

No. 18-13592-EE

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

DREW ADAMS,
Plaintiff-Appellee,

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant.

**On Appeal from the United States District Court
for the Middle District of Florida, Case No. 3:17-cv-00739-TJC-JBT**

**EN BANC BRIEF OF ANTI-SEXUAL ASSAULT, DOMESTIC VIOLENCE,
AND GENDER-BASED VIOLENCE ORGANIZATIONS AS *AMICI
CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE & AFFIRMANCE**

DIMITRI D. PORTNOI
Counsel of Record
KYLE M. GROSSMAN
O'Melveny & Myers LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
(213) 430-6000

Attorneys for Amici Curiae

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Rules 26.1-1 through 26.1-3 and 28-1(b) of the Rules of the United States Court of Appeals for the Eleventh Circuit, undersigned counsel for *amici curiae* certifies that the Certificate of Interested Persons (“CIP”) set forth in the En Banc Brief of Appellant the School Board of St. Johns County, Florida (Oct. 26, 2021) is correct and complete, subject to the amendments of other *amici* who have filed CIPs since that time and subject to the following additions:

Amici Curiae:

1. Advocate Safehouse Project
2. Asian Pacific Institute on Gender-Based Violence
3. Black AIDS Institute
4. Bridges Oregon
5. Colorado Coalition Against Sexual Assault
6. Connecticut Alliance to End Sexual Violence
7. Crisis Intervention Service
8. Crisis Support Network
9. Diverse & Resilient
10. Domestic Violence Intervention Program
11. Domestic Violence Legal Empowerment and Appeals Project
12. Dove House Advocacy Services

13. Equality New Mexico
14. Futures Without Violence
15. Healthy Families of Clallam County
16. Helping Services' Domestic Abuse Resource Center
17. Idaho Coalition Against Sexual & Domestic Violence
18. Jewish Women International
19. Journey Center for Safety and Healing
20. Limen
21. Los Angeles LGBT Center
22. Lovelace Consulting Services, Inc.
23. LYRIC
24. Maine Coalition Against Sexual Assault
25. Mariposa House
26. Maryland Network Against Domestic Violence
27. Middle Way House, Inc.
28. Minority Recovery Collective, Inc. (MRCI)
29. MOCSA
30. National Council of Jewish Women
31. National Domestic Violence Hotline
32. National Organization for Women Foundation
33. North Carolina Coalition Against Sexual Assault
34. NYC Anti-Violence Project
35. OutReach LGBTQ + Community Center

36. Project Safeguard
37. Rape Crisis Center - Dane County
38. Safe Haven of Greater Waterbury
39. Safehouse Progressive Alliance for Nonviolence
40. SAGE
41. Sexual Trauma Awareness and Response (STAR) Center
42. Sexual Violence Prevention Association
43. South Asian Network
44. Standpoint
45. Stepping Stones, Inc.
46. Texas Advocacy Project
47. The Caribbean Voice, Inc.
48. The Center for Family Justice
49. Turning Points Network
50. Ujima, Inc., The National Center on Violence Against Women in the Black Community
51. Vera House, Inc.
52. Victim Rights Law Center
53. Walnut Avenue Family & Women's Center
54. Washington Coalition of Sexual Assault Programs
55. Wisconsin Education Association and Council
56. Wisconsin Faith Voices for Justice

Counsel for *Amici Curiae*:

1. Kyle M. Grossman

Pursuant to Rule 26.1-1(b) of the Rules of the United States Court of Appeals for the Eleventh Circuit, the undersigned certifies that the above information will be entered into the web-based stock ticker symbol CIP, indicating that there is nothing to declare.

Undersigned counsel for *amici curiae* further certifies that no *amici* nor counsel for *amici* has a parent corporation, and no company owns a ten percent or greater ownership interest in *amici* nor counsel for *amici*.

/s/ Dimitri D. Portnoi

Dimitri D. Portnoi

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STATEMENT OF INTEREST¹

Amici curiae anti-sexual assault and domestic violence organizations respectfully submit this brief in support of Appellee Drew Adams. *Amici* are 70 organizations that advocate for victims of sexual assault, domestic violence, and other gender-based violence. The form of their advocacy varies, but their purpose is uniform: to eliminate sexual assault, domestic violence, and other gender-based violence, and to support and empower all survivors of these crimes.

As organizations that support, empower, and advocate for victims, *amici* reject the argument by the School Board that its policy discriminating against transgender students—which was found to violate both the Fourteenth Amendment’s Equal Protection Clause and Title IX of the Education Amendments Act of 1972—is necessary to protect the privacy and safety of other students.

There is no evidence that allowing transgender students to use the bathroom corresponding with their gender identity increases safety or privacy risks to non-transgender students. Without protection, transgender people face real risks to their safety. Transgender individuals, and the LGBTQ community generally, experience sexual assault, harassment, and abuse at higher rates than the rest of the population. By barring transgender students from bathrooms that do not

¹ No party’s counsel authored any part of this brief nor did any party’s counsel or any other person contribute any money intended to fund this brief.

correspond with their gender identity, policies like those adopted by the School Board increase the risk that both transgender people and people who are perceived as transgender will fall victim to the same type of violence and privacy intrusions that the School Board and its *amici* claim they want to avoid. The Court should affirm the District Court's conclusion that the School Board's discriminatory policy violates the Equal Protection Clause of the Fourteenth Amendment and Title IX.

STATEMENT OF THE ISSUES

Whether the district court's opinion, issued after a three-day bench trial and entry of extensive findings of fact, should be affirmed in holding that:

A. The School Board's policy of barring boys who are transgender, such as Drew Adams, from the boys' restroom violates equal protection guarantees of the Fourteenth Amendment.

B. The School Board's policy of barring boys who are transgender, such as Drew Adams, from the boys' restroom violates Title IX of the Education Amendments of 1972.

SUMMARY OF THE ARGUMENT

The argument by the School Board that discrimination is necessary to protect students' safety and privacy has no basis in fact and contradicts the experience and expertise of *amici* who have worked for decades to eliminate

sexual assault, domestic violence, and other gender-based violence.

Policies that deny transgender students access to bathrooms that correspond with their gender identity do nothing to reduce the incidence of sexual assault. Quite the opposite: these policies place transgender people—who are victims of sexual assault, domestic violence, and other gender-based violence at higher rates than the rest of the population—in harm’s way. Proponents of such policies justify this increased risk to transgender people as the price of safety and privacy for non-transgender individuals. *E.g.*, Br. of *Amici Women’s Liberation Front* at 6-7 (Dec. 27, 2018). Yet these policies achieve neither goal.

The School Board’s unwritten policy and “Best Practices Guidelines” (together, the “policy”) required transgender students to use the bathroom that corresponded with their sex assigned at birth, or to use gender-neutral facilities. Before the policy’s implementation, Drew used the boys’ bathroom for more than a month during his freshman year without incident. No male student or parent complained of Drew’s practice of using the boys’ bathroom. Instead, two unidentified female students reported they had seen Drew entering the boys’ bathroom, which prompted the administrators at Drew’s high school to enforce its discriminatory policy and preclude Drew from using the boys’ bathroom.

Drew’s initial experience—that using the bathroom corresponding with his gender identity was not a problem—is consistent with the history of

nondiscrimination protections for transgender people. This type of law has existed for decades across many jurisdictions. To date, seventeen states, the District of Columbia, and more than 200 municipalities have enacted laws that prohibit discrimination based on gender identity and protect the right of transgender people to use facilities (including bathrooms) consistent with their gender identity. Such laws protect individuals who would otherwise risk safety and privacy to attend to the most basic of human needs. None of these jurisdictions has reported a rise in sexual violence or other public safety issues following the enactment of these laws.

The School Board and its supporters offer no evidence that discriminatory policies protect students' safety—criminal laws preventing assault, battery, and sexual crimes already protect women and men in bathrooms. Yet supporters of policies like the one adopted by the School Board make the baseless argument that students or others with criminal intent will use nondiscrimination laws to pretend they are transgender and illegally access facilities in order to assault women and children. Neither the Equal Protection Clause nor Title IX protects criminal conduct or allows students to use nondiscrimination policies as a cover for otherwise prohibited behavior. In cases like the present one, it is school administrators who are in the best position to deal with these hypothetical criminal students on a case-by-case basis.

In light of this background, *amici* submit this brief to aid the Court in

discerning fact from fiction. It is laws that discriminate based on transgender identity that harm safety and intrude on privacy—not nondiscrimination laws protecting this vulnerable minority. There is no evidence that offenders rely on nondiscrimination laws or policies to escape liability for their crimes. These fictions hinge on misconceptions about and prejudices against transgender people, and they are refuted by rigorous research and the experience of organizations that work with sexual assault survivors every day.

ARGUMENT

The summer before high school, Drew informed the Student Services Department at his school that he was transitioning and would be attending high school as a boy. *See Adams v. Sch. Bd. of St. Johns Cty., Fla.*, Case No. 3:17-cv-739-J-32JBT (M.D. Fla. Jul. 26, 2018) Doc. No. 192, Findings of Fact and Conclusions of Law (“FFCL”) at 25. Drew started high school as the boy that he is. Although he had used the boys’ bathrooms at his school for six weeks without incident, Drew was pulled out of class in September and told that going forward, he had to use the gender-neutral bathroom—or use the girls’ bathroom. There were no complaints regarding Drew’s use of the boys’ bathroom apart from a report lodged by two unidentified female students who informed officials that he was using the boys’ bathroom, and there were no reported instances of privacy or safety breaches during the time that Drew used the boys’ bathroom. *Id.* at 27.

After that, Drew was forced to use the gender-neutral bathrooms at school and, subsequently, brought this lawsuit.

In a thoughtful opinion, Judge Timothy J. Corrigan of the Middle District of Florida found that the safety and privacy concerns lodged by the School Board were “conjectural” and insufficient to justify the discriminatory policies adopted by the School Board. Judge Corrigan held that the School Board had violated both the Equal Protection Clause and Title IX in its treatment of Drew.

The School Board then appealed. The Eleventh Circuit panel unequivocally affirmed the decision of the lower court on the equal protection claim, holding that the School Board had “not met its demanding constitutional burden” because it could not show a substantial relationship between its exclusive policy and student privacy. *Adams v. Sch. Bd. Of St. Johns Cty.*, 3 F. 4th 1299, 1320 (11th Cir. 2020), *reh’g en banc granted*, 9 F.4th 1369 (11th Cir. 2021). The court declined to reach the Title IX claim. *Id.*

At trial, the School Board asserted that “a policy or practice that would allow students to use bathrooms in accordance with their gender identity as opposed to their sex assigned at birth . . . would violate the bodily privacy rights of students and raise[d] privacy, safety and welfare concerns.” FFCL at 27. The School Board continues to stoke those unfounded fears. In its en banc brief, appellant asserts that legal protections for transgender students will “risk the[]

safety and welfare” of both transgender and non-transgender students. Appellant’s Br. at 7.

The School Board makes these claims without any support. As Judge Corrigan found, “the School Board’s concerns about privacy and safety are only *conjectural*.” FFCL at 44 (emphasis added). There is “no evidence that Adams encountered any safety concerns during the six weeks he used the boys’ restroom at Nease or when he does so in other public places” nor was there any evidence that “Adams presents any safety risk to other students or that transgender students are more likely than anyone else to assault or molest another student in the bathroom.” *Id.* at 43.

Academic research, empirical data, and the expertise and experience of *amici* refute the contention that denying transgender people access to facilities consistent with their gender identity makes anyone safer. Rather, these policies work against their stated goals by increasing safety risks to transgender people.

I. BASELESS SAFETY CONCERNS DO NOT JUSTIFY DISCRIMINATION AGAINST TRANSGENDER STUDENTS.

The School Board claims that reversal is required to protect the safety of students—presumably in part because non-transgender men masquerading as women with lewd intent will use protections afforded by the Fourteenth Amendment and Title IX to circumvent criminal statutes. *See, e.g.*, FFCL at 21 (“a football player for example—could pose as being gender-fluid for the purpose of

gaining access to the girls’ restroom”). Policies like the one the School Board adopted here supposedly prevent would-be criminals from gaining easier access to their victims.

Notably, the School Board never explains *how* laws or policies preventing sex-based discrimination against transgender people result in an increased safety risk. In Florida—and in every other state—criminal laws prohibiting assault, battery, and other sexual crimes already protect individuals when they use the restrooms at school or at any other place. Perhaps the School Board believes that restricting access for transgender people will allow law enforcement or school officials to identify potential criminals before they enter sex-segregated facilities. Unless an enforcer is stationed at the bathroom door to check birth certificates—a solution the School Board cannot realistically support—violations by strangers will rarely, if ever, be effectively uncovered. As Drew has experienced, transgender people are typically not recognized by others as members of their sex assigned at birth. *See* FFCL at 45 n.41 (“in reality [Drew] is not welcome to use the girls’ restrooms (and he does not)”). These anti-transgender policies provide only symbolic assurance and not protection against assault while imposing real harm on transgender people or those perceived to be transgender.

In any event, nothing prevents law enforcement or school officials from removing anyone engaged in unlawful conduct from a bathroom. FFCL at 21.

After all, *the conduct*—not a person’s gender identity or anatomy—is at issue. As explained in Part II, transgender-inclusive bathrooms have existed for years.

Where they do, they have not been associated with any increase in sexual predation or violence.² Nor do inclusive restroom rules alter the nature of sex-separated restrooms.

The School Board’s safety claims are even more perplexing in the context of Title IX. First, Title IX and the implementing regulation at issue here, 34 C.F.R. § 106.33, apply to students using school facilities. Schools officials tend to know who their students are, and they know which ones have publicly identified as transgender. *See* FFCL 24-27 (describing the process by which Drew began to socially transition at school, which included communications with school administrators and teachers); *id.* at 14 (“The School Board is aware of approximately sixteen transgender students in its schools, some of whom would like to use restrooms which match their gender identity.”). If the concern is that students will pretend to be transgender to gain access to otherwise off-limits facilities, school officials are well positioned to deal with those students on a case-by-case basis. The School Board has all the tools needed to address this potential misbehavior; there is no benefit added by discriminating against all transgender

² The School Board itself researched other schools and school districts with transgender-inclusive policies and found no instances of unlawful conduct associated with such policies.

students. And the School Board presented no evidence that this unlawful activity has ever occurred.

Many of the safety arguments advanced in this case rest on the false assumption that there is no way to distinguish transgender people from non-transgender male predators posing as transgender women. Not so. Gender identity is a deeply ingrained, innate characteristic that often manifests itself in early childhood. *See, e.g.,* Kristina Olson, et al., *Gender Cognition in Transgender Children*, 26 *Psych. Sci.* 467, 468, 472 (2015) (finding sample of 5-12 year-old transgender children's Implicit Association Test results were as consistent with their expressed gender identity as their 5-12 year-old non-transgender peers' results); FFCL at 7-9. The argument that non-transgender men will exploit nondiscrimination laws for criminal purposes thus misunderstands gender identity and incorrectly presupposes that nondiscrimination laws prevent law enforcement officers from carrying out their duties.

II. EXPERIENCE DEMONSTRATES THAT TRANSGENDER-INCLUSIVE BATHROOMS DO NOT INCREASE THE RISK OF SEXUAL VIOLENCE.

The experiences of over two hundred localities, seventeen states, and the District of Columbia show that nondiscrimination laws do not result in increased criminal activity in restrooms. Each of these jurisdictions has passed a nondiscrimination law permitting transgender individuals to use the facilities that

correspond with their gender identity. *See* ACLU, *Know Your Rights: Transgender People and the Law*;³ National Center for Transgender Equality, *Public Accommodations*.⁴ The first of these laws has been in effect since 1993. *See* Minn. Stat. § 363A.11. None of these jurisdictions has reported a rise in sexual violence or other public safety issues as a result of transgender individuals using the bathrooms, locker rooms, or other sex-segregated facilities that correspond with their gender identity. *Cf.* Michael Scherer, *Battle of the Bathroom*, *Time* (May 30, 2016) at 35 (“[T]here is not yet any anecdotal evidence that trans-friendly rules have been abused by predators, or that incidents of violence or sexual assault have increased.”).

When asked, public officials, members of law enforcement, and anti-sexual assault organizations from jurisdictions across the country with transgender-inclusive laws all state that they have not experienced any of the safety-related problems imagined by the School Board.⁵

A law enforcement official from Baltimore, for instance, stated in response

³ https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochurelaw2015electronic.pdf.

⁴ <http://www.transequality.org/know-your-rights/public-accommodations>.

⁵ *See also* FFCL at 40 (stating that the “research and experience” of school officials in two other counties revealed “no privacy concerns” when transgender students used the bathrooms matching their gender identity); *id.* at 43 (“None of the school officials who testified had ever heard of an incident where student safety was compromised by the presence of a transgender student in the restroom that matched his or her gender identity.”).

to an email survey about negative safety effects of gender identity nondiscrimination laws that “[i]t’s the most ridiculous thing I’ve ever heard I’m more concerned in going to the bathroom about someone reaching under and trying to snatch my purse.” See Lou Chibbaro Jr., *Predictions of Trans Bathroom Harassment Unfounded*, Wash. Blade (Mar. 31, 2016).⁶ A school official in St. Paul, Minnesota noted that, in the more than 25 years since the Minnesota Human Rights Act was amended to protect transgender individuals, there was “no correlation between the Act and incidences of bullying or harassment.” Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, Media Matters for America (June 3, 2015).⁷ The CEO of the Dallas Area Rape Crisis Center not only denied any problems, but noted that “those that cite this proposition as an ‘opportunity’ to victimize someone are simply doing so in ignorance; not understanding the mentality of perpetrators.” Carlos Maza & Rachel Percelay, *Texas Experts Debunk The Transgender “Bathroom Predator” Myth Ahead of HERO Referendum*, Media Matters for

⁶ <https://www.washingtonblade.com/2016/03/31/predictions-of-trans-bathroom-harassment-unfounded/>.

⁷ <https://www.mediamatters.org/sexual-harassment-sexual-assault/17-school-districts-debunk-right-wing-lies-about-protections>.

America (Oct. 15, 2015).^{8, 9}

Nor is there any support, statistical or sociological, for the proposition that public bathrooms must be singled out for additional protection against sexual assault at the expense of nondiscrimination protections for transgender people. A long-term analysis of data from the National Crime Victimization Survey suggests that more than two-thirds of sexual assaults of female victims occur either at or

⁸ <https://www.mediamatters.org/sexual-harassment-sexual-assault/texas-experts-debunk-transgender-bathroom-predator-myth-ahead-hero>.

⁹ See also Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for America (Mar. 20, 2014), <https://www.mediamatters.org/sexual-harassment-sexual-assault/15-experts-debunk-right-wing-transgender-bathroom-myth>; Rachel Percelay, *Florida Experts Debunk the Transgender “Bathroom Predator” Myth*, Media Matters for America (Jan. 12, 2016), <https://www.mediamatters.org/sexual-harassment-sexual-assault/florida-experts-debunk-transgender-bathroom-predator-myth>; Joe Garofoli, *Texan needs to be schooled in San Francisco on transgender rights*, San Francisco Chron. (May 15, 2016), <http://www.sfchronicle.com/politics/article/Texan-needs-to-be-schooled-in-San-Francisco-on-7469979.php>; Michael Scherer, *Battle of the Bathroom*, Time, May 30, 2016; National Task Force to End Sexual and Domestic Violence Against Women, *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 21, 2016), <https://www.scribd.com/doc/309946430/National-Consensus-Statement-of-Anti-Sexual-Assault-and-Domestic-Violence-Organizations-in-Support-of-Full-and-Equal-Access-for-the-Transgender-Commun>; Rachel Percelay, *National Expert: Anti-LGBT “Bathroom Predator” Fears Are “Very Misinformed”*, Media Matters for America (Apr. 21, 2016), <http://mediamatters.org/blog/2016/04/21/national-expert-anti-lgbt-bathroom-predator-fears-are-very-misinformed/210001>; Carlos Maza, *An Expert Explains Why The Right-Wing “Bathroom Predator” Myth is Wrong and Dangerous*, Media Matters for America (Oct. 15, 2015), <http://mediamatters.org/blog/2015/10/15/an-expert-explains-why-the-right-wing-bathroom/206163>.

near the victim's home or the home of the victim's friend, relative, or acquaintance. See Michael Planty, et al., *Female Victims of Sexual Violence, 1994-2010*, U.S. Dep't of Just. at 4 (rev. May 2016).¹⁰ Bathrooms are not, as some have suggested, fertile ground for such criminal conduct. Amirah Hazenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms, Sexuality Research and Social Policy* (2019) 16:70-83 at 70, published online July 23, 2018 ("Hazenbush Article").¹¹

The Hazenbush Article, the first of its kind, "sought to empirically assess whether reports of safety or privacy violations in public restrooms, locker rooms, and dressing rooms change in frequency in localities that have gender identity inclusive public accommodations nondiscrimination ordinances (GIPANDOs) as compared to matched localities without GIPANDOs." *Id.* at 73. Using statistical modeling and public records requests, the study "found *no evidence* that privacy and safety in public restrooms change as a result of the passage of GIPANDOs." *Id.* at 78.

Moreover, the vast majority of perpetrators are not strangers lying in wait in bathrooms, but rather someone who already knows the victim. See Planty, et al., at

¹⁰ <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>.

¹¹ Counsel for *amici* can provide the Court a copy of this study at the Court's request.

4 (concluding from National Crime Victimization Survey data that between 2005-2010, female victims knew 78 percent of rape or sexual assault perpetrators); Federal Bureau of Investigation, *Relationship of Victims to Offenders by Offense Category* (2019) (concluding that, in 2019, approximately 80 percent of sex offenders were either a family member or otherwise known to the victim.)¹²; accord Michele C. Black, et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, NISVS, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention at 23 (2011)¹³; Matthew J. Breiding, et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011* (Sept. 2014).¹⁴

Nevertheless, *amici* are keenly aware that bathrooms—like any location—can be a site for sexual violence. See Will Doran, *Equality NC director: No public safety risks in cities with transgender anti-discrimination rules*, PolitiFact N.C. (Apr. 1, 2016) (confirming three convictions since 1999 of men in women’s bathrooms for sexual crimes from reporter’s searches).¹⁵ *Amici* are also sensitive

¹² <https://ucr.fbi.gov/nibrs/2019/tables/data-tables>.

¹³ https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf.

¹⁴ https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e.

¹⁵ <http://www.politifact.com/north-carolina/statements/2016/apr/01/chris-gro/equality-nc-director-no-public-safety-risks-cities/>.

to the fact that survivors of sexual assault and domestic violence may, based on their traumatic experiences, fear that sexual predators might hide behind transgender-inclusive nondiscrimination laws. The consequences of sexual assault, including post-traumatic stress disorder and severe anxiety, can profoundly impact how survivors engage with the outside world. Many of the undersigned *amici* work directly with survivors to help them navigate their daily lives after a sexual assault, and they recognize that increased fear and anxiety may persist for many years, and in many different types of spaces.

Amici point out, however, that such fears do not change the fact that nondiscrimination protections for transgender people do not compromise the safety of women. Additionally, transgender people, particularly survivors of sexual assault, also experience stress upon being forced to use bathrooms and other facilities that do not correspond with their gender identity—places where they know they are at increased risk of harassment and violence. *See* Lisa Rapaport, *Trans Teens Face Higher Risk When Schools Restrict Bathrooms*, Reuters (May 6, 2019) (reporting that a “survey of 3,637 trans and nonbinary teens in American middle and high schools found that more than one in four reported being sexually assaulted in the previous 12 months”).¹⁶ Indeed, school bathrooms and locker

¹⁶ <https://www.reuters.com/article/us-health-youth-transgender/trans-teens-face-higher-sexual-assault-risk-when-schools-restrict-bathrooms-idUSKCN1SC1LR>.

rooms are no exception. *See id.* (reporting that “[w]hen schools required students to use bathrooms and locker rooms based on their sex assigned at birth, transgender boys...were 26 percent more likely to experience sexual assault,” and “transgender girls . . . had more than twice the assault risk”). Transgender survivors are equally deserving of protection from this increased fear and anxiety, sexual assault, and other violent crimes. The School Board’s discriminatory policy ignores this fact.

III. THE SCHOOL BOARD’S POLICY INCREASES SAFETY RISKS TO TRANSGENDER STUDENTS.

A. Transgender Individuals Are More Likely to Be Victims of Sexual Assault and Other Crimes.

Policies like the one adopted by the School Board do not prevent sexual assault and other crimes, but they do have a safety impact: increasing risks to transgender students.

Reported crimes against transgender people, including sexual assault and other sex crimes, are on the rise. In 2015, the National Coalition of Anti-Violence Programs reported that 26 percent of all reported incidents of anti-LGBTQ hate violence involved anti-transgender bias. *See* Emily Waters, et al., *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2015*, National Coalition of Anti-Violence Programs, (2016).¹⁷ Excluding the 49 lives lost at

¹⁷ https://avp.org/wp-content/uploads/2017/04/ncavp_hvreport_2015_final.pdf.

Pulse Nightclub in Orlando on June 12, 2016, there was still a 17 percent increase in LGBTQ hate violence homicides in 2016. Sixty-eight percent of these victims were transgender or gender nonconforming. See Emily Waters, et al., *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2016*, National Coalition of Anti-Violence Programs, at 9 (2017).¹⁸ In 2017, 52 percent of the victims of LGBTQ hate-violence homicides nationwide were transgender women. Emily Waters, et al., *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate and Intimate Partner Violence in 2017*, National Coalition of Anti-Violence Programs at 7 (2018) (“NCAVP 2017”).¹⁹ And the Human Rights Campaign reported that 2020 saw a record number of homicides of transgender and gender non-conforming individuals. Human Rights Campaign, *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*.²⁰

Sexual and gender minorities in the United States are exposed to staggeringly high levels of violence. Academic analysis of criminal data shows that “lesbian, gay, bisexual, and transgender (LGBT) victims were more likely to be victims of sexual assault” than others. Robert J. Cramer, et al., *Mental Health and Violent Crime Victims, Does Sexual Orientation Matter?*, Law and Human

¹⁸ https://avp.org/wp-content/uploads/2017/06/NCAVP_2016HateViolence_REPORT.pdf.

¹⁹ <http://avp.org/wp-content/uploads/2019/01/NCAVP-HV-IPV-2017-report.pdf>.

²⁰ <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020>.

Behavior 36(2) (2012), at 87. These high rates of hate crimes, sexual assault crimes, and crimes of violence are well-documented. *See, e.g.*, Andrew R. Flores, et al., *Victimization Rates and Traits of Sexual and Gender Minorities in the United States: Results from the National Crime Victimization Survey, 2017*, Science Advances (2020) (finding that LGBTQ individuals are nearly four times as likely to be subject to violent victimization, including rape, sexual assault, and aggravated simple assault)²¹; Osman Ahmed & Chai Jindasurat, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014*, National Coalition of Anti-Violence Programs (2015) (“NCVAP 2014”) (finding that “transgender women were almost twice as likely (1.6) to experience sexual violence [than other hate-violence victims surveyed], highlighting a disproportionate impact of sexual violence against transgender women.”)²²

Between 2014 and 2018, “the total number [of hate crimes motivated by anti-LGBTQ bias] increased every year.” Tim Fitzsimmons, *Anti-LGBTQ hate crimes rose 3 percent in ‘17, FBI finds*, NBC News (Nov. 14, 2018) (citing FBI 2017 Hate Crime Statistics).²³ And in the last several years, crimes against transgender and nonbinary individuals have been on the rise. Grace Hauck, *Anti-*

²¹ <https://www.science.org/doi/10.1126/sciadv.aba6910>.

²² https://avp.org/wp-content/uploads/2017/04/2014_HV_Report-Final.pdf.

²³ <https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-hate-crimes-rose-3-percent-17-fbi-finds-n936166>.

LGBT Hate Crimes Are Rising, the FBI says. But It Gets Worse, USA Today (June 28, 2019) (emphasizing that “[c]rimes motivated by gender identity . . . have generally risen since 2013,” and that “nearly half of transgender people experience sexual assault in their lifetime”)²⁴; Joe Hernandez, *Hate Crimes Reach the Highest Level In More Than A Decade*, NPR (Sept. 1, 2021) (explaining that the most recent FBI data shows a substantial increase in hate crimes, including crimes motivated by gender or gender identity).²⁵

These disquieting statistics are likely just the tip of the iceberg. “Existing official crime statistics, victim surveys, and self-report surveys provide a very limited glimpse of LGBTQ people’s victimization and offending because they exclude sexual orientation and gender identity as key variables” J.B. Woods, “*Queering Criminology*”: *Overview of the State of the Field, Handbook of LGBT Communities, Crime, and Justice*, D. Peterson and V. R. Panfil (eds.), Springer Science & Business Media at 18 (2013). And, even where sexual orientation and gender identity are studied, experts believe the existing statistics *underestimate* the actual rates of crimes against transgender people.²⁶ In other words, it is likely that

²⁴ <https://www.usatoday.com/story/news/2019/06/28/anti-gay-hate-crimes-rise-fbi-says-and-they-likely-undercount/1582614001/>.

²⁵ <https://www.npr.org/2021/08/31/1032932257/hate-crimes-reach-the-highest-level-in-more-than-a-decade>.

²⁶ Transgender people underreport violence because they are more likely to be the victims of police violence than other survivors of sexual assault, domestic violence, and other gender-based violence. J. Grant, et al., *Injustice at Every Turn*:

LGBTQ individuals, and transgender people in particular, experience these crimes at higher rates than currently available statistics suggest.

B. Transgender People Experience Violence in Public Facilities with Staggering Frequency.

Transgender people experience far more violence than the population at large, even when compared with lesbian, gay, and bisexual individuals. Bathrooms in particular have become a common site of violence *against* transgender people. In a 2013 survey of transgender residents of Washington, D.C., for example, nearly 70 percent of all respondents reported that they had been verbally harassed or physically assaulted in public bathrooms. Jody L. Herman, *Gendered Restrooms and Minority Stress*, Williams Institute (2013) at 71.²⁷ The findings of this study

A Report of the National Transgender Discrimination Survey, National Center for Transgender Equality at 6 (2011) (national survey of transgender individuals found that almost half of the respondents, 46 percent, were “uncomfortable seeking police assistance.”).

https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566cbf2c57eb8de92a5392e6/1449967404768/ntds_full.pdf. In fact, transgender people have been found to be 3.1 times more likely to experience police violence and seven times more likely to experience physical violence in interactions with the police than other survivors of assault and abuse. *See* NCVAP 2014, *supra* at 20. All sexual assault crimes are underreported, but this is especially problematic with transgender survivors. *See* C. Kruttschnitt, et al., *Estimating the Incidence of Rape and Sexual Assault*, National Research Council, National Academies Press (2014) at 37 (noting that 65 percent of all sexual assault crimes in the U.S. go unreported and that 13 percent of those crimes are not reported because of the belief that the police would not help).

²⁷ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Restrooms-Minority-Stress-Jun-2013.pdf>.

are also borne out in anecdotal reporting. See Christina Caron, *2 North Carolina Women Charged With Sexually Assaulting Transgender Woman in Bar*, N.Y. Times (Jan. 10, 2019) (two women were arrested for sexually assaulting a transgender woman at a bar in Raleigh, N.C.);²⁸ Edecio Martinez, *Suspects in beating of transgender woman Chrissy Lee Polis could face hate crime charges*, CBS News (Apr. 26, 2011) (Chrissy Lee Polis, a 22-year-old Maryland transgender woman, was brutally attacked by two teenage girls when she attempted to use a McDonald's bathroom; the girls spit in her face, ripped her hair, threw her to the floor, and kicked her in her face while others stood by laughing);²⁹ see also, e.g., Associated Press, *Report: Transgender teen attacked in bathroom of Northern California high school*, The Oregonian (Mar. 4, 2014) (student whose sex assigned at birth was female “but identifies as male, told officers he was leaving a boys’ bathroom at Hercules Middle/High School when three teenage boys pushed him inside a large stall and assailed him”).³⁰

Prejudice and violence motivated by anti-transgender animus also threaten the safety of people who have been mistakenly identified as transgender in

²⁸ <https://www.nytimes.com/2019/01/10/us/transgender-woman-sexual-assault-nc.html>.

²⁹ <https://www.cbsnews.com/news/suspects-in-beating-of-transgender-woman-chrissy-lee-polis-could-face-hate-crime-charges/>.

³⁰ https://www.oregonlive.com/today/2014/03/report_transgender_teen_attack.html.

bathrooms. Non-transgender women have been victims of the anti-transgender animus that discriminatory policies encourage. For example, Aimee Toms, a 22-year-old non-transgender Connecticut woman who had recently donated her hair to cancer patients, was physically attacked when washing her hands in a Walmart bathroom because the assailant mistakenly thought she was transgender. *See* Jon Levine, *Connecticut Woman Who Donated Hair to Cancer Patients is Victim of Transphobic Attack*, Yahoo Finance (May 17, 2016).³¹ In short, transgender people, and those mistakenly targeted by anti-transgender animus, are frequently victimized in bathrooms.

This violence is not, however, a basis for separating transgender students from their peers, as the School Board has suggested. As explained below, stigmatizing policies that shunt transgender students out of common restrooms exacerbate, rather than minimize, such safety risks.

C. Discriminatory Policies Like the One Adopted by the School Board Increase the Risk That Transgender Individuals Will Be the Victims of Sexual Assault and Other Crimes.

Amici spend every day addressing concerns related to sexual assault and other forms of gender-based violence. But singling out transgender identity as a means of addressing this concern only raises the risk that transgender people will

³¹ <https://sg.finance.yahoo.com/news/connecticut-woman-donated-hair-cancer-131400077.html>.

be the victims of violence. Barring transgender people from facilities appropriate to their gender identity based on imagined safety concerns does nothing to mitigate such threats. It only gives credence to those who harbor prejudicial stereotypes casting transgender individuals as sexual deviants and predators. In this way, discriminatory policies increase the risk of violence and harassment in bathrooms by making them a space where people who harbor ill will toward transgender people feel entitled to enforce discriminatory rules on their own. Policies like the one adopted by the School Board legitimize that animus, and both safety and privacy suffer.

Amici, academic commentators, and others who advocate against sexual violence all recognize that such exclusionary policies are a cause of—not a solution to—transphobia that leads to violence. “[S]exual minority victimization experiences are hypothesized to be a function of society-induced stigma . . . [that is] continually reinforced through subtle and overt means such as anti-LGBT legislation” Cramer, et al. *supra* at 20, at 87 (emphasis added) (citing G.M. Herek, *Hate crimes and stigma-related experiences among sexual minority adults in the United States*, *J. of Interpersonal Violence* 24(1) at 54-74 (Jan. 2009)). In other words, inflexible policies like the so-called “Best Practices” adopted by the School Board reinforce the prejudices the policy purportedly sought to address. *See* FFCL at 8-9 n.15 (“The School Board Attorney also testified that . . .

transgender students ‘are a vulnerable student population’ who ‘fear for their safety,’ and ‘are more prone to be victims of violence, bullying [and] physical [harm] than other students.’”). And such policies feed the prejudices that make sexual assault and violence in bathrooms a legitimate fear for many transgender people. *See Transgender Teens with Restricted Bathroom Access at a Higher Risk of Sexual Assault*, Harvard T.H. Chan School of Public Health (2019) (finding that 36 percent of transgender or nonbinary students with restricted bathroom or locker room access reported being sexually assaulted in the last 12 months).³²

One study investigating the relationship between transgender bathroom protections and criminal activity unequivocally finds that “fears of increased safety and privacy violations as a result of nondiscrimination laws are not empirically grounded.” Hazenbush Article at 70.

Statistics about the prison population, while not wholly analogous, are representative of the ways in which transgender individuals experience victimization compared to a general population. These surveys and studies support a clear conclusion: there is an elevated risk of sexual assault to transgender women required to use facilities inconsistent with their gender identity. “Correctional officers, courts, prisoners, advocates, and survey data agree: Gay, bisexual,

³² <https://www.hsph.harvard.edu/news/hsph-in-the-news/transgender-teens-restricted-bathroom-access-sexual-assault/>.

transgender, and effeminate prisoners face greatly elevated risks of sexual abuse.”

Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender, and the Rule of Law*, Yale L. & Pol’y Rev. 29(1) at 15 (2010); *see also generally Farmer v.*

Brennan, 511 U.S. 825, 848 (1994) (recounting how the petitioner’s transgender status and feminine appearance alerted prison officials to the risk of sexual abuse).

A study of California state prison inmates found that transgender inmates are 13 times more likely to be sexually assaulted in prison; 59 percent reported sexual assault.³³ Valerie Jenness, et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, University of California, Irvine, Center for Evidence-Based Corrections at 2 (2007).³⁴ Like many transgender inmates, this was the case for Janetta Johnson, a transgender woman who was forced into a men’s prison in California. She “experienced sustained sexual assault, including resorting to oral sex to avoid penetrative rape. She also endured harassment from guards” Zoe Greenberg, *Sentenced to Abuse: Trans People*

³³ Recently, California officials have been responsive to concerns about transgender-inmate safety, adopting a policy that permits transgender individuals to be housed according to their gender identity. Jonathan McDougle, *California to House Transgender Inmates Based on Gender Identity*, CBS News (October 7, 2020), <https://www.cbsnews.com/news/california-transgender-prison-inmates-gender-identity-housing/>; *see also* California Department of Corrections and Rehabilitation, *Operations Manual* at 574 (Jan. 31, 2016), https://web.archive.org/web/20160328162355/http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%202016/2016_DOM.PDF.

³⁴ http://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf.

in Prison Suffer Rape, Coercion, Denial of Medical Treatment, Rewire (May 12, 2015).³⁵ “[T]he American Psychological Association and the National Commission on Correctional Health Care have both issued statements recognizing that transgender inmates are at especially high risk of abuse and calling for their protection.” Brenda V. Smith, et al., *Policy Review and Development Guide: Lesbian, Gay, Bisexual and Intersex Persons in Custodial Settings*, 3rd ed., National Institute of Corrections at 7 (2016).³⁶ Forcing transgender individuals to use the bathroom corresponding with their sex assigned at birth, like forcing transgender women into men’s prisons, will only increase the risk that they will be the victims of assault.

Despite these facts, the School Board cites safety as a key justification for exclusionary action against transgender students. It ignores the real risk that more harm, not less, will result from its proposals.

CONCLUSION

Discriminating against transgender people does not give anyone more control over their body or security. *Amici* welcome policies that will combat sexual assault, but the School Board’s “Best Practices” and other policies like it do

³⁵ <https://rewire.news/article/2015/05/12/sentenced-abuse-trans-people-prison-suffer-rape-coercion-denial-medical-treatment/>.

³⁶ https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1055&context=fasch_rpt.

nothing to advance that goal. Instead, these rules mandate discrimination in response to unsubstantiated safety concerns. Nothing in the Constitution or Title IX protects criminal conduct or otherwise allows students to pretend to be transgender in order to assault or harass other students. And the transgender students most in need of protection from bullying, harassment, and assault are also the students most harmed by these policies. For these reasons, *amici* urge the Court to rely on the accumulated experience and knowledge of experts around the nation who have concluded that nondiscrimination protections for transgender students pose no safety threat to other students. These protections safeguard some of the most vulnerable students in the nation. For the foregoing reasons, we respectfully request that the Court affirm Judge Corrigan's conclusion that the School Board violated Drew Adams's constitutionally guaranteed right to equal protection and Title IX.

Respectfully submitted,

/s/ Dimitri D. Portnoi

Dimitri D. Portnoi

Counsel of Record

Kyle M. Grossman

O'MELVENY & MYERS LLP

400 South Hope Street

Los Angeles, CA 90071

(213) 430-6000
dportnoi@omm.com

Counsel for Amici Curiae

APPENDIX - List of *Amici Curiae*

List of *Amici Curiae*

National Organizations
1. Asian Pacific Institute on Gender-Based Violence
2. Black AIDS Institute
3. Domestic Violence Legal Empowerment and Appeals Project
4. Futures Without Violence
5. Jewish Women International
6. Lovelace Consulting Services, Inc.
7. National Alliance to End Sexual Violence
8. National Coalition Against Domestic Violence
9. National Council of Jewish Women
10. National Domestic Violence Hotline
11. National Organization for Women Foundation
12. National Resource Center on Domestic Violence
13. Sexual Violence Prevention Association
14. The Caribbean Voice, Inc.
15. Ujima Inc., The National Center on Violence Against Women in the Black Community
16. Victim Rights Law Center
Statewide Organizations
17. Bridges Oregon
18. Colorado Coalition Against Sexual Assault
19. Connecticut Alliance to End Sexual Violence
20. Diverse & Resilient
21. Equality New Mexico
22. Idaho Coalition Against Sexual & Domestic Violence
23. Illinois Accountability Initiative
24. Iowa Coalition Against Sexual Assault (IowaCASA)

25.Louisiana Foundation Against Sexual Assault
26.Maine Coalition Against Sexual Assault
27.Maryland Network Against Domestic Violence
28.Nebraska Coalition To End Sexual and Domestic Violence
29.Nevada Coalition to End Domestic and Sexual Violence
30.North Carolina Coalition Against Sexual Assault
31.New Hampshire Coalition Against Domestic & Sexual Violence
32.New York State Coalition Against Sexual Assault
33.Oasis Legal Services
34.OutReach LGBTQ+ Community Center
35.Standpoint
36.Texas Advocacy Project
37.Vermont Network Against Domestic and Sexual Violence
38.Virginia Sexual & Domestic Violence Action Alliance
39.Washington Coalition of Sexual Assault Programs
40.Wisconsin Coalition Against Sexual Assault
41.Wisconsin Education Association Council
42.Wisconsin Faith Voices for Justice
Local Organizations
43.Advocate Safehouse Project
44.Crisis Intervention Service
45.Crisis Support Network
46.Domestic Violence Intervention Program
47.Dove House Advocacy Services
48.Healthy Families of Clallam County
49.Helping Services' Domestic Abuse Resource Center
50.Journey Center for Safety and Healing
51.Limen

52.Los Angeles LGBT Center
53.LYRIC
54.Mariposa House
55.Middle Way House, Inc.
56.Minority Recovery Collective Inc. (MRCI)
57.MOCSA
58.NYC Anti-Violence Project
59.Project Safeguard
60.Rape Crisis Center - Dane County
61.Safe Haven of Greater Waterbury
62.Safehouse Progressive Alliance for Nonviolence
63.SAGE
64.Sexual Trauma Awareness and Response (STAR) Center
65.South Asian Network
66.Stepping Stones, Inc.
67.The Center for Family Justice
68.Turning Points Network
69.Vera House, Inc.
70.Walnut Avenue Family & Women's Center

CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing brief of Anti-Sexual Assault, Domestic Violence, and Gender-Based Violence Organizations as *Amici Curiae* in Support of Plaintiff-Appellee complies with (1) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it was written in Times New Roman, 14-point font and (2) the type-volume limitations contained in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i), because it contains 6,489 words, excluding those parts of the brief excluded from the word count under Federal Rule of Appellate Procedure 32(f).

/s/ Dimitri D. Portnoi

Dimitri D. Portnoi

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief of Anti-Sexual Assault, Domestic Violence, and Gender-Based Violence Organizations as *amici curiae* in support of Plaintiff-Appellee was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit on November 24, 2021 using this Court's ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that four paper copies of the brief with green covers and backing will be dispatched for delivery via Federal Express to:

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

/s/ Dimitri D. Portnoi

Dimitri D. Portnoi