

**Case No. 16-3522**

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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ASHTON WHITAKER, a minor,  
by his mother and next friend,

Plaintiff-Appellee,

v.

KENOSHA UNIFIED SCHOOL DISTRICT  
NO. 1 BOARD OF EDUCATION and  
SUE SAVAGLIO-JARVIS,  
in her official capacity as Superintendent  
of the Kenosha Unified School District No. 1,

Defendants-Appellants.

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Appeal from the United States District Court  
for the Eastern District of Wisconsin  
Case No. 16-CV-843  
The Honorable Judge Pamela Pepper

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**AMICI CURIAE BRIEF OF SCHOLARS WHO STUDY THE TRANSGENDER  
POPULATION IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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Appellate Court No: 16-3522

Short Caption: Whitaker v. Kenosha Unified School District No. 1 Board of Education, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Katherine R. Allen, Nadav Antebi-Gruszka, M.V. Lee Badgett, and other scholars who study the transgender  
population, in their individual capacities, as identified in Appendix A

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Sidley Austin LLP

- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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### INTEREST OF AMICI CURIAE

*Amici curiae* are sixty-two scholars of demographics, economics, law, psychology, political science, public health, public policy, and other disciplines. Many of them are affiliated with the Williams Institute, an academic research center at the UCLA School of Law dedicated to the study of sexual orientation and gender identity law and policy. *Amici* have conducted extensive research and authored numerous studies regarding the transgender population in the United States. Individual *amici* are identified in Appendix A.

As scholars who specialize in issues related to transgender people, *amici* have a substantial interest in this matter. Many of the individual *amici* have testified as expert witnesses in federal district courts and/or have appeared as an amicus in federal Courts of Appeals and the U.S. Supreme Court on related issues. The Supreme Court, this Court, and other federal appellate and district courts have expressly relied on research from the Williams Institute. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015); *Baskin v. Bogan*, 766 F.3d 648, 663, 668 (7th Cir. 2014); *Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906, 943 n.42 (S.D. Miss. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 763-64 (E.D. Mich. 2014). *Amici* believe that the research and data presented herein and *amici*'s academic expertise will aid the Court in evaluating why discrimination against transgender students (a) is sex discrimination prohibited under Title IX and (b) requires heightened scrutiny under the Equal Protection Clause of the U.S. Constitution.

This brief is filed with the consent of all parties. Pursuant to Rule 29(a)(4), *amici* state that no one other than *amici*'s counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

## BACKGROUND

The term “transgender” generally describes individuals whose gender identity does not correspond with their sex assigned at birth.<sup>1</sup> “Gender identity” refers to a “person’s deeply felt, inherent sense” of gender (*e.g.*, being a man, a woman, or genderqueer (*i.e.*, non-binary identity)), while “sex assigned at birth” refers to the assignment made typically at birth by a medical practitioner based on a review of external genitalia.<sup>2</sup> “Transgender” individuals are distinguished from “cisgender” individuals (those whose gender identity matches their sex assigned at birth).<sup>3</sup> One’s gender identity typically is established in young toddlerhood and is distinct from sexual orientation; indeed, people who identify as transgender report varying sexual orientations.<sup>4</sup>

Although evolving, relevant research reflects that sex- and gender-related characteristics are an amalgamation of one’s chromosomes, internal and external genitalia, hormones,

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<sup>1</sup> See, *e.g.*, American Psychological Ass’n (“APA”), *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOL. 832, 832, 862 (Dec. 2015), available at <https://www.apa.org/practice/guidelines/transgender.pdf> [hereinafter APA Transgender Guidelines]; Hendricks & Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 PROF. PSYCH.: RESEARCH AND PRACTICE 460, 461 (2012); Williams Institute, Gender Identity in U.S. Surveillance Group, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* ix (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf> [hereinafter *Best Practices*]; see also James et al., Nat’l Ctr. for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 44-45 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [hereinafter “USTS”].

<sup>2</sup> APA Transgender Guidelines, *supra* note 1, at 861-62; *Best Practices*, *supra* note 1, at x.

<sup>3</sup> See INST. OF MED., NAT’L ACAD. OF SCI., *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE* 26-27 (2011); *Best Practices*, *supra* note 1, at ix.

<sup>4</sup> See APA Transgender Guidelines, *supra* note 1, at 835-36; Herman, *LGB within the T: Sexual Orientation in the National Transgender Discrimination Survey*, in *TRANS STUDIES: BEYOND HETERO/HOMO NORMATIVITIES* (Martinez San-Migules & Tobias Ed. 2016); USTS, *supra* note 1, at 59.

psychology, and cultural associations. In most people, these factors generally align as either “male” or “female.” In others, they do not. For example, some people with an XY chromosome do not develop male genitalia, meaning that one’s “sex” is not necessarily fixed by one’s chromosomes.<sup>5</sup> Likewise, there is ongoing research into potential genetic and biological underpinnings of gender identity, including relating to development of the brain.<sup>6</sup> Contrary to Defendants’ assertion, the prevailing understanding of being transgender does not contrast one’s “gender identity” to one’s “actual ‘biological status’” or assume that the sex assigned at birth is one’s “actual” sex. *Cf.* Opening Br. 8-9.<sup>7</sup>

According to several *amici*’s analysis of data managed by the Centers for Disease Control and Prevention, the United States is home to approximately 1.4 million transgender adults, or 0.6% of the U.S. adult population, and 150,000 transgender youth (aged 13-17), or 0.7% of the U.S. youth population.<sup>8</sup> Transgender people live in every state and other U.S. jurisdictions.

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<sup>5</sup> See, e.g., APA Transgender Guidelines, *supra* note 1, at 861; Heniz, *Rethinking Gender*, NAT’L GEOGRAPHIC 50, 50-51, 56, Jan. 2017; *Best Practices*, *supra* note 1, at ix.

<sup>6</sup> See, e.g., Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 515-16 (2016) (reviewing studies); Bockting et al., *Adult Development and Quality of Life of Transgender and Gender Nonconformity People*, 23 CURRENT OPINION IN ENDOCRINOLOGY, DIABETES & OBESITY 188, 193 (Apr. 2016) [hereinafter *Adult Development*]; Heniz, *supra* note 5, at 56.

<sup>7</sup> Defendants purport to derive the concept of an “actual ‘biological status’” from the APA’s 2012 guidance for the treatment of gay, lesbian, and bisexual patients. Defendants do not faithfully cite that guidance and in any event ignore the more recent, more relevant definitions in the APA Transgender Guidance and other research specific to transgender issues. See *supra* note 1; see also Flynn, *TRANSforming the Debate: Why We Need to Include Transgender Rights in the Struggle for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 394 (2001) (collecting studies and noting: “[G]ender identification is generally accepted within the medical and psychological professions as more integral to a person’s sex than anatomical birth sex.”); Decl. of Dr. Nicholas Gorton, M.D. ¶¶ 16-17, 21, 25.

<sup>8</sup> Flores et al., Williams Institute, *How Many Adults Identify as Transgender in the United States?* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [hereinafter *How Many Identify*]; Flores et al., Williams Institute, *Age of Individuals Who Identify as Transgender in the United States* 4 (2017),

Wisconsin is home to approximately 19,150 transgender adults and 1,850 transgender youth; in the geographic area of the Seventh Circuit, there are approximately 96,500 transgender adults and 11,000 transgender youth.<sup>9</sup> Nationally and in Wisconsin, younger people are somewhat more likely to identify as transgender than older adults.<sup>10</sup>

Although a small proportion of the U.S. population, transgender people reflect the general population in many respects. They are racially and ethnically diverse; nationally and in Wisconsin, transgender adults are more likely to be a racial/ethnic minority than the general adult population.<sup>11</sup> They are military personnel and veterans,<sup>12</sup> inventors and entrepreneurs,<sup>13</sup> religious leaders and political organizers,<sup>14</sup> assembly workers and medical professionals,<sup>15</sup> artists

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<http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf> [hereinafter *Age Report*]. Cf. Wilson et al., Williams Institute, *Sexual and Gender Minority Youth In Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, at 36-37 (2014), [http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS\\_report\\_final-aug-2014.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf).

<sup>9</sup> See *How Many Identify*, *supra* note 8, at 3-4; *Age Report*, *supra* note 8, at 4-5.

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<sup>11</sup> See Flores et al., Williams Institute, *Race and Ethnicity of Adults Who Identify as Transgender in the U.S.* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf>.

<sup>12</sup> Gates & Herman, Williams Institute, *Transgender Military Service in the United States* 4 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf> (estimating that 15,500 transgender individuals are serving on active duty or in the Guard or Reserve forces; approximately 134,300 transgender individuals are veterans or military retirees; and transgender individuals are twice as likely as other adults to have served); see also Dawson, *Transgender, at War and in Love*, N.Y. TIMES, June 4, 2015, <https://www.nytimes.com/video/opinion/100000003720527/transgender-at-war-and-in-love.html>.

<sup>13</sup> E.g., Miller, *The Trans-Everything CEO*, N.Y. MAG., Sept. 7, 2014, <http://nymag.com/news/features/martine-rothblatt-transgender-ceo/>.

<sup>14</sup> E.g., Kong, *Meet the Trans Women of Color Who Helped Put Stonewall on the Map*, MIC, June 25, 2016, <https://mic.com/articles/121256/meet-marsha-p-johnson-and-sylvia-rivera-transgender-stonewall-veterans#.6mnvQ5Aru>; Anderson, *The Christian Church Continues to Spurn Transgender Clergy*, VICE, June 25, 2015, [https://www.vice.com/en\\_us/article/the-christian-church-continues-to-spurn-transgender-clergy-456](https://www.vice.com/en_us/article/the-christian-church-continues-to-spurn-transgender-clergy-456).

and entertainers,<sup>16</sup> academics and public servants,<sup>17</sup> and many other things.<sup>18</sup> They are U.S. citizens and immigrants.<sup>19</sup> They span the political spectrum.<sup>20</sup> They have a diverse array of religious and spiritual identities.<sup>21</sup> They are parents, and they are people's children.<sup>22</sup>

Despite the many contributions transgender people make to our families, communities, and larger society, “[t]ransgender people face systematic oppression and devaluation as a result

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<sup>15</sup> Mickens, N.Y. TIMES, <http://www.nytimes.com/interactive/projects/storywall/transgender-today/stories/mykel-mickens> (last visited Jan. 23, 2017); Zezima, *Meet Rachel Levine, one of the very few transgender public officials in America*, WASH. POST, June 1, 2016, <http://wpo.st/Q4nP2>.

<sup>16</sup> See, e.g., *25 Transgender People Who Influenced American Culture*, TIME, May 29, 2014, <http://time.com/130734/transgender-celebrities-actors-athletes-in-america/>.

<sup>17</sup> See, e.g., Keen, *An Exclusive Interview With Kim Coco Iwamoto*, HAWAII NEWS NOW, <http://www.hawaiinewsnow.com/story/5676068/an-exclusive-interview-with-kim-coco-iwamoto> (last visited Jan. 23, 2017); Office of Mayor Edward B. Murray, Press Release, *Mayor Appoints Director of New Office of Labor Standards*, May 29, 2015, <http://murray.seattle.gov/mayor-appoints-director-of-new-office-of-labor-standards/>; Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phillis Fyre*, N.Y. TIMES, Aug. 29, 2015, [http://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html?\\_r=0](http://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html?_r=0); Teo, *Transgender professor advocates for women in science*, STANFORD DAILY, Oct. 4, 2013, <http://www.stanforddaily.com/2013/10/04/transgender-professor-advocates-for-women-in-science/>.

<sup>18</sup> See, e.g., *Transgender Lives: Your Stories*, N.Y. TIMES, <http://www.nytimes.com/interactive/projects/storywall/transgender-today/> (last visited January 30, 2017); Tannehill, *The Top 50 successful transgender people you should know*, LGBTQ NATION, Jan. 12, 2017, <http://www.lgbtqnation.com/2017/01/top-50-successful-transgender-americans-know/>.

<sup>19</sup> See, e.g., USTS, *supra* note 1, at 58.

<sup>20</sup> See, e.g., Rude, *The truth about transgender Republicans*, DAILY DOT, Apr. 29, 2015, <http://www.dailydot.com/layer8/transgender-republican-bruce-jenner/>.

<sup>21</sup> See, e.g., USTS, *supra* note 1, at 54.

<sup>22</sup> See, e.g., Stotzer et al., Williams Institute, *Transgender Parenting: A Review of Existing Research* (2014), <http://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014>; Conant, *I am Nine Years Old: Children Across the World Tell How Gender Affects Their Lives*, NAT'L GEOGRAPHIC, Jan. 2017, at 31-47; Plaschke, *Transgender Teenage Ballplayer as Santa Monica Prep School Spreads Message of Hope and Acceptance*, L.A. TIMES, Apr. 10, 2016, <http://www.latimes.com/sports/la-sp-transgender-baseball-plaschke-20160410-column.html>.

of social stigma attached to their gender nonconformity.”<sup>23</sup> Two large national surveys – the 2011 National Transgender Discrimination Survey (NTDS) and the 2015 U.S. Transgender Survey (USTS) – provide data on the pervasiveness of discrimination and its effects on transgender people’s education, future economic prospects, and health.<sup>24</sup>

According to the recent USTS, 77% of respondents who were out or perceived as transgender in grades K-12 had negative experiences at school from being transgender, such as being verbally harassed or physically or sexually assaulted.<sup>25</sup> The NTDS likewise found alarming rates of school-place harassment and assault both nationally<sup>26</sup> and specifically among Wisconsin respondents.<sup>27</sup> As one USTS respondent recounted:

I was constantly bullied and physically assaulted by my classmates. Teachers would often see it happen and make no move to intervene. The harassment continued, and eventually I had to change high schools three times, each time just as bad as the last, until I finally gave up on public schools.<sup>28</sup>

Another USTS respondent described abuse so persistent – including being pelted with spit-balls, paper airplanes of hate mail, and soda cans – that the respondent avoided the school bus and restrooms from fear for personal safety.<sup>29</sup> Nearly one-sixth of USTS respondents who were out

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<sup>23</sup> Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. OF PUB. HEALTH 943, 943 (2013) [hereinafter *Stigma*].

<sup>24</sup> See Grant et al., Nat’l Ctr. for Transgender Equality and Nat’l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 32-46 (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf) [hereinafter NTDS]; USTS, *supra* note 1.

<sup>25</sup> USTS, *supra* note 1, at 130-135.

<sup>26</sup> NTDS, *supra* note 24, at 3, 33-46.

<sup>27</sup> Nat’l Ctr. for Transgender Equality and Nat’l Gay & Lesbian Task Force, *Findings of the National Transgender Discrimination Survey: Wisconsin Results*, at 1 [http://www.transequality.org/sites/default/files/docs/resources/ntds\\_state\\_wi.pdf](http://www.transequality.org/sites/default/files/docs/resources/ntds_state_wi.pdf) [hereinafter Wisconsin NTDS Results]. State-level results from the USTS are not yet available.

<sup>28</sup> USTS, *supra* note 1, at 134.

<sup>29</sup> *Id.*

as transgender in grades K-12 left school because of harassment; among Wisconsin NTDS respondents, one in five left school.<sup>30</sup>

These findings are consistent with other research showing that transgender youth face pervasive school-place harassment<sup>31</sup> and “a high prevalence of sexual assault and rape.”<sup>32</sup>

Research likewise shows high rates of discrimination and victimization at secondary schools.<sup>33</sup>

As these studies reflect, such discrimination and stigmatization impair many transgender students’ equal access to education. Because educational attainment, especially high school completion, is a significant determinant of economic status and health across the life course, harassment and discrimination of transgender people at school reduces economic prospects and increases risk of homelessness and other negative outcomes.<sup>34</sup>

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<sup>30</sup> USTS, *supra* note 1, at 132; Wisconsin NTDS Results, *supra* note 27, at 1; *cf.* Strabstein & Piazza, *Public Health, Safety and Educational Risks Associated with Bullying Behaviors in American Adolescents*, 20 INT. J. ADOLESCENT MED. HEALTH 223 (2008) (documenting drop out rates and other negative effects from bullying).

<sup>31</sup> *See, e.g.,* Collier, et al., *Sexual Orientation and Gender Identity/Expression Related Peer Victimization in Adolescence: A Systematic Review of Associated Psychosocial and Health Outcomes*, 50 J. SEX RESEARCH 299 (2013); Berlan, *Sexual Orientation and Bullying among Adolescents in the Growing Up Today Study*, 46 J. ADOLESCENT HEALTH 366 (2010); Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9–12 — Youth Risk Behavior Surveillance, Selected Sites, United States, 2001–2009*, 60 MORBIDITY AND MORTALITY WEEKLY REPORT 1, 11 (2011); GREYTAK ET AL., GLSEN, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS (2009); *cf.* GLSEN, *School Climate in Wisconsin* (2015), <https://www.glsen.org/sites/default/files/Wisconsin%20State%20Snapshot%20-%20NSCS.pdf>.

<sup>32</sup> *E.g.,* Stotzer, *Violence against Transgender People: A Review of United States Data*, 14 AGGRESSION AND VIOLENT BEHAVIOR 170, 172 (2009).

<sup>33</sup> *See, e.g.,* USTS, *supra* note 1, at 9, 136; Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, J. HOMOSEXUALITY 1 (2016) (collecting studies).

<sup>34</sup> *E.g.,* USTS, *supra* note 1, at 137; NTDS, *supra* note 24, at 32-33, 46; Brown & Taylor, *Bullying, Education and Earnings: Evidence from the National Child Development Study*, 27 ECONOMICS EDUC. REV. 387 (2008); *Stigma*, *supra* note 23, at 943.

Overwhelming research also shows that stigma and mistreatment – not the fact of being transgender – result in transgender individuals experiencing disproportionately high rates of depression, anxiety, and other psychological distress.<sup>35</sup> Fully 82% of transgender people responding to the USTS seriously considered killing themselves at some point in their lives; nearly half (48%) in the previous year.<sup>36</sup> Among respondents who had attempted suicide, more than a third (34%) made their first attempt at age 13 or younger; three-quarters did so before age 18.<sup>37</sup> Other research confirms that transgender people who experience discrimination and gender-related abuse in their youth have higher rates of major depression and suicidality during adolescence.<sup>38</sup>

Research has shown, however, that creating a supportive environment that treats transgender people consistent with their gender identity can ameliorate these negative outcomes. Transgender people who are accepted and supported at home and in their community report lower rates of negative outcomes, including lower rates of mental distress, homelessness, and suicide.<sup>39</sup>

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<sup>35</sup> See, e.g., Hendricks & Testa, *supra* note 1, at 465 (“Study after study has demonstrated that trans individuals are subject to negative life events directly related to their gender variance and that these events have potentially dire mental health effects ....”); *Adult Development*, *supra* note 6, at 190; *Stigma*, *supra* note 23, at 948; USTS, *supra* note 1, at 3, 103.

<sup>36</sup> USTS, *supra* note 1, at 112-14.

<sup>37</sup> *Id.* at 115.

<sup>38</sup> See, e.g., NTDS, *supra* note 24, at 45; Hendricks & Testa, *supra* note 1, at 465-66; Clements-Nolle et al., *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 J. OF HOMOSEXUALITY 53, 61-65 (2006); Nuttbrock et al., *Psychiatric Impact of Gender-Related Abuse Across the Life Course of Male-to-Female Transgender Persons*, 47 J. SEX. RES. 12 (2010).

<sup>39</sup> See, e.g., APA Transgender Guidance, *supra* note 1; USTS, *supra* note 1, at 76; *Stigma*, *supra* note 23; Heniz, *supra* note 5; Plaschke, *supra* note 22.

### SUMMARY OF THE ARGUMENT

The Supreme Court has long recognized that education is “perhaps the most important function of [the] state,” as it provides “the very foundation of good citizenship” and is “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). The lessons children learn at school – about themselves and how to treat others – can “affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494. A school can teach a student like Ash Whitaker self-confidence and dignity, and help him to become an entrepreneur, scholar, scientist, or civic leader. However, harassment and discrimination against transgender students in schools, including treating them inconsistent with their gender identity, is stigmatizing, causes substantial harm, and impairs their access to equal education. For the reasons set forth in Plaintiff-Appellee’s Brief and district court’s decision, this Court should conclude that Ash Whitaker has established a sufficient likelihood of success on his claims under both Title IX and the Equal Protection Clause.

1. Research supports Plaintiff’s likelihood of success on his statutory claim.

Discriminating against and stigmatizing transgender people based on their gender identity, transgender status, or gender transition are all forms of discrimination based on “sex” within the language of Title IX, as confirmed by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), and related authorities. Moreover, discrimination against transgender students, including with respect to bathroom policies, can deny them the benefits of education, compromise their physical and mental health, and negatively impact their future opportunities – precisely what Title IX is designed to fight against.

2. Research also supports Plaintiff's likelihood of success on his constitutional claim. Plaintiff's Brief explains that Defendants' actions violate the Equal Protection Clause under any level of review. *Amici* write separately to demonstrate that transgender people meet the requirements for suspect-class status. The approximately 1.55 million transgender people (youth and adults) in the United States share characteristics that distinguish them as an identifiable, discrete minority group, and overwhelming evidence demonstrates that transgender people have long been the victims of public and private discrimination permeating all aspects of life. Moreover, transgender people are a small minority group that lack political power to protect themselves within the political process, and as courts and scholars agree, the discrimination they face bears no relation to their ability to contribute to society. As a result, state action targeting transgender individuals should be subject to heightened scrutiny.

## ARGUMENT

### **I. GENDER IDENTITY DISCRIMINATION IS DISCRIMINATION BASED ON SEX FOR PURPOSES OF TITLE IX**

Title IX of the Education Amendments of 1972 provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 *et seq.* Like the Supreme Court's decision in *Brown*, Title IX reflects that, "because education provides access to jobs and financial security, discrimination here is doubly destructive." 118 Cong. Rec. 5803, 5806-07 (1972) (remarks of Senator Bayh).

As explained in Plaintiff's brief, although Congress enacted Title IX to protect women from discrimination in education, the plain language of the statute extends protection beyond that intention, and the statute clearly protects all people from sex discrimination. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (explaining that anti-discrimination

statutes “often go beyond the principal evil to cover reasonable comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”); *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016) (holding male student stated Title IX claim); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002) (applying *Oncale* to hold that same-sex discrimination is actionable under Title IX).<sup>40</sup>

The Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 240-42, 258 (1989), and its progeny establish that prohibitions on discrimination on the basis of sex include gender discrimination and discrimination based on nonconformity to stereotypes and norms about sex and gender. See, e.g., *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492-93 (7th Cir. 2000); *Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816 (C.D. Ill. 2008) (applying *Price Waterhouse* to Title IX).<sup>41</sup> For this reason, among others, four circuit courts,<sup>42</sup> numerous district courts,<sup>43</sup> and the EEOC in *Macy v.*

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<sup>40</sup> Courts interpreting Title IX often look to Title VII law, and have held that Title IX prohibits gender stereotyping. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE XI LEGAL MANUAL § IV.D, <https://www.justice.gov/crt/title-ix#I> (last visited January 5, 2017).

<sup>41</sup> This Court is currently considering *en banc* whether discrimination based on one’s sexual orientation is prohibited by Title VII. See *Hively v. Ivy Tech Comm’y Coll.*, 830 F.3d 698, 705-09 (7th Cir. 2016), *pet. for reh’g en banc granted and vacated*, 2016 WL 6768628 (Oct. 11, 2016). A ruling in *Hively* that sexual orientation discrimination is prohibited under Title VII would further support Plaintiff’s claims here, but it is not necessary, because being transgender is different from one’s sexual orientation. See *supra* note 4.

<sup>42</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

<sup>43</sup> See, e.g., *Finkle v. Howard Cnty., Md.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Michaels v. Akal Sec., Inc.*, No. 09-cv-1300, ZLW-CBS 2010 WL 2573988 (D. Colo. June 24, 2010); *Kastl v. Maricopa Cnty. Comm. Coll. Dist.*, No. Civ.02-1531, 2004 WL 2008954 (D. Ariz. June 3, 2004), *aff’d* 325 Fed. Appx. 492 (9th Cir. 2009); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diag. Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. VIC.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375, E (SC) 2003 WL

*Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*10 (E.E.O.C. Apr. 20, 2012), have recognized that sex discrimination encompasses discrimination on the basis of gender identity, transgender status, and/or gender transition.<sup>44</sup>

The research described in the Background above confirms this emerging legal consensus. Transgender people face pervasive discrimination based on “their *gender nonconformity*”<sup>45</sup> – i.e., people’s “incorrect assumption that gender identity automatically aligns with sex assigned at birth” and that variance is unhealthy or pathological.<sup>46</sup> Just as in *Price Waterhouse* or *City of Belleville* – where the discrimination involved a woman’s failure to act more femininely and a man’s failure to act more “macho” – discrimination against transgender people frequently manifests when transgender people challenge sex and gender norms by not presenting or acting in conformity with their norms and stereotypes associated with their sex assigned at birth. As a result, transgender people not only face “enacted stigma” (actual experiences of rejection and discrimination), but they may also internalize that stigma, devaluation, and fear of rejection, exacerbating the psychological distress. See *supra* at pp. 7-9; *supra* notes 45-46; cf. *Brown*, 347 U.S. at 494 & n.11 (citing studies on effects of prejudice and discrimination on development).

Not only is discrimination on the basis of gender identity, transgender status, or gender transition discrimination on the basis of sex, research demonstrates that such discrimination is a

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22757935 (W.D.N.Y. Sept. 26, 2003); *Doe v. United Consumer Fin. Servs.*, No. 01CV111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

<sup>44</sup> *Amici* agree with Plaintiff that *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), has been undermined by *Price Waterhouse* and that this Court should disavow the decision.

<sup>45</sup> *Stigma*, *supra* note 23, at 943 (emphasis added).

<sup>46</sup> APA Transgender Guidelines, *supra* note 1, at 835, 838, 840; see also, e.g., Hendricks & Testa, *supra* note 1, at 462, 465-66; USTS, *supra* note 1, at 132-134; NTDS, *supra* note 24, at 2-8, 33-39, 50-60 (describing manifestations of discrimination and harassment in school and work settings); cf. Levi & Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE L. REV. 133, 151-58, 164-70 (2009) (explaining how bathroom laws targeting transgender people, like anti-cross-dressing laws of old, are rooted in desire to enforce sex and gender norms).

“comparable evil” prohibited by Title IX. As with women at the time Title IX was passed, transgender individuals face “persistent, pernicious discrimination” that serves to “perpetuate second-class citizenship.” *Cf.* 118 Cong. Rec. at 5806-07 (Sen. Bayh, discussing purpose of Title IX). Such discrimination and harassment impairs transgender students’ equal access to the educational benefits and programs, with discrimination in education compounding discrimination in the workforce, housing, and other areas of life. *See supra* at pp. 7-9.<sup>47</sup> With respect to restroom access specifically, transgender students who are prohibited from using, or experience problems accessing, restrooms consistent with their gender identity report greater absenteeism, poorer performance in school, withdrawing from public spaces and events, physical health impacts (such as bladder infections and kidney problems), and mental health impacts, including increased risk of suicide.<sup>48</sup> All of the foregoing amply establishes Plaintiff’s likelihood of success on his statutory claim.

## **II. GENDER IDENTITY DISCRIMINATION DEMANDS HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE**

The Equal Protection Clause prohibits governmental classifications that are “arbitrary or irrational” as well as those that reflect “a bare . . . desire to harm a politically unpopular group.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 446-47 (1985). The general rule that classifications need only be “rationally related to a legitimate state interest,” “gives way . . . when a statute classifies” groups that have been historically subject to discrimination or

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<sup>47</sup> *See also, e.g.,* Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J.L. GENDER & SOC’Y 245 (2013); Skinner-Thompson & Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 296-99 (2013).

<sup>48</sup> *See, e.g.,* Herman, *Gendered Restrooms and Minority Stress*, 19 J. PUB. MGMT. & SOC. POL’Y 65 (2013); Seelman, *supra* note 33 (finding that transgender people who had been denied access to college bathrooms that matched their gender identity were 1.5 times more likely to have attempted suicide than those who were not denied bathroom access, even controlling for other forms of victimization).

“impinge[s] on personal rights protected by the Constitution.” *Id.* at 440. Where the law discriminates based on “suspect” classifications, such as race, or “quasi-suspect” classifications, such as gender, it is subject to heightened judicial scrutiny. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

To the extent the Court decides it needs to reach the issue of whether to apply heightened scrutiny, it should hold that transgender people are properly considered a suspect class. Supreme Court jurisprudence identifies various factors in determining whether classifications are suspect, including: whether the class has “obvious, immutable, or distinguishing characteristics that define them as a discrete group;” whether the group has experienced a history of discrimination; whether the group lacks the ability to protect itself within the political process; and whether the discrimination is based on “stereotyped characteristics not truly indicative” of the group’s abilities. *Bowen*, 483 U.S. at 602; *City of Cleburne* 473 U.S. at 441-42. All of these considerations show that the Court should review state action that discriminates against transgender people with heightened scrutiny.

**A. The Transgender Population Is An Identifiable, Discrete Minority Group**

As described above in the Background section, transgender people in the United States are a “discrete” minority group identifiable according to a distinguishing characteristic: a lack of congruence between their gender identity and their assigned sex at birth. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (“transgender status is a sufficiently discernible characteristic to define a discrete minority class”). That “transgender status is a sufficiently discernible characteristic” is also reflected in the fact that transgender people “face backlash in everyday life when their status is discovered.” *Adkins*, 143 F. Supp. 3d at 139-40 (citing *Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012)).

**B. Transgender People Have Long Faced Pervasive Discrimination in All Domains of Life**

“[T]here is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare.” *Bd. of Educ. v. U.S. Dep’t of Educ.*, No. 2:16-CV-524, 2016 U.S. Dist. LEXIS 131474, at \*58 (S.D. Ohio Sept. 26, 2016); *accord Adkins*, 143 F. Supp. at 139 (stating that “transgender people have suffered a history of persecution and discrimination . . . is not much in debate” (internal quotation omitted)); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society today is well-documented.”).

For decades, laws have expressly discriminated against transgender people. For example, at local levels, city ordinances long criminalized cross-dressing to enforce gender norms, effectively sweeping transgender people into the criminal justice system.<sup>49</sup> Some legislatures continue to exclude gender identity discrimination from anti-discrimination and hate-crime laws, even while extending protection based on sexual orientation.<sup>50</sup> As recently as last year, North Carolina and Mississippi adopted legislation expressly targeting transgender people.<sup>51</sup>

Transgender individuals have also faced discrimination in the court system, including, for

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<sup>49</sup> See, e.g., *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (involving 53 people arrested under Houston ordinance criminalizing “dress[ing] with the designed intent to disguise his or her true sex as that of the opposite sex”); *People v. Archibald*, 296 N.Y.S.2d 834, 836 (App. Div. 1968) (affirming conviction of transgender defendant); Levi & Redman, *supra* note 46 (discussing history of cross-dressing ordinances and case law).

<sup>50</sup> See, e.g., Wisc. Stat. §§ 111.31-111.395 (employment antidiscrimination law); *id.* § 939.645 (hate crime law); Barry, *supra* note 6.

<sup>51</sup> Public Facilities Privacy & Security Act, N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3) (“HB2,” forbidding transgender people from using single-sex facilities matching their gender identity); 2016 Miss. Laws Ch. 334 (H. B. 1523), § 2(c) (2016) (permitting discrimination on belief that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth”).

example, denial of parental and familial rights, as well as being cruelly mocked and discriminated against in the context of name-change petitions.<sup>52</sup>

In addition to de jure discrimination, transgender people face discrimination and stigma in vital areas of life, as explained in the Background and further below, and which is linked to deleterious consequences for health and well-being.

### **1. Discrimination in education, housing, public accommodations, and healthcare**

The Background recounts some of the research showing discrimination against transgender students in education. Discrimination against transgender people in housing and public accommodations is widespread as well. As documented in the USTS and NTDS, for example, many transgender people report being denied a home or apartment or evicted due to their transgender status and an increased likelihood of homelessness.<sup>53</sup> Transgender people are frequently denied equal treatment or service and/or verbally harassed at places of public accommodation (*e.g.*, retail stores, hotels and restaurants, doctors' offices, hospitals, etc.).<sup>54</sup>

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<sup>52</sup> See, *e.g.*, *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986) (terminating parental rights for seeking to assume a female identity); *Kantaros v. Kantaros*, 884 So.2d 155 (Fla. App. 2004) (reversing custody grant due to parent's transgender status); *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at \*28 (E.D. La. Sept. 16, 2002) (asserting that transgender litigant was just "impersonating" a woman and "pretend[ing]" to "disguise himself"); *In re Petition of Richardson to Change Name*, 23 Pa. D. & C.3d 199, 201 (1982) (calling transgender people "gargoyles;" characterizing name-change petition as a "freakish rechristening"); *Ashlie v. Chester-Upland Sch. Dist.*, No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at \*14 (E.D. Pa. May 9, 1979) (comparing transgender litigant to man trying to change himself "into a donkey").

<sup>53</sup> USTS, *supra* note 1, at 175-78; see also, *e.g.*, Wisconsin NTDS Results, *supra* note 28, at 1; Bradford et al., *Experiences of Transgender-Related Discrimination and Implications for Health: Results from the Virginia Transgender Health Initiative Study*, 103 AM. J. PUB. HEALTH 1820 (2013).

<sup>54</sup> *Id.* at 214; see also, *e.g.*, Wisconsin NTDS Results, *supra* note 28, at 2; REISNER ET AL., FENWAY HEALTH, DISCRIMINATION AND HEALTH IN MASSACHUSETTS: A STATEWIDE SURVEY OF TRANSGENDER AND GENDER NONCONFORMING ADULTS 16 (2014); Bradford, *supra* note 53.

Transgender people also face significant hurdles in accessing health care. In the USTS, for example, one in three respondents reported negative experiences in seeking medical care within just the prior year, such as healthcare providers who were unaware of basic aspects of transgender health or who asked invasive questions about the person's transgender status unrelated to his or her reason for visiting.<sup>55</sup> Nearly one in four USTS respondents reported that they had avoided seeking necessary healthcare from fear of being mistreated.<sup>56</sup> As one respondent explained:

Multiple medical professionals have misgendered me, denied to me that I was transgender or tried to persuade me that my trans identity was just a misdiagnosis of something else, have made jokes at my expense in front of me and behind my back, and have made me feel physically unsafe. I often do not seek medical attention when it is needed, because I'm afraid of what harassment or discrimination I may experience in a hospital or clinic.<sup>57</sup>

## 2. Discrimination in the workplace

Overwhelming evidence documents pervasive discrimination against transgender people in the workplace.<sup>58</sup> For example, among USTS respondents, 27% of those who held or applied for a job reported being fired, denied a promotion, or not hired because of their gender identity or

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<sup>55</sup> USTS, *supra* note 1, at 97; *see also, e.g.*, Wisconsin NTDS Results, *supra* note 28, at 2; REISNER, *supra* note 54, at 20; Lambda Legal, *When Health Care Isn't Caring: Transgender and Gender-nonconforming People* (2009), <https://www.lambdalegal.org/sites/default/files/publications/downloads/whcinserttransgender-and-gender-nonconforming-people.pdf>.

<sup>56</sup> USTS, *supra* note 1, at 98.

<sup>57</sup> *Id.* at 96.

<sup>58</sup> *See, e.g.*, Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People*, 45 LOYOLA L. REV. 715 (2012); Sears et al., Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009), [http://williamsinstitute.law.ucla.edu/wp-content/uploads/12\\_SpecificExamples.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/12_SpecificExamples.pdf); Bradford, *supra* note 53; NTDS, *supra* note 24, at 50-70; Wisconsin NTDS Results, *supra* note 27, at 1.

expression *in just the prior year*, while 15% reported being verbally harassed, physically attacked, or sexually assaulted.<sup>59</sup>

Transgender people also face high unemployment rates. Fifteen percent of USTS respondents reported being unemployed, more than triple the national unemployment rate at the time of the survey.<sup>60</sup> Unemployment rates were even higher for transgender people of color: 35% of Middle Eastern respondents, 20% of Black respondents, and 21% of Latino respondents were unemployed.<sup>61</sup>

Connected to discrimination, unemployment, or under-employment, many transgender people are living in poverty. Twelve percent of USTS respondents reported earning less than \$10,000 annually – a rate three times that of the U.S. population at the time of the survey.<sup>62</sup> Even those USTS respondents with income above \$10,000 per year reported lower household incomes than the general population: 62% had household incomes under \$50,000 per year (compared to 38% of the general population),<sup>63</sup> while only 15% reported earning more than \$100,000 per year (compared to 31% of the general population). Nearly one third (29%) of respondents were living in poverty compared to the 14% national average.<sup>64</sup>

These figures are consistent with a forthcoming study by several *amici*, based on representative data from 27 states, finding “clear evidence that self-identified transgender

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<sup>59</sup> USTS, *supra* note 1, at 148, 150-53.

<sup>60</sup> *Id.* at 140; *see also* Sears & Mallory, Williams Institute, *Documented Evidence of Employment Discrimination and its Effects* (2011), <http://williamsinstitute.law.ucla.edu/research/workplace/documented-evidence-of-employment-discrimination-its-effects-on-lgbt-people/>.

<sup>61</sup> USTS, *supra* note 1, at 141.

<sup>62</sup> *Id.* at 142.

<sup>63</sup> *Id.* at 144.

<sup>64</sup> *Id.*

individuals have significantly lower employment rates and household incomes and significantly higher poverty rates than non-transgender individuals.”<sup>65</sup> The study concludes that transgender adults suffer a “household income penalty” equivalent to 12% of annual household income.<sup>66</sup>

### **3. Greater Likelihood of Facing Violence and Discriminatory Treatment by Law Enforcement**

Transgender people face high levels of physical violence. In 2013 alone, the National Council of Anti-Violence Programs reported 13 hate-motivated murders of transgender women.<sup>67</sup> In its 2009 report in support of Local Law Enforcement Hate Crimes Prevention Act of 2009, Congress recognized that over 400 people were murdered due to anti-transgender bias in the preceding decade, including 21 in 2008 alone.<sup>68</sup> As explained in the Background, transgender individuals suffer high rates of sexual violence, yet they rarely report the crimes, often from fear of mistreatment by the police and others.<sup>69</sup>

Indeed, respondents to the USTS reported high levels of harassment, abuse, or neglect by law enforcement officers. Of respondents who had interacted with law enforcement officers in the year before the survey, well over half (58%) reported negative treatment, 20% reported verbal harassment or disrespect, and 4% reported being physically attacked by officers.<sup>70</sup> In

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<sup>65</sup> Carpenter et al., *Transgender Status, Employment, and Income* (forthcoming 2016), at 9 (on file with counsel).

<sup>66</sup> *Id.*

<sup>67</sup> Nat’l Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, at 8, 22–23 (2014), [http://avp.org/storage/documents/2013\\_ncavp\\_hvreport\\_final.pdf](http://avp.org/storage/documents/2013_ncavp_hvreport_final.pdf).

<sup>68</sup> H.R. Rep. No. 111-86, at 11 (2009).

<sup>69</sup> Stotzer, *supra* note 32, at 172-73.

<sup>70</sup> USTS, *supra* note 1, at 186; *see also* Mallory et al., Williams Institute, *Harassment by Law Enforcement Officers in the LGBT Community* (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>.

some cases, police officers were unwilling to assist transgender people who had been the victim of crimes. One respondent described her encounter with law enforcement:

I was found in a ditch after being brutally raped for three days. I was taken to an ER. There I met an officer who told me I deserved it for attempting to be a woman and should have died. He also refused to take a report.<sup>71</sup>

Fifty-seven percent of respondents admitted being uncomfortable approaching the police for assistance.<sup>72</sup>

**C. Transgender People Lack the Ability to Eliminate Discrimination Through the Political Process**

As a minority comprising just 0.6% of the total adult population, transgender people lack political power to protect themselves in the political process against a hostile majority. *Bd. of Educ.*, 2016 U.S. Dist. LEXIS 131474, at \*59-60 (finding transgender community politically powerless “as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings”); *see also Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989-90 (S.D. Ohio 2013) (citing “small population size” as factor establishing powerlessness of gays and lesbians), *rev’d DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Further evidence that transgender people lack political power is reflected by the lack of openly transgender elected or appointed political officials. In *Adkins*, the court recognized the absence of openly transgender members of the United States Congress or federal judiciary. 143

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<sup>71</sup> USTS, *supra* note 1, at 201.

<sup>72</sup> *Id.* at 185.

F. Supp. 3d at 140. A recent study found only three openly transgender elected officials, all at local levels, and that very few transgender people have ever even been candidates.<sup>73</sup>

Although there are no conclusive answers as to why transgender individuals are underrepresented in elected and appointed office, research suggests that an enormous hurdle is getting transgender candidates—who may have to overcome fears of violence, discrimination, or backlash—to run.<sup>74</sup> Transgender individuals also may lack the support needed to get elected if political parties and influential donors do not believe transgender candidates can win elections or are otherwise reluctant to give their support to transgender candidates.

Transgender people's political power is also undermined by laws requiring voters to have a certain form of identification in order to vote. These laws risk disenfranchising many transgender individuals, who face administrative obstacles to obtaining identification that reflects their correct gender identity. According to one recent study, the strictest of these voter-identification laws may have disenfranchised over 34,000 transgender people in eight states in the November 2016 general election.<sup>75</sup>

**D. Being Transgender Is Not an Indication of a Person's Ability to Contribute to Society**

The final factor in determining whether a classification demands heightened scrutiny is whether the group in question is distinctively different from other groups in a way that “bears [a]

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<sup>73</sup> See Casey & Reynolds, *Standing Out: Transgender and Gender Variant Candidates and Elected Officials Around the World*, App. 2 (2015), <http://www.lse.ac.uk/InternationalInequalities/pdf/Standing-Out.pdf>.

<sup>74</sup> *Id.* at 19-21.

<sup>75</sup> Herman, The Williams Institute, *Potential Impact of Voter Identification Laws on Transgender Voters in the 2016 General Election* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Voter-ID.pdf>.

relation to ability to perform or contribute to society.” *City of Cleburne*, 472 U.S. at 440-41 (quotation omitted). Being transgender does not.

As explained in the Background, transgender people contribute to the workplace and our society in countless ways unrelated to their gender identity, including as CEOs, soldiers, scholars, health care workers, and parents, among others.<sup>76</sup> As *Adkins* recently explained:

Some transgender people experience debilitating dysphoria while living as the gender they were assigned at birth, but this is the product of a long history of persecution forcing transgender people to live as those who they are not. The Court is not aware of any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society.

143 F. Supp. 3d at 139; *see also Bd. of Educ.*, 2016 U.S. Dist. LEXIS 131474, at \*59.

Given the opportunity to be who they are, transgender individuals can thrive. Yet the research also shows that discrimination and stigma threatens transgender kids’ education, economic prospects, health, and well-being. Schools should support and protect their students, rather than perpetuate discrimination and its effects.

### CONCLUSION

For these reasons and those in Plaintiff-Appellee’s brief, the District Court’s orders should be affirmed.

Dated: January 30, 2017

Respectfully submitted,

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By: /s/ Mark E. Haddad

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<sup>76</sup> *See supra* notes 12-22; Sears et al., Williams Institute, *Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace* (2009), [http://williamsinstitute.law.ucla.edu/wp-content/uploads/4\\_PerformanceInWorkplace.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/4_PerformanceInWorkplace.pdf).

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and Circuit Rule 29, because it contains 6,998 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32, and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Times New Roman font.

By: /s/ Mark E. Haddad

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 30, 2017, I caused the foregoing AMICI CURIAE BRIEF OF SCHOLARS WHO STUDY THE TRANSGENDER POPULATION IN SUPPORT OF APPELLEE AND AFFIRMANCE to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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