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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, Appellee, v. MONICA RENEE JONES, Appellant.	No. (Municipal Court No. 20139021636) **BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA *ET AL.*** **INTERESTS OF *AMICI CURIAE*[1]**

Amici Curiae are advocacy and civil rights organizations committed to protecting the freedoms guaranteed by the First Amendment and defending the constitutional and civil rights of women, including transgender women, LGBT people, people of color and people impacted by the criminal justice system. *Amici* have an interest in the constitutional issues raised by the defense in this case and have particular expertise on the impact of criminal laws on transgender individuals.

[1] *Amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici*, their members, and their counsel contributed money towards the preparation or filing of this brief. This brief has been submitted together with a motion seeking this Court's leave to file. We wish to acknowledge the significant contribution of V. Soma, Esq., in the writing of this brief.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU is committed to protecting the freedoms guaranteed by the First Amendment and advocating for the rights of LGBT persons and criminal defendants. The ACLU of Arizona (ACLU-AZ) is the Arizona state affiliate of the national ACLU. The ACLU-AZ has acted to protect the rights and well-being of arrested, incarcerated and otherwise confined transwomen including in the state's largest shelter and in various jails and prisons. Because the ordinance under which the defendant was convicted is unconstitutional and the continued prosecution of individuals under that law raises serious concerns for the transgender community, the proper resolution of this case is a matter of significant concern to the ACLU and its membership throughout the country.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is a national organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and those living with HIV through impact litigation, education and public policy work. Lambda Legal has appeared as counsel or *amicus curiae* in numerous cases in federal and state court involving the rights of transgender people, including incarcerated transgender people. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), (holding that Wisconsin law preventing transgender prisoners from accessing transition-related care violated prohibition against cruel and unusual punishment) cert. denied, 132 S. Ct. 1810 (2012); *Shaw v. District of Columbia*, 944 F. Supp. 2d 43 (D.D.C. 2013), appeal docketed, No. 13-5212 (D.C. Cir. Mar. 19, 2014) (arguing as *amici* that D.C. Circuit should affirm district court decision denying defendants' motions to dismiss deliberate indifference claim of transgender female detainee who was sexually harassed while housed with male detainees). Because protecting and advancing the rights of transgender people is integral to Lambda Legal's mission, Lambda Legal has a strong interest in the proper resolution of this case.

Founded in 1876, The Legal Aid Society is the nation's oldest and largest provider of legal services to indigent clients. Annually, in all five boroughs of New York City, The Legal Aid Society ("LAS") provides legal assistance in more than 300,000 individual matters for low-

income families and individuals with civil, criminal, and juvenile rights legal problems. Since 1965, we have served as the primary defender in New York City. In addition to representing many thousands of people each year in trial and appellate courts, LAS also pursues impact litigation and other law reform initiatives. Two specific projects at The Legal Aid Society contribute to our interest in the issues raised in the instant case. First, the Trafficking Victims Advocacy Project is a specialized unit in our criminal practice — dedicated to identifying and advocating for victims of human trafficking and people arrested and prosecuted for prostitution offenses in the criminal justice system. This unit is the first effort by a public defender office to look critically at the issue of criminalization of victims of trafficking and to respond to anti-prostitution policing practices that violate the rights of those engaging in prostitution or those merely profiled as such and falsely arrested. Similarly, the LGBT Law & Policy Initiative at The Legal Aid Society engages in litigation, public policy and legislative efforts on behalf of low-income LGBT New Yorkers, and has specifically fought policies that unjustly discriminate against transgender individuals in the areas of medical coverage and foster care.

Transgender Law Center (TLC) is the nation's largest organization dedicated to advancing the rights of transgender and gender nonconforming people. TLC works to change law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression. TLC works to fight the systems that disproportionately funnel transgender people — and especially low-income transgender people of color — into prison. Transgender Law Center has a serious interest in the proper resolution of this case because unconstitutional ordinances similar to the one defendant was convicted under disproportionately harm transgender women of color around the country.

For 30 years, the Urban Justice Center (UJC) has served New York City's most vulnerable residents through a combination of direct legal service, systemic advocacy, community education and political organizing. The UJC assists clients on numerous levels, from one-on-one legal advice, to helping individuals access housing and government assistance, to filing class action lawsuits to bring about systemic change. The UJC often defends the rights of people who are overlooked or turned away by other organizations. The UJC is composed of eleven distinct

projects that offer services to severely marginalized individuals, including lesbian, gay, bisexual, and transgender community; survivors of domestic violence; sex workers and those profiled as sex workers; the homeless, veterans and people with mental illness. The UJC seeks a proper resolution of this case because the law under which Monica Jones was convicted is unconstitutional and results in the profiling and targeting of transgender women as well as other marginalized individuals.

STATEMENT OF THE CASE

Phoenix City Code Section 23-52(A)(3) (hereafter "Section" or "Manifesting Law") makes it a crime to "manifest[] an intent to commit or solicit an act of prostitution." The "circumstances that may be considered in determining whether such intent is manifested" include whether a person "repeatedly beckons to, stops or attempts to stop or engage passersby in conversation or repeatedly, stops or attempts to stop, motor vehicle operators by hailing, waiving [sic] of arms or any other bodily gesture," or "inquires whether a potential patron, procurer or prostitute is a police officer or searches for articles that would identify a police officer," or "requests the touching or exposure of genitals or female breast." *Id.* This list of enumerated "criteria [is] not exclusive and . . . other conduct may also form the basis of an arrest if the conduct manifests the prohibited intent." *Arizona v. Savio*, 924 P.2d 491, 493 (1996). As a result, a law enforcement officer may "consider [any] other behaviors, including other bodily gestures" when making an arrest under the Section. *Id.*

On May 18, 2013, Monica Jones, a transgender woman of color and full-time social work student at Arizona State University, was arrested for allegedly manifesting intent to commit an act of prostitution in violation of the City Code. At trial, the arresting officer testified that, based on his experience as an officer, Ms. Jones's presence near her home, in an area "known for prostitution" and her "black, form-fitting dress," suggested to him that she was manifesting intent to engage in prostitution justifying his targeting of her in the undercover sting. [Trial Transcript ("Trial Tr.") at 42: 11-12; 71: 3]. The Court credited the officer's testimony and in a bench trial on April 11, 2014, Ms. Jones was convicted of one count of manifesting intent to engage in prostitution. Defendant-Appellant Monica Jones appeals her conviction. *Amici* agree with the

Defendant-Appellant that her conviction must be overturned for the reasons outlined in Appellant's brief. This brief focuses on the Section's infringement upon protected speech, including gender expression, and the Section's violation of basic principles of Due Process. *Amici* also offer background information about the profiling of transgender women as sex workers by law enforcement to highlight the particular dangers to the transgender community of standardless and overreaching laws like the law at issue here.

SUMMARY OF THE ARGUMENT

The First Amendment, as applied to the states through the Fourteenth Amendment, protects the rights of individuals to speak and express themselves without undue interference from the government. Amend. I, U.S. Const. The Arizona Constitution also protects the rights of individuals to "freely speak, write, and publish on all subjects." Art. 2, § 6 Ariz. Const.; *see Coleman v. City of Mesa*, 284 P.3d 863, 872 n.5 (Ariz. 2012) (observing that, in some respects, Article 2 Section 6 is "more protective of free speech rights than the First Amendment"). The Manifesting Law severely infringes upon these rights. The law is overbroad, both facially and as applied to Ms. Jones, infringing upon protected speech and expression, including constitutionally protected gender expression, extending far beyond what is necessary to advance any alleged interest in preventing prostitution.

Additionally, the vagueness of the law allows officers unfettered discretion to profile transgender women and presume that they are engaging in criminal conduct when conducting constitutionally protected activities such as walking down the street with friends, going to a grocery store in their neighborhood, flagging a cab, or greeting friends. Comparably overbroad and vague prostitution laws have been struck down by other courts. *See, e.g., Silvar v. Eighth Judicial Dist. Court ex rel. Cnty. Court of Clark*, 129 P.3d 682 (2006) (striking down Nevada law making it a crime to loiter for purposes of prostitution and recognizing that the law invited discriminatory enforcement); *Wyche v. Florida*, 619 So.2d 231 (1993) (striking down equivalent Florida law for same reasons). By failing to provide guidance as to what conduct is prohibited, the law "encourage[s] arbitrary and discriminatory enforcement" in violation of due process. *United States. v. Jae Gab Kim*, 449 F.3d 933, 942 (9th Cir. 2006); *cf. State v. Speer*, 212 P.3d

787, 795 (Ariz. 2009)(*en banc*)(Due Process standards of state Constitution coextensive with federal constitutional standards).

The problem of profiling transgender women, particularly transgender women of color, as sex workers is well documented and widespread. Rather than serve as a barrier to arbitrary and biased law enforcement, this vague and overbroad law encourages discriminatory targeting of disfavored communities. As a black transgender woman and activist, Monica Jones was particularly vulnerable to the type of discriminatory enforcement and profiling that the constitution does not tolerate. Should the Manifesting Law be allowed to stand, Ms. Jones and other individuals vulnerable to police profiling and abuse will suffer greater harms and indignities.

ARGUMENT

I. PHOENIX CITY CODE 23-52(A)(3) IS UNCONSTITUTIONALLY OVERBROAD AND SWEEPS UP CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). In the First Amendment context, a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted).

Here, the sweep of the Phoenix ordinance is far-reaching and encompasses a wide range of constitutionally protected speech. Under a plain reading of the Section, the Phoenix police could impose criminal penalties on Arizonans engaged in a wide range of everyday activities. *See Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) ("The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others."); *U.S. v. Stevens*, 559 U.S. 460 (2010) (considering implications of federal law banning depictions of animal cruelty beyond the particular facts of Defendant's prosecution). Pursuant to this law, an officer could arrest a canvasser that stops

passersby to discuss a petition on the public forum of a city sidewalk; a person seeking help who inquires as to whether someone is a police officer; a lost tourist who beckons to pedestrians and vehicles in an attempt to obtain directions. There is no requirement that the acts manifesting intent be cumulative or that an act in furtherance of the crime of prostitution be present. Under this law, a single act "manifesting intent" is sufficient. This means that on its face, the law makes it a crime to stand on the edge of the road and repeatedly attempt to hail a vehicle. Even if that vehicle is a cab and even if the person doing the hailing is only trying to get to the airport on a particularly busy day. The Manifesting Law also permits, as in Ms. Jones's case, the government to imprison a person for having a conversation about constitutionally protected, private, consensual sexual activity. *Cf. Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("'[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause . . . [T]his protection extends to intimate choices by unmarried as well as married persons.'") (*citing Bowers v. Hardwick*, 478 U.S., at 216 (1986)) (Stevens, J., dissenting)).

This Section both facially and as applied to Ms. Jones also impermissibly permits the criminalization of the particularized message conveyed by gender expression. Non-verbal expression is entitled to protection under the First Amendment, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), where such non-verbal expression conveys a "particularized message" likely to be "understood by those who viewed it." *Spence v. State of Wash.*, 418 U.S. 405, 411 (1974) (Court found that student's act of displaying upside down U.S. flag with peace symbol as message of discontent with political climate around Cambodia invasion and Kent State shooting was particularized message likely to be understood by those who viewed it). Of particular relevance here, clothing that expresses a particularized message "is unquestionably protected by the First Amendment." *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 427-28 n.21 (9th Cir. 2008) (a t-shirt with words on the shirt constitutes pure speech for purposes of the First Amendment); *Tinker*, 393 U.S. 503 (wearing of black armbands in protest of Vietnam War constitutes speech protected by the First Amendment).

Clothing that expresses a particularized message of one's gender identity falls under the

protections of the First Amendment. For a transgender person, like Ms. Jones, choice about clothing is grounded in the person's every day existence and conveys a central message about her core identity. *See, e.g.*, *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 at *3 (Mass. Super. Oct. 11, 2000), attached hereto as Exhibit A, ("plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity"), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).[2]

Where clothing affirms the female identity of a transgender woman, it conveys an important, particularized message – that they are women despite the fact that they were assigned male at birth. In *Doe v. Yunits*, a Massachusetts court held that "by dressing in clothing and accessories traditionally associated with the female gender, [a transgender person] is expressing her identification with that gender" and the Defendant School District's suppression of that message violated the First Amendment. *Yunits*, 2000 WL 33162199 at *3; *see also Zalewska v. Cnty. of Sullivan, New York*, 316 F.3d 314, 320 (2d Cir. 2003) (*citing Yunits* and recognizing that there "may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection."); *McMillen v. Itawamba Cnty. School Dist.*, 702 F. Supp. 2d 699, 704-05 (N.D. Miss. 2010) (holding that a female student's desire to wear a tuxedo to the prom to convey her "social and political views that women should not be constrained to wear clothing that has traditionally been deemed 'female' attire . . . is the type of speech that falls squarely within the purview of the First Amendment").

For a person who is known or perceived to be transgender, like Ms. Jones, the unambiguous message conveyed by her traditionally feminine attire – that she is a woman – is readily understood by those who view it. On the night of her arrest, Ms. Jones was wearing a skirt, a black t-shirt and a long blonde and burgundy wig. Ms. Jones clearly communicated the message to the officer and the public that she is female even though she was assigned male at birth. In fact, the arresting officer clearly understood that message and then used Ms. Jones's

[2] *Amici* are aware that pursuant to Ariz. R. Crim. P. 31.24 and Ariz. R. Civ. App. P. 28 (c), the Court does not accept Memorandum Decisions. This decision from Massachusetts provides important background information about the application of First Amendment principles to the dress of transgender individuals and is offered for that purpose. A copy of this decision is attached hereto.

perceived gender non-conformity as a basis to approach her.[3] Besides referring to Ms. Jones as male on or around nineteen times in the report, the officer refers to her attire as "*his* [sic] dress."[4] [Trial Tr. 67: 18-25]. It was thus Ms. Jones's message of expression in accordance with her female gender that suggested to the arresting officer, who instead incorrectly viewed her as a male dressed as a female, that she was manifesting intent to engage in prostitution. *Cf. Yunits*, 2000 WL 33162199 at *9 ("Defendants in this case have prohibited the plaintiff from wearing items of clothing that are traditionally labeled girls' clothing, such as dresses and skirts, padded bras, and wigs. This constitutes direct suppression of speech because [non-transgender] females who wear items such as tight skirts to school are unlikely to be disciplined by school officials."). The officer's use of Ms. Jones's transgender status and gender expression as evidence of a manifestation of intent to engage in prostitution demonstrates how the Manifesting Law's overbreadth criminalizes protected speech.

As the Appellant's brief highlights, this infringement on protected speech cannot survive constitutional review.

II. THE VAGUENESS OF THE CITY CODE ENCOURAGES ARBITRARY ENFORCEMENT OF THE LAW AGAINST TRANSGENDER WOMEN WHO ARE REGULARLY PROFILED BY POLICE AS ENGAGING IN PROSTITUTION WHEN GOING ABOUT THEIR DAILY ROUTINES.

The Manifesting Law violates the basic principles of due process because it lacks sufficient guidance to put the public on notice as to what conduct is criminalized and impermissibly affords officers unfettered discretion to determine when there is an intent to engage in prostitution. *Jae Gab Kim*, 449 F.3d at 942 (a law violates due process when it fails to "provide guidance to citizens concerning how they can avoid violating it" or to "provide authorities with

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[3] The fact that the officer distorted and equated this message with an intent to engage in prostitution does not change the message that Ms. Jones communicated (that she is female) and the fact that he understood it.

[4] The officer's suggestion was also that Ms. Jones was wearing overly suggestive and revealing clothing. But as she testified, Ms. Jones was wearing a t-shirt and skirt, an outfit that would likely describe the clothing of countless non-transgender women on any given night. As a policy matter, criminal law should not be used to control the contours of acceptable dress for women. As a constitutional matter, it is plainly unconstitutional to criminalize the particularized message conveyed by the dress of a transgender woman.

principles governing enforcement"). Due process prohibits "impermissibly delegate[ing] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also City of Chicago v. Morales*, 527 U.S. 41, 52 (1999)(striking down Chicago's anti-gang loitering ordinance as impermissibly vague because it failed to provide sufficient guidance to prevent arbitrary enforcement). "[W]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.'" *Grayned*, 408 U.S. at 109 (internal citations omitted). As in Ms. Jones's case, the Manifesting Law affords law enforcement officers standardless discretion "to censor ideas and enforce their own personal preferences," *id.* at 113 n.22 (internal citations omitted), regarding gender expression and to target "disfavored" communities, here transgender women of color. *Desertrain v. City of Los Angeles*, No. 11-56957, 2014 WL 2766541 at *9 (9th Cir. June 19, 2014) (If a statute provides 'no standards governing the exercise of ... discretion,' it becomes 'a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" (internal citations omitted)).

The Manifesting Law fails to provide guidance to the public and to law enforcement as to what conduct is criminal. It is entirely unclear when waving down a car or passersby would be evidence of intent to engage in prostitution or whether someone's inquiry about a person's status as a law enforcement officer could be evidence that the person is manifesting intent to engage in prostitution. *See id.* (striking down Los Angeles ordinance prohibiting the use of vehicles as living quarters as unconstitutionally vague where individuals were forced to guess when otherwise legal conduct would constitute a violation of the ordinance); *cf. Akron v. Rowland*, 618 N.E.2d 138, 146 (Ohio 1993) (striking down drug loitering ordinance as unconstitutionally vague and overbroad noting "an average person who lives or works in a high-crime neighborhood could not be sure whether just standing on the street in front of his or her home or workplace might 'manifest' something illegal."). Not only do the enumerated examples of "manifesting intent" to solicit prostitution provide no guidance regarding what conduct is criminal, the list is "non-

exclusive." *Savio*, 924 P.2d at 493 The ordinance allows any "bodily gesture", *id*., that an officer considers to manifest intent to engage in prostitution to be a crime. There are no limiting principles or other protections to prevent the targeted and arbitrary enforcement of the law. For Ms. Jones, merely walking down the street in her own neighborhood signaled to the officer that she was manifesting intent to engage in prostitution.

Without any guidance as to what actually constitutes the crime of manifesting intent to engage in or solicit an act of prostitution, the Manifesting Law impermissibly delegates "basic policy matters to police[ ]," *Grayned*, 408 U.S. at 108-09, and permits the targeting of disfavored communities for discriminatory enforcement. *Desertrain*, 2014 WL 2766541. The Manifesting Law purports to criminalize "intent" to engage in prostitution but does not actually require that a person possess a specific intent to engage in prostitution (only that an officer perceives intent based on the person's actions) nor does the law require an act in furtherance of the crime (only an act that evidences intent to the officer).

Other courts have struck down comparable laws because they invite discriminatory enforcement against disfavored and marginalized communities. A Florida appeals court struck down a similar ordinance that made it a crime to loiter for the purposes of engaging in prostitution holding that the law "allows for arbitrary enforcement by law enforcement." *City of West Palm Beach v. Chatman*, 112 So.3d 723, 729 (Fla. Dist. Ct. App. 2013); *see also Silvar*, 129 P.3d at 687 (striking down similar prostitution-related ordinance and noting that such ordinances "do not require an overt act of solicitation or prostitution [such that] an officer may arrest someone on a mere suspicion of future criminality" (internal citations and quotation marks omitted)). In *Chatman* the court explained that the law's "language that the violator's conduct must be activity which 'demonstrates' a specific intent does not vitiate the fact that much is left to individual officers' discretion. The individual officer may still determine subjectively if waving at passersby or strolling down the street 'demonstrates' the specific intent to violate the ordinance." *Chatman*, 112 So.3d at 729. The same is true here.

The vagueness of the Manifesting Law poses a particular risk to transgender women, particularly transgender women of color like Ms. Jones, who are often assumed by law

enforcement to manifest intent to engage in prostitution simply because of who they are and how they express their gender (i.e., the way that an individual looks, dresses, stands, speaks). This perception by law enforcement that gender non-conformity by definition constitutes "intent to prostitute" leads to the criminalization, as here, of one's message of gender expression and makes it almost inevitable that standardless prostitution laws will be discriminatorily enforced against transgender women and that protected speech will be infringed.

Police profiling of transgender women of color is well documented. A survey of four major U.S. cities documented how transgender persons are routinely profiled as sex workers and are "stopped and searched while doing nothing illegal, including walking home, returning from school, and waiting for the bus." Human Rights Watch, Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities, 75 (July 2012); *see also* Frank Galvan & Mohsen Bazargan, Interactions of Latina Transgender Women With Law Enforcement, BIENESTAR, 1 (April 2012) (Almost 60% of transgender survey respondents of color who had been stopped by police reported they had been "coming back from the grocery store" "waiting for the bus" or otherwise engaged in completely legal "everyday things"); Make the Road New York, Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights, Queens, 15-16 (October 2012) (59% of transgender respondents indicated that they had been stopped by police, in comparison to only 28% of surveyed non-transgender respondents). "Transgender women, particularly transgender women of color, are so frequently perceived to be sex workers by police that the term *walking while trans*… was coined" to describe the problem of profiling of transgender women by the police. Joey Mogul et al., Queer (In)justice: The Criminalization of LGBT People in the United States 61 (2011). Like so many women of color, particularly transgender women and low-income women, Ms. Jones was targeted based on how she looked for simply walking down the street in her own neighborhood, which happened to be a neighborhood that the arresting officer associated with prostitution-related activity.

The profiling and arrest of transgender individuals for engaging in everyday legal activities are not isolated or merely anecdotal, but systematic and nationwide. The Center for Constitutional Rights has estimated that 80% of transgender women of color have experienced

"police harassment or false arrest based on unfounded suspicion of prostitution." Center for Constitutional Rights, *Stop-and-Frisk: The Human Impact* (2012). In recognition of this widespread problem, some police departments have deemed it necessary to issue affirmative guidance to officers to prevent such profiling. For example, the Chief of Police of the Los Angeles Police Department (LAPD) issued a policy directive instructing that "non-traditional gender identities and gender expression do not constitute reasonable suspicion or prima facie evidence that an individual is or has engaged in prostitution or any other crime." Charlie Beck, Chief of Police, "Police Interactions with Transgender Individuals," Los Angeles Police Department (April 10, 2012).

Laws like the Manifesting Law that give the police license to profile transgender women as sex workers not only violate those women's basic constitutional rights but also discourage transgender women from interacting with the police which compromises the safety of transgender women and the general public. The threat of arrest for merely walking down the street adds to the fear and distrust of law enforcement within the transgender community. In a national survey of over 6,000 transgender respondents, 46% of respondents indicated that they are uncomfortable seeking police assistance. Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 6 (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf; *see also* Monsello Arrington, *Move Along: Policing Sex Work in Washington, D.C.* 43 (2008), https://dctranscoalition.wordpress.com/tag/police/ (In a survey of individuals who either identified as sex workers or who were perceived to be sex workers in the District of Columbia, 86.7% of transgender survey respondents reported being fearful of police). Amplifying this fear is the fact that transgender people are disproportionately subjected to abuse and violence by the police. *See* Amnesty International, Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S., 3, 17-19 (September 2005)("Transgender people, particularly low-income transgender people of color, experience some of the most egregious cases of police brutality reported."); Make the Road Report (Noting that 51% of gay, lesbian, bisexual, transgender, and queer respondents who had been stopped by police indicated they had been verbally harassed by law enforcement and 46% of

transgender respondents faced physical abuse at the hands of law enforcement officers); Lambda Legal, *Protected and Served*, available at http://www.lambdalegal.org/protected-and-served-police#2b (In a survey of 2,376 respondents about experiences with police, 22% of transgender and gender non-conforming respondents reported experiencing verbal assault from officers).

The transgender community's fear of interacting with the police is particularly concerning given the fact that transgender women experience disproportionately high rates of violence and, thus, are in great need of protection. The National Coalition for Anti-Violence Programs ("NCAVP") reported that, among hate violence incidents targeting LGBT people in 2013, "[m]ore than half (72%) of victims were transgender women, while 67% of homicide victims were transgender women of color, yet transgender survivors and victims only represent 13% of total reports to NCAVP, highlighting a disproportionate impact of homicide against transgender people." Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013 (2014), available at http://www.avp.org/storage/documents/2013_ncavp_hvreport_final.pdf; Where vulnerable communities fear the police because of profiling and violence, everyone is less safe. As one veteran police officer from the District of Columbia explained, "[a]fter 25 years as a D.C. police officer, I can say with confidence that building relationships with the community is fundamental to preventing and solving crimes. When trust is replaced by fear …everyone's public safety is compromised." *See, e.g.*, National Immigration Law Center et al., Uncover the Truth Behind ICE and Police Collaboration: A Toolkit (2010), http://www.nationalimmigrationproject.org/resources/deportation/Uncover_the_Truth_Toolkit.pdf (documenting problems of distrust of police in context of fear of deportation).

Given the well-documented problem of police profiling of transgender women, particularly transgender women of color, as sex workers, the Section's lack of any guidance as to what conduct is prohibited all but guarantees that transgender women like Ms. Jones will be stopped and arrested for simply walking down the street.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the conviction of Defendant-Appellant Monica Jones be reversed.

Dated: August 5, 2014

ACLU FOUNDATION OF ARIZONA

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EXHIBIT A

Superior Court of Massachusetts.
Pat DOE,[FN*],[FN1]

FN* Editor's Note: A petition for interlocutory relief from the preliminary injunction entered in this opinion was denied by the Appeals Court sub nom *Doe v. Brockton School Committee,* No.2000-J-638 (November 30, 2000) (Jacobs, J.).

FN1. By her next friend, Jane Doe, plaintiff's grandmother and guardian.

v.
John YUNITS, et al.[FN2]

FN2. Maurice Hancock, Wayne Carter, George Allen, Mary Gill, Dennis Eaniri, Kevin Nolan, Ronald Dobrowski. School Committee Members; Joseph Bage, Superintendent; Kenneth Cardone, Principal of South Junior High School; Dr. Kenneth Sennett, Senior Director for Pupil Services, in their individual and official capacities; and Brockton Public Schools.

No. 001060A.
Oct. 11, 2000.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

GILES.

***1** Plaintiff Pat Doe [FN3] ("plaintiff'), a fifteen-year-old student, has brought this action by her next friend, Jane Doe, requesting that this court prohibit defendants from excluding the plaintiff from South Junior High School ("South Junior High"), Brockton, Massachusetts, on the basis of the plaintiff's sex, disability, or gender identity and expression. Plaintiff has been diagnosed with gender identity disorder, which means that, although plaintiff was born biologically male, she has a female gender identity. [FN4] Plaintiff seeks to attend school wearing clothes and fashion accouterments that are consistent with her gender identity. Defendants have informed plaintiff that she could not enroll in school this academic year if she wore girls' clothes or accessories. After a hearing, and for the reasons stated below, plaintiff's motion for preliminary injunction is *ALLOWED*.

FN3. A pseudonym.

FN4. This court will use female pronouns to refer to plaintiff: a practice which is consistent with the plaintiff's gender identity and which is common among mental health and other professionals who work with transgender clients.

BACKGROUND

Plaintiff began attending South Junior High, a Brockton public school, in September 1998, as a 7th grader. In early 1999, plaintiff first began to express her female gender identity by wearing girls' make-up, shirts, and fashion accessories to school. South Junior High has a dress code which prohibits, among other things, "clothing which could be disruptive or distractive to the educational process or which could affect the safety of students." In early 1999, the principal, Kenneth Cardone ("Cardone"), would often send the plaintiff home to change if she arrived at school wearing girls' apparel. On some occasions, plaintiff would change and return to school; other times, she would remain home, too upset to return. In June 1999, after being referred to a therapist by the South Junior High, plaintiff was diagnosed with gender identity disorder. Plaintiff's treating therapist, Judith Havens ("Havens"), determined that it was medically and clinically necessary for plaintiff to wear clothing consistent with the female gender and that failure to do so could cause harm to plaintiff's mental health.

Plaintiff returned to school in September 1999,

as an 8th grader, and was instructed by Cardone to come to his office every day so that he could approve the plaintiff's appearance. Some days the plaintiff would be sent home to change, sometimes returning to school dressed differently and sometimes remaining home. During the 1999-2000 school year, plaintiff stopped attending school, citing the hostile environment created by Cardone. Because of plaintiff's many absences during the 1999-2000 school year, plaintiff was required to repeat the 8th grade this year.

Over the course of the 1998-1999 and 1999-2000 school years, plaintiff sometimes arrived at school wearing such items as skirts and dresses, wigs, high-heeled shoes, and padded bras with tight shirts. The school faculty and administration became concerned because the plaintiff was experiencing trouble with some of her classmates. Defendants cite one occasion when the school adjustment counselor had to restrain a male student because he was threatening to punch the plaintiff for allegedly spreading rumors that the two had engaged in oral sex. Defendants also point to an instance when a school official had to break up a confrontation between the plaintiff and a male student to whom plaintiff persistently blew kisses. At another time, plaintiff grabbed the buttock of a male student in the school cafeteria. Plaintiff also has been known to primp, pose, apply make up, and flirt with other students in class. Defendants also advance that the plaintiff sometimes called attention to herself by yelling and dancing in the halls. Plaintiff has been suspended at least three times for using the ladies' restroom after being warned not to.

***2** On Friday, September 1, 2000, Cardone and Dr. Kenneth Sennett ("Sennett"), Senior Director for Pupil Personnel Services, met with the plaintiff relative to repeating the 8th grade. At that meeting, Cardone and Sennett informed the plaintiff that she would not be allowed to attend South Junior High if she were to wear any outfits disruptive to the educational process, specifically padded bras, skirts or dresses, or wigs. On September 21, 2000, plaintiff's grandmother tried to enroll plaintiff in school and was told by Cardone and Sennett that plaintiff would not be permitted to enroll if she wore any girls' clothing or accessories. Defendants allege that they have not barred the plaintiff from school but have merely provided limits on the type of dress the plaintiff may wear. Defendants claim it is the plaintiff's own choice not to attend school because of the guidelines they have placed on her attire. Plaintiff is not currently attending school, but the school has provided a home tutor for her to allow her to keep pace with her classmates.

On September 26, 2000, the plaintiff filed a complaint in this court claiming a denial of her right to freedom of expression in the public schools in violation of G.L.c. 71, § 82; a denial of her right to personal dress and appearance in violation of G.L. c. 76, § 83; a denial of her right to attend school in violation of G.L. c. 76, § 5; a denial of her right to be free from sex discrimination guaranteed by Articles I and XIV of the Declaration of Rights of the Massachusetts Constitution; a denial of her right to be free from disability discrimination guaranteed by Article CXIV of the said Declaration of Rights; a denial of her due process rights as guaranteed by G.L. c. 71, § 37 and G.L. c. 76, § 17; a denial of her liberty interest in her appearance as guaranteed by the Massachusetts Declaration of Rights, Art. I and X; and a violation of her right to free expression as guaranteed by the said Declaration of Rights, Art. I and X.

DISCUSSION

I. Introduction

In evaluating a request for a preliminary injunction, the court must examine "in combination the moving party's claim of injury and chance of success on the merits." *Packing Industries Group, Inc. v. Cheney,* 380 Mass. 609, 617 (1980). "If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create

for the opposing party ... Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *GTE Products Corp. v. Stewart,* 414 Mass. 721, 722-23 (1993), quoting *Packaging Industries Group, Inc. v. Cheney, supra* (footnote omitted). In addition, where the injunction is sought against a public entity, as it is here, the court must consider the risk of injury to the public interest which would flow from the grant of the injunction. *Brookline v. Goldstein,* 388 Mass. 443, 447 (1983); *Biotti v. Board of Selectmen of Manchester,* 25 Mass.App.Ct. 637, 639 (1988).

II. The Likelihood of Plaintiff's Success on the Merits

***3** Plaintiff's complaint asserts eight causes of action based on the Massachusetts Declaration of Rights and the General Laws. They are individually addressed below to evaluate the likelihood of success on the merits.

A. Freedom of Expression, Massachusetts Declaration of Rights, Art. II and X

The Massachusetts Declaration of Rights, Article XVI (as amended by Article 77) provides, "[t]he right of free speech shall not be abridged." The analysis of this article is guided by federal free speech analysis. See *Hosford v. School Committee of Sandwich,* 421 Mass. 708, 712 n. 5 (1996); *Opinion of the Justices to the House of Representatives,* 387 Mass. 1201, 1202 (1982); *Colo. v. Treasurer and Receiver General,* 378 Mass. 550, 558 (1979). According to federal analysis, this court must first determine whether the plaintiff's symbolic acts constitute expressive speech which is protected, in this case, by Article VXI of the Massachusetts Declaration of Rights. See *Texas v. Johnson, supra,* citing *Spence v. Washington, supra.* If the speech is expressive, the court must next determine if the defendants' conduct was impermissible because it was meant to suppress that speech. See *Texas v. Johnson,* 491 U.S. 397, 403 (1989), citing *United States v. O'Brien,* 391 U.S. 367, 377 (1968); see also *Spence v. Washington,* 418 U.S. 405, 414 n. 8 (1974). If the defendants' conduct is not related to the suppression of speech, furthers an important or substantial governmental interest, and is within the constitutional powers of the government, and if the incidental restriction on speech is no greater than necessary, the government's conduct is permissible. See *United States v. O'Brien, supra.* In addition, because this case involves public school students, suppression of speech that "materially and substantially interferes with the work of the school" is permissible. See *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 739 (1969).

1. The Plaintiff's Conduct is Expressive Speech Which is Understood by Those Perceiving It

Symbolic acts constitute expression if the actor's intent to convey a particularized message is likely to be understood by those perceiving the message. See *Spence v. Washington,* 418 U.S. 405, 410-11 (1974) (finding that an upside-down flag with a peace symbol attached was protected speech because it was a purposeful message people could understand); see also *Chalifoux v. New Caney Independent School Dist.,* 976 F.Sup. 659 (S.D.Tex.1997) (students wearing rosary beads as a sign of their religious belief was likely to be understood by others and therefore protected).

Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity. Contrast *Olesen v. Board of Education of School District No. 228,* 676 F.Sup. 820 (N.D.Ill.1987) (school's anti-gang policy of prohibiting males from wearing earrings, passed for safety reasons, was upheld because plaintiff's desire to wear an earring as an expression of his individuality and attractiveness to girls was a message not within the scope of the First Amendment).

***4** This court must next determine if the plaintiff's message was understood by those perceiving it, i.e., the school faculty and plaintiff's fellow students. See *Bivens v. Albuquerque Public Schools,* 899 F.Sup. 556 (D.N.M.1995) (student failed to provide evidence that his wearing of sagging pants to express his identity as a black youth was understood by others and, therefore, such attire was not speech). In the case at bar, defendants contend that junior high school students are too young to understand plaintiff's expression of her female gender identity through dress and that "not every defiant act by a high school student is constitutionally protected speech." *Id.* at 558. However, unlike *Bivens,* here there is strong evidence that plaintiff's message is well understood by faculty and students. The school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received. Moreover, plaintiff is likely to establish, through testimony, that her fellow students are well aware of the fact that she is a biological male more comfortable wearing traditionally "female"-type clothing because of her identification with that gender.

2. The Defendants' Conduct Was a Suppression of the Plaintiff's Speech

Plaintiff also will probably prevail on the merits of the second prong of the *Texas v. Johnson* test, that is, the defendants' conduct was meant to suppress plaintiff's speech. Defendants in this case have prohibited the plaintiff from wearing items of clothing that are traditionally labeled girls' clothing, such as dresses and skirts, padded bras, and wigs. This constitutes direct suppression of speech because biological females who wear items such as tight skirts to school are unlikely to be disciplined by school officials, as admitted by defendants' counsel at oral argument. See *Texas v. Johnson,* 491 U.S. 397, 408-16 (1989). Therefore, the test set out in *United States v. O'Brien,* which permits restrictions on speech where the government motivation is not directly related to the content of the speech, cannot apply here. Further, defendants' argument that the school's policy is a content-neutral regulation of speech is without merit because, as has been discussed, the school is prohibiting the plaintiff from wearing clothes a biological female would be allowed to wear. Therefore, the plaintiff has a likelihood of fulfilling the *Texas v. Johnson* test that her speech conveyed a particularized message understood by others and that the defendants' conduct was meant to suppress that speech.

3. Plaintiff's Conduct is not Disruptive

This court also must consider if the plaintiff's speech "materially and substantially interferes with the work of the school." *Tinker v. Des Moines Community School Dist., supra.* Defendants argue that they are merely preventing disruptive conduct on the part of the plaintiff by restricting her attire at school. Their argument is unpersuasive. Given the state of the record thus far, the plaintiff has demonstrated a likelihood of proving that defendants, rather than attempting to restrict plaintiff's wearing of distracting items of clothing, are seeking to ban her from donning apparel that can be labeled "girls' clothes" and to encourage more conventional, male-oriented attire. Defendants argue that any other student who came to school dressed in distracting clothing would be disciplined as the plaintiff was. However, defendants overlook the fact that, if a female student came to school in a frilly dress or blouse, make-up, or padded bra, she would go, and presumably has gone, unnoticed by school officials. Defendants do not find plaintiff's clothing distracting *per se,* but, essentially, distracting simply because plaintiff is a biological male.

***5** In addition to the expression of her female gender identity through dress, however, plaintiff has engaged in behavior in class and towards other students that can be seen as detrimental to the learning process. This deportment, however, is separate from plaintiff's dress. Defendants vaguely cite instances when the principal became aware of threats by students to beat up the "boy who dressed like a girl" to support the notion that plaintiff's dress alone is disruptive. To rule in defendants' fa-

vor in this regard, however, would grant those contentious students a "heckler's veto." See *Fricke v. Lynch,* 491 F.Sup. 381, 387 (D .R.I.1980). The majority of defendants' evidence of plaintiff's disruption is based on plaintiff's actions as distinct from her mode of dress. Some of these acts may be a further expression of gender identity, such as applying make-up in class; but many are instances of misconduct for which any student would be punished. Regardless of plaintiff's gender identity, any student should be punished for engaging in harassing behavior towards classmates. Plaintiff is not immune from such punishment but, by the same token, should not be punished on the basis of dress alone.

Plaintiff has framed this issue narrowly as a question of whether or not it is appropriate for defendants to restrict the manner in which she can dress. Defendants, on the other hand, appear unable to distinguish between instances of conduct connected to plaintiff's expression of her female gender identity, such as the wearing of a wig or padded bra, and separate from it, such as grabbing a male student's buttocks or blowing kisses to a male student. The line between expression and flagrant behavior can blur, thereby rendering this case difficult for the court. It seems, however, that expression of gender identity through dress can be divorced from conduct in school that warrants punishment, regardless of the gender or gender identity of the offender. Therefore, a school should not be allowed to bar or discipline a student because of gender-identified dress but should be permitted to ban clothing that would be inappropriate if worn by any student, such as a theatrical costume, and to punish conduct that would be deemed offensive if committed by any student, such as harassing, threatening, or obscene behavior. See *Bethel v. Fraser,* 478 U.S. 675 (1986) .

B. G.L. c. 71, § 82

Defendants argue that G.L. c. 71, § 82 is inapplicable because the statute only applies to secondary school; and South Junior High has been designated a primary school. Therefore, plaintiff will probably fail in this claim if defendants can substantiate their assertion. Nevertheless, the Supreme Court's constitutional analysis in *Tinker,* which was codified by G.L. c. 71, § 82, see *Pyle v. School Committee of South Hadley,* 423 Mass. 283, 286 (1996), remains applicable in this case and implicates the same principles. As discussed, plaintiff has demonstrated a likelihood of success on the merits in her common law freedom of expression claim.

C. Liberty Interest in Appearance Massachusetts Declaration of Rights Article I and X

***6** Plaintiff is also likely to prevail in this claim. A liberty interest under the First Amendment has been recognized to protect a male student's right to wear his hair as he wishes. See *Richards v. Thurston,* 424 F.2d 1281 (1st Cir.1970), cited with approval *Bd. of Selectmen of Framingharn v. Civil Service Commission,* 366 Mass. 547, 556 (1974). The question in liberty interest cases is whether the government's interest in restricting liberty is strong enough to overcome that liberty interest. Given that plaintiff has a likelihood of success in proving that her attire is not distracting, as discussed above, she is likely to prove that defendants' interests do not overcome the recognized liberty interest in appearance.

D. Sex Discrimination G.L. c. 76, § 5 and Article I and XIV of the Massachusetts Declaration of Rights

G.L. c. 76, § 5 states that "Every person shall have the right to attend the public schools of the town where he actually resides ... No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and course of study of such public school on account of race, color, sex, religion, national origin or sexual orientation." G.L. c. 76, § 5 (2000). Federal cases have recognized the impropriety of discriminating against a person for failure to conform with the norms of' their biological gender. See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250 (1989) (sex stereotyping occurred

when members of an accounting firm denied female associate promotion because she failed to walk, talk, and dress femininely); *Rosa v. Park West Bank,* 214 F.3d 213 (1st Cir .2000) (claim of sex discrimination may be sustained when cross-dressing man was denied a loan application until he went home to change clothes). This court finds plaintiff's reliance on such cases persuasive and the cases cited by defendants distinguishable, as discussed below.

Plaintiff contends that defendants' action constitute sex discrimination because defendants prevented plaintiff from attending school in clothing associated with the female gender solely because plaintiff is male. Defendants counter that, since a female student would be disciplined for wearing distracting items of men's clothing, such as a fake beard, the dress code is gender-neutral. Defendants' argument does not frame the issue properly. Since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male. [FN5] Therefore, defendants' reliance on cases holding that discrimination on the basis of sexual orientation, transsexualism, and transvestism are not controlling in this case because plaintiff is being discriminated against because of her gender. See *Ulane v. Eastern Airlines,* 742 F.2d 1081 (7th Cir.1984).[FN6] Furthermore, such cases have been criticized and distinguished under both Title VII and the First and Fourteenth Amendments. See *Quinn v. Nassau County Police Dept.,* 53 F.Sup.2d 347 (E.D.N.Y.1999); *Blozis v. Mike Raisor Ford, Inc.,* 896 F.Sup. 805 (N.D.Ind.1995); *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir.2000).

FN5. This case is distinguishable from *Harper v. Edgewood Bd. of Education,* 655 F.Sup. 1353 (S.D.Ohio 1987). In *Harper,* the court granted summary judgment in favor of the defendants, who prevented two students dressed in clothing of the opposite gender from attending the prom against a claim that the plaintiffs' First Amendment rights were violated. The court found the school's action permissible because it fostered community values and maintained discipline. Plaintiff in this case, however, is not merely engaging in rebellious acts to demonstrate a willingness to violate community norms; plaintiff is expressing her personal identity, which cannot be suppressed by the school merely because it departs from community standards.

FN6. *LaFleur v. Bird-Johnson Co.,* 1994 W.L. 878831 (Mass.Super. Nov. 3, 1994) [3 Mass.L.Rptr. 196], is also distinguishable. *LaFleur* was decided after *Price Waterhouse v. Hopkins* but recognized the Supreme Judicial Court's holding in *Macauley v. MCAD,* 379 Mass. 279 (1979), that transsexual discrimination is not within the scope of this state's sexual discrimination law. However, the case at hand differs from *LaFleur,* where the plaintiff claimed she was discriminated against in the employment context because she was a transvestite, because the instant plaintiff is likely to establish that defendants have discriminated against her on the basis of sex by applying the dress code against her in a manner in which it would not be applied to female students.

***7** In support of their argument, defendants cite cases in which gender-specific school dress codes have been upheld in the face of challenges based on gender discrimination and equal protection because the codes serve important governmental interests, such as fostering conformity with community standards. See *Jones v. W.T. Henning Elementary School,* 721 So.2d 530 (La.App.3rd Cir1998); *Hines v. Caston School Corp.,* 651 N.E.2d 330, 335 (Ind.App.1995); *Harper v. Edgewood Board of Education.* 655 F.Sup. 1353 (S.D.Ohio 1987). Such

cases are not binding on this court. This court cannot allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort. "Our constitution ... neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 539 (1896) (dissenting opinion of Harlan, J.). Thus, plaintiff in this case is likely to establish that the dress code of South Junior High, even though it is gender-neutral, is being applied to her in a gender discriminatory manner.

E. Disability Discrimination Article CXIV of the Massachusetts Declaration of Rights

Plaintiff does not have a likelihood of success in proving that the defendants' conduct constituted disability discrimination. Analysis of federal discrimination law is instructive in construing state disability discrimination law. See *Cox v. New England Tel. & Tel. Co.,* 414 Mass. 375 (1993). The federal Americans with Disabilities Act expressly excludes "transvestism, transsexualism ... [and] gender identity disorders not resulting from physical impairments ..." 42 U.S.C. 12211(b) (2000). While noting that the courts of this state can, and often do, provide more protection than its federal counterpart, there is no authority to support the notion that Gender Identity Disorder is a protected disability under the Massachusetts Declaration of Rights of laws of this state.

F. Due Process G.L. c. 76, § 17

Plaintiff does not have a likelihood of success on the merits of this claim because, as defendants correctly point out, the plaintiff has not been expelled from school. Therefore, no process was due the plaintiff.

G. G.L. c. 71, § 83

Defendants again are correct in asserting that this section, which protects a student's right to personal dress, is a local option statute which applies only to jurisdictions that have chosen to adopt it. G.L. c. 71, § 86. Therefore, the plaintiff has not demonstrated a likelihood of success on the merits of this claim.

II. Irreparable Harm

The party seeking an injunction bears the burden of establishing irreparable harm, i.e., that it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits. *GTE Products Corp. v. Stewart, supra* at 726. Plaintiff in this case has met the burden of establishing irreparable harm. The plaintiff is currently being home schooled because the defendants will not allow her to attend school in girls' attire. Therefore, plaintiff is being denied the benefits of attending school with her peers, learning in an interactive environment, and developing socially. See *McLaughlin v. Boston School Committee,* 938 F.Sup. 1001, 1011-12 (D.Mass.1994). Such harm is further exacerbated by the fact that the plaintiff has been the subject of much controversy over the past two years and now is noticeably absent from school. Defendants argue that any harm to the plaintiff is self-induced because plaintiff has chosen not to attend school under the conditions the defendants have put on her attire. This contention is without merit. Defendants are essentially prohibiting the plaintiff from expressing her gender identity and, thus, her quintessence, at school. Their actions have forced plaintiff to submit to home schooling. However, "in the field of public education the doctrine of 'separate but equal' has no place." *Brown v. Board of Education of Topeka,* 347 U.S. 483, 495 (1954).

III. The Balance of the Equities

***8** The balance of the equities tips in favor of plaintiff in his case. The plaintiff attended South Junior High School for two academic years; and the school and its students, with the exception of new students entering this year, are accustomed to interacting with plaintiff and, thus, are capable of doing so again. Because the school is empowered to discipline plaintiff for conduct for which any other student would be disciplined, the harm to the school in readmitting plaintiff is minimal. On the other hand, if plaintiff is barred from school, the potential harm to plaintiff's sense of self-worth and social development is irreparable. Defendants cite cases that

stand for the proposition that a school's interest in disciplining students by barring them from school outweigh the harm to the student. See *Katchak v. Glasgow Independent School District,* 690 F.Sup. 580, 583 (W.D.Ky.1988). In this case, however, the school is not disciplining the plaintiff for certain conduct. The school is barring her from school on account of the expression of her very identity. Defendants maintain that plaintiff is free to enroll in school as long as she complies with the stated dress code. This is not entirely true because the defendants have placed specific restrictions on plaintiff's dress that may not be placed on other female students. This court does take note of the fact that defendants made efforts to accommodate the plaintiff's desire to dress in girl's clothes for over a year. However, their proscription of the items of clothing that can be worn by plaintiff is likely to be impermissible. Therefore, the harm to plaintiff by the actions of the defendants outweigh the harm to the defendants in granting this injunction.

IV. The Harm to the Public Interest

Defendants have not made a showing that the granting of this injunction will harm the public interest. Although defendants contend that plaintiff's dress is disruptive to the learning process, the workings of the school will not be disrupted if they are permitted to discipline plaintiff according to normal procedures for truly disruptive attire and inappropriate behavior. Furthermore, this court trusts that exposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone's unique personal experience in that “Brave New World” out there.

ORDER

For all the foregoing reasons, plaintiff's motion for preliminary injunction is *ALLOWED;* and it is hereby *ORDERED THAT:*

1. Defendants are preliminarily enjoined from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined.

2. Defendants are further preliminarily enjoined from disciplining plaintiff for any reason for which other students would not be disciplined.

3. If defendants do seek to discipline plaintiff in conformance with this order, they must do so according to the school's standing policies and procedures.

Mass.Super.,2000.
Doe ex rel. Doe v. Yunits
Not Reported in N.E.2d, 2000 WL 33162199 (Mass.Super.)

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