

No. 16-1989

*In the*  
**United States Court of Appeals**  
*for the*  
**Fourth Circuit**

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**JOAQUÍN CARCAÑO**, et al.,

*Plaintiffs - Appellants*

– v. –

**PATRICK MCCRORY**, in his official capacity  
as Governor of North Carolina

*Defendant - Appellee,*

and

**PHIL BERGER**, in his official capacity as President *pro tempore* of  
the North Carolina Senate, and **TIM MOORE**, in his official capacity  
as Speaker of the North Carolina House of Representatives

*Intervenors/Defendants-Appellees.*

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
No. 1:16-cv-00236-TDS-JEP*

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**AMICI CURIAE BRIEF OF SCHOOL ADMINISTRATORS FROM  
CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, FLORIDA,  
ILLINOIS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS,  
MICHIGAN, MINNESOTA, NEVADA, NEW HAMPSHIRE, NEW JERSEY,  
NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, TEXAS,  
VERMONT, WASHINGTON, AND WISCONSIN  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## **STATEMENT REGARDING PARTICIPATION BY PARTIES**

No counsel for a party authored this brief, in whole or in part,<sup>1</sup> and no person other than *amici curiae* and their counsel made any monetary contribution to fund the preparation or submission of this brief.

## **STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE**

*Amici curiae* are a school district and superintendents, principals, school board members, general counsel, social workers, and other officials from schools and school districts that have adopted, or are in the process of adopting, inclusive policies and practices for their transgender students. Together, *amici* represent a broad cross-section of schools and districts from across the country, collectively responsible for educating more than 1.4 million students annually. *Amici* offer valuable perspectives on a number of the issues in this case, based on their broad collective experience with adopting, implementing, and enforcing such policies in their schools. Counsel for *amici* conducted interviews with certain individual *amici* in Fall 2015, Spring 2016, and Fall 2016 to obtain their input for this brief; synopses of *amici* interviews are on file with *amici*'s counsel Pillsbury Winthrop

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<sup>1</sup> A version of this brief was previously submitted to this Court in October 2015, in support of the Appellant in *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3086 (U.S. Sept. 1, 2016) (No. 16-273). *Amici* note that Ms. Borelli and Mr. Palazzolo, counsel for Appellants in this case, interviewed some of the *amici* participating in the October 2015 brief, all of whom have joined this brief. Neither Ms. Borelli nor Mr. Palazzolo has been involved in authoring this brief, and neither has engaged in further communications with any of the *amici* in connection with this brief.

Shaw Pittman, LLP (“Pillsbury”). *Amici* who were not interviewed or are not quoted in this brief have experiences consistent with those expressed herein. With the exception of amicus Washoe County School District, amici join this brief in their individual capacities and not as representatives of their respective schools or districts.

A list identifying each of the *amici* follows. An Addendum filed simultaneously with this brief includes additional information regarding each *amici*’s background and relevant experience.

<b>Judy Chiasson, Ph.D.</b>	Program Coordinator for the Office of Human Relations, Diversity and Equity, Los Angeles Unified School District, Los Angeles, California
<b>David Vannasdall, Ed.D.</b>	Superintendent, Arcadia Unified School District, Arcadia, California
<b>Eldridge Greer, Ph.D.</b>	Associate Chief, Student Equity and Opportunity, Denver Public Schools, Denver, Colorado
<b>Diana K. Bruce</b>	Director of Health and Wellness, District of Columbia Public Schools, Washington, DC
<b>Denise Palazzo</b>	Statewide Safe Schools Director for Equality Florida; Former Instructional Facilitator and Diversity and LGBTQ <sup>2</sup> Coordinator, Broward County, Florida Public Schools
<b>Jeremy Majeski</b>	Former Principal, Komensky Elementary School, Berwyn, Illinois

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<sup>2</sup> The acronym “LGBTQ” stands for lesbian, gay, bisexual, transgender, and questioning.

<b>Thomas A. Aberli, Ed.D.</b>	Principal, J.M. Atherton High School, Louisville, Kentucky
<b>Howard Colter</b>	Interim Superintendent, Cape Elizabeth School Department, Cape Elizabeth, Maine; former Superintendent, Mount Desert Island Regional School System, Bar Harbor, Maine
<b>Matthew Haney</b>	Principal, Mount Desert Island High School, Bar Harbor, Maine
<b>Ken Kunin</b>	Superintendent, South Portland Public Schools, South Portland, Maine
<b>Robert A. Motley</b>	Principal, Glenwood Middle School, Glenwood, Maryland
<b>Roger Bourgeois</b>	Superintendent-Director, Greater Lowell Technical Regional School District, Massachusetts
<b>Blake Prewitt</b>	Superintendent, Ferndale Public Schools, Ferndale, Michigan
<b>Michael Thomas</b>	Chief of Schools, Minneapolis Public Schools, Minneapolis, Minnesota
<b>Mary Doran</b>	Former School Board Chair (term ended 12/31/15), Saint Paul Public Schools Board of Education, St. Paul, Minnesota
<b>Washoe County School District</b>	Washoe County School District, Reno, Nevada
<b>James C. Morse, Sr., Ed.D.</b>	Superintendent, Oyster River Cooperative School District, Durham, New Hampshire
<b>Thomas Smith, Ed.D.</b>	Superintendent, Hopewell Valley Regional School District, Mercer County, New Jersey
<b>John O'Reilly</b>	Principal, Academy of Arts and Letters, Public School/Middle School 492, Brooklyn, New York
<b>Heidi Carter</b>	Former Chair (term ended June 2016), Durham Public Schools Board of Education, Durham, North Carolina

<b>Rudy Rudolph</b>	Project Manager, Equity Department, Portland Public Schools, Portland, Oregon
<b>Peyton Chapman</b>	Principal, Lincoln High School, Portland, Oregon
<b>Rachel Santa, Ed.D.</b>	Director of Special Education, Cumberland, Rhode Island Schools
<b>Lindsey Pollock, Ed.D.</b>	Principal, Garden Oaks Montessori Magnet School, Houston, Texas
<b>Brian Schaffer</b>	Principal, Lamoille Union High School, Hyde Park, Vermont
<b>Lisa Love</b>	Manager of Health Education, Seattle Public Schools, Seattle, Washington
<b>Dylan Pauly</b>	General Counsel, Madison Metropolitan School District (“MMSD”), Madison, Wisconsin
<b>Sherie Hohs</b>	Social Worker, MMSD, Madison, Wisconsin
<b>Bryan Davis, Ph.D.</b>	Superintendent, Shorewood School District (“SSD”), Shorewood, Wisconsin
<b>Paru Shah, Ph.D.</b>	President, Board of Education, SSD, Shorewood, Wisconsin

### **INTRODUCTION TO ARGUMENT**

Collectively, *amici* are responsible for the education, safety, and wellbeing of **more than 1.4 million students across the country** and have extensive experience in the development, implementation, administration, and enforcement of inclusive policies for transgender students in a school setting. Some, such as Dr. Chiasson, Ms. Bruce, Ms. Chapman, and Mr. Bourgeois, have many years of experience applying inclusive policies in their schools; others have recently implemented such policies to meet the needs of their schools’ transgender students.

Thousands of transgender students attend American schools every day, many of whom – like Appellant H.S. – have come forward to request from their schools the same support and respect for their gender identity that all other students receive as a matter of course. In *amici*'s view, it is both the legal and professional obligation of all educators to provide that support and respect to *all* students. North Carolina House Bill 2 (“H.B. 2”) effectively precludes North Carolina educators from meeting those obligations.

*Amici*'s collective experiences refute the hypothetical concerns raised here by Governor McCrory and the Intervenors/Defendants-Appellees (collectively, “Appellees”): that allowing all students to access sex-specific facilities and amenities that match their gender identity – such as multiple-occupancy restroom and locker room facilities – will lead to general disruption in these spaces, violate the privacy, “dignity” or “comfort” of other students, or will lead to the abolition of gender-segregated restroom and locker room facilities. These same hypothetical concerns have also been raised in many of *amici*'s schools. Although *amici* have addressed – and in some cases personally grappled with – many of the same fears and concerns, in *amici*'s professional experience in the school context, *none of those fears and concerns have materialized in the form of actual problems in their schools*. Instead, inclusive policies have the effect not only of fully supporting the

reality of transgender students' circumstances, but also of fostering a safer and more welcoming learning environment for all students.

## ARGUMENT

### **I. POLICIES RESPECTFUL OF EVERY STUDENT'S GENDER IDENTITY MINIMIZE DISRUPTIONS AND HELP CREATE A SAFE, WELCOMING, AND PRODUCTIVE LEARNING ENVIRONMENT FOR ALL**

*At first, we had our concerns – would letting students participate in activities and facilities that were consistent with their gender identity create problems? What would happen?*

*Ultimately, we decided that we as the adults needed to manage our fears and give students the respect and dignity that they deserved. And I'm pleased to say that none of our fears has materialized.*

Dr. Judy Chiasson Testimony to the Cal. Senate Education Comm. on A.B. 1266 (June 12, 2013) ("Chiasson Testimony"), available at <https://www.youtube.com/watch?v=Xmq9dIQdsNE>.

As educators who have devoted much of their lives to young people, *amici* recognize that all students deserve equal respect and equal treatment by their educators. The schools and districts with which *amici* are associated have adopted, or are in the process of adopting or refining, policies that allow transgender students access to the same facilities and opportunities as other students. *Amici's* collective experience is that inclusive policies are necessary for a learning environment that is accessible, safe, and welcoming, which in turn enhances the educational experience for all students. Refusing to respect a student's gender

identity is “toxic for the student – it says ‘you are not welcome,’ every day.”

Robert A. Motley Interview, October 11, 2016. By contrast, respecting students’ gender identity eliminates the disruption that results from singling out, stigmatizing, and discriminating against transgender students, and avoids disrupting the normal social interactions involved in use of communal school bathrooms and locker rooms.

Appellees have expressed fears over the imagined consequences of fully integrating transgender students like H.S. into the school community. But *amici*’s experiences reveal that these fears are unfounded. The inclusive policies in place in *amici*’s schools – some for a decade, or nearly so – simply have not resulted in the problems about which Appellees speculate. *Amici*’s experiences have instead been overwhelmingly positive. Far from being disruptive or potentially unsafe, as Appellees speculate, such policies have instead *minimized* disruption and safety concerns in *amici*’s schools. In *amici*’s experience, the only disruption is caused by a lack of clarity about how to support transgender students. As Ms. Bruce observes, “A policy that requires equal treatment is not difficult to implement. Beyond sorting it out at the beginning, it’s not an ongoing, lingering issue[.]” Diana Bruce Interview (“Bruce Interview”), Oct. 5, 2015.

As educators, “[o]ur goal is to make sure that *every* young person is as present, and as able to engage in academic work as possible. Promoting a safe and

welcoming environment is a way to promote education.” *Id.* (emphasis added).

The results have been overwhelmingly positive, not only for transgender students, but for all students, faculty, administrators, and communities as a whole.

**A. In Contrast to Adults’ Unfounded Fears, Students’ Experiences in Schools with Inclusive Policies Have Been Positive**

In *amici*’s professional experience, fears and concerns about inclusive policies are almost exclusively held by adults, rather than by students.<sup>3</sup> The students, by contrast, have often set a leading example in respectful treatment of transgender students – recognizing their rightful place in school facilities that match their gender identity. Based on her more than ten years’ experience working with the inclusive policies in place at Los Angeles Unified School District (“LAUSD”), the second-largest school district in the country, Dr. Chiasson recounts:

Our experience has been that the fears of the adults rarely play out. The students are very affirming and respectful of their classmates. Most of the reaction that I’ve ever encountered has been in response to people’s fears, not the

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<sup>3</sup> *E.g.*, Howard Colter Interview, June 6, 2016 (“As to the students, I am most impressed. They are very understanding and accepting of their classmates. It feels like the adult community is struggling with it more.”); Sherie Hohs Interview, Oct. 15, 2015 (“This isn’t a kid issue. It’s an adult issue.”); Roger Bourgeois Interview, Oct. 8, 2015 (“Most of the problem is with the adults; the students are pretty accepting of these issues.”); Dr. Rachel Santa Interview, May 27, 2016 (“Adults have more issues than the students do.”); Dr. Eldridge Greer Interview (“Greer Interview”), October 14, 2016 (“Students are much more resilient and forward-thinking than we as adults are.”); Dr. David Vannasdall Interview II, September 9, 2016 (“With the kids, there hasn’t been a problem at all.”).

students' experiences. The students' experiences have been overwhelmingly positive. I have yet to be called into a situation to respond to an actual incident; I've only had to respond to fears, and the fears are unfounded.

Dr. Judy Chiasson Interview, Sept. 23, 2015 ("Chiasson Interview").

Several of the *amici* have themselves wrestled with many of the same concerns raised by Appellees here, when first faced with the need to adopt an inclusive policy. Indeed, Dr. Vannasdall's district's initial experience with a transgender student resulted in a complaint and investigation by the U.S. Department of Justice ("DOJ") and the U.S. Department of Education, Office for Civil Rights ("OCR"). Administrators and others within the Arcadia Unified School District were concerned that respecting the transgender student's gender identity by treating him in all respects as they would any other boy would be disruptive and burdensome. Dr. David Vannasdall Interview, Sept. 23, 2015 ("Vannasdall Interview I"). But Dr. Vannasdall and his colleagues experienced a change of heart that began with a simple, open conversation between administrators and the student and his family. *Id.* In that conversation, it became "obvious that this student had no intentions of creating a disruption – he just wanted a home and a place to learn, and not worry about which restroom to use." *Id.* Once Arcadia's administrators understood that the student was simply asking to be treated like any other boy, their obligation as educators became clear – to help this student, and all of their students:

come to school ready to learn. If they're worrying about the restroom, they're not fully there to learn, but instead just trying to navigate their day. Give students the opportunity to just be a kid, to use the bathroom, and know that it's not a disruption, it just makes sense.

*Id.* Ultimately, Dr. Vannasdall's district resolved the complaint against it by a voluntary resolution agreement in 2013 with the DOJ and OCR. That resolution agreement included adopting a comprehensive policy respecting students' gender identity – covering among other things equal access to sex-segregated restrooms and locker rooms consistent with gender identity.<sup>4</sup> Unlike the fears Appellees have expressed as their rationale for enacting H.B. 2, the outcome for Dr. Vannasdall's district over the past three years has been “very positive for the school, the district, and the students.” *Id.*

Dr. Vannasdall now regularly consults with educators across the country, giving informal advice and guidance on inclusive policies for transgender students.

*Id.* He well understands what it is like to grapple with the actual and anticipated negative reactions from some parents and community members – but when those are the primary concern, “you have people making decisions from the basis of fear

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<sup>4</sup> See Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Office of Civil Rights, OCR Case No. 09-12-1020/DOJ Case No. 09-12-1020 (July 24, 2013), available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>. See also Letter from DOJ and OCR to Arcadia School District, available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>.

and extremes, and that’s never good for kids.” Julie Bosman & Motoko Rich, *As Transgender Students Make Gains, Schools Hesitate Over Bathroom Policies*, N.Y. Times, Nov. 4, 2015, at A14 (quoting Dr. Vannasdall).<sup>5</sup> The “game-changer” for Arcadia and for other districts with which Dr. Vannasdall has consulted on these issues is when educators “remember what we are here to do” – to help kids learn. Vannasdall Interview I. Accommodating individual students’ needs is “something educators do every day” – indeed, educators have proven themselves “very flexible and adaptable in adopting new policies for their students” in order to meet their needs – and providing transgender students what they need to thrive in school is no different. Vannasdall Interview II. Dr. Vannasdall believes that generally school administrators new to dealing with transgender students are “overthinking this issue. This doesn’t need to be as tough as some people make it. It can be a good experience for that student and other students as well.” *Id.*

Similarly, for Dr. Aberli of Atherton High School in Louisville, Kentucky, his first experience working with transgender youth also arose out of a student request. Dr. Aberli, too, was unfamiliar with this issue when it first arose, and had concerns about possible disruptions or privacy issues. But Dr. Aberli tried to understand the student’s request on both a personal level and in terms of the legal obligations of the

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<sup>5</sup> A version of this article is available online at: <http://www.nytimes.com/2015/11/04/us/as-transgender-students-make-gains-schools-hesitate-at-bathrooms.html>.

schools. Dr. Thomas Aberli Interview, Oct. 7, 2015 (“Aberli Interview”).

Atherton’s policy was developed through an extensive collaborative effort by Dr. Aberli and a panel of school administrators, teachers and parents, in which “[w]e considered the issue very carefully and thoughtfully, and posted all of the evidence we reviewed online.” Aberli Interview.<sup>6</sup> Atherton’s policy is based on LAUSD’s policy, which has worked well for a decade, without any complaints. *Id.* Although there were some comments to the effect that, if the people in his (Kentucky) school district wanted California policies, they would move to California, Dr. Aberli stated unequivocally that empathy and equality do not stop at state borders:

The value of human life is the same in Kentucky as it is anywhere else in this nation. And when we’re talking about an issue of civil rights, we’re talking about the value we put on human individuals.

Aberli Testimony. Understanding that the policy is about protecting students’ basic civil rights has helped clarify the issue.

It helped people to understand that this wasn’t about providing a special accommodation or “special rights” – this is about eliminating discrimination. When you tell a person you will do something that makes them stand out from everyone else, *that’s* when you start discriminating against them.

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<sup>6</sup> See also Dr. Thomas Aberli Testimony before the Kentucky Senate Education Committee on S.B. 76 (Feb. 19, 2015) (“Aberli Testimony”), video excerpt available at <https://www.youtube.com/watch?v=QodplMWsEvQ>. The materials Dr. Aberli references as having been posted online are available at <http://schools.jefferson.kyschools.us/High/Atherton/SBDM.html>.

Aberli Interview. At the outset, when the issue was new and unfamiliar to many in the community, a handful of students as well as adults questioned Atherton's new policy.

We had students that opposed the policy originally, and they're still with us. I respect that some people may disagree or even feel uncomfortable with the policy, because honestly, for many people – including myself until a few months ago – they simply weren't knowledgeable, or it wasn't a close enough personal issue in terms of interacting with openly LGBT people to have a comfort level. I acknowledge and respect that. But I am not going to use someone's discomfort as a means for discriminating against a protected population.

*Id.* Ultimately, despite the initial opposition, Dr. Aberli reports that in practice he has “received zero complaints regarding a specific incident of concern for a violation of privacy. The concerns raised by individuals have all been philosophical.” *Id.*

Indeed, in *amici*'s experience, “an affirming policy has a positive effect on other students as well. If everyone is taken care of, students see that and they value that.” Denise Palazzo Interview, Oct. 3, 2015 (“Palazzo Interview”). “When kids see that you are respecting all students, then they know that they will be respected. We are showing them how to treat people respectfully and know they will be treated the same.” Santa Interview. As Principal Peyton Chapman relates:

Students have high integrity radars – if some youth are made fun of, then they know it could happen to them. These fears keep all students in small boxes. They don't

try things out, engage their creativity and figure out who they are and can be. If schools define “who” students need to be and how they should behave, then they are less free to explore themselves, cultures and communities.

Peyton Chapman Interview, May 27, 2016 (“Chapman Interview”). A policy respectful of every student’s gender identity, by contrast, fosters mutual respect and “creates open and innovative environments.” *Id.*

**B. Frequently Raised Areas of Concern, Such as Inappropriate Student Behavior in Restrooms and Locker Rooms, Have Not Been an Issue**

*There have not been any issues regarding this policy in locker rooms or bathrooms. But it has brought greater awareness of how we can increase privacy for all students.*

Aberli Interview.

No student should be denied access to any gender-specific facilities that are available to other students of the same gender identity solely because of their transgender status. As educators and administrators, *amici* are well-situated to provide the Court with experience-based information about some of the hypothetical fears and concerns commonly raised when schools integrate transgender students into gender-specific restrooms and locker rooms, including the fear that some individuals might use an inclusive policy to gain access to the facilities of another gender for an improper purpose. *Amici* have found such fears and concerns to be wholly unfounded in practice.

## 1. Concerns About Restrooms Have Not Materialized

“Questions about bathrooms come up in every staff training, and it’s an important thing that school staff want to understand. I think there’s an assumption that there will be disruption around restrooms.” Bruce Interview. But, as Ms. Bruce observes, all schools routinely “deal[] with many more adolescent behavior issues than just who’s using the bathroom based on gender identity,” and are adept at addressing those issues. *Id.* As with any behavior issue, “oftentimes disruption in our experience has been around inconsistency by staff – and that’s why clear guidance for schools is important[.].... Our transgender students just want to use the restroom and be safe when they do it, and that’s all they’re trying to do.” *Id.*

Dr. Aberli similarly reports that Atherton has

multiple transgender individuals in our school, and restroom access has not been an issue. . . . [T]here has not been any issue at all with respect to the implementation. It’s not a big deal when you look at it from a standpoint of, we’re dealing with real people, we’re dealing with children. Even at the high school level we’re dealing with people who have had a hard enough time as it is, and they’re just looking for reasonable support from the school in a very challenging social context, or during a very difficult process, as it is for many of them.

Aberli Interview. In *amici*’s collective experience,

[t]here’s been no pandemonium. There have been no transgender students who are sexual predators, or who are “switching gender” to peek at others. None of those irrational fears have been realized at all. I supervise our Title IX investigator, and there have been no issues with

our policy there. I also supervise the general complaint process. Nothing has come through either of those two processes on this issue.

Dylan Pauly Interview, October 15, 2015 (“Pauly Interview”).

## **2. Concerns About Locker Rooms Have Not Materialized**

As with restrooms, *amici* have experienced no problems with locker rooms related to transgender-inclusive policies. Such policies generally allow students access to locker rooms in accordance with gender identity, and in *amici*'s experience, students have not attempted to exploit the policy in any way. Diana Bruce explains that “our transgender students are not interested in walking around the locker rooms and checking out anatomy. They’re just trying to get through P.E. safely.” Bruce Interview. Mary Doran concurs: “[W]hen the *coaches* tell me ‘this [transgender policy] isn’t an issue, isn’t a big deal,’ that really says something.”

Mary Doran Interview, Oct. 16, 2015.

Indeed, in the rare instances that *amici* have needed to address locker room issues, it has been to ensure the safety of the transgender students – “the real risk is to people who identify as transgender, or gay, or just ‘other.’” Kunin Interview, June 10, 2016. And even there, “[l]ocker rooms aren’t a [special] concern because we are already accustomed to dealing with students who have unique or special needs in the locker room context. This is just one more type of student that may need additional support in that space.” Palazzo Interview.

### 3. Concerns About Students “Posing” as Transgender to Gain Improper Access to Restrooms and Locker Rooms Have Not Materialized

*Amici* have also frequently addressed the concern that transgender students might just be “confused,” are likely to change their minds often about their gender identity, or might be falsely claiming to be transgender for some nefarious purpose. None of these concerns have materialized for *amici*. Moreover, *amici*’s policies allow schools to make reasonable assessments of individual requests for accommodation. As Dr. Chiasson explained in a letter to Dr. Aberli,

[i]t is reasonable to expect that a student will exercise consistency with respect to their identity and access to facilities. Students cannot switch their identity arbitrarily or opportunistically. For example, a student cannot be transgender only during physical education.

If the school strongly suspects that the request is not legitimate, they should provide accommodation for the student while continuing the conversation to better understand the student’s motivation for the request. Being transgender is a deeply rooted identity [...]. It is not subject to arbitrary whims.

Chiasson Letter to Aberli dated May 29, 2014 (“Chiasson Letter”).<sup>7</sup> Similarly, Mr. Bourgeois explains that

A student can’t just show up and say, “I’m a male, but I want to start using the girls’ locker room today.” People worry some football player will show up and want to get into the girls’ locker room, but we would not allow that. There’s a process we go through to work with them and

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<sup>7</sup> A copy of Dr. Chiasson’s letter to Dr. Aberli is included among the materials posted by Atherton. See footnote 5, *supra*.

their families, and verify their identity. Far from being disruptive, our experience has been that those students just want to blend in.

Bourgeois Interview. All *amici*'s schools follow a similar policy, and as a general matter, it is easy to identify genuine requests.

Some people fear someone will masquerade ... as transgender to be predatory. But being transgender is persistent and consistent throughout the day: all classes; all relationships; in and out of the classroom. ... I've never had that happen, where someone has pretended to be transgender for nefarious reasons. It's just plain silly to think that [a male student] is going to come to school for months on end, wear female attire, present as female to all of his friends and teachers, just so he can go into the female locker room.

Chiasson Interview. Indeed, schools are very adept at dealing with instances of misbehavior in restrooms and locker rooms precisely because it is not particularly difficult for a student to gain access to another gender's facilities.

Adolescents can be impulsive, and we have had boys and girls dart into the other bathroom. We find them and deal with them. They certainly don't need to masquerade as transgender to engage in that misconduct.

*Id.*; see also Greer Interview ("There are easier ways to get into the girls' bathroom – and we have policies and consequences to address that. From a social justice standpoint, it is incredibly offensive to think that our [transgender] students would go through the psychological trauma of transforming their identity just to game the system.").

In other words, schools routinely deal with all sorts of behavioral problems – and *amici* “would have a problem” with any student actively violating the privacy of another, and would deal with that misconduct as it arises. Brian Schaffer Interview, June 1, 2016. However, while parents, teachers, and administrators alike are always looking out for the safety of all students, a policy respecting transgender students is far more likely to thwart misbehavior in these spaces than to be a cause of it.

## **II. SCHOOLS CAN AND SHOULD FULLY RESPECT BOTH THE GENDER IDENTITY AND THE PRIVACY CONCERNS OF ALL STUDENTS**

Many of the concerns that have been raised with regard to inclusive policies for transgender students involve perceived threats to the “privacy” or “comfort” of other students. As educators, *amici* are respectful of the needs and concerns of all of their students – but *amici* strongly disagree that a school should discriminate against transgender students in order to accommodate complaints that other students are “uncomfortable” with sharing a restroom or locker room with a transgender person. That is simply not how educators deal with students’ discomfort with others or with themselves. To the extent that a student has concerns about sharing facilities with transgender students, schools must help the student deal with that discomfort in a way that does not impinge upon others’ civil rights.

One solution is to offer private facilities to the student who does not want to use the same facilities as a transgender student. Most of *amici*'s schools offer private facilities that may be used by persons of either gender, in addition to gender-segregated facilities. Ms. Bruce, for example, recounts that in her schools,

[a]ccording to our policy guidance, if a student has a problem, we can make another bathroom available to that student. I haven't heard from our schools, however, of students that have asked to use a different restroom in that circumstance. When I train our school staff, some want to ask hypotheticals, but in our experience, this has not been an issue. Young people are pretty savvy and comfortable, and can understand and empathize with someone who just wants to use the bathroom.

Bruce Interview. Indeed, some students may prefer to use these private facilities for any number of reasons, and are permitted to do so without the need to provide an explanation – including in the rare circumstance that a student might not want to use the same facility as a transgender student. Dr. Chiasson, for example, explains that

any student who, for whatever reason, feels uncomfortable in a communal setting – whether because of weight, personal comfort, body image, social anxiety, or other reasons – we will accommodate that without the need for explanation, and they can use a private setting such as a nurse's room. The sad truth is that our transgender children are significantly more likely to be the targets of student misconduct, rather than the perpetrators of it.

Chiasson Interview. Similarly, Dr. Aberli's school

allows any student who wants to use a private restroom to do so. What I have clearly communicated in public, is that any student may use the front office restroom. We don't ask why. There's a thousand reasons that a student needs privacy, so it's our responsibility to accommodate any student for any reason. It could be shyness, or trauma.

Aberli Interview. When separate facilities are not available or practical to meet student requests for additional privacy, there are other means of providing extra privacy to students when needed, such as using a curtain to create a separate area, or allowing a student to use the locker room before or after other students.

Matthew Haney Interview, June 6, 2016.

But, even in the rare case where a student might express discomfort with sharing facilities with a transgender student, the solution cannot be to deny access to the transgender student. As Mr. Bourgeois explains, any student expressing such discomfort should be offered alternative facilities or arrangements to address their concerns,

[b]ut we're not going to tell the transgender student they can't go where they're comfortable. I can still remember the remnants of white people being uncomfortable with black people being in same locker rooms and restrooms, so it's not about whether everyone is "comfortable." Just because some people were uncomfortable didn't mean you treated people as second-class citizens.

Bourgeois Interview. Mr. Kunin agrees that "being uncomfortable doesn't overrule someone's rights," but he also emphasizes that "there are also ways to

support the person who is uncomfortable – we would want that person to feel safe and participate, too.” Kunin Interview. In short, although the schools should accommodate requests for extra privacy from any student (regardless of the reason), no transgender student should ever be *forced* to use separate facilities (or to go without using communal restrooms and locker rooms at all) – as North Carolina is effectively forcing transgender students in its public schools and universities to do – in order to accommodate the actual or anticipated discomfort of other students.

Appellees, through H.B. 2 and related measures, propose to meet anticipated privacy and “comfort” concerns by precluding transgender individuals from using multiple occupancy restrooms and locker rooms that do not correspond to the gender marker indicated on their birth certificate. Appellees have suggested that it could be a “reasonable accommodation” to provide “a single occupancy restroom, locker room, or shower facility when readily available and when practicable” for transgender individuals. JA441 (N.C. Exec. Order No. 93 (Apr. 12, 2016)). But the fact is that, particularly in the educational context, such a discriminatory policy singles out students like H.S. and Mr. McGarry from their peers and creates a serious dilemma for them – requiring them to either use a separate restroom or locker room simply because they are transgender (assuming such facilities are even available on campus, which they frequently are not for H.S. and Mr. McGarry), or

put themselves at risk of harassment or bullying by forcing them to use facilities that are patently inconsistent with their gender.

Having to navigate this problem daily seriously interferes with transgender students' education, impairs their ability to learn and socialize, and results in real physical and emotional harm. Ms. Bruce explains that when transgender students

have reported worrying about whether they can use the restroom that matches their gender identity, they have said they just don't go to the bathroom at school. That can't possibly help them learn.

We don't want them preoccupied with trying not to use the bathroom, when they're supposed to pay attention to trigonometry. ... We want them to know where they can use the restroom, so they can feel more like anyone else in their school and not like an outsider. We want to make sure that all of our students have an opportunity to participate in everything a school has to offer, including social opportunities throughout the campus. When transgender students don't use the restroom, they're missing an opportunity to socialize with their peers.

Bruce Interview. Although, as noted above, *amici* routinely offer separate facilities to any student requesting additional privacy for any reason (including but certainly not limited to transgender students), no student should ever be forced to use a separate facility simply because they are transgender. Dr. Aberli agrees that "making transgender students use the nurse's room" is no answer at all:

Tell me what we would say to that child – that there's something so freakish about you, and so many people are uncomfortable with you, that you have to use a

completely separate restroom than the one you feel like you should be using?

Aberli Interview. Instead, in *amici*'s view, all students' needs are best served when educators are in a position to treat all students equally. As Ms. Pauly articulates,

It's our goal to have every student comfortable in their learning environment. [But if] we had a student with a health condition that wasn't comfortable changing in a locker room with everyone else, we wouldn't have a 'health condition locker room' and a 'non-health condition locker room.' This is the same thing. This allows us to offer the same accommodation to every student to allow them to be comfortable.

Pauly Interview. H.B. 2, however, strips North Carolina's educators of their ability to treat all of their students equally – to the detriment of all North Carolina schools.

### **III. GENDER-SEGREGATED SPACES AND ACTIVITIES ARE FULLY CONSISTENT WITH SCHOOL POLICIES RESPECTING EVERY STUDENT'S GENDER IDENTITY**

Appellees have suggested that permitting individuals to use facilities consistent with their gender identity could lead to the abolition of gender-specific restrooms and locker rooms. Contrary to that “slippery slope” argument, however, all *amici* continue to maintain gender-segregated restroom and locker room facilities in their schools. In fact, respecting the gender identity of transgender students *reinforces* the concept of separate facilities for girls and boys. By contrast, requiring a transgender girl like H.S. to use the boys' restroom or a transgender boy to use the girls' locker room, *undermines* the notion of gender-

specific spaces. Dr. Chiasson offers an example from her own district, in which a new student, a transgender male, had been

using the female facilities, incorrectly assuming that because he was a natal female, that he would be required to do so. *It was equally uncomfortable for him to use the girls' facilities as it was for the girls themselves.* When the administration learned of the situation, they told the young man that he could use the boys' facilities. Everyone was relieved.

Chiasson Letter. Mr. O'Reilly similarly commented that, until he considered the effect of forcing a transgender student to use a restroom inconsistent with gender identity, he “hadn't really understood the literal meaning of the word ‘misfit.’

When forced to use the restroom for the gender they do not associate with, a student literally becomes a *misfit*: someone being forced into a place they don't belong.” John O'Reilly Interview, Sept. 20, 2015. Notably, transgender students (like H.S. here) have not sought to eliminate gender-specific facilities but instead merely want to use the facilities that correspond with their gender identity.

Because respecting transgender students' gender identity solves the “misfit” problem in gender-segregated spaces, “[t]ransgender-affirming policies solve problems, not create them. Even if the law allowed it, forcing a transgender boy to use the female facilities would be extremely uncomfortable for all parties involved.” Chiasson Interview.

## CONCLUSION

Appellees have assumed that policies respectful of individuals' gender identity are disruptive and impinge upon the rights and well-being of cisgender individuals, but *amici*'s experience as school administrators has proven otherwise: showing respect for a transgender student's gender identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn. Moreover, such policies have not been disruptive – either to the academic climate or to the maintenance of gender-specific facilities – and instead protect the safety and privacy of all youth.

While *amici* agree with Appellants that H.B. 2 is contrary to the law, on a more fundamental level it is simply bad public policy, and particularly so in the educational context. All students inhabit a world – both inside and outside of school – that includes transgender people. Pretending that this is not so for the sake of entirely unfounded concerns is harmful to transgender students, to their fellow students, and to the community at large. *Amici* therefore respectfully urge this Court to reverse the district court's denial of relief on Plaintiffs-Appellants' equal protection claim and to direct entry of a preliminary injunction enjoining Part I of H.B. 2.

Dated: October 25, 2016

Respectfully submitted,

/s/ Cynthia Cook Robertson

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman style, with 14-point font.

DATED: October 25, 2016

/s/ Cynthia Cook Robertson  
Cynthia Cook Robertson

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 25, 2016, I filed the foregoing *Amici Curiae* Brief of School Administrators from California, Colorado, District of Columbia, Florida, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin in Support of Plaintiffs-Appellants with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

/s/ Cynthia Cook Robertson

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