

Case No. 18-35708

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

PARENTS FOR PRIVACY *et al.*,

Plaintiffs-Appellants,

v.

DALLAS SCHOOL DISTRICT NO. 2 *et al.*,

Defendants-Appellees,

BASIC RIGHTS OREGON,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for the District of Oregon
Portland Division, No. 3:17-cv-01813-HZ
Hon. Marco A. Hernandez, United States District Judge

**BRIEF OF NATIONAL EDUCATION ASSOCIATION AS *AMICUS
CURIAE* IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLEE
BASIC RIGHTS OREGON AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* National Education Association states that it is not a publicly-held corporation, does not issue stock, and does not have a parent corporation.

/s/ Eric A. Harrington

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *Amicus* National Education Association (“NEA”) files this *amicus curiae* brief with the consent of all the parties.

NEA is the nation’s largest professional association representing approximately three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation’s public schools.¹ NEA believes that all children have the right to learn in a safe environment free from intimidation and harassment, including those who identify as transgender or non-binary.

Educators, and courts, are increasingly recognizing that supportive and inclusive classrooms benefit all students. Such classrooms give every student the opportunity to thrive and lead to better educational outcomes. Like the students of the Dallas School District, many transgender students around the nation have benefited from trans-inclusive nondiscrimination policies that allow them to participate equally in school activities.

NEA has a longstanding commitment to advocating for safe schools for transgender students. In preparation for filing *amicus* briefs in *Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018), and other cases, including this one, NEA has periodically interviewed public school employees from across the

¹ No party or party’s counsel authored this brief in whole or in part, and no party or person other than *Amicus* contributed money to fund its preparation or submission. Fed. R. App. P. 29(a)(4).

country about this issue. Collectively, NEA’s members and interviewees represent a variety of experiences with transgender educational policies (and access to sex-segregated facilities in particular), which will provide this Court with valuable perspectives about the needs of transgender students, and, indeed, all students, in our nation’s schools.

The Third Circuit, in denying the *Boyertown* plaintiffs’ request to compel the Boyertown Area School District to discriminate against transgender students (a request much like the one Plaintiffs make here), specifically credited NEA’s perspective on these issues:

[T]he [Boyertown] School District’s [trans-inclusive] policy fosters an environment of inclusivity, acceptance, and tolerance. As the appellees’ amicus brief from the National Education Association convincingly explains, these values serve an important educational function for both transgender and cisgender students. When a school promotes diversity and inclusion, classroom discussion is livelier, more spirited, and simply more enlightening and interesting because the students have the greatest possible variety of backgrounds. Students in diverse learning environments have higher academic achievement leading to better outcomes for all students. Public education must prepare pupils for citizenship in the Republic, and inclusive classrooms reduce prejudices and promote diverse relationships which later benefit students in the workplace and in their communities. Accordingly, the School District’s policy not only serves the compelling interest of protecting transgender students, but it benefits all students by promoting acceptance.

Id. at 529 (footnotes, citations, brackets, and internal quotation marks omitted).

ARGUMENT

Transgender youth often face difficult obstacles. Being transgender can challenge students’ closest relationships, including with their parents and friends; it

can subject them to harassment, bullying, and violence; and the social pressure to live according to their birth-assigned sex can be intense. These profound challenges and pressures can lead to serious psychosocial harms.

But when schools adopt trans-inclusive policies, transgender students are able to thrive. The Dallas School District has done the right thing in adopting its “Student Safety Plan.” Educators and education policymakers understand that schools work best when they fully welcome transgender students into the educational community. A critical aspect of this affirming and welcoming environment is allowing transgender students to use sex-segregated facilities, such as restrooms, that are consistent with their gender identity. When schools adopt policies like the Dallas School District’s, all students benefit from a sense of inclusivity, which has a positive effect on the overall school climate. These policies tell all students that they too are welcome and equal within the school community even if they are different.

On the other hand, should this Court side with Plaintiffs and order the Dallas School District to discriminate against its transgender students, such an order would stigmatize transgender students and deny them equal educational opportunities. And such an order would harm educators too because it would compel them to enforce discriminatory and harmful policies. To force educators to participate in the stigmatization and degradation of their students is professionally and psychologically damaging to the educators themselves.

I. School can be a dangerous and stigmatizing place for transgender students.

Ninety percent of transgender students have heard derogatory remarks about their gender identity and sexual orientation at school, and 82 percent feel unsafe.

Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experience of Transgender Youth in Our Nation's Schools* 10, 14 (2009),

<https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>. Over 75 percent

of transgender students have been sexually harassed at school, *id.* at 21; and 13

percent who were out or perceived as transgender have been sexually assaulted in

school, Sandy E. James et al., *Nat'l Ctr. for Transgender Equality, The Report of the 2015 U.S. Transgender Survey* 134 (2016),

<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

More than half have been physically harassed at school, and 44 percent have been physically assaulted at school, yet only 46 percent have reported the harassment to school officials, and only one-third felt that the school responded effectively.

Greytak et al., *supra*, at 18–22.

The kind of pervasive bullying and harassment often experienced by transgender students leads to negative educational outcomes. Seventeen percent of transgender students have reported that they have transferred or quit school because of harassment. James et al., *supra*, at 135; *see also* Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality & Nat'l Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 3

(2011), <https://goo.gl/U9uhr9>. Almost half have missed school because they feel unsafe. Greytak et al., *supra*, at 14. Transgender students subject to gender-based verbal harassment have, on average, worse grades than their peers, and those who face frequent harassment pursue post-secondary education at lower rates than those who are not harassed. *Id.* at 27. This stigmatization and exclusion puts transgender students at a much higher risk for suicide than their cisgender peers. Grant et al., *supra*, at 2; James et al., *supra*, at 132.²

II. When schools respect transgender students, transgender students are subjected to less bullying and have better outcomes, and all students benefit from a more positive school climate.

1. Allowing the Dallas School District's policy to remain in place is critical to the well-being of all transgender students. In schools with anti-LGBTQ bullying policies, students have better relationships with staff and, as a result, feel safer when at school. Nat'l Ass'n of Sch. Psychologists & Gender Spectrum, *Gender Inclusive Schools: Policy, Law, and Practice 2* (2016) (citing Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 *J. Youth & Adolescence* 1175 (2010)). And LGBTQ students have more academic success at such schools.

² Even students who are not themselves the victims of bullying but nonetheless witness such bullying face significant negative mental health outcomes. See Ian Rivers et al., *Observing Bullying at School: The Mental Health Implications of Witness Status*, 24 *Sch. Psychol. Q.* 211 (2009); Daniel J. Flannery, Kelly L. Wester & Mark I. Singer, *Impact of Exposure to Violence in School on Child and Adolescent Mental Health and Behavior*, 32 *J. Cmty. Psychol.* 559 (2004).

Stephen T. Russell et al., *Safe Schools Policy for LGBTQ Students*, 24 Social Policy Report, no. 4, at 6–7 (2010).

When schools support transgender students who come out and socially transition at school, transgender students feel more included in the school community than those who are closeted. *See* Greytak et al., *supra*, at 30–31. This sense of belonging correlates with higher academic achievement. *Id.* at 29. In short, when transgender students are supported, they have higher grade point averages, better attendance records, increased self-esteem, and are bullied at lower rates than peers at other schools. Joseph G. Kosciw et al., GLSEN, *2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* 121 (2008), <https://www.glsen.org/download/file/NDIyMg==>.

Educators likewise affirm the reality that transgender-inclusive policies work. Educators described to us how transgender-inclusive policies allow their transgender students to be active and valued participants in the school community who:

- Take on leadership roles in school government (La Crescenta, California);
- Do not have notable attendance or disciplinary issues (Farmingdale, Maine);
- Participate in school athletic teams (Evanston, Illinois);
- Run for homecoming court (Indianapolis, Indiana); and
- Have supportive peer groups and are academically engaged (Federal Way, Washington).

The value of inclusive policies for transgender student outcomes is pronounced even in schools that only recently adopted such policies. An educator in Rhode Island spoke of a student who was formerly doing poorly in school and feeling suicidal, but now, following the adoption of an inclusive transgender student policy, is on track to graduate. Many educators report students crying tears of joy when their schools adopt inclusive policies because transgender students feel—often for the first time—that they are valued members of the school community.

When transgender students are respected, they are able to engage fully and equitably with the educational experience, and when that happens, transgender students, like all students, are able to thrive.

2. School policies that respect transgender students not only benefit transgender students, but also promote a positive school climate for all students.

School climate—that is, the “product of the interpersonal relationships among students, families, teachers, support staff and administrators” that sets the “norms, values, and expectations that support people feeling socially, emotionally, and physically safe” in school—is a key predictor of student engagement, student mental and physical health, and academic achievement, and is positively correlated with decreased absenteeism, dropout rates, and suspensions.³

³ See Nat'l Sch. Climate Ctr., *School Climate Research Summary 2–3* (August 2012), <https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf>; Nat'l Educ. Ass'n, *Research Brief: Importance of School Climate 1* (2013), https://www.nea.org/assets/docs/15584_Bully_Free_Research_Brief-4pg.pdf; Nat'l

The Supreme Court has long understood this intuitively. “[P]ublic education must prepare pupils for citizenship in the Republic[.]” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (internal quotation marks omitted). “It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” *Id.* A critical component of a healthy school climate is diversity and inclusion: “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotation marks omitted). Moreover, the “fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.” *Bethel Sch. Dist. No. 403*, 478 U.S. at 681 (citations and internal quotation marks omitted).

Sch. Climate Council, *The School Climate Challenge 5* (2007), <http://www.schoolclimate.org/climate/documents/policy/school-climate-challenge-web.pdf>; David Osher et al., *Improving Academic Achievement Through Improving School Climate and Student Connectedness* (Apr. 14, 2009), <https://goo.gl/4nCGPJ>; Adam Voight, Gregory Austin & Thomas Hanson, *A Climate for Academic Success* (2013), <http://files.eric.ed.gov/fulltext/ED559741.pdf>; see also Alex Kajitani, *The #1 Factor That Determines a Toxic or Thriving School Culture*, EdWeek (Apr. 27, 2016), <https://goo.gl/6s0q1V>; Taica Hsu, *How I Support LGBTQ+ Students at My School*, Am. Educator, Winter 2016-2017, at 20-22, <https://goo.gl/VW7gGM>.

When educators reinforce inclusion and respect all students, students in diverse classrooms have higher academic achievement. *See* Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School-Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 *J. Educ. Psychol.* 570, 571 (2003); John Rosales, *Positive School Cultures Thrive When Support Staff Included*, *NEA Today* (Jan. 10, 2017), <https://goo.gl/K2Swud>.

Courts have long understood the vital role that educators and other school employees play in promoting diversity, acceptance, and tolerance. “[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.” *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979). Not just by “the presentation of course materials” but also by “the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities.” *Id.*

When schools adopt transgender-inclusive policies and practices, appropriately respond to bullying, and allow transgender students to be acknowledged in accordance with their gender identity, not only do transgender students feel more welcome, but the school climate overall is also more positive, leading to better outcomes for all students. *See* N. Eugene Walls, Sarah B. Kane & Hope Wisneski, *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 *Youth & Soc’y* 307, 323–25 (2010); *see also* Stephen T. Russell, *Are School*

Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers' Perspectives, 54 *J. Sch. Psychol.* 29 (2016).

Students who feel a sense of belonging in school are less likely to have mental health problems and later suffer substance abuse. Lyndal Bond et al., *Social and School Connectedness in Early Secondary School as Predictors of Late Teenage Substance Use, Mental Health, and Academic Outcomes*, 40 *J. Adolescent Health* 357.e9, 357.e16 (2007). And students report “more positive levels of . . . quality of school life in schools that [are] more supportive of cultural pluralism and diversity.” Brand et al., *supra*, at 571.

Inclusive classrooms also reduce prejudice and promote cross-cultural friendships, which later benefit students in the workplace and in their communities. Jeanne L. Reid & Sharon Lynn Kagan, *A Better Start: Why Classroom Diversity Matters in Early Education* 9 (Apr. 2015); *see also* Econ. & Soc. Research Council, *Diversity in Primary Schools Promotes Harmony, Study Finds*, *ScienceDaily* (July 26, 2008), <https://www.sciencedaily.com/releases/2008/07/080724064835.htm>. Respect for the diversity of students is associated with increased feelings of safety in schools, and there is less bullying in schools with greater student diversity. *See* *ScienceDaily, supra*; Jaana Juvonen, Adrienne Nishina & Sandra Graham, *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 *Psychol. Sci.* 393, 397 (2006).

Students also benefit academically from inclusive settings. See Open Soc’y Found., *The Value of Inclusive Education* (Oct. 2015), <https://goo.gl/imqFgK>; Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students With and Without Disabilities and Their Educators*, 20 Remedial & Special Educ. 114, 114 (1999). And classrooms that are fully welcoming of transgender students will generate noticeable and quantifiable benefits to transgender students and the broader community. Examples of the benefits of classroom inclusion and diversity abound in other contexts where such inclusion has a longer history.

Title IX itself provides one of the best examples of the power of equality to promote collective advancement. Since its enactment over 40 years ago, Title IX has promoted gender inclusivity in school sports, the benefits of which have rippled from the athletic field to the classroom and beyond. See generally Nat’l Coal. for Women and Girls in Educ., *Title IX at 40: Working to Ensure Gender Equity in Education* (2012), <http://www.ncwge.org/PDF/TitleIXat40.pdf>. In recent Olympic Games, U.S. women have brought home more medals than U.S. men, and U.S. women alone won as many medals as any other nation. See Greg Myre, *U.S. Women Are the Biggest Winners at the Rio Olympics*, NPR (Aug. 21, 2016), <https://goo.gl/z5FmxN>. Girls who play sports perform better academically and are more likely to graduate high school. Nat’l Coal. for Women and Girls in Educ., *supra*, at 10. This increased success goes beyond the classroom: 82 percent of

female business executives were on a school sports team. *Id.* at 11. Without Title IX’s mandate of inclusivity for women in athletics, women (and the larger community) would not have reaped these benefits.

Since passage of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act, *see* 29 U.S.C. § 701 *et seq.*; 20 U.S.C. § 1400 *et seq.*, decades of research demonstrate that students with and without disabilities likewise benefit from participating in inclusive classrooms. When students with disabilities are educated alongside their non-disabled peers, disabled and non-disabled students score higher on literacy measures, perform better on standardized tests, get better grades, and are more likely to master their individualized education program goals. *See* Kathleen Whitbread, *What Does the Research Say About Inclusive Education?*, Wrightslaw (1998-2016), <https://goo.gl/K6TzL6>; Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?*, 6 *Future Child*. 77, 91 (1996).

Racially and socioeconomically inclusive classrooms also benefit students. The average student from a low-income background who attends a middle-class school—a school where less than 50 percent of the student body is low-income, as measured by free or reduced lunch eligibility—performs better academically than his low-income peers who attend low-income schools. *See* Richard D. Kahlenberg, *From All Walks of Life: New Hope for School Integration*, *Am. Educ.*, Winter 2012-2013, at 4–5. Classroom activities that call for cooperation between students

from diverse backgrounds “promote creativity, motivation, deeper learning, critical thinking, and problem-solving skills.” Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, *How Racially Diverse Schools and Classrooms Can Benefit All Students* 14 (Feb. 2016), <https://goo.gl/FgSseO>.

On the other hand, allowing discrimination against one group decreases the positive impact of anti-discrimination efforts that target other groups.⁴ Educators understand this instinctively: their classrooms cannot embrace diversity, tolerance, and mutual respect in some ways, but deny it in others and still obtain the benefits of inclusive classrooms. Students who see their transgender peers being treated as “less than” justifiably fear that they one day will be treated as “less than” as well. The reverse is also true: educators have discussed with us how, once their school began adopting LGBTQ-inclusive policies, students with other minority identities, such as those with a disability, non-white ethnicity, or an atypical home life, felt safer and more accepted at school.

III. Educational discrimination harms transgender students profoundly, with no offsetting benefits.

⁴ See, e.g., Wanda Cassidy & Margaret Jackson, *The Need for Equality in Education: An Intersectionality Examination of Labeling and Zero Tolerance Practices*, 40 McGill J. Educ. 435, 438 (2005) (“[C]hildren who experience discrimination on the basis of race, gender, class, disability, and/or sexual orientation may suffer from more than one form of discrimination. Those factors can be seen to intersect in ways which compound rather than simply add together in final impact. And, while the child may experience multiple levels of discrimination, multiple levels of protection may not be provided by the school.”).

1. Like all schools, the Dallas School District has an obligation to create and maintain a nondiscriminatory educational environment in which all students have the opportunity to learn and thrive. To discharge this duty, schools must reevaluate best practices in light of evolving standards and norms. The Supreme Court has “recogniz[ed] that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

An order that prohibited transgender boys from accessing boys facilities and prohibited transgender girls from girls facilities would send a harmful message to transgender students, their peers, and the broader school community. The court would be signaling that transgender students are not worthy of society’s equal respect; that they are outcasts and pariahs who ought to be feared; and that their classmates must be protected from them. The “necessary consequence” of such an outcome is to demean and stigmatize transgender students. *See id.* at 2602.

NEA members have witnessed how discriminatory policies reflect and promote hostility toward transgender youth. When schools deny transgender students access to facilities and programs that others have access to, they tell those students that they are less than others. Scorn and abuse from other students and the larger school community often follow. When this happens, transgender students lose more than the “mere affirmation of subjective perceptions about gender[.]” Pls.’-Appellants’ Br. 49. They forever “suffer the stigma of knowing” that in the eyes of their school

district and community, they are “somehow lesser[.]” *Obergefell*, 135 S. Ct. at 2600. Accomplishing this through a federal court order would, if anything, be even more harmful. This type of stigmatization is extremely damaging to transgender students and compounds the problem by legitimizing existing hostility against them.

2. One of our nation’s fundamental guarantees is that students have equal access to educational opportunities regardless of gender differences. *See, e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; *United States v. Virginia*, 518 U.S. 515, 531 (1996). This is the crux of Title IX. *See* 20 U.S.C. § 1681 *et seq.* “[G]ender must be irrelevant to [educational] decisions.” *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (construing Title VII’s prohibition of discrimination on the basis of sex); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–98 (1979) (concluding that Title VII and Title IX’s prohibition on sex discrimination are construed the same way).

Yet when schools deny transgender students access to locker rooms or restrooms that are consistent with their gender identity, this exclusionary discrimination has ripple effects. Transgender students often avoid participating in gym class, sports, or other extracurricular activities altogether and refrain from using bathrooms at all.

The ability to fully participate in all aspects of school life is critical for transgender students’ well-being. For all students, the opportunity to participate in

sports results in positive outcomes like better grades, higher rates of homework completion, higher educational and occupational aspirations, improved self-esteem, and better psychological health. *See, e.g.,* McGuire et al., *supra*, at 1177, 1186. And like other group activities, participation in athletics forges strong social bonds. But when schools have exclusionary policies that discriminate against transgender students in any manner, those students are less likely to reap the benefits of the array of extracurricular activities available to the student body at large.

Bathroom avoidance is also a common and acute problem for transgender students, which is linked to health problems and diminished educational outcomes. *See* James et al., *supra*, at 228–29; *see generally* Laura J. Wernick, Alex Kulick & Matthew Chin, *Gender Identity Disparities in Bathroom Safety and Wellbeing Among High School Students* (Working Paper Jan. 7, 2017), <https://goo.gl/uTX6fO>.

This reality is confirmed not only by academic studies, but also by the experiences of educators. A Michigan teacher interviewed by NEA shared the story of a transgender student who was denied access to a bathroom consistent with his gender identity. The student avoided eating breakfast and lunch so that he would not need to relieve himself during the school day. Thirst and hunger made it difficult for him to concentrate. A gender-neutral bathroom in the office at the other end of the building was made available to him, but using it required him to

out his transgender status to his teachers to explain why he would be gone from the classroom for an extended period of time. Like many transgender students, this student was not out to all his peers and teachers and was reluctant to out himself to the entire school community. The student's daily anxiety about being able to satisfy his basic human need to use the bathroom detracted from his ability to focus and engage in class, and his academic performance suffered as a result.

A teacher from the Great Plains interviewed for this brief likewise spoke about how bathroom avoidance causes students to forgo food and drink, harming their health and energy levels, and how the use of pronouns that are not consistent with the student's gender identity by school staff causes transgender students to withdraw from the educational process altogether—either by skipping class or simply withdrawing from classroom engagement.

Another interviewed teacher described how, in response to a group of parents complaining about a transgender boy using the boys bathroom, the school administration required the transgender boy to use the girls bathroom. But parents and students were also uncomfortable with him using the girls room, because, by all outward measure, he expresses himself as a boy. This student suffers the cruel fate of being ostracized from both sides and feeling that he belongs nowhere at school. This experience, sadly, is not unique.

When schools exclude transgender boys and girls from the facilities used by other boys and girls and, thus, single them out for stigmatization and scorn, the

students suffer psychosocial harms that deprive them of the opportunity to become their best selves. This harm cannot be undone on its own. “Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.” *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

Nor does the harm end there. As the Supreme Court has recognized, depriving educational opportunity to any subset of students necessarily harms broader society.

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. . . . We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Id. at 221.

3. Fortunately, all students’ privacy interests can be addressed without discriminating against transgender students. In schools that permit transgender students to use the facilities consistent with their gender identity, gender-neutral facilities are commonly open to any student who would rather not use a sex-segregated facility, and installations that increase privacy for everyone in sex-segregated facilities are beneficial to all students. The Dallas School District has made similar efforts to accommodate privacy needs by, for instance, making available single-user facilities for any student, regardless of gender identity. That said, in general, the majority of out transgender students report that their

classmates are supportive of them using facilities consistent with their gender identity. James et al., *supra*, at 137.

IV. Educators themselves are harmed when they are compelled to be instruments of discrimination against their students.

Finally, educators and other school employees themselves are harmed when schools require them to discriminate against transgender students.

Transgender-discriminatory policies, like the court order Plaintiffs seek here, are not self-executing; they compel individual administrators, educators, and other public school employees to carry them out. Compelling educators to participate in such a harmful and degrading scheme—a scheme that many educators understand is harmful (and not just to transgender students but to other students and the overall school climate)—negatively impacts those educators. Educators suffer both professional and psychological harms when they are forced to watch, and participate in, the stigmatization and degradation that discriminatory policies inflict on students.

When policies prevent teachers from addressing student needs, teachers no longer have access to the moral rewards of being an educator, leading to demoralization. Doris A. Santoro, *Good Teaching in Difficult Times: Demoralization in the Pursuit of Good Work*, 118 Am. J. Educ. 1, 1–2, 11–12 (2011); see also Lisa C. Ehrich et al., *Ethical Dilemmas: A Model To Understand Teacher Practice*, 17 Teachers & Teaching: Theory & Prac. 173 (2011). And this

demoralization causes teachers to suffer “depression, discouragement, frustration, and shame,” leaving them “continually frustrated” in their “pursuit of good teaching.” Santoro, *supra*, at 17. On the other hand, “[t]he moral rewards of teaching are activated when educators feel that they are doing what is right in terms of one’s students, the teaching profession, and themselves.” *Id.* at 2.

As an educator from the Great Plains put it to us:

My first five years of teaching was at a school district that did not have a nondiscrimination policy that included sexual orientation, gender identity, or gender expression. I remember a birth-assigned boy who exhibited extreme behaviors such as anger, aggression, and crying, and so on. I eventually learned from the student’s grandmother that the student wanted to dress in “girls” clothes and wear make-up, and that the grandmother allowed the student to do this at home, secretly, once a month, in an effort to help the behaviors subside. I now realize that this student was a transgender girl, and that the outward behaviors, at least in part, manifested because she could not be her true self. I still feel so much guilt to this day that I wasn’t able to be an affirming adult for that student because of the discriminatory school environment I worked in.

Even school employees who support discriminatory policies may be harmed by them. Recent peer-reviewed studies have found that individuals who act with prejudice towards others face negative health outcomes. Mark L. Hatzenbuehler, Anna Bellatorre & Peter Muennig, *Anti-Gay Prejudice and All-Cause Mortality Among Heterosexuals in the United States*, 104 Am. J. Pub. Health 332, 332, 335 (2014); Yeonjin Lee et al., *Effects of Racial Prejudice on the Health of Communities*, 105 Am. J. Pub. Health 2349, 2352–53 (2015). Those who engage in discrimination experience more anger and stress, and frequently deal with this

anger and stress by engaging in unhealthy coping mechanisms. Hatzenbuehler, *supra*, at 336. And working in a discriminatory environment can be harmful, even for those who do not directly participate in the discrimination. *Cf.* Lisa Rapaport, *Racism Linked to Mortality for Both Blacks and Whites in U.S.*, Reuters (Sept. 18, 2015), <https://goo.gl/g6f9ns>; *see also* Lee et al., *supra*, at 2353.

CONCLUSION

Plaintiffs seek an order that would compel schools to engage in intentional discrimination against their students. Such an order would harm transgender students, degrade the school climate for all students, and injure educators themselves. NEA urges the Court to affirm the lower court's ruling in all respects.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it uses a proportionally spaced typeface (Times New Roman) in 14-point. It complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 4,914 words, which is less than half of the 14,000 words allowed for principal briefs under Ninth Circuit Rule 32-1(a).

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system, as all counsel are filing users.

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