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## I. INTRODUCTION AND INTEREST OF *AMICI CURIAE*

*Amicus curiae*, Equality Virginia (“EV”), is the leading advocacy organization in Virginia seeking equality for lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people. With over 35,000 supporters and more than 100 community-based organizational partners throughout the Commonwealth, EV provides impactful education and programs that seek to advance knowledge and empowerment among LGBTQ Virginians and allies. EV is committed to advocating for inclusive school environments where transgender and non-binary youth feel safe, celebrated, and supported in their education.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to defending the principles of liberty and equality embodied in the Constitution. *Amicus curiae*, the ACLU of Virginia—the ACLU’s state affiliate in the Commonwealth—has a long history of advocating for the civil rights and civil liberties of Virginians in both state and federal courts across the Commonwealth, including in the case of *Grimm v. Gloucester County School Board* in which the U.S. Court of Appeals for the Fourth Circuit established that equal protection and Title IX protect transgender students from school bathroom policies that prohibit them from affirming their gender. The ACLU of Virginia has approximately 28,000 members. As an organization that advocates for First Amendment liberties as well as equal rights for LGBTQ people, the ACLU of Virginia and its members have a strong interest in this case.

*Amici curiae* Arlington Gender Identity Allies (AGIA), Black Pride RVA, Black Transmen Inc., Diversity in Recovery, Diversity Richmond, Equality Loudoun Inc., Fairfax County Public Schools Pride, Fairfax Pride Liberation Project, Farmville Pride, Garden of Peace, Inc., GLSEN NoVA, GLSEN Richmond, He She Ze and We, Homoglobin, Let’s Talk, Metropolitan Community Church of Northern Virginia, NRV Trans Support & NRV Trans Support – Youth &

Families, Peter's Place RVA, PFLAG Blue Ridge, PFLAG Floyd, Planned Parenthood Advocates of Virginia, Rappahannock Region Transgender Support (RRTS), Richmond Triangle Players, Rockbridge LGBTQIA+ Alliance, Scaffolding Advocacy and Inclusive Leadership, Inc., Shenandoah LGBTQ Center, Side by Side, SMYAL, Southeastern Transgender Resource Center, Staunton Pride, Suffolk LGBT Center of Hampton Roads, Transgender Assistance Program Virginia, TransGender Education Association of Greater Washington, Us Giving Richmond Connections, Virginia Anti-Violence Project, Virginia Council on LGBTQ+, Virginia Equality Bar Association, and Winchester Pride are organizations and groups who support LGBTQ people in Virginia.

*Amici curiae* the Honorable Judy Le (Albemarle County), the Honorable Ellen Osborne (Albemarle County), the Honorable Barbara J. Kanninen (Chair, Arlington County), the Honorable Cristina Diaz-Torres (Arlington County), the Honorable David Priddy (Arlington County), the Honorable Lisa Larson-Torres (Chair, Charlottesville City), the Honorable Karl V. Frisch (Fairfax County), the Honorable Laura Downs (Vice Chair, Falls Church City), the Honorable Greg Anderson (Falls Church City), the Honorable Sonia Ruiz-Bolanos (Falls Church City), the Honorable Tanya K. Bhasin (Norfolk City), and the Honorable Elizabeth Warner (Stafford County) are members of school boards representing school divisions across the Commonwealth and Mr. Jason Kamras is Division Superintendent of the Richmond City Public Schools.

Through their work with individual students and their families, *amici* have come to understand the profound harm that occurs when transgender students are segregated from their cisgender peers. Experiences of transgender students and their families, described below, show that without inclusive policies, students face physical abuse, bullying, extreme emotional harm, and feelings of isolation and shame, among many other negative consequences, which further

impact the students' education and well-being. Appellees' Model Policies for the Treatment of Transgender Students in Virginia's Public Schools (the "Model Policies") aim to stop those harms. The student and family experiences below show that transgender students thrive when they are supported through policies that provide an inclusive school environment, and they further demonstrate the need for guidance across the state—through the Model Policies—to ensure equal treatment.

## II. LEGAL ARGUMENT

Courts have long recognized that separating students because of innate characteristics is harmful. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (such separation “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . .”). The same type of harm Black children experienced as a result of school segregation now harms transgender children. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 625 (4th Cir. 2020) (Wynn, J., concurring), *as amended* (Aug. 28, 2020), *cert. denied* No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021) (“I see little distinction between the message sent to Black children denied equal treatment in education under the doctrine of ‘separate but equal’ and transgender children relegated to the ‘alternative appropriate private facilit[ies]’ provided for by the Board’s policy.”). Courts have explicitly recognized the harm to transgender children when they are differentiated from their peers, such as by preventing them from using the facilities aligned with their gender identities. Notably, in *Grimm*, in which the Supreme Court has just denied the school board’s effort to seek review, the Fourth Circuit affirmed the district court’s finding that a transgender student was harmed by a policy that required him to use a separate, single-user restroom where he presented evidence that this felt like a “walk of shame” in that it was stigmatizing and isolating, that he developed urinary tract infections from avoiding the bathroom, that he was distracted from his classwork, that the stress resulted in suicidal thoughts

and hospitalization, and that he was excluded from after-school events because the bathroom was not available. *Id.* at 617; *see also Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (finding that a policy that segregated bathrooms based on sex assigned at birth “punishes transgender students” for defying gender stereotypes, and that forcing them “to choose between using a single-stall restroom in isolation from their peers or using a restroom that does not match their gender identity and causes them humiliation and insult”); *Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020) (recognizing that anxiety about bodily exposure in locker rooms is particularly experienced by transgender students and holding that a policy allowing a transgender student to use the facility associated with his gender identity was lawful); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 529 (3d Cir. 2018) (“When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening.”); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017) (recognizing that requiring a transgender student to use a single-user restroom invited invasive questions from peers, demanding he make “the unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or avoid use of the bathroom altogether at the expense of his health”).

Just as it is harmful to treat transgender students differently than their cisgender peers when it comes to access to bathrooms or locker rooms, transgender students are also harmed when schools treat them differently than their cisgender peers in other school settings—for example when schools tolerate harassment or fail to update their records to be consistent with the student’s gender identity, use the pronouns and names consistent with the student’s gender identity, or adopt policies to protect the students’ privacy. *See infra* Section III; *see also Brief of Amici Curiae*

*PFLAG Metro DC et al., Christian Action Network v. Qarni*, at 6-7, CL21000282-00 (Va. Cir. Ct. filed Mar. 29, 2021) (describing how schools can be hostile environments for transgender and gender non-conforming students). The Fourth Circuit held that the school board’s failure to update Mr. Grimm’s records discriminated in violation of Title IX:

Again, the Board based its decision not to update Grimm’s school records on his sex—specifically, his sex as listed on his original birth certificate, and as it presupposed him to be. This decision harmed Grimm because when he applies to four-year universities, he will be asked for a transcript with a sex marker that is incorrect and does not match his other documentation. And this discrimination is unlawful because it treats him worse than other similarly situated students, whose records reflect their correct sex.

972 F.3d at 619. With the Supreme Court’s denial of the school board’s petition for a writ of *certiorari*, the principles set forth in the Fourth Circuit’s opinion carry greater weight still. Moreover, it is clear that singling out transgender students because of their gender identity is harmful because “the Constitution does not tolerate *any* form of gender stereotyping on the basis of one’s birth sex and sexual organs.” *Adams*, 968 F.3d at 1303 (emphasis added).

Nor does allowing students to use facilities associated with their gender identity harm cisgender students. Policies that operate as though cisgender children need protection from the mere presence of transgender children perpetrate “a special kind of discrimination against a child that he will no doubt carry with him for life.” *Grimm*, 972 F.3d at 620. The Fourth Circuit rejected the appellant’s argument that allowing Mr. Grimm, a transgender boy, to use the boys’ restroom harmed the privacy interests of other students. *Id.* at 614. Not only was there no evidence that the bodily privacy of cisgender students was negatively impacted by Mr. Grimm’s use of the restrooms, but school boards across Virginia that had implemented trans-inclusive bathroom policies had “seen none of the negative consequences predicted by opponents of such policies.” *Id.* (internal quotation marks omitted). The Commonwealth-specific evidence set forth in *Grimm*

is particularly significant given the policy developed by the Commonwealth’s own Department of Education that has been challenged in this case. Moreover, the Fourth Circuit noted similar results across the country—trans-inclusive bathroom policies do not harm cisgender students. *Id.* See also, e.g., *Adams*, 968 F.3d at 1299 (“[Appellant’s] presence in the boys’ bathroom does not jeopardize the privacy of his peers in any concrete sense.”); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d at 533 (“[T]he presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces.”); *Hecox v. Little*, 479 F. Supp. 3d 930, 979-81 (D. Idaho 2020) (rejecting defendant’s argument that cisgender student athletes were harmed by allowing transgender student athletes to compete on the same team); *Matter of Childers-Gray*, 2021 UT 13, 487 P.3d 96, 125 n.44 (collecting cases, rejecting theoretical arguments that recognizing the needs of transgender people will negatively impact cisgender people).

It is clear that the Virginia Department of Education has both a compelling interest and a legitimate government purpose in propounding policies that shield transgender students from the harms described above. Opp’n to Appellants’ Mot. for Intermediate Relief, at 9, *Christian Action Network v. Qarni*, CL21000282-00 (Va. Cir. Ct. filed Mar. 29, 2021); *Parents for Priv.*, 949 F.3d at 1238 (“[T]he Student Safety Plan is rationally related to the legitimate purpose of protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status.”). It is also clear that Title IX’s prohibition against sex discrimination encompasses discrimination against transgender children. *Grimm*, 972 F.3d at 616-17 (citing *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), and explaining that Title VII of the Civil Rights Act of 1964 guides courts’ interpretation of Title IX). Thus, practices that segregate transgender students based on their gender identities—practices that the Model Policies aim to prevent—are clearly encompassed

within Title IX's prohibition on discrimination. *See, e.g., id.; Adams*, 968 F.3d at 1304-05 (holding that a policy that excluded a transgender boy from the boy's bathroom discriminated against him in violation of Title IX); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d at 533 ("We also agree with the School District's position that barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.").

### **III. STUDENT AND FAMILY EXPERIENCES SHOW THE NEED FOR MODEL POLICIES TO AVOID HARM TO TRANSGENDER STUDENTS**

The experiences of transgender students and their families in Virginia schools demonstrate the harm caused by segregated facilities and the lack of trans-inclusive practices. These experiences underscore the need for the Model Policies to ensure these students are not singled out relative to their cisgender peers.

#### **A. Amanda and J**

Amanda lives in Stafford, Virginia, with her husband and six children. They are a military family and Amanda's husband is a human resource specialist in the U.S. Army who is approaching retirement. Amanda is a stay-at-home mom who also dedicates her time to helping families find safe, healthy housing. She is also the co-leader of MilPride, a Modern Military Association of America program that helps support families with LGBTQ children. Her daughter, J, is transgender.

Amanda first learned her child was transgender when they were living in Fairfax and she saw her child's friends using the name J in a group chat. J was around 12 years old at this time. Amanda asked, "Who is J?" When her child responded, "They're talking about me. I'm J," Amanda asked J to give her some time to think. She elaborated, "Not because anything is wrong, but because I have no idea what to do." Amanda wanted to be supportive of J, but she realized she did not know how to help her child transition or who she could talk to. After doing some research,

Amanda found the American Military Partner Association, a nonprofit resource for the partners, spouses, families, and allies of America's LGBTQ service members and veterans. Amanda sent a message to the president of AMPA and she and J were invited to their National Gala. J thoroughly enjoyed the Gala, and continued to look forward to it every year thereafter. J also met some of her mentors through this event, and realized that she had a path to being in that room because of the people who had come before. Amanda says this was a hugely impactful event for her, because she was not only able to see J surrounded by people like her, but surrounded by LGBTQ adults who were living full lives and thriving. This full and happy life is all Amanda could want for J.

At the beginning of the seventh grade school year, J began her transition in school with the support of her family. This was rocky at best. There were some adults in the middle school who tried to be supportive. J's history teacher gave her space to come to his class for lunch, and the drama teacher at J's school offered to sponsor the Ally club that J was starting. J also had a small group of friends. However, the school as a whole was ultimately not supportive enough for J to feel safe and be successful. J was called slurs by other students at the school, and was once given a note telling her to harm herself. Amanda recalls the moment that was the last straw for her family:

“She was going somewhere with a hall pass and a teacher asked for the hall pass and it had J on it. The teacher was like, ‘This isn't your hall pass.’ And [J]’s like, ‘Yeah, it is.’ And the teacher was like, ‘This isn't your real name. What's your real name?’ J says, ‘My name is J.’ And [the teacher]’s like, ‘Your name obviously isn't J. What's your real name?’ And this sort of went on until her history teacher, I guess, caught the tail end of it and pulled her into his classroom.”

The history teacher called Amanda and informed her of what had happened. Amanda went to the school's administration to let them know this wasn't appropriate. The school backed up the teacher because J's name had not officially been changed in her school documentation. Amanda

pulled J from the school before the end of the year to ensure she would not have to endure further humiliation.

In eighth grade, J was able to switch to a new school, but unfortunately, the situation was not any better. Similar to her old school, there was support in the beginning from adults. Based on J's comfort, they allowed her access to single-stall teachers' bathrooms, both in her eighth grade classes and in the one class she took at the high school. Unfortunately, J faced a lot of harassment from other children and was punished for her reactions to such harassment. In one instance, J was physically attacked by another student. In the midst of a light-hearted argument over which restaurant had the best food, J playfully put her hands on another student. After being egged on by other students to defend himself, this child approached J and demanded to know if she was a boy or a girl. When she responded, "What does it matter to you?", the boy asked for a hall pass to leave the room and then waited for J to leave the classroom so he could assault her. Amanda was called to the school to pick up J but was told that J had had an allergic reaction. Amanda realized that J's swollen face was not the result of an allergic reaction when she saw bruises in the shape of handprints on J's neck. Amanda took J to the hospital where they found that she had a severe concussion, and this subsequently caused J to miss nearly six weeks of school. This concussion had also caused J to be unsure about what had happened to her in the moment, and so she had been unable to tell Amanda that she had been assaulted. Amanda was able to see the security footage of the assault and questioned how nobody saw this incident happen. The administrators claimed that this was due to the volume of students at the school, and that camera footage is only reviewed when an incident is reported. She even spoke to the school's guidance counselor who told her that J would have to be more mindful of how she interacted with other kids so that this would not continue to happen. Amanda felt as though her daughter was being told this was her fault and that

she would be held to a different standard of behavior than other children because she is transgender. The event that solidified the family's belief that the school system would not affirm J was when school administrators requested that J meet with her attacker for mediation. Amanda asked the mediator before the meeting if they would affirm J's name and pronouns, and the mediator said no. Amanda says they felt as though they would be risking J's mental health by placing her into a school that facilitated action that wouldn't affirm her, and so the family decided that they wanted no part in this mediation process.

After the attack, J returned to school and was angry, sad, hurt, and scared for her personal safety. She wondered how she could protect herself, and then wondered why she should have to since school was supposed to be a safe place to learn and grow. J continued in this school system through her junior year of high school. Amanda explains that after the attack, she did not feel like there were any options for J. She had already moved schools and her current school was supposed to be the better, more supportive school of the two. Still, the school division continued to not be supportive of J. At the beginning of J's freshman year of high school, Amanda received a call informing her that the high school did not have gender neutral bathrooms. Amanda was confused by this because J had been using gender neutral bathrooms at the high school the year before for the language class she took there. Amanda reminded the school's administration of this, and was able to get them to allow J to continue using the gender neutral restrooms she had used before. However, throughout the school year, Amanda received many calls from the school informing her that J was consistently late to her classes. This was because J was attempting to use the bathroom between classes but the bathrooms available to her were on opposite sides of the school. Again, Amanda had to push back on the administration in order to get J more time to walk between classes in order to accommodate the distance.

J's family moved to Stafford County during the Covid-19 pandemic, so J started her senior year of high school at a new school in a new county. J's second semester got off to a rocky start when, on the first day of a new class, one of her teachers used her birth name in front of J's classmates. It turns out that this teacher had been reading through J's individualized education plans and had seen J's birth name in parentheses next to "J" on some of the older forms. This teacher assumed that J was the birth name and that J's parents were not supportive of the new name. When the teacher asked for clarification on the first day of school, she outed J as transgender in front of all of J's classmates. Amanda immediately contacted the school to let them know that this was not appropriate, and informed them that this sort of conversation should always take place over email. The teacher apologized and explained her confusion, while a school administrator explained that having that conversation over email might not occur to teachers because the school's usual policy is for transgender students to have gender support meetings that include a consent form from parents. Amanda indicated that she understood that the school system was attempting to do its best with the gender support meetings, but that having to sign a form that says she consents to her child being her true self is very uncomfortable. J just wants to be treated like any other high school student and she and Amanda both know that the cisgender high school students do not have to get signed permission from their parents to be themselves. When J decided to attend school in-person during the last quarter, Amanda and J did end up having to attend a gender support meeting with the school so that administrators could ensure that they could accommodate her in-person.

Outside of this incident and conflict in policy, J has done well in school this year and has been able to bond with classmates and teachers in both the virtual and in-person classroom. She has since graduated and will be pursuing her dream of becoming a teacher by going to Virginia Commonwealth University (“VCU”) in the fall. J wants to become a supportive adult in the lives of children like her.



Figure 1. Pictured (from left to right) Amanda and J.

## **B. Marijean and G**

Marijean and Seth have been together since 2012 and married since 2016. They live in Charlottesville, Virginia, with Seth’s two children from a previous marriage. The youngest of the two, G, is a transgender boy.

In the summer of 2018, when he was 11 years old, G came to his dad and step-mom and said, “I am a boy. My name is G. I use he/him pronouns.” G had previously come out as non-binary and expressed the desire to use they/them pronouns earlier in the spring, but at the time, the adults didn’t quite know how to respond and were dealing with some other serious family matters. They responded cautiously, respecting G’s assertion of identity, but were pretty uncomfortable with it at first and hoped that it would not be long-standing. By the time G approached his dad and step-mom again to let them know that his name was G and that his pronouns were he/him, Marijean and Seth were in a place where they could focus on their youngest child/step-child. Marijean says she started doing research, which quickly dispelled her original concerns that G’s

coming out was based on a need for attention. However, Marijean did not know any other transgender people at this time, and was unsure what being transgender or non-binary meant. She was especially concerned about what this could mean for G's future, and was upset to think that G might suffer mental anguish, discrimination, and unkindness from other people.

In the very beginning, Seth and G's biological mother had a more difficult time accepting that G was transgender and avoided the issue in the hopes that it might go away. Marijean says that Seth's initial hesitancy made working on acceptance of G more stressful. That summer was a pivotal moment for the family. Before G had come out as a boy and was still using they/them pronouns, Marijean and Seth had hired a local 19-year-old woman to act as a driving babysitter for G and his sibling. She spent time with the family and grew to know them well. One day, she asked to sit down and have a conversation with Seth and Marijean. Marijean remembers the young woman emphatically saying to them, "You have to use their pronouns." Hearing from this young woman who had spent so much time with his children was a big moment for Seth, and he began making more progress in accepting his transgender child. Not long after the conversation with the babysitter, Marijean went to a transgender discussion panel at the Waynesboro Public Library and was able to learn a variety of ways she and her husband could support G. Specifically, she heard from the three panelists that living their truth made them much happier, and that all three were successful professionally and had rich social networks. The panelists also shared that transitioning later in life was more difficult for them, and that puberty-blockers and hormone therapy are often life-saving for transgender people. She remembers sitting Seth down and listing all of the things they needed to do to help G be successful in his transition.

G began his social transition at school at the end of seventh grade and he began taking puberty blockers around the same time. Seth and Marijean thought the transition with the school went well. His name and pronouns were respected, and students and teachers were sufficiently educated about transgender identity. G was also permitted to dress however he chose and had access to gender-neutral restrooms. Unfortunately, the return to school the next year was not what they were expecting. G was violently assaulted by a classmate, resulting in G being homeschooled for the remainder of eighth grade. This was an incredibly difficult year for him.



Figure 2. Pictured (from left to right) G and Marijean.

Marijean and Seth wanted to do everything they could to make entering high school this year easier for G. This past summer, Seth helped G legally change his name and gender marker. This school year has been difficult due to the Covid-19 pandemic, but G has persevered and gotten through it. Both teachers and his classmates use G's correct pronouns, he is accepted in social groups with other students, and teachers have made significant effort to ensure that G receives help with his schoolwork. He has joined the boys' tennis team and is loving every minute of it. Because of the support he has received from his family and school system, he is excited to return to non-virtual school next year and be his true self.

### C. **Brigitte and K**

Brigitte and her family live in Floyd, Virginia. She and her husband moved there when their two children were young because they wanted to live in an area that was great for raising a family, and where they could potentially find support and community. They have happily raised their family there for the last 18 years. Their youngest son, K, is transgender.

When K was twelve, he came out to his parents and let them know that he was a boy. Brigitte remembers feeling cautious about how to handle her child coming out as transgender. K is on the autism spectrum and at the time was still playing make-believe games and trying different personas, so Brigitte wanted to ensure that they did not rush into anything, just in case. Over time, it became clear that K's gender identity was insistent, persistent, and consistent. Both Brigitte and her husband wanted to be supportive of K, but struggled with figuring out how to do so. They also grappled with their own worries about their son's safety, and in many ways grieved the loss of who they thought their child was.

K socially transitioned during seventh grade, which had its ups and downs. While K felt strongly about his decision to socially transition, it was a difficult process for the family as they were concerned with how their son would be perceived and whether he would have a strong peer group. K's father worked as a guidance counselor in his school, so K was fortunate to have that support readily available. However, the school would unfortunately not allow any discussion of LGBTQ issues. This blocked K and his teachers from being able to explain to his peers what was happening, and he had to fend off questions from other students by himself. Brigitte says that some teachers were supportive and used K's name and pronouns, but because of the rule against speaking about LGBTQ issues, they were unable to do much else to normalize K's experience. Overall, Brigitte says that the school did not provide any support to her and her husband as they tried to help K navigate his transition.

Starting high school was just a continuation of these challenges. Brigitte remembers asking K how his days at school were and his response would always be, “Bad.” When Brigitte asked what was wrong or tried to get background information from K’s sister, she discovered that while K wasn’t experiencing any overt bullying, he was isolated and was merely being tolerated by his peers and teachers. Sometimes, teachers at pick-up would use the wrong name and pronouns and would fail to address their mistake, and many students would not include K or talk to him at all during the school day. K didn’t feel like he fit in anywhere and it began to take an obvious toll on his mental health. Brigitte says she remembers seeing him come home from school and isolate himself from the family so he could decompress. He was no longer invested in doing well in school and was only doing the minimum required to pass. Brigitte became so concerned about K’s wellbeing that she started looking into private schools. “I was prepared to ruin ourselves financially to get him out of that school,” she says.

Then Brigitte found Springhouse Community School. She remembers looking at their website and talking with the head of school, Jenny Finn, and thinking this was a perfect fit for K.

They were very fortunate that a community member reached out to sponsor K so that this opportunity could be possible. The Springhouse Community School focused on making sure K was comfortable, part of the group, celebrated, and safe, which was exactly what K and his family were looking for. The school is also very



Figure 3. Pictured (from left to right) K’s sister, Amity, and K.

open and transparent about their support of LGBTQ students, and understands the resources and supports that K and his parents need in order for K to thrive. Now when Brigitte asks K how school is, he talks the whole drive home about how much he loves it.

K is doing well now and is excited about learning again. Brigitte is very grateful she has been able to make this change for her family, but she also recognizes that not every family will have the community support they had or the funds to send their transgender child to an affirming private school. She wants every child to be able to feel celebrated and part of the community the way K does at his new school.

**D. Joanna and L**

Joanna<sup>1</sup> is a federal civil service employee who moved to the Hampton Roads area a few years ago with her husband and two children at the time. They originally settled in York County when her oldest was about to go into kindergarten and her second child was about three years old. They currently reside in Newport News with their three children. Her second child, L, is a transgender girl.

When Joanna and her family moved to York County, they decided to put their children in a private Lutheran school because their oldest child needed some additional support in kindergarten with respect to fine and gross motor skill development. Their second child, L, was in the school's preschool program. At age 4, L was already showing interest in stereotypically girly colors, toys, and clothes. Joanna and her husband were trying to show their open-mindedness by letting both children know that they could like whatever they wanted, and that it didn't have to say anything about their gender. Joanna was also very particular when speaking to teachers to

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<sup>1</sup> "Joanna" is a pseudonym, which is being used because of the potential harm of disclosing that her daughter is transgender.

ensure that they did not discourage the way L played. The teachers were very open to supporting L's interests, and always made sure to reinforce to the class that anyone can play with any toys that they want to. As time progressed, L kept asking Joanna and her husband, "When do boys become girls? When do you get to switch?" So, Joanna and her spouse decided to keep a record of these statements to determine how consistent L's thoughts were on gender. L also began to ask if dresses would be okay to wear to school. Joanna says that her desire to protect and her desire to affirm her child came into conflict, so she decided to come up with a compromise. Since the school had uniforms, she would have L wear the uniform at school, but L could wear dresses on the weekends. This seemed like a good compromise for a while, but L soon began talking about other body-related concerns. Therefore, Joanna thought it might be a good idea to talk to someone who had experience raising a transgender child.

Joanna reached out to a parent of a transgender child in the Richmond area. She explained that she wanted to ensure that any sort of transition was really L's idea, but she wasn't sure how to have an appropriate conversation with her four-year-old. The other parent said, "Have you considered explaining that some boys have penises and some have vaginas, while some girls have vaginas and others have penises?" Joanna explained that it hadn't occurred to her to frame it that way, and she and her spouse decided to have this conversation with both of their children, family meeting style. This way, nobody would feel singled out and it could just be a conversation about bodies if L was not interested. As it turns out, this was what L needed to hear, because during the discussion she exclaimed, "That's what I am! I'm a girl with a penis!" She then asked her parents to tell the principal and teachers to make an announcement so that everyone could stop saying she was a boy at school. L and her family attended a family wedding shortly after this conversation, and L was elated to wear a dress and present as female around others. The family was thrilled to

see L so happy, but were also nervous about how others might treat her and how they could best protect her.

Joanna went to L's school and had a conversation with the administration about L being transgender. They were very honest about not having handled anything like this before, but they expressed how much they adored L and were willing to support her in any way they could. Both teachers and administration used L's name and pronouns and made notes on school rosters to ensure substitutes would not deadname or misgender her. Joanna was happy that they were so supportive and that L would not have to feel like she could not be herself at school, but she knew that her children would not be in private school forever. She and her husband wanted their children to grow up around people of diverse backgrounds and experiences, so they were planning on placing them in the public school system. Joanna reached out to York County Public Schools to talk to them about L joining the school division for kindergarten and to see what their policies for transgender students were. The administration informed Joanna that they had the same policies as Gloucester County. Because of the Gavin Grimm case, Joanna was familiar with the policies and did not think the school division would be able to support her daughter. The administration informed her that kindergarten would not be an issue for L, because each class had a single stall restroom in it. Joanna tried to get them to see her perspective:

“What about when she's at lunch? What about when they go to gym class? What about any of the years after kindergarten? Everything you're saying gets back to 'she is not a girl in the view of the policy,' that there is something different or other about her and that's not going to work for us.”

L's parents began considering moving to another locality with more diverse schools and better policies on supporting transgender students. Joanna found this difficult at times, because

she soon realized that many school divisions did not have overarching policies and so the family would have to look into individual schools. Joanna and her spouse met with the Newport News Director of Elementary Education about the division's policies for transgender students. The Director informed them that the division also did not have an overarching policy, but she was willing to direct L's parents to the two elementary schools that she thought might be the most welcoming to transgender students.

Joanna went to the two elementary schools and met with each principal. The principal at the first school was outwardly nice, but also focused mostly on L's ability to use single stall bathrooms in kindergarten. The principal ultimately ended the conversation by bringing up her concern about what other parents might do or say if they found out L was transgender. Joanna called the Director of Elementary Education on her way to the next school to let the Director know how poorly the interaction had gone. The Director assured her that she was confident that Joanna would have a better time in her meeting at the second school. Joanna met with the principal at this school and was grateful to hear that the school already had transgender-friendly policies in place because they had past experience supporting gender-diverse students. L would be able to use the girls' bathroom, and her teachers would use her correct name and pronouns. Joanna decided that the second school would be the best place for her kids, and so the family officially moved. Joanna took it upon herself to meet with all of L's teachers and her oldest child's teachers to ensure they understood the situation and would be supportive. She was met with open minds and support across the board.

Joanna and her husband are very glad to have found a school that is welcoming and affirming to L. They also recognize that not everyone has the same freedom to move and change school divisions to ensure their child feels safe and supported. They want to do everything she

can to protect her children, but the burden to ensure that L is treated like other children falls entirely on Joanna and her husband in the absence of affirming policies. Joanna says that she often feels like she has to be two steps ahead of any given situation. They will have to anticipate how to address the school when L's classes discuss bodily changes or if L ever wants to participate in sports. Having an overarching policy or set of guidelines to protect transgender students would take the strain off of families like theirs and would help better support kids like L.

**E. Davina and T**

Davina is an educator and the mother of two children. She and her family live in the Fairfax/Loudoun area. Her oldest child, T, is a transgender girl. T came out to Davina in early October when she was in sixth grade. Davina remembers T approaching her and saying, "Mommy, I'm a girl." Davina was ready to immediately start supporting her daughter; she wanted to learn as much as she could and make a plan on what the next steps would be for T.

The next day at school, T told all of her classmates that she was a girl, but they were not nearly as ready to accept T as her mother was. Overall, the school was not prepared to adequately serve a transgender child. There were a few teachers that antagonized T. At the beginning of her social transition, T would wear wigs to school as a part of her gender expression. One teacher told her to stop playing with the wig or she would be asked to remove it, while another told her she was not allowed to wear Halloween costumes to class. Other teachers just did not know how to respond in order to support T. In one instance, T was on the playground and her wig came off. She was humiliated and emotional, to the point of writing suicidal notes when she came back to the classroom. The teacher did not react to the situation or to the notes. T was so overwhelmed that she got up and left the school to walk home. Davina received a call from the school informing her that they could not find T. Davina remembers saying, "You have five seconds to find my kid" before making a bee line to her home, assuming that was where T was headed. Fortunately, she

was right and caught up with T, who told her everything that had happened. Davina called the principal to tell them that this was not acceptable. She had a meeting with the administration and the teacher to ask them what they would do for any other child in an embarrassing situation: “I’m walking them through, I said, ‘What would you have done and why is it different because she’s transgender?’ And they couldn’t answer me.”

When T started seventh grade and moved to middle school, Davina decided to take a new approach. Every time she spoke with the administration, she made sure to discuss her daughter’s rights as inevitable, using phrases such as “when she goes to the girls’ bathroom” or “when she uses the girls’ locker room.” She wanted to be sure the school knew that her daughter being treated like other girls was the only option. Still, the school kept making T feel different by asking about the transition process, which made her feel as though she had to keep disclosing her genital status. T didn’t understand why the school was asking her these questions. She doesn’t examine people or question them about their genitals when she uses the bathroom, so why would that be allowed to happen to her? She kept telling her mom, “I want people to treat me like a girl. I have no problem being transgender, but they can’t handle it.” Davina just kept reaffirming to T that nobody had the right to ask her that, and she didn’t have to disclose anything that made her uncomfortable.

School remained difficult for T. Her old name was used in the yearbook, even when Davina attempted well in advance to make sure that this would not happen. Substitute teachers were given rosters that did not include T’s real name. The administration claimed that T needed more services than they could provide, so she was placed in an alternative education program. When she would become overwhelmed in class by how poorly she was being treated, she would often retreat to the bathroom to call her mom. At one point, this resulted in T being cornered in the bathroom by three adults, including the School Resource Officer. All of this left T feeling scared and isolated. T

eventually attempted suicide. Davina was so concerned about her daughter that she tried everything. T switched middle schools three times and even went to live with her aunt in another state for a period of time.

Any success that T has had has been because of her willingness to demand to be treated fairly, her mother's support, and the friends she has made along the way. When T was early on in her transition, she and her mother went to a school board meeting to speak out about the transgender bathroom policies. They ended up on the news, and the community at large learned that T was transgender. They received generally positive responses and Davina and T met some of their closest friends and allies through that experience. T's peer group in school has been very supportive of her. When one of the schools she attended was questioning whether she should be able to use the girls' locker room under the assumption that it would make other girls uncomfortable, T created a petition to be allowed to use the locker room. So many other girls signed the petition, that there was no question that T's peers saw her as the girl she is and were fine sharing that space with her.

Still, the burden of care has fallen predominantly on T's and Davina's shoulders. To guarantee that T is treated like other girls, they have to initiate conversations about policy with the schools. If policies to support transgender students were already in place in each school division, parents and children would not have to hold the responsibility of educating educators.

#### **IV. THE MODEL POLICIES AIM TO PREVENT THE TYPES OF HARM EXPERIENCED BY THESE STUDENTS AND THEIR FAMILIES**

The experiences of transgender students and their families in Virginia schools demonstrate the harm that students face without uniform protections like those offered in the Model Policies. Without clear protections, transgender children risk physical and sexual harm when they attend school. *See supra* Section III.B, at 14 (explaining that G was sexually assaulted); Section III.A, at

9 (explaining that J was physically assaulted and required hospitalization). Without these protections, transgender students suffer isolation and stigma when they are differentiated from their peers. *See supra* Section III E, at 23 (describing how T frequently felt humiliated, scared, and isolated, which caused her to attempt suicide, and her teachers bullied her); Section III.C, at 16 (describing how K felt isolated and the effect on his mental health); Section III.A, 8-11 (describing embarrassment and shame when J was questioned about name on hall pass and outed as transgender during roll call); *Grimm*, 972 F.3d at 617 (describing how segregation leads to stigma and isolation); *Adams*, 968 F.3d at 1296 (describing how segregation leads to “humiliation and insult” of transgender students). Without the protections of the Model Policies, transgender students’ education suffers. *See supra* Section III.C, at 16 (when K was in an unsupportive school, he only did the minimum required to pass); Section III.A, at 9 (J missed six weeks of school after she was assaulted); Section III.E, at 23 (T left school after isolation and suicide attempt). *Compare* Section III.A, at 10 (J was frequently late to class because the bathrooms she was permitted to use were on the opposite side of the school) *with Whitaker*, 858 F.3d at 1045 (describing the harm from missing class to use the prescribed bathrooms). Without the Model Policies, students and their families must move to shop for schools with supportive policies (Joanna and L, and Davina and T), leave the public school system altogether (G and K), or suffer harm in unsupportive schools (Amanda and J). Further, without the Model Policies, parents bear the burden of anticipating risks to their children and proposing school policies to deal with them on an *ad hoc* basis. *See supra* Sections III.D and III.E (describing the burdens on Joanna, Davina and T). Uniform policies ensure equity and relieve the strain on parents who may not have the resources to meet this heavy burden.

In contrast to the harms described, the experiences of transgender students and their

families also underscore the benefits of inclusive policies, like those contained in the Model Policies. L thrived after relocating to a new school, which supported her, used the correct pronouns and permitted her to use the bathrooms associated with her gender identity. *Supra* Section III.D, 20-21. After G moved to a school where he was supported by his teacher and classmates, and legally changed his name and gender marker, he is doing well in school and loves playing on the tennis team. *Supra* Section III.B, at 14. Brigitte noticed a stark improvement in K’s mood after he switched to a more supportive school—he became excited about learning and their car rides home transformed from silent and sullen to talkative. *Supra* Section III.C, 16-17. Similarly, after moving to a supportive high school, despite some isolated hurdles, J has done well and will attend VCU this fall. *Supra* Section III.A, at 12. By contrast, T’s school situation improved only through the support of her peers and community members. *Supra* Section III.E, at 23. These positive experiences should not be isolated or hard fought. Rather, the Virginia Department of Education should be permitted to propound Model Policies that ensure that transgender students across the Commonwealth have access to quality education where they are supported and not unlawfully differentiated from their peers.

## **V. CONCLUSION**

For the reasons set forth above, *amici* respectfully request this Court acknowledge the importance of the Model Policies in preventing harm to transgender students and deny Appellants’ Motion for Intermediate Relief.

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Respectfully submitted,

**COHEN MILSTEIN SELLERS & TOLL PLLC**

*/s/ Alison Deich*

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