they authored the entirety of this brief and no person other than the amicus curiae on whose behalf this has been filed or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] It is the intention of Max and his parents to file appropriate documents to legally change Max's name once Max has made a decision as to what he would like his middle name to be.

[3] On January 14, 2020, a panel of this Court entered its Order denying the motion of Vivian and Max to appear as amicus curiae due to their desire for anonymity. Pursuant to leave granted in the Order, Vivian and Max renewed their motion using their full names. Leave to file this brief was granted by Order dated February 11, 2020.

[4] Independent School District 283 Policy II.A. adopted June 11, 2018, revised September 9, 2019.

for individuals in Max's situation are two restrooms located at inconvenient parts of the school. That location makes it both logistically difficult for Max to use the separate restrooms, as well as emotionally distressing since the boys' restrooms are closer and more readily accessible. Max feels stigmatized by having to use a special restroom set aside primarily for transgender people and others with disabilities, especially since being transgender is not a disability under Minnesota or Federal law. As a result of the challenges imposed by the school, Max avoids using the restroom during the school day as much as possible. Doing so sometimes leads to medical problems including urinary infections and abdominal pain, and when use of the restroom is unavoidable, Max often has to miss portions of his classes to walk to and from the distant restrooms.

The inconvenience, difficulty, and stigmatization that Max experiences due to being barred from the boys' restrooms at his school compounds the many life challenges he faces. While Max has an IQ in the "gifted" range, Max struggles in school and in life, having been diagnosed with mood and learning disorders. The challenges of being transgender in an environment that does not accommodate the bodily function needs of transgender individuals has caused Max great distress.

Max's family – including both of his parents, all of his siblings and siblings-in-law, and other members of Max's large extended family[5] – unconditionally support Max's gender identity, and his eventual legal name change, as well as the physical changes that Max will ultimately experience under medical supervision. As Max's mother and natural guardian, as

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[5] Undersigned counsel are, respectively, Max's father and brother.

well as in her professional life as a practicing physician who treats transgender patients for physical as well as psycho-social conditions, Vivian has a public interest in seeing that not only her child, but all similarly situated children, receive the protections guaranteed by the Minnesota Constitution as they move through the public school system and on to adulthood.

The interest of Max and Vivian in the certified question specifically relates to their desire to see the scope of the equal protection provisions of the Minnesota Constitution, Article I, Sec. 2, as interpreted and applied in light of the Education Clause of the Minnesota Constitution, Article XIII, Sec. 1, and in light of the right to privacy established by the Minnesota Constitution, extended to protect the rights of transgender students to be free from discrimination in the use of public school facilities. Thus, amici have a private interest in establishing Max's own constitutional right to use a boys' restroom at school, and Max and Vivian also have a public interest in advocating for such rights for all transgender students in Minnesota.

BACKGROUND

Human beings have always had the biological need to urinate, defecate, and attend to various personal hygiene needs. More than seven billion people do it on this planet every day. Despite this long history of shared humanity, sex-segregated facilities for engaging in the discharge of these bodily functions are not known to have existed prior to their

appearance in Paris in the eighteenth century.[6] Although laws requiring sex-segregation of restrooms date back to 1887 when Massachusetts enacted a statute requiring that toilet facilities be separated by sex,[7] the *only* Minnesota law presently addressing this issue provides that in public places "[w]here plumbing fixtures are required, separate facilities should be provided for each sex," but the law is silent as to which separate facilities transgender individuals are permitted to use. 2015 Minnesota Building Code § 2902.2.

The historic rationale for sex-segregated restrooms had nothing to do with biology or anatomical differences; instead, it stemmed from the belief that women needed special protections when in the public realm.[8] As notions of gender have evolved, and as transgender individuals have begun to be understood as occupying a place on the wide spectrums of gender rather than treated as having a mental illness, the rationale for continuing to have gender segregated restrooms has come under challenge. Recent studies reflect that Max's negative experiences in not being able to use the restroom of his gender identity is by no means unique. The 2015 Transgender Survey found that 59 percent of respondents avoided using a public restroom in the preceding year, nearly one-third of respondents limited the amount they ate and drank in order to avoid having to use a public

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[6] *Barnett et. al.*, "The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science," *Journal of the American Academy of Psychiatry and the Law Online,* June 2018, 46 (2) 232-241; DOI: https://doi.org/10.29158/JAAPL.003761-18.

[7] *Id.*

[8] As discussed, *infra*, the Minnesota Human Rights Act prohibits discrimination in the use of restrooms based on gender identity.

restroom, and eight percent reported having urinary tract, kidney infection, or another kidney-related problem as a result of avoiding restrooms.[9]

The notion that transgender individuals should have the right to use the restroom that conforms with their gender identity is finding increasing support within the medical profession. Pediatricians are advised by their professional organization that "sexual assault is highly prevalent in transgender and nonbinary youth and that restrictive school restroom and locker room policies may be associated with risk."[10] At the same time cisgender individuals have no factual basis upon which to claim that they fear sharing a restroom or locker room that aligns with a transgender person's gender identity because "[f]rom a scientific and evidence-based perspective, there is no current evidence that granting transgender individuals access to gender-corresponding restrooms results in an increase in sexual offenses."[11] The district court properly acknowledged these evidence-based findings as well as other realities of life as a transgender individual in its decision. Add. 20-22, 24-25.

Other courts are finding that it is appropriate for schools and other institutions to permit individuals to use whatever restroom they are most comfortable with based upon the gender with which they identify, and that permitting such use does not impair the privacy or

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[9] *Jaems, S.E., et al. The Report of the 2015 U.S. Transgender Survey.* Washington, DC: National Center for Transgender Equality (2016), p. 17. Available at https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[10] *Murchison et. al.,* "School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth," *Pediatrics: Official Journal of the American Academy of Pediatrics,* June 2019, 143. Available at **https://doi.org/10.1542/peds.2018-2902.**

[11] *Barnett et al, supra.*

other rights of cisgender individuals. *See, e.g., Parents for Privacy v. Barr,* No. 18-35708 ___ F. 3d ___ (9th Cir., Feb. 12, 2020) (affirming decision that public school district policy permitting transgender individuals to use the restrooms and locker rooms of the gender with which they identify does not violate rights of cisgender persons under federal statutes or the U.S. Constitution). Consistent with the decisions in cases such as *Parents for Privacy,* Minnesota Department of Education guidelines state that "Any student who wishes not to share a restroom with a transgender or gender conforming student can be provided a private space such as a single-user restroom." This is precisely the opposite of what Max's school district has done.

Now, against this background of societal change, this Court must consider the extent to which the Minnesota Constitution protects the rights of transgender individuals in Minnesota public schools to use the locker room or restroom which aligns with their gender identity. The district court correctly concluded that under the Equal Protection Clause of the Minnesota Constitution "transgender" is a suspect class and, therefore, restrictions affecting that class will be subjected to strict scrutiny and will be struck down unless it can be proven that discrimination against that class advances a compelling governmental interest. The district court did not address the question of whether the fundamental rights of transgender individuals are also implicated by restrictive restroom or locker room policies even though protection of fundamental rights is a separate and independent basis for applying strict scrutiny in the constitutional context. Thus, neither the district court, Appellants, nor amicus curiae Minnesota State Bar Association have directly addressed the important point that the rights to education and privacy, each a fundamental right under the

Minnesota Constitution, intersect with the Minnesota Constitution's Equal Protection Clause with respect to the issue before the Court and also require a strict scrutiny analysis.

In the pages that follow we first explain that the right to an education is well-established as a fundamental right under the Minnesota Constitution and any infringement upon that right is subject to a strict scrutiny analysis. We next explain that the gender identity of a transgender person implicates the right to privacy of that individual, and that it is well-established that any infringement upon the right to privacy is also subject to a strict scrutiny analysis under the Minnesota Constitution. Finally, we demonstrate that when a public school district prohibits a transgender person from using a locker room or restroom which aligns with their gender identity, but places no such restrictions on cisgender individuals, the school district impinges on the transgender person's fundamental rights to privacy and education. Consequently, such restrictions cannot survive a strict scrutiny analysis under the equal protection clause of the Minnesota Constitution because there is no compelling governmental interest which is vindicated by prohibiting transgender individuals from using facilities which align with their gender identity.

ARGUMENT

I. EDUCATION IS A FUNDAMENTAL RIGHT UNDER THE MINNESOTA CONSTITUTION AND IS SUBJECT TO "STRICT SCRUTINY" ANALYSIS.

The Minnesota Constitution establishes education as one of the fundamental rights afforded to an individual in Minnesota. Minn. Const. Art. XIII, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish *a general and uniform system of public schools.*" (emphasis

added)). Moreover, it has long been understood that this constitutional provision imposes a "duty" on the legislature to establish a system of public schools that is general, uniform, thorough, and efficient; indeed, it is the only provision of the constitution where the phrase "it is the duty of the legislature" is used. *See id.* ("The legislature shall make such provisions by taxation or otherwise as will secure *a thorough and efficient system of public schools* throughout the state." (emphasis added)); *see also Skeen v. State of Minnesota,* 505 N.W. 2d 299, 313 (Minn. 1993).

Based upon this language plus "the sweeping magnitude of the opening sentence of the Education Clause," the Minnesota Supreme Court said "We hold that education is a fundamental right under the state constitution, not only because of the overall importance to the state but also because of the explicit language used to describe the constitutional mandate . . .the Education Clause *is* a *mandate*, not simply a grant of power." *Skeen, at 313* (citations omitted). The Court went on to say:

> [Th]e right of the people of Minnesota to an education is sui generis and . . . there is a fundamental right, under the Education Clause, to a "general and uniform system of education" which provides an adequate education to all students in Minnesota. In evaluating a challenge to such a fundamental right, this court must employ the strict scrutiny test. Under that test, a law will be upheld only if it is necessary to serve a compelling governmental interest.

Id., at 315.

The supreme court recently reaffirmed this principle, adding that "[t]he fundamental right recognized in *Skeen* was not merely a right to anything that might be labeled as 'education,' but rather, a right to a *general* and *uniform* system of education that is thorough and efficient, that is supported by sufficient and uniform funding, and that provides an

adequate education to all students in Minnesota." *Cruz-Guzman v. State of Minnesota,* 916 N.W. 2d 1, 11 (Minn. 2018) (emphasis added).

Further bolstering the importance of providing an "adequate" and "uniform" education, in *State v. Newstrom,* 371 N.W. 2d 525, 532 (Minn. 1985), the Minnesota Supreme Court took note of the "revolutionary holding" of *Brown v. Board of Education,* 347 U.S. 483, 493 (1954), that "the circumstances under which a child is educated can and do impart to children social messages of their claims to equality and self-respect which 'may affect their hearts and minds in a way unlikely even to be undone.'"

The principle of uniformity under the Education Clause requires the legislature to adopt a *system* which has general and uniform application to the entire state. *See Skeen,* 505 N.W. 2d at 310 (*quoting Curryer v. Merrill,* 25 Minn. 1, 6-7 (1878)). The legislature has created school districts as quasi-public corporations with limited powers specifically delegated to carry out the legislature's constitutional duty; "They are arms of the state and are given corporate powers solely for the exercise of public functions for educational purposes." *Village of Blaine v. Independent School District No. 10, Anoka County,* 138 N.W. 2d 32, 38 (Minn. 1965) (*citing Mokovich v. Independent School District No. 22,* 225 N.W. 292 (Minn. 1929)).

The legislature has never explicitly addressed the question of whether or not transgender youth can use the restroom of the gender with which they identify in public schools, though on its face the Minnesota Human Rights Act would appear to bar school districts from prohibiting them from doing so. Minn. Stat. § 363A.24, subd. 1 (prohibition against discrimination based on sex does not apply to restrooms and locker rooms, but the exception is not applicable to discrimination based on sexual orientation, which is defined in

Minn. Stat. § 363A.03, subd. 44, to include "being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"). As a result of this lack of legislative guidance, some public schools in Minnesota permit transgender students to use the restroom or locker room which aligns with their gender identity while others prohibit them from doing so. While the legislature established a *uniform system* for dealing with this issue for transgender public school students by prohibiting discrimination against them with respect to the use of locker rooms and restrooms, some individual school districts to which it has delegated some of its constitutional authority to educate students have failed to adhere to that uniform system. Those school districts which do not allow transgender students to use the locker room or restroom of their gender identity while permitting cisgender students to use the facility of their gender identity are plainly discriminating against transgender students and denying them their educational rights.

An adequate, uniform, thorough, and efficient system of public schools in Minnesota must impart to the children it educates, including transgender children and cisgender children alike, the message that their rights to equality and self-respect are equal and valid. Any action taken under the authority of the legislature that has been delegated to public school districts that fails to deliver that important educational message to the transgender children of Minnesota by treating them as less than cisgender children must fail the strict scrutiny test. Prohibiting transgender students from using the restroom or locker room which aligns with the gender with which they identify violates the Education Clause's promise of an adequate, uniform, thorough, and efficient system of public schools and serves no compelling governmental interest.

II. PRIVACY IS A FUNDAMENTAL RIGHT UNDER THE MINNESOTA CONSTITUTION AND IS SUBJECT TO STRICT SCRUTINY ANALYSIS.

The Minnesota Constitution affords all Minnesotans a right to privacy, a right which has long been recognized as fundamental.[12] *State v. Gray,* 413 N.W. 2d 107, 111 (Minn. 1987). "The right begins with protecting the integrity of one's own body." *Jarvis v. Levine,* 418 N.W. 2d 139, 148 (1988). Moreover, under the Minnesota Constitution the right to privacy is one of the circumstances under which Minnesota courts "will interpret our constitution to provide more protection than that afforded under the federal constitution." *Women of the State of Minnesota v. Gomez,* 542 N.W. 22, 17, 30 (Minn. 1995).

This greater protection is fundamental to our identity as Minnesotans because "Minnesota possesses a long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere." *Gomez,* 542 N.W. 22, 17. Indeed, "[t]his tradition is evident in legislative actions on behalf of the poor, the ill, the developmentally disabled and other persons largely without influence in society." *Id.* The *Gomez* Court described how, during the civil war era, it "relied on the Minnesota Constitution to strike legislation denying citizens of secessionist states access to Minnesota courts" because the government must protect the rights of each of its citizens, regardless of the fact that the larger community may hold them in low esteem." *Id.* (citing

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[12] Neither the district court nor the parties have addressed the right to privacy of transgender students as a fundamental right which is protected by the equal protection clause subject to strict scrutiny analysis. However, this court reviews the district court's decision *de novo, B.M.B. v. State Farm Fire & Cas. Co.,* 664 N.W. 2d 817, 821 (Minn. 2003), and its decision can be affirmed if it can be sustained on any grounds. *Doe v. Archdiocese of Saint Paul and Minneapolis,* 817 N.W. 2d 150, 163 (Minn. 2012).

Davis v. Pierse, 7 Minn. 1, 6 (1862)); *accord Thiede v. Town of Scandia Valley,* 14 N.W.2d 400, 405 (Minn. 1944).

It is hard to imagine a group of people who have been more on the "periphery of society," or more lacking in "influence in society," than transgender individuals. Shunned by virtually every religious and ethnic group throughout history, bullied and beaten if they dared to reveal their true selves, it is only recently that such individuals have bravely left the shadows and stepped into the light to publicly proclaim and embrace their gender identity. Just as the Minnesota Supreme Court has ruled that the right to privacy "protects the woman's *decision* to abort," *Gomez, 542 N.W.* at 31, the right to privacy should equally protect a transgender person's right to choose to publicly live life as a member of the gender with which they identify, including the right to use a restroom or locker room that aligns with their gender identity.[13] When public schools prohibit a transgender person from using the restroom designated for the gender with which they identify, that person's constitutional right to privacy is impermissibly infringed.

Properly interpreted, the right to privacy in the Minnesota Constitution guarantees to transgender youth the right to use the public school locker room or restroom that aligns with their gender identity. Because that right exists, any action taken by public school

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[13] While the right to privacy protects a transgender person's right to choose to publicly live life in the gender with which they identify, federal courts consistently hold that the right to privacy does not give cisgender persons a right not to have transgender individuals who identify with the same gender as the cisgender persons excluded from a restroom or locker room used by the cisgender individual. *See, e.g., Parents for Privacy v. Barr, supra.*

districts — which derive their authority from the legislature pursuant to the Education Clause — which denies transgender youth that right fails constitutional muster.

III. PROHIBITING TRANSGENDER STUDENTS FROM USING RESTROOMS DESIGNATED FOR THEIR GENDER IDENTITY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE MINNESOTA CONSTITUTION UNDER THE STRICT SCRUTINY TEST.

Though it does not use the words "equal protection," the Bill of Rights of the Minnesota Constitution contains what the Minnesota Supreme Court has interpreted to be an equivalent of the federal Equal Protection Clause — "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. Art. I § 2. The Minnesota Supreme Court has held that "both clauses have been analyzed under the same principles, and begin with the mandate that all similarly situated individuals shall be treated alike, but only invidious discrimination is deemed constitutionally offensive." *Greene v. Comm'r Minn. Dept. of Human Services,* 755 N.W. 2d 713, 725 (Minn. 2008) (*quoting Kolton v. County of Anoka,* 645 N.W. 2d 403, 411 (Minn. 2002)). State action that involves a suspect classification or a fundamental right is reviewed under a strict scrutiny standard. *Id.,* citing *Bituminous Cas. Corp. v. Swanson,* 341 N.W. 2d 285, 289 (Minn. 1983)). Where strict scrutiny is applicable, the classification must be "narrowly tailored and reasonably necessary to further a compelling governmental interest." *Id., (*quoting *Hennepin Cty, v. Perry,* 561 N.W. 2d 889, 897, n.7 (Minn. 1997)).

The district court concluded that strict scrutiny should be applied to the equal protection claims asserted in this action because transgender individuals are a suspect class.

Add. 24-25. As noted above, the district court did not address fundamental rights, the other category that is subject to strict scrutiny. While amici agree with the district court's equal protection analysis as far as it goes, amici do not believe the district court's analysis takes the analysis as far as it should under the Minnesota Constitution. The equal protection clause comes into play here not merely because transgender individuals are a suspect class, but also — and importantly — because both the right to education and the right to privacy are fundamental rights under the Minnesota Constitution, and as fundamental rights any infringement upon them is subject to strict scrutiny.

Cisgender public school students who identify with the sex they are assigned at birth are permitted to use the restroom of their gender identity in every school in the state. Transgender public school students who identify with a gender different than the sex they were assigned at birth are not permitted to use the restroom of their gender identity in some schools but are allowed to do so in others. The legislature has failed to explicitly provide a uniform method by which restroom use is to be permitted in public schools. Where transgender students are not permitted to use the public school restroom of their gender identity, their fundamental rights of education and privacy are being denied protection of the law equal to the protection afforded to the rights of cisgender students. That is an impermissible constitutional violation.

To reach the conclusion that there is no compelling governmental interest at play which would justify such a transgression of constitutional rights, this Court need look no further than the Minnesota Human Rights Act. The definitional section of the act distinguishes between "sex" and "sexual orientation." *Compare* Minn. Stat. §§ 363A.03, subd.

42 and 44. The definition of "sexual orientation" explicitly includes a person "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." In Minn. Stat. § 363A.13, subd. 1, the legislature provided it is a statutory violation to discriminate "in any manner in the full utilization or benefit from any educational institution" because of, inter alia, sex or sexual orientation. And while the prohibition on discrimination "relating to sex, shall not apply to such facilities as restrooms, locker rooms, and other similar places," Minn. Stat. § 363A.24, subd. 1, there is no similar exemption for discrimination relating to restrooms or locker rooms based on sexual orientation; thus the legislature allows sex-segregated restrooms but does not permit discrimination in the use of those restrooms based on "having a self-image or identity not traditionally associated with one's biological maleness or femaleness," which would include transgender students.

Moreover, as noted by the district court, the Minnesota Department of Education has published guidelines stating that "(t)ransgender . . . students should be afforded the opportunity to use the restroom of their choice . . ." Add. at 21.; MDHR Add. at 35. Thus it is not at all surprising that two state agencies — the Departments of Human Rights and Education — are both participating in this appeal on the side of Respondent, represented by no less than the Attorney General of Minnesota. Given the provisions of the Minnesota Human Rights Act and the positions being taken in this action by two state agencies and the Attorney General, Appellant would be hard pressed to show a compelling governmental interest in denying transgender students the right to use the locker room or rest room of the

gender with which they identify in the face of the position being taken in this case by the State of Minnesota.

CONCLUSION

For the reasons set forth above, amici urge the Court to affirm the district court decision and hold that denial of the right of transgender public school students to use the rest room or locker room which aligns with their gender identity violates the Equal Protection provisions of the Minnesota Constitution under the applicable strict scrutiny test.

Dated: March 9, 2020

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Certificate of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 4,424 words. This brief was prepared using Microsoft Word 2010.

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