



March 21, 2017

VIA CM/ECF FILING

Patricia S. Connor
Clerk of Court
United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Re: *Carcaño v. Cooper*, Case No. 16-1989
Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j)

Dear Ms. Connor:

Plaintiffs-Appellants provide notice of pertinent supplemental authority. In *Evancho v. Pine-Richland School District*, No. 2:16-01537, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017), the district court preliminarily enjoined a school policy that excluded transgender students from restrooms consistent with their gender identity, finding that the policy likely violated the Fourteenth Amendment's guarantee of equal protection.

The court recognized that the policy—which limited access to sex-separated facilities based on what it termed “biological sex”—targeted transgender students. *Id.* at *4, *6, *11. Pursuant to the policy, “unlike every other student, [transgender students] would have to use restrooms where they are wholly unlike everyone else in appearance, manner, mode of living, and treatment at school.” *Id.* at *11.

The court ruled that the policy was subject to heightened judicial scrutiny, because “transgender people as a class” exhibit all the indicia of a suspect class.¹ *Id.* at *13; *cf.* Pls.’ Br. (ECF No. 46) 37-40. The court further held for transgender

¹ The court presumed that intermediate scrutiny was appropriate, at a minimum, without addressing whether strict scrutiny was required.

people, “gender identity is entirely akin to ‘sex’ as that term has been customarily used in the Equal Protection analysis.” 2017 WL 770619, at *13.

As here, Pls’ Br. 40-51, the defendants failed to show that the policy furthered any important government interest. 2017 WL 770619, at *14. First, transgender students had previously used restrooms matching their gender identity without incident, and there was no evidence or explanation to show why that should change. *Id.* Second, any privacy concerns were already well addressed by other measures, such as privacy barriers. *Id.* The record failed to reveal “any actual risk (or even an actual risk of a risk)” to privacy interests—including based on transgender students’ mere presence in restrooms matching their gender identity. *Id.* Third, the court found no evidence of any “gap” in existing prohibitions against “malicious ‘peeping Tom’ activity by anyone pretending to be transgender.” *Id.* at *15. Enforcement of the policy only caused harm to transgender students—without any benefit to the school district or anyone else. *Id.* at *17.

Respectfully submitted,

/s/ Peter C. Renn

Peter C. Renn
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2017, the foregoing document was served on all parties or their counsel or record through the CM/ECF system.

/s/ Peter C. Renn

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