

**No. 18-13592**

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**United States Court of Appeals**  
*for the*  
**Eleventh Circuit**



DREW ADAMS,

*Plaintiff-Appellee,*

v.

THE SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA, No. 3:17-cv-00739-TJC-JBT

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***EN BANC* BRIEF OF THE NATIONAL WOMEN'S LAW CENTER  
AND 50 ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* IN  
SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE**

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November 23, 2021

**ADDITIONAL *AMICI CURIAE***

1. 9to5
2. A Better Balance
3. ADL (Anti-Defamation League)
4. American Medical Women's Association (AMWA)
5. Athlete Ally
6. Autistic Self Advocacy Network
7. Bay Area Lawyers for Individual Freedom (BALIF)
8. Birnbaum Women's Leadership Network at NYU School of Law
9. California Women Lawyers
10. Chicago Foundation for Women
11. Collective Power for Reproductive Justice
12. Colorado Consumer Health Initiative
13. Education Law Center PA
14. Equal Rights Advocates
15. Family Equality
16. Feminist Women's Health Center
17. FORGE, Inc.
18. Girls Inc.
19. GLSEN
20. Healthy Teen Network
21. Human Rights Campaign
22. In Our Own Voice: National Black Women's Reproductive Justice Agenda
23. International Action Network for Gender Equity & Law (IANGEL)
24. LatinoJustice PRLDEF
25. League of Women Voters
26. Legal Aid at Work
27. Legal Momentum, the Women's Legal Defense and Education Fund
28. Legal Voice
29. Louisiana Coalition for Reproductive Freedom
30. Louisiana NOW
31. Maine Women's Lobby
32. NARAL Pro-Choice America
33. National Association of Social Workers
34. National Association of Women Lawyers
35. National Black Justice Coalition
36. National Council on Independent Living
37. National Women's Political Caucus
38. Oklahoma Call for Reproductive Justice
39. Our Bodies Ourselves Today
40. Planned Parenthood of South Florida and the Treasure Coast, Inc.
41. Reproaction
42. SIECUS: Sex Ed for Social Change
43. Southern Poverty Law Center
44. The Women's Law Center of Maryland
45. Women Lawyers Association of Los Angeles
46. Women Lawyers On Guard Inc.
47. Women's Bar Association of the District of Columbia
48. Women's Institute for Freedom of the Press
49. Women's Law Project
50. WV FREE

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

**Certificate of Interested Persons**

Pursuant to 11th Cir. R. 26.1-1 through 26.1-3, the undersigned certifies that they believe that the Certificates of Interested Persons set forth in the Petition for Panel Rehearing and Rehearing *En Banc* of Appellant The School Board of St. Johns County, Florida (Aug. 4, 2021), the *En Banc* Brief of *Amici Curiae* Medical and Mental Health Professionals Supporting Defendant-Appellant School Board of St. Johns County, Florida (Nov. 8, 2021), and the proposed *En Banc* Brief of *Amici Curiae* the American Civil Liberties Union and the ACLU of Florida in Support of Plaintiff and Affirmance (Nov. 19, 2021), are complete, subject to the following amendments:

**Added:**

1. 9to5: *amicus curiae*
2. American Medical Women's Association (AMWA): *amicus curiae*
3. Anastasio, Morgan L. (Quinn Emanuel Urquhart & Sullivan, LLP):  
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4. Anten, Todd (Quinn Emanuel Urquhart & Sullivan, LLP): counsel for  
*amici curiae*
5. Athlete Ally: *amicus curiae*
6. Autistic Self Advocacy Network: *amicus curiae*

7. Bay Area Lawyers for Individual Freedom (BALIF): *amicus curiae*
8. Birnbaum Women’s Leadership Network at NYU School of Law:  
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10. Collective Power for Reproductive Justice: *amicus curiae*
11. Colorado Consumer Health Initiative: *amicus curiae*
12. Education Law Center PA: *amicus curiae*
13. Family Equality: *amicus curiae*
14. Feminist Women’s Health Center: *amicus curiae*
15. Ferguson, Laura N. (Quinn Emanuel Urquhart & Sullivan, LLP):  
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16. GLSEN: *amicus curiae*
17. Healthy Teen Network: *amicus curiae*
18. Human Rights Campaign: *amicus curiae*
19. International Action Network for Gender Equity & Law (IANGEL):  
*amicus curiae*
20. League of Women Voters: *amicus curiae*
21. Louisiana Coalition for Reproductive Freedom: *amicus curiae*
22. Louisiana NOW: *amicus curiae*
23. Maine Women’s Lobby: *amicus curiae*

24. NARAL Pro-Choice America: *amicus curiae*
25. National Black Justice Coalition: *amicus curiae*
26. National Council on Independent Living: *amicus curiae*
27. National Women’s Political Caucus: *amicus curiae*
28. Oklahoma Call for Reproductive Justice: *amicus curiae*
29. Our Bodies Ourselves Today: *amicus curiae*
30. Planned Parenthood of South Florida and the Treasure Coast, Inc.:  
*amicus curiae*
31. Quinn Emanuel Urquhart & Sullivan, LLP: counsel for *amici curiae*
32. Reproaction: *amicus curiae*
33. SIECUS: Sex Ed for Social Change: *amicus curiae*
34. Southern Poverty Law Center: *amicus curiae*
35. Women Lawyers Association of Los Angeles: *amicus curiae*
36. Women’s Institute for Freedom of the Press: *amicus curiae*
37. WV FREE: *amicus curiae*

**Corporate Disclosure Statement**

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 through 26.1-3 and 28-1(b), the National Women’s Law Center and 50 organizations submitting this brief each certifies that: (1) it has no parent corporation, and (2) no publicly held corporation owns 10% or more of its stock.

\* \* \*

The undersigned will enter all updated information into the Court's web-based CIP contemporaneously with this Certificate of Interested Persons and Corporate Disclosure Statement.

*/s/ Laura N. Ferguson*  
Laura N. Ferguson

**TABLE OF CONTENTS**

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT.....	C-1
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
I. THE EQUAL PROTECTION CLAUSE AND TITLE IX PROHIBIT DISCRIMINATION AGAINST TRANSGENDER STUDENTS .....	6
II. ALLOWING TRANSGENDER STUDENTS TO USE RESTROOMS CORRESPONDING WITH THEIR GENDER IDENTITY DOES NOT CHALLENGE THE EXISTENCE OF SINGLE-SEX RESTROOMS .....	9
III. PROHIBITING TRANSGENDER STUDENTS FROM USING RESTROOMS CORRESPONDING WITH THEIR GENDER IDENTITY DOES NOT PROMOTE THE SAFETY OR PRIVACY OF CISGENDER GIRLS OR WOMEN, BUT INSTEAD HARMS TRANSGENDER STUDENTS .....	11
A. The Board’s Policy Does Not Advance Actual Safety or Privacy Interests of Cisgender Girls.....	12
B. The Health and Safety of Transgender Students Are Jeopardized as a Result of Exclusionary Restroom Policies.....	17
CONCLUSION.....	23
CERTIFICATE OF COMPLIANCE.....	24
CERTIFICATE OF SERVICE .....	25

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page(s)</u>
<i>Adams v. Sch. Bd. of St. Johns Cty.</i> , 318 F. Supp. 3d 1293 (M.D. Fla. 2018).....	3, 7, 8, 10, 11, 12, 13, 15, 19, 20
<i>Bd. of Educ. of Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ.</i> , 208 F. Supp. 3d 850 (S.D. Ohio 2016) .....	15
<i>Bostock v. Clayton County</i> , 140 S. Ct. 1731 (2020) .....	3, 6, 8
<i>Bowers v. Bd. of Regents of Univ. Sys. of Ga.</i> , 509 F. App’x 906 (11th Cir. 2013) .....	6
<i>Cruzan v. Special Sch. Dist., No. 1</i> , 294 F.3d 981 (8th Cir. 2002).....	16
<i>Doe v. Boyertown Area Sch. Dist. No. 1</i> , 897 F.3d 518 (3d Cir. 2018).....	7, 16, 19
<i>Evancho v. Pine-Richland Sch. Dist.</i> , 237 F. Supp. 3d 267 (W.D. Pa. 2017).....	7, 8, 15
<i>Franklin v. Gwinnett Cty. Pub. Schs.</i> , 503 U.S. 60 (1992).....	6
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011) .....	6
<i>Grimm v. Gloucester Cty. Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020), <i>as amended</i> (Aug. 28, 2020), <i>cert. denied</i> , 141 S. Ct. 2878 (2021).....	7, 9, 10
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982) .....	6
<i>Olmstead v. L.C. ex rel. Zimring</i> , 527 U.S. 581 (1999).....	6
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326 F. Supp. 3d 1075 (D. Or. 2018) .....16

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<https://www.hrw.org/report/2016/09/14/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us> ..... 10, 12, 19

### INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* consist of the National Women’s Law Center and the 50 additional organizations listed on the inside cover. These organizations are committed to ensuring that all students, including transgender students, enjoy equal access to rights and opportunities, free from sex discrimination.

The National Women’s Law Center (“NWLC”) is a nonprofit legal organization dedicated to the advancement and protection of women’s legal rights and the rights of all people to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the U.S. Constitution, Title IX of the Education Amendments Act of 1972, and other laws prohibiting sex discrimination. NWLC has participated as counsel or *amicus curiae* in numerous cases, including before this Court, other courts of appeals, and the Supreme Court to emphasize that protections against sex discrimination include protections against discrimination based on sexual orientation and gender identity. NWLC contends all people, including lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) individuals, must be provided the

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<sup>1</sup> All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. NWLC attorneys, including Phoebe Wolfe and Shiwali Patel, and policy consultant Harper Jean Tobin also contributed to the preparation of this brief.

protections against sex discrimination promised by federal law. NWLC also represents survivors of sexual violence, including in schools and workplaces, and routinely engages in policy advocacy to ensure that survivors are fully protected under civil rights laws, including Title IX.

Defendant-Appellant's (the "Board's") policy at issue bars Plaintiff-Appellee Andrew Adams<sup>2</sup> from using the same restroom as other boys simply because he is a transgender boy. *Amici* submit this brief to refute the Board's argument that its policy is justified because it allegedly protects nontransgender (or cisgender) girls. It does not. The policy serves no end but to harm transgender students, as well as cisgender girls who do not conform to sex stereotypes. *Amici* include entities that are experts in addressing sex discrimination, including sexual assault; assessing and treating the damage from sex discrimination; and advocating for the rights of LGBTQ students in educational settings. This expertise may assist the Court in its resolution of this case. *Amici* reject a framework that assumes the rights of cisgender and transgender people are pitted against each other; rather, *amici* find common cause in addressing the actual harms created by sex discrimination, including through the protections contained in our nation's federal civil rights laws and the U.S. Constitution.

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<sup>2</sup> *Amici* understand that Andrew Adams is Plaintiff-Appellee's current legal name.

## SUMMARY OF ARGUMENT

Andrew should be allowed to use the boys' restroom because he is a boy. The Board's policy barring transgender boys from using the boys' restroom at school singles Andrew out by denying him that access. The district court thus correctly held that this policy violates both the Equal Protection Clause and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*, finding that Andrew "poses no threat to the privacy or safety of any of his fellow students" and that "[w]hen it comes to [Andrew's] use of the bathroom, the law requires that he be treated like any other boy." *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1297 (M.D. Fla. 2018).<sup>3</sup> *Amici* concur, and the judgment below should be affirmed.

There can be no serious dispute that protections against sex discrimination based on the U.S. Constitution and contained in Title IX include prohibitions of discrimination against transgender people. As the Supreme Court confirmed in *Bostock v. Clayton County*, a policy that discriminates against transgender people discriminates based on sex under Title VII. 140 S. Ct. 1731, 1741-43 (2020). So here too, recognizing that a prohibition of sex discrimination prohibits discrimination against transgender people is necessary to fulfill Title IX's purpose:

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<sup>3</sup> The district court's decision also can be found at App. Vol. XV, Doc. 192 at 165-235.

to prevent sex discrimination in education. Allowing Andrew and other transgender students the same access to restrooms consistent with their gender identity that their peers enjoy does not remove the privacy expectations of single-sex restrooms, nor does it challenge the existence of single-sex restrooms. A transgender boy's use of a boys-only restroom does not change the restroom from being a boys' restroom. Hundreds of school districts across the country have adopted non-discrimination policies that allow transgender students to use restrooms that correspond with their gender identity while maintaining separate boys' and girls' restrooms. It is incorrect to suggest that these schools no longer have sex-separated facilities simply because they allow students access to restrooms consistent with their gender identity. To the contrary, mandating that Andrew, a boy, use a girls-only restroom is inconsistent with a policy assigning restrooms based on sex.

The Board, claiming purported safety and privacy concerns, asks for a ruling that would require transgender students to use restrooms intended for members of another sex. In other words, the Board's policy would require transgender boys to use the girls' restroom or to be singled out and compelled to use inconveniently located single-stall restrooms. But there is *no* credible evidence that transgender students using restrooms corresponding with their gender causes *any* injury to *any* student. In fact, the Board's policy harms cisgender girls by inviting others to question girls who do not conform to expected sex stereotypes when they use girls'



restrooms. Allowing all students, cisgender and transgender, to use restrooms corresponding with their gender identity provides the safest environment for everyone.

The record in this case, confirmed by social science, shows the significant physical and emotional harms that policies such as the Board's inflict upon transgender students. Denying transgender students equal access to restrooms compounds the already-high rates of sex harassment these students face. Accordingly, NWLC, and the 50 additional organizations joining this brief, urge the Court to affirm the district court's injunction preventing the Board from enforcing its harmful policy on the basis that it violates this nation's laws prohibiting sex discrimination.

### **ARGUMENT**

The Court has asked the parties to address whether the Board's "policy of assigning bathrooms based on sex" violates the Equal Protection Clause or Title IX. (Notice, Sept. 16, 2021). *Amici* respectfully submit that the issue before the Court does not involve a dispute about assigning restrooms "based on sex" because this suit does not challenge the notion of allowing separate restrooms for boys and girls. Rather, the Board's policy prohibits transgender boys—who are, indeed, boys—from using the same restroom as other boys merely because they are transgender.

So framed, a policy that treats transgender boys differently than other boys discriminates based on sex in violation of the law.

## **I. THE EQUAL PROTECTION CLAUSE AND TITLE IX PROHIBIT DISCRIMINATION AGAINST TRANSGENDER STUDENTS**

The Board’s policy categorically hinges adverse treatment on a student’s transgender status (or gender identity), which is a form of sex discrimination under the U.S. Constitution and Title IX. As *Bostock* explained, “it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741; *see also Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (“discriminating against someone on the basis of his or her gender non-conformity,” including against transgender people, “constitutes sex-based discrimination under the Equal Protection Clause”).

*Bostock*’s textual analysis of Title VII’s prohibition of sex discrimination readily applies to Title IX, a statute meant to eradicate sex discrimination in educational programs.<sup>4</sup> *See, e.g., North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (observing that to “give [Title IX] the scope that its origins dictate, we

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<sup>4</sup> Courts interpreting Title IX routinely draw from the settled interpretation of Title VII in analyzing the scope of sex discrimination prohibited by federal law. *See, e.g., Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (relying on Title VII case law to interpret Title IX); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) (“[t]his Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX”); *Bowers v. Bd. of Regents of Univ. Sys. of Ga.*, 509 F. App’x 906, 910 (11th Cir. 2013) (per curiam) (“We apply Title VII case law to assess Bowers’s Title IX claim.”).

must accord it a sweep as broad as its language”) (quotations omitted). So it comes as no surprise that federal courts repeatedly: (1) have found that school policies prohibiting transgender students from using restrooms corresponding with their gender identity violate Title IX, *see, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017); and (2) have rejected claims that policies allowing transgender students to use facilities consistent with their gender identity violate Title IX, *see, e.g., Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533-36 (3d Cir. 2018); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1227-29 (9th Cir. 2020). The same applies to the Equal Protection Clause. *See, e.g., Grimm*, 972 F.3d at 608-10.<sup>5</sup>

The Board’s policy reinforces a notion that *Bostock*, medical science (*see, e.g., Adams*, 318 F. Supp. 3d at 1298-99), history, and countless courts have rejected: it

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<sup>5</sup> *Amici* also note the application of heightened scrutiny to Andrew’s equal protection claim, as many courts have concluded, applying similar logic as *Bostock*. *See, e.g., Grimm*, 972 F.3d at 608 (applying heightened scrutiny to transgender student’s sex discrimination claim “because such policies punish transgender persons for gender non-conformity”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288-89 (W.D. Pa. 2017) (applying heightened scrutiny to transgender student’s equal protection claim because “gender identity is entirely akin to ‘sex’ as that term has been customarily used in the Equal Protection analysis”). Heightened scrutiny is also proper because transgender people “constitute at least a quasi-suspect class” entitled to heightened protection under the Equal Protection Clause. *Grimm*, 972 F.3d at 610-13; *Evancho*, 237 F. Supp. 3d at 288-89 (similar). Thus, under either theory, heightened scrutiny applies to Andrew’s equal protection claim.

incorrectly insists that Andrew is not a boy because of his birth-assigned sex.<sup>6</sup> Indeed, the policy by its terms denies that people can be transgender. But as the district court recognized, Andrew “consistently, persistently, and insistently” identifies as a boy,” and medical science and the State of Florida both consider Andrew to be male. *Adams*, 318 F. Supp. 3d at 1296. Significantly, the School District agreed “to treat Adams as a boy in all other respects” aside from the restroom it permitted him to use. *Id.* at 1308.

The Board’s policy thus “unavoidably discriminates against persons with one sex identified at birth and another today” by excluding Andrew as a transgender student as compared to cisgender students. *Bostock*, 140 S. Ct. at 1746. The district court properly recognized that this constitutes unlawful sex discrimination.

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<sup>6</sup> As experts on the legal protections against sex discrimination, *amici* also note that the Board posits a historically inaccurate and narrow definition of “sex.” The Board suggests that under the nation’s federal civil rights statutes, “sex” is limited to a particular notion of sex (such as birth-assigned sex). But in the context of Title VII, for example, “[c]ourts have long interpreted ‘sex’ ... to go beyond assigned sex as defined by the respective presence of male or female genitalia.” *Evancho*, 237 F. Supp. 3d at 296. Indeed, “numerous courts have held that Title VII’s prohibition of discrimination on the basis of ‘sex’ includes discrimination on the basis of among other things transgender status, gender nonconformity, sex stereotyping, and sexual orientation.” *Id.* at 296-97 (collecting cases). Notwithstanding that historically broad scope of the legal protections against sex discrimination, even if the definition of “sex” was limited in the manner argued by the Board, the policy still discriminates against Andrew based on his birth-assigned sex.

## II. ALLOWING TRANSGENDER STUDENTS TO USE RESTROOMS CORRESPONDING WITH THEIR GENDER IDENTITY DOES NOT CHALLENGE THE EXISTENCE OF SINGLE-SEX RESTROOMS

The Board’s premise implies that allowing transgender students to access the single-sex restrooms that correspond with their gender identity somehow challenges whether such single-sex spaces will continue to be allowed under the law. But this argument highlights a fundamental misunderstanding about what it means to be transgender. It also ignores the widespread practice adopted by *hundreds* of school boards of allowing students to access restrooms corresponding with their gender identity.<sup>7</sup>

Transgender boys are boys. As the Fourth Circuit recently explained, “being transgender is not a choice. Rather, it is as natural and immutable as being cisgender.” *Grimm*, 972 F.3d at 612-13. There is also substantial evidence that this conclusion is biologically based. For example, research has found that a transgender man’s brain is structured and functions more similarly to the brain of an average cisgender man than an average cisgender woman—even before or without gender-

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<sup>7</sup> *Separation and Stigma: Transgender Youth & School Facilities*, MOVEMENT ADVANCEMENT PROJECT & GLSEN 4-6 (2017), [http://www.glsen.org/sites/default/files/2019-11/Separation\\_and\\_Stigma\\_2017.pdf](http://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf) (“Hundreds of school districts across the country have successfully worked to ensure that transgender students have access to facilities that match their gender identity while still protecting the privacy and safety of all students. Additionally, 13 states and the District of Columbia have explicit laws prohibiting discrimination in education based on gender identity and sexual orientation.”).

affirming hormone therapy.<sup>8</sup> At minimum, a transgender boy is completely out of place in a girls' restroom.<sup>9</sup> Not even the Board contends otherwise.

A transgender person uses a school restroom in the same way as a cisgender person: “by entering a stall and closing the door.” *Whitaker*, 858 F.3d at 1052; *see also Adams*, 318 F. Supp. 3d at 1314 (“When he goes into a restroom, [the transgender student] enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves.”). As a result, “school districts across the country have implemented policies that allow transgender students to use the restroom matching their gender identity, and they have done so without incident.” *Grimm*, 972 F.3d at 597. Those districts’ policies—which govern schools attended by tens of millions of students and, in some cases, have been in place for nearly two decades<sup>10</sup>—are *consistent* with assigning restrooms based on sex. Allowing

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<sup>8</sup> Hillary B. Nguyen et al., *What has sex got to do with it? The role of hormones in the transgender brain*, 44 NEUROPSYCHOPHARMACOLOGY 22, 25, 27-34 (2019).

<sup>9</sup> *See generally Shut Out: Restrictions on Bathrooms and Locker Room Access for Transgender Youth in US Schools*, HUMAN RIGHTS WATCH (Sept. 2016), <https://www.hrw.org/report/2016/09/14/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us> [hereinafter “HUMAN RIGHTS WATCH, *Shut Out*”].

<sup>10</sup> For example, the San Francisco Unified School District has had a policy of allowing students to access restrooms that correspond with their gender identity since 2003. *See* Laura Waxmann, *SF school officials stand by protections for transgender students*, S.F. EXAMINER (Feb. 14, 2018), <https://www.sfexaminer.com/news/sf-school-officials-stand-by-protections-for-transgender-students/>.

transgender students to use restrooms corresponding with their gender identity *maintains* the nature of a single-sex restroom: girls use the girls' restroom, and boys use the boys' restroom.

### **III. PROHIBITING TRANSGENDER STUDENTS FROM USING RESTROOMS CORRESPONDING WITH THEIR GENDER IDENTITY DOES NOT PROMOTE THE SAFETY OR PRIVACY OF CISGENDER GIRLS OR WOMEN, BUT INSTEAD HARMS TRANSGENDER STUDENTS**

The Board justifies its policy—which interferes with Andrew's ability to obtain the benefits of a public education—by pointing to concerns for “the bodily privacy rights of students and risk[s] [to] their safety and welfare.” Appellant's En Banc Br. 7. These concerns are illusory. The Board's privacy and safety concerns have hinged on its purported concerns for cisgender girls. *Adams*, 318 F. Supp. 3d at 1304-05. But as history and social science demonstrate, excluding transgender students from appropriate restrooms to “protect” cisgender girls and women is based on unfounded fears and archaic stereotypes about women. *Amici*—which include groups that have championed laws protecting the equality and safety of all girls and women for decades—recognize that such exclusionary policies not only fail to promote safety or privacy interests of any cisgender students but also actively *harm* the physical and mental health and safety of transgender students.

**A. The Board's Policy Does Not Advance Actual Safety or Privacy Interests of Cisgender Girls**

For the reasons explained by Andrew and detailed by the district court, the Board's policy does not advance any real interest in cisgender girls' safety or privacy.<sup>11</sup> And beyond the record in this case, research confirms that alleged safety and privacy concerns regarding transgender students' use of school restrooms that correspond with their gender identity are unsubstantiated.<sup>12</sup>

As noted, because Andrew was otherwise recognized as male at school (including through his name, pronouns, and dress), it likely would feel *more* invasive to female students to have him use the girls' restroom. As *amici* know, many transgender people have long been using restrooms matching their gender identity, including in schools across our country, without incident.

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<sup>11</sup> In fact, the Board's policy arbitrarily *allows* some transgender students to use restrooms corresponding with their gender identity. Under the Boards' policy, "[i]f a transgender student initially enrolls with documents listing the gender that matches the student's gender identity, the [Board] will accept the student as being of that gender." *Adams*, 318 F. Supp. 3d at 1302. But if a student's original enrollment documents designate one gender, and that student "later presents a document, such as a birth certificate or driver's license, which lists a different gender, the original enrollment documents control." *Id.* The Board has not explained how a transgender student who transitions after enrollment, such as Andrew, poses any greater risk to cisgender students' safety or privacy than students who transition earlier, making it clear that the policy is not animated by any actual safety or privacy concerns.

<sup>12</sup> HUMAN RIGHTS WATCH, *Shut Out*, *supra* note 9, at 2; *see also* Rachel E. Moffitt, *Keeping the John Open to Jane: How California's Bathroom Bill Brings Transgender Rights Out of the Water Closet*, 16 GEO. J. GENDER & L. 475, 500 (2015).



Additionally, although the Board’s policy purports to advance privacy and safety interests, its rationale—that a girl needs a private space to “refresh her makeup” and “talk to other girls”<sup>13</sup>—is aimed at the anachronistic protection of women and rests on stereotypes regarding who needs protection, and from whom.<sup>14</sup> These policies also reinforce antiquated notions of femininity by harming girls who do not conform to gender stereotypes, whether they are cisgender or transgender.<sup>15</sup> These policies particularly exacerbate harm to Black and brown girls who already are often targeted for not conforming to gender-based expectations.<sup>16</sup> These

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<sup>13</sup> *Adams*, 318 F. Supp. 3d at 1305 (quoting App. Vol. XII, Doc. 161 at 213); *see also id.* (“[A] student may want privacy to undress or clean up a stain on her clothing.”) (citing App. Vol. XII, Doc. 161 at 248); *id.* (“[A]llowing a transgender student to use a restroom that conformed to his or her gender identity could create opportunities for students ‘with untoward intentions to do things they ought not to do[.]’”) (quoting App. Vol. XIII, Doc. 162 at 112-13); *id.* (“[T]he School Board seeks to assure that members of the opposite sex are not in an unsupervised bathroom together, citing as an example the risks of danger posed to a female freshman student who might find herself alone in the restroom with an 18-year[-]old male student.”) (citing App. Vol. XIII, Doc. 162 at 69, 111, 115).

<sup>14</sup> Notably, the district court found that while some students do change clothes or clean stains on their clothing in the public area of the restroom, they do not undress or appear nude in these areas. *Adams*, 318 F. Supp. 3d at 1314 (“[R]esearch and experience of the school officials from [other counties] revealed no privacy concerns when transgender students used the restroom that matched their gender identity.”).

<sup>15</sup> *See German Lopez, Women are getting harassed in bathrooms because of anti-transgender hysteria*, VOX (May 19, 2016), <https://www.vox.com/2016/5/18/11690234/women-bathrooms-harassment>.

<sup>16</sup> *Cf. Ruth Padawer, The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES MAGAZINE (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex->

stereotypes are not only insulting to girls and women but also invite harassment and the singling out of both transgender students and cisgender students who may not conform to traditional sex stereotypes. Ultimately, cisgender girls and women do not need protection from other girls in restrooms, including transgender girls and women.

The Board offers no factual basis for its purported concern that cisgender boys will claim transgender status as a pretext to obtain access to girls' restrooms. There is no evidence to support that individuals would dishonestly identify as transgender to improperly access a restroom. Nor is it reasonable to conclude that an exclusionary restroom policy like the Board's will impact the behavior of anyone who plans to obtain access to a restroom for an improper purpose.<sup>17</sup> Both existing laws and school policies prohibiting sexual harassment, including assault, would

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[testing-female-athletes.html](https://www.baltimoresun.com/sports/bs-sp-morgan-state-black-female-athlete-study-20180625-story.html); Katherine Fominykh, *New study from Morgan State explores how black female athletes navigate racism and sexism to excel*, BALTIMORE SUN (June 27, 2018), <https://www.baltimoresun.com/sports/bs-sp-morgan-state-black-female-athlete-study-20180625-story.html>.

<sup>17</sup> Although “[o]pponents of gender identity nondiscrimination laws in public accommodations have largely cited fear of safety and privacy violations in public restrooms, locker rooms, and changing rooms if such laws are passed,” a 2019 study found that the passage of inclusive transgender public accommodations laws were “not related to the number or frequency of criminal incidents in such public spaces.” Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEX. RES. & SOC. POL’Y 70, 80 (2019).

remain in effect regardless of whether a school has adopted a transgender-inclusive restroom policy.

Similarly, it is not credible to argue that, absent the Board's policy, someone would "identify" as transgender for the chance to interact with members of another sex in a restroom. And there is no evidence of such incidents.<sup>18</sup> Rather, as with Andrew, transgender students seeking to use restrooms corresponding with their gender identity often have gender dysphoria. As the district court found, and the Board does not dispute, gender dysphoria is a diagnosable medical condition in which individuals "'consistently, persistently, and insistentl[y]" with another sex and experience related distress that can be addressed medically, for example, through hormone therapy or surgery. *Adams*, 318 F. Supp. 3d at 1298-99, 1317. Andrew himself underwent significant medical treatment, including surgery.

Many *amici* are advocates and service providers for survivors of sexual violence, including student survivors. *Amici* would never support a policy that could put a girl, or any young person, at greater risk of assault or harassment. Rather, as discussed below, *see infra* Part III.B, evidence shows that incidents of sexual

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<sup>18</sup> See, e.g., *Evancho*, 237 F. Supp. 3d at 291 (noting lack of evidence that treating transgender students equally would encourage improper behavior in restrooms); *Bd. of Educ. of Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 877 n.15 (S.D. Ohio 2016) (rejecting argument that equal access will "lead to disruption or safety incidents").

violence are *more likely* when a school has a policy that bans transgender students from using restrooms that correspond with their gender identity.<sup>19</sup> To eradicate sexual violence against students, schools must have policies that support the safety, success, and equal treatment of *all* students.<sup>20</sup>

This Court should therefore join the many federal courts that have recognized that these discriminatory policies fail to advance safety and privacy interests and have thus rejected claims that transgender-inclusive restroom policies violate other students' rights. *See, e.g., Boyertown Area Sch. Dist.*, 897 F.3d at 529-30 (rejecting arguments that a school policy protecting transgender students violated other students' rights); *Cruzan v. Special Sch. Dist., No. 1.*, 294 F.3d 981, 983-84 (8th Cir. 2002) (rejecting arguments that a school policy protecting transgender employees with respect to restroom use violated another employee's rights under Title VII); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1099 (D. Or. 2018) (rejecting arguments that a school policy protecting transgender students violated other students' rights); *Students & Parents for Privacy v. U.S. Dep't of*

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<sup>19</sup> *See* Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, 143 PEDIATRICS 1, 5 (2019).

<sup>20</sup> *See 100 School Districts: A Call to Action*, NATIONAL WOMEN'S LAW CENTER 5 (Apr. 2021), <https://nwlc.org/wp-content/uploads/2021/04/100SD-report-5.3.21-vF.pdf>.

*Educ.*, 2016 WL 6134121, at \*26-27 (N.D. Ill. 2016), *report & recommendation adopted*, 2017 WL 6629520 (N.D. Ill. 2017).

**B. The Health and Safety of Transgender Students Are Jeopardized as a Result of Exclusionary Restroom Policies**

Not only does the Board’s policy fail to advance any purported safety or privacy interests of cisgender students, but discriminatory policies like the Board’s also jeopardize the health and safety of transgender students.

While exclusionary policies place all transgender people at a heightened risk of violence and harassment,<sup>21</sup> transgender students face unique risks at school due to their age group and social setting. Studies show that transgender students exhibit “a higher risk for suicide and other life threatening behaviors” because of the

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<sup>21</sup> See, e.g., Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY 14-15 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. It is well-documented that transgender people experience “disproportionate[ly]” high rates of violence, including violence related to their transgender status. Andrew R. Flores et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017-2018*, 111 AM. J. PUB. HEALTH 726, 729 (Apr. 2021); see also *id.* at 727 (“Transgender people experience violence at a rate of 86.2 victimizations per 1000 persons compared with 21.7 per 1000 persons among cisgender people.”). The Human Rights Campaign recorded more acts of fatal violence against transgender and gender-nonconforming individuals in 2020—a year that also saw significant advances in the introduction of anti-transgender legislation—than in any other year since it started tracking that data in 2013. See *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2020*, HUMAN RIGHTS CAMPAIGN (2020), <https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-confirming-people-in-the-united-states-in-2020>.

“elevated risk of social isolation” and “verbal and physical abuse and harassment” by their peers.<sup>22</sup> The CDC’s 2019 Youth Risk Behavior Survey found transgender students were many times more likely than their cisgender peers to experience violent or harassing incidents, with correspondingly multiplied risks for suicidality and substance abuse.<sup>23</sup> Recent CDC data show that 27% of U.S. transgender high school students feel unsafe at school or traveling to or from campus, that 35% are bullied at school, and that 35% attempt suicide.<sup>24</sup> Similarly, in a 2020 survey of over 40,000 LGBTQ youth ages 13 to 24, more than 60% of transgender and nonbinary youth reported engaging in self-harm within the previous 12 months, and over 75% of transgender and nonbinary youth reported experiencing symptoms of generalized anxiety disorder within the previous two weeks.<sup>25</sup>

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<sup>22</sup> Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. LAW 1, 48 (2011) (citing studies).

<sup>23</sup> Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 68 CDC MORBIDITY & MORTALITY WKLY. REP. 67, 70 (Jan. 25, 2019).

<sup>24</sup> Johns et al., *supra* note 23, at 69.

<sup>25</sup> *National Survey on LGBTQ Youth Mental Health 2020*, THE TREVOR PROJECT 1-3 (Mar. 8, 2021), <https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf> [hereinafter “THE TREVOR PROJECT NATIONAL SURVEY”].

At school, transgender students face particularly elevated risks to their health and safety when they are restricted from using restrooms corresponding to their gender identity. Andrew, for example, “testified that he feels alienated and humiliated, and it causes him anxiety and depression to walk past the boys’ restroom on his way to a [separate] bathroom, knowing every other boy is permitted to use it but him. ... [Andrew] thinks it also sends a message to other students who see him use a ‘special bathroom’ that he is different, when all he wants is to fit in.” *Adams*, 318 F. Supp. 3d at 1308.

Andrew’s experiences speak for many other transgender students who also face increased risk of harassment and bullying in school restrooms, which are not typically monitored by teachers. Students interviewed by Human Rights Watch, for example, reported that being forced to use restrooms that did not correspond with their gender identity “made them feel unsafe at school” and “exposed them to verbal and physical assault.”<sup>26</sup> This “walk of shame” “very publicly brand[s] all transgender students with a scarlet ‘T,’ and they should not have to endure that as the price of attending their public school.” *Boyertown Area Sch. Dist.*, 897 F.3d at 530.

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<sup>26</sup> HUMAN RIGHTS WATCH, *Shut Out*, *supra* note 9, at 9-10.

Additionally, such discriminatory restroom policies are physically harmful. Rather than use restrooms that do not correspond with their gender identity, many transgender students avoid urinating while at school. This leads to serious health risks, including kidney damage and urinary tract infections.<sup>27</sup> Andrew, for example, “monitor[ed] his fluid intake to minimize his need to use the restroom” and “use[d] the school bathroom only once or twice a day.” *Adams*, 318 F. Supp. 3d at 1307.

Transgender youth prohibited from using restrooms corresponding with their gender identity also face a significantly greater risk of violence. A 2019 study found that transgender and non-binary students whose schools prohibited them from using

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<sup>27</sup> James et al., *supra* note 21, at 229. A recent study found that more than 60% of transgender participants avoided using a restroom in public, at work, or at school based on fear of discrimination. Justin Evan Lerner, *Having to “Hold It”: Factors that Influence the Avoidance of Using Public Bathrooms among Transgender People*, 46 HEALTH & SOC. WORK 260, 263 (2021). That study, citing data gathered as part of the 2015 U.S. Transgender Survey, also observed that 90% of transgender people who avoided the restroom had to “hold it” when needing to go, 52% avoided eating or drinking, 12% developed a urinary tract infection, and almost 3% experienced a kidney infection. *Id.* at 264; *see also* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 J. PUB. MGMT. & SOC. POL’Y 65, 75-76 (2013) (quantitative study documenting physical health effects of discriminatory restroom policies); Samuel Dubin et al., *Public Restrooms in Neighborhoods and Public Spaces: a Qualitative Study of Transgender and Nonbinary Adults in New York City*, SEX. RES. & SOC. POL’Y 7 (Mar. 17, 2021) (discussing transgender and nonbinary people’s adverse physical consequences as a result of delaying restroom use); Celia T. Hardacker et al., *Bladder Health Experiences, Perceptions and Knowledge of Sexual and Gender Minorities*, 16 INT’L J. ENVIRON. RES. & PUB. HEALTH 3170, 3179 (2019) (similar).



restrooms and locker rooms that matched their gender identity—*i.e.*, “restricted” transgender youth—“were significantly more likely to experience sexual assault than those whose facility use was not restricted.”<sup>28</sup> Thirty-six percent of restricted-restroom transgender youth reported being sexually assaulted in the prior year.<sup>29</sup> Restricted-restroom transgender girls were 2.49 times more likely to experience sexual assault than nonrestricted transgender girls; restricted-restroom transgender boys were 1.26 times more likely to experience sexual assault than nonrestricted transgender boys.<sup>30</sup> Such discrimination results in real harms: transgender youths who experienced restroom discrimination report higher rates of depression, suicidal thoughts, and attempts of suicide than those who have not.<sup>31</sup>

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<sup>28</sup> Murchison et al., *supra* note 19, at 5. Transgender and non-binary students already are at an increased risk of sexual assault compared to their cisgender peers. More than 25% of transgender and non-binary students reported being sexually assaulted in the prior year, compared to 15% of cisgender girls and 4% of cisgender boys. *Id.*; see also Diane Ehrensaft & Stephen M. Rosenthal, *Sexual Assault Risk and School Facility Restrictions in Gender Minority Youth*, 143 PEDIATRICS 1, 1-2 (2019).

<sup>29</sup> Murchison et al., *supra* note 19, at 5.

<sup>30</sup> Murchison et al., *supra* note 19, at 5.

<sup>31</sup> Myeshia Price-Feeney et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. ADOLESCENT HEALTH 1142, 1145-46 (2021). Conversely, studies examining transgender and nonbinary youth attending gender-affirming schools report over 25% lower risk of a suicide attempt within the past year. See *Research Brief: LGBTQ Youth in Small Towns and Rural Areas*, THE TREVOR PROJECT 2 (Nov. 2021), [https://www.thetrevorproject.org/wp-content/uploads/2021/11/The-Trevor-Project\\_-Rural-LGBTQ-Youth-November-2021.pdf](https://www.thetrevorproject.org/wp-content/uploads/2021/11/The-Trevor-Project_-Rural-LGBTQ-Youth-November-2021.pdf).

Discriminatory restroom policies thus impose severe physical and psychological tolls that compound the discrimination transgender students already face in their daily lives. For example, 40% of transgender and nonbinary youth report having been physically threatened or harmed due to their gender identity.<sup>32</sup> And among all transgender people who experienced multiple instances of discrimination or violence in the past year, 98% thought about committing suicide, and 51% attempted suicide.<sup>33</sup> Among respondents who reported being denied equal treatment because they were transgender, 61% had suicidal thoughts, and 13% reported suicide attempts because of the discrimination.<sup>34</sup> High exposure to anti-transgender discrimination doubled the odds of depression in transgender girls and women, nearly tripled the odds of PTSD, and increased eightfold the odds of stress caused by suicidal thoughts.<sup>35</sup>

The scope and severity of the range of harms many transgender students face is pervasive and troubling. Inclusive and nondiscriminatory school policies are

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<sup>32</sup> THE TREVOR PROJECT NATIONAL SURVEY, *supra* note 25, at 7.

<sup>33</sup> Jody L. Herman et. al., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey*, WILLIAMS INST. 27-28 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>.

<sup>34</sup> Herman et al., *supra* note 33, at 21.

<sup>35</sup> Erin C. Wilson et al., *The Impact of Discrimination on the Mental Health of Trans\*Female Youth and the Protective Effect of Parental Support*, 20 AIDS BEHAV. 2203, 2208-09 (2016).

crucial not only to ensure equal educational opportunities but also to save lives.<sup>36</sup> Discriminatory restroom policies, such as the Board's, create additional harm for transgender students and do not provide any safety- or privacy-related benefits to any student.

## CONCLUSION

*Amici* respectfully urge the Court to affirm the judgment below.

Dated: November 23, 2021

Respectfully submitted,

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<sup>36</sup> See Joseph. G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN xxi-xxv (2020) (students less likely to experience harassment, violence, or encounter anti-LGBTQ remarks at schools with transgender-inclusive policies).

**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the length limit requirements of Fed. R. App. P. 29(a)(5) because it contains 5,742 words (based on the Microsoft Word word-count function) excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman, 14-point type.

Dated: November 23, 2021

*/s/ Laura N. Ferguson* \_\_\_\_\_  
Laura N. Ferguson

**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2021, the foregoing was filed electronically with the Clerk of the Court using the Court's CM/ECF system. Service will be effectuated to all parties and counsel of record in this matter who are registered with the Court's CM/ECF system.

Dated: November 23, 2021

/s/ Laura N. Ferguson  
Laura N. Ferguson