

Appeal Nos. 20-35813, 20-35815

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

LINDSAY HECOX; JANE DOE, with her next friends
Jean Doe and John Doe,
Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as
Governor of the State of Idaho, et al.
Defendants-Appellants,

and

MADISON KENYON; MARY MARSHALL,
Intervenors-Appellants.

On Appeal from the United States District Court for the District of Idaho,
District Court Case No. 1:20-cv-00184-DCN, Hon. David C. Nye

**BRIEF FOR *AMICI CURIAE* ALTRIA GROUP, INC., AMALGAMATED BANK,
ASANA, INC., BEN & JERRY'S HOMEMADE, INC., LUSH COSMETICS LLC,
NIKE, INC., AND THE BURTON CORPORATION
SUPPORTING APPELLEES AND URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amici curiae* make the following disclosures:

Altria Group, Inc., a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

Amalgamated Bank, a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

Asana, Inc., a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

Ben & Jerry's Homemade, Inc. is a wholly owned subsidiary of Unilever USA, Inc. Unilever USA, Inc. is a wholly owned subsidiary of Unilever PLC, a United Kingdom corporation. No publicly held company holds 10% or more of the stock of Unilever PLC.

Lush Cosmetics LLC has no parent company and is a privately held company.

Nike, Inc., a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

The Burton Corporation has no parent company and is a privately held company.

TABLE OF CONTENTS

AUTHORITY TO FILE AND RULE 29(A)(4)(E) STATEMENT	1
INTEREST OF AMICI CURIAE	1
INTRODUCTION	3
ARGUMENT	5
I. Protection for Gender Identity Has Been Well Established for Decades in Both the Law and Corporate Non-Discrimination Policies	5
II. Laws that Discriminate Based on Transgender Status and Gender Identity Harm <i>Amici's</i> Businesses	10
A. Anti-Transgender Discrimination Harms <i>Amici's</i> Employees	10
1. H.B. 500 Harms the Transgender Children of Employees	11
2. H.B. 500 Harms Transgender Employees	15
B. Anti-Transgender Discrimination Harms <i>Amici's</i> Ability to Recruit and Retain Employees	16
C. Anti-Transgender Discrimination Harms <i>Amici's</i> Interest in a Well-Prepared Workforce	17
D. Anti-Transgender Discrimination Harms <i>Amici's</i> Bottom Line	19
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Adams v. Sch. Bd. of St. John’s Cnty.</i> , 968 F.3d 1286 (11th Cir. 2020).....	7
<i>Bostock v. Clayton County</i> , 590 U.S. ___, 140 S. Ct. 1731 (2020)	6
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954).....	12, 17
<i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020).....	7
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003) (O’Connor, J., concurring)	12
<i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921 (N.D. Cal. 2010).....	15
 Rules	
Fed. R. App. P. 29(a)(2).....	1
Fed. R. App. P. 29(a)(4)(E).....	1
 Statutes	
2020 Idaho Sess. Laws 970–73	4
Bellevue City Code, tit. 1, ch. 7	9
Boise City Code, tit. 5, ch. 15	8
Cal. Civil Code § 51(b).....	7
Cal. Civil Code § 51(e)(5).....	7
Cal. Gov’t Code § 12940	7

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Coeur d’Alene City Code, tit. 9, ch. 9.568

Colo. Rev. Stat. § 2-4-401(13.5)7

Colo. Rev. Stat. § 24-34-402.....7

Conn. Gen. Stat. § 46a-60(b).....7

D.C. Code § 2.1401.02(12A)9

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D.C. Code § 2-1402.319

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Del. Code Ann. tit. 19, § 7117

Driggs City Code, tit. 5, ch. 5.....9

Guam Code Ann. § 5201.....7

Hailey City Code, tit. 9, ch. 9.18.....9

Haw. Rev. Stat. § 368-17

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Idaho Code § 33-6203(3)14

Idaho Falls City Code, tit. 5, ch. 11.....8

Ill. Comp. Stat. § 5/1-103(O-1)7, 8

Ill. Comp. Stat. § 5/1-103(Q)7

Ill. Comp. Stat. § 5/1-102.....8

Iowa Code Ann. § 216.67

Iowa Code Ann. § 216.77

Ketchum City Code, tit. 7, ch. 9.24.....8

Lewiston City Code, ch. 38.....8

Mass. Gen. Laws ch. 151B, § 4.....7

Md. Code Ann., State Gov’t § 20.606(a)(1)7

Me. Stat. tit. 5, § 4552.....7, 8

Me. Stat. tit. 5, § 4553(5-C)7

Me. Stat. tit. 5, § 4553(9-C)7

Meridian City Code, tit. 1, ch. 15.....9

Minn. Stat. § 363.03.....7

Minn. Stat. § 363A.03.....8

Minn. Stat. § 363A.11, subd. 1.....8

Minn. Stat. § 363.08.....7

Moscow City Code, tit. 10, ch. 19.....8

N.H. Rev. Stat. Ann. § 354-A:77

N.J. Stat. Ann. § 10:5-4.....7, 8

N.J. Stat. Ann. § 10:5-5(rr)7

N.J. Stat. Ann. § 10:5-12.....7

N.M. Stat. Ann. § 28-1-77, 8

N.Y. Exec. Law § 296.....7

Nev. Rev. Stat. § 613.3307

Or. Rev. Stat. § 100.7.....8

Or. Rev. Stat. § 174.100(7)7

Or. Rev. Stat. § 659A.030(1)(a)7

Or. Rev. Stat. § 659A.4038

P.R. Laws Ann. tit. 29, § 1568
 Pocatello City Code, tit. 9, ch. 9.36.....8
 R.I. Gen. Laws § 1.1, 28-5-77
 R.I. Gen. Laws § 11-24-2.....8
 R.I. Gen. Laws § 11-24-2.1(h)8
 R.I. Gen. Laws § 28-5-41.17
 Sandpoint City Code, tit. 5, ch. 2, § 10.....8
 Utah Code Ann. § 34A-5-106(1)(a)(1).....7
 Va. Code Ann. § 2.2-3905B8
 Vt. Stat. Ann. tit. 1, § 1448
 Vt. Stat. Ann. tit. 9, § 4502(a).....8
 Vt. Stat. Ann. tit. 21, § 4957
 Wash. Rev. Code § 49.60.040(27)7
 Wash. Rev. Code § 49.60.180.....7
 Wash. Rev. Code § 49.60.215.....8

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<https://tinyurl.com/k4jal4h>19
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AUTHORITY TO FILE AND RULE 29(A)(4)(E) STATEMENT

This brief is authorized to be filed under Fed. R. App. P. 29(a)(2) because all parties have consented to its filing. Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amici curiae* and their counsel, contributed money that was intended to fund preparing or submitting the brief.

INTEREST OF *AMICI CURIAE*

The seven businesses that join this brief as *amici* collectively employ millions of valued employees upon whom the companies' success depends. *Amici* are committed to fostering diverse and inclusive workplaces, where all of their employees—including those who identify as lesbian, gay, bisexual, transgender, or queer (“LGBTQ”)—are treated equally and with respect, and feel secure expressing themselves. In support of that commitment, *amici* maintain robust antidiscrimination policies that prohibit discrimination on the basis of, *inter alia*, sexual orientation and gender identity.

Amici invest in a diverse workforce not only because their values proscribe discrimination in any form, but also because creating and

maintaining diverse and inclusive workplaces benefit their employees, who are more productive in inclusive workplaces. In short, ending discrimination is good for employees, good for business, and good for the United States and world economy.

But the commitment to ending discrimination cannot be limited only to equality in the workplace; *amici* support equality in all areas of the law because *amici*'s employees can be negatively impacted by discrimination in *any* area of their lives, including barriers that may be faced by their children and loved ones. In addition, young people who face discrimination—especially in the classroom or in athletics—are less likely to become committed and productive employees as adults. Because of the fear of unequal treatment these individuals face, they may be less able to achieve their full potential in their future professions.

Therefore, *amici* oppose unequal treatment of individuals in any arena because of their sexual orientation or gender identity. LGBTQ employees, students, and athletes—indeed all of society—only can excel when workplaces and all aspects of American life are free from discrimination.

INTRODUCTION

H.B. 500 must be called out for what it is: blatant discrimination against transgender women and girls. In passing H.B. 500, Idaho became the first and only state to categorically bar the participation of transgender women and girls in women’s student athletics. Prior to the enactment of H.B. 500, no state or athletic association completely barred transgender student athletes from participating in athletics consistent with their gender identity. Likewise, no state or university imposed a verification process for all competitors in women’s athletics whose sex is disputed.

Idaho’s categorical bar to transgender girls and women stands in stark contrast to the policies of the major athletic bodies that regulate sports both nationally and globally—including the National Collegiate Athletic Association (“NCAA”) and the International Olympic Committee (“IOC”)—which allow transgender women to participate on women’s sports teams and in women’s events once certain criteria are met.¹

¹ For example, a transgender female student-athlete being treated with testosterone suppression medication may compete on an NCAA women’s team after completing one calendar year of testosterone

The animus behind H.B. 500 is clear: the law discriminates against transgender women in design, operation, and effect, and excludes transgender women from athletic competition.² By denying transgender women the ability to participate equally because of who they are, it condones, reinforces, and affirms the status of transgender individuals as outsiders who deserve hostility and exclusion from their peers. The undersigned *amici* do not and cannot condone such

suppression treatment. NCAA, *NCAA Inclusion of Transgender Student-Athletes* (2011), available at www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf. Under IOC rules, those who transition from male to female are eligible to compete in the female category provided that, *inter alia*, the athlete demonstrates that her total testosterone level in serum is below a particular level for at least 12 months prior to her first competition and remains below a particular level throughout the period of desired eligibility to compete in the female category. International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (Nov. 2015), available at https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

² Further evidence of Idaho's animus is the fact that the Legislature also passed another bill, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. 2020 Idaho Sess. Laws 970–73. Governor Little signed H.B. 500 and H.B. 509 into law on the same day. *See* 2020 Idaho Sess. Laws 970 (noting that H.B. 500 was approved as law on March 30, 2020); 2020 Idaho Sess. Laws 973 (noting that H.B. 509 was approved as law on March 30, 2020).

discrimination on the playing field, in schools, at the office, or in any other arena.

ARGUMENT

I. Protection for Gender Identity Has Been Well Established for Decades in Both the Law and Corporate Non-Discrimination Policies

At least three of the *amici* supporting the Appellants (“Appellant *Amici*”) have suggested that gender identity is not a workable legal standard for a discrimination cause of action because it is, they claim, not “objectively verifiable.” Br. of *Amici Curiae* Medical Professionals 11–13; Br. of *Amicus Curiae* Women’s Human Rights Campaign 6–12; Br. of *Amicus Curiae* Women’s Liberation Front 9–23. Indeed, *Amicus* The Women’s Liberation Front goes so far as to label gender identity an “idiosyncratic,” “subjective,” and “quasi-spiritual” concept. Br. of *Amicus Curiae* Women’s Liberation Front 9, 11. Appellant *Amici* are mistaken. Gender identity is a well-established concept that has won substantial acceptance in the law and in corporate diversity and human rights policies.

Most recently, the United State Supreme Court confirmed that transgender status is protected from discrimination under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 781, in *Bostock*

v. Clayton County, 590 U.S. ___, 140 S. Ct. 1731 (2020). There, the Supreme Court held that an individual’s lesbian, gay, bisexual, or transgender status is not relevant to employment decisions. Thus, there simply is no basis in law for any of the Appellant *Amici* to argue that transgender status does not exist. Moreover, as the Court noted in *Bostock*, “it’s irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.” 590 U.S. at ___, 140 S. Ct. at 1744.

Although the current case before this Court does not deal directly with employment, the *Bostock* analysis holds true. Regardless of how appellants and their *amici* frame the argument, H.B. 500 is not about fairness in sports or about balancing competitive advantages. Rather, it is about targeting transgender individuals—and those whom others suspect may be transgender—based on stereotyped assumptions about appearance and dress and excluding them from aspects of life available to others.

Other Circuits that recently have considered laws and policies targeting transgender students have found that such laws violate the Constitution and are based on gender stereotypes. *See Grimm v.*

Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020); *Adams v. Sch. Bd. of St. John's Cnty.*, 968 F.3d 1286 (11th Cir. 2020). This type of bias and stereotyping is inconsistent with the Constitution and with the corporate equal employment opportunity policies of the *amici*, which prohibit such discriminatory behavior.

Transgender status also has been protected through legislative enactments. Beginning with Minnesota in 1993, at least 22 states, the District of Columbia, Puerto Rico, and Guam have enacted statutes barring discrimination in employment based upon gender identity.³ At least twelve states and the District of Columbia have also forbidden discrimination based upon gender identity in public accommodations.⁴

³ Minn. Stat. §§ 363.03, 363.08; Cal. Gov't Code § 12940; Col. Rev. Stat. §§ 2-4-401(13.5), 24-34-402; Conn. Gen. Stat. § 46a-60(b); Del. Code Ann. tit. 19, § 711; Haw. Rev. Stat. § 368-1; 775 Ill. Comp. Stat. §§ 5/1-103(Q), 5/1-103(O-1); Iowa Code Ann. § 216.6; Me. Stat. tit. 5, §§ 4552, 4553(5-C), 4553(9-C); Md. Code Ann., State Gov't § 20.606(a)(1); Mass. Gen. Laws ch. 151B, § 4; Nev. Rev. Stat. § 613.330; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. §§ 10:5-4, 10:5-5(rr), 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. §§ 174.100(7), 659A.030(1)(a); R.I. Gen. Laws §§ 28-5-41.1, 28-5-7; Utah Code Ann. § 34A-5-106(1)(a)(1); Vt. Stat. Ann. tit. 21, § 495; Wash. Rev. Code §§ 49.60.040(27), 49.60.180; Va. Code Ann. § 2.2-3905B; D.C. Code §§ 2-1402.11, 32-408; P.R. Laws Ann. tit. 29, § 156; 22 Guam Code Ann. § 5201.

⁴ Cal. Civil Code §§ 51(b), 51(e)(5); Haw. Rev. Stat. § 489-3; 775 Ill. Comp. Stat. §§ 5/1-103(O-1), 5/1-102; Iowa Code Ann. § 216.7; Me. Stat.

In addition, over 100 localities have adopted ordinances prohibiting discrimination against transgender people, including: New York City, Boston, Chicago, Detroit, San Francisco, Dallas, Philadelphia, Atlanta, Milwaukee, Seattle, Montgomery County, Maryland, Broward County, Florida, Tucson, Iowa City, Louisville, Ann Arbor, Toledo, Kansas City and Charleston.⁵

Indeed, the Idaho law under review here is an outlier even in Idaho. At least a dozen cities in Idaho have adopted ordinances banning discrimination based upon gender identity.⁶

tit. 5, § 4552; Minn. Stat. §§ 363A.03, 363A.11, subd. 1; N.J. Stat. Ann. § 10:5-4; N.M. Stat. Ann. § 28-1-7(F); Or. Rev. Stat. §§ 100.7; 659A.403; R.I. Gen. Laws §§ 11-24-2.1(h), 11-24-2; Vt. Stat. Ann. tit. 1, § 144, tit. 9, § 4502(a); Wash. Rev. Code §§ 49.60.040(27), 49.60.215; D.C. Code §§ 2.1401.02(12A), 2-1402.31.

⁵ See Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (2018), available at <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>; Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012), available at <http://digitalcommons.lmu.edu/llr/vol45/iss3/3>.

⁶ See, e.g., Lewiston City Code, ch. 38; Idaho Falls City Code, tit. 5, ch. 11; Moscow City Code, tit. 10, ch. 19; Sandpoint City Code, tit. 5, ch. 2, § 10; Boise City Code, tit. 5, ch. 15; Ketchum City Code, tit. 7, ch. 9.24; Coeur d'Alene City Code, tit. 9, ch. 9.56; Pocatello City Code, tit. 9, ch.

Corporations increasingly have endorsed the goal of gender identity non-discrimination in recent years as well. In 2003, only 5% of the Fortune 500, which collectively employ about 25 million people, had a gender identity non-discrimination policy; however, 69% of the Fortune 100 had such a policy. By 2018, 83% of the Fortune 500 and 97% of the Fortune 100 had gender identity non-discrimination policies.⁷ Among Fortune magazine's ten largest publicly traded companies, all ten prohibit discrimination based on gender identity.⁸

Appellant *Amici* insist that gender identity is an unworkable legal standard. The reality, however, is that the law and America's employers have—for more than a generation—had no trouble applying

9.36; Driggs City Code, tit. 5, ch. 5; Hailey City Code, tit. 9, ch. 9.18; Bellevue City Code, tit. 1, ch. 7; Meridian City Code, tit. 1, ch. 15.

⁷ See Human Rights Campaign, *Workplace Discrimination Laws and Policies*, available at www.hrc.org/resources/Workplace-Discrimination-Policies-Laws-and-Legislation (last visited Dec. 12, 2020).

⁸ See Human Rights Campaign, *LGBTQ Equality at the Fortune 500*, available at www.hrc.org/resources/lgbt-equality-at-the-fortune-500 (last visited Dec. 12, 2020).

a standard of gender identity non-discrimination to promote inclusion and equity for their employees.

II. Laws that Discriminate Based on Transgender Status and Gender Identity Harm *Amici's* Businesses

In addition to the various equitable and legal defects in H.B. 500, Idaho's new law is bad for business. H.B. 500 will make it harder for companies like *amici* to foster a productive workforce and recruit new employees in part because it undermines the educational system that companies like *amici* rely upon to train the next generation of workers. And it will have a negative impact on *amici's* bottom line.

A. Anti-Transgender Discrimination Harms *Amici's* Employees

Like all businesses, the success of the *amici* is dependent on the productivity and morale of its employees. A productive, dynamic workforce is the most valuable asset of any company, and *amici* therefore have a strong interest in protecting their employees from discrimination. Idaho's new law infringes this interest, particularly with regard to those employees who are transgender or who are the parents of transgender children. Idaho's law also threatens

discrimination against individuals who are not transgender but who simply may not conform to traditional gender stereotypes.

1. H.B. 500 Harms the Transgender Children of Employees

Amici take seriously their responsibility to support employees with children. Along with a growing segment of corporate America, *amici* have adopted a series of family-friendly policies with this goal in mind. Marcus M. Butts et al., *How Important Are Work–Family Support Policies? A Meta-Analytic Investigation of Their Effects on Employee Outcomes*, 98 J. Applied Psychol. 1 (2013). And so, when a state adopts a law that discriminates against certain children, *amici* have a strong interest in opposing it.

After all, employees cannot work at full productivity if they are worried about how their children are being treated at school or on the playing field. Parents cannot work effectively if their child, or the child of someone they are close to, is targeted for exclusion from athletic activities and stigmatized by school policies.

Idaho’s new law, if enforced, undoubtedly will harm transgender children and their parents. In the first place, the law communicates to the children their state’s “moral” disapproval of their transgender

identity. *See Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003) (O’Connor, J., concurring). This sort of state-sanctioned “sense of inferiority” cannot help but warp children’s conception of themselves and their place in the wider world. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

More practically, Idaho’s law will exclude transgender girls from school athletics programs in which they would otherwise be entitled to participate. In doing so, the law denies these children the myriad benefits of student athletics. Pediatricians have long recognized that children “suffer and experience worse health outcomes when they are ostracized from their peers through policies that exclude them from spaces and activities that other boys and girls are able to participate in consistent with gender identity.” (Adkins Decl. ¶ 37.) Playing sports has been associated with a long list of benefits related to physical, mental, and social development among youth. Sports provide an opportunity to “develop skills, make friends, increase their levels of physical activity, continue their participation over time, and learn valuable life lessons.” (Fry Decl. ¶ 45.) Other benefits that can be ingrained through participation in sports include the development of

communication skills, emotional intelligence, and self-discipline, all of which are critical in today's workplace. R.P. Dobosz & L.A. Beaty, *The Relationship Between Athletic Participation and High School Students' Leadership Ability*, 34 *Adolescence* 215, 215–220 (Spring 1999). Sports also teach invaluable lessons involving leadership and collaboration, which are essential to success in today's workforce.

The denial of the opportunities provided by these team activities may follow these young people over the course of their lives and negatively impact their progress. They may be less likely to finish college, less likely to be “actively engaged in planning for their future,” and less likely to succeed “in the business world.” (Fry Decl. ¶46.) Research has shown that people who have the opportunity to play youth and high school sports make better employees later in life and have more career opportunities. Kevin M. Kniffin, Brian Wansink, & Mitsuru Shimizu, *Sports at Work: Anticipated and Persistent Correlates of Participation in High School Athletics*, 22 *J. Leadership & Organizational Stud.* 217, 217–230 (2015). Indeed, “a disproportionate

number” of CEOs played sports when they were younger.⁹ This is especially true of today’s female business leaders.¹⁰

Finally, Idaho’s law does not simply discriminate against transgender girls; it discriminates against girls who may be perceived to be masculine or otherwise not match sex stereotypes. The law provides for a mechanism by which a person may “dispute” a child’s participation in a girls-only athletic event. To “verify [her] biological sex,” the disputed student could be forced to undergo invasive, medically unnecessary tests. Idaho Code § 33-6203(3). Inevitably, rather than face the humiliation of being subjected to these tests, many girls will forgo student athletics all together. The law thus extends its discriminatory reach to all girls who may not conform to a particular and restrictive concept of what girls are “supposed” to look like. Such stereotyped assumptions are inconsistent with current workplace standards implemented by *amici*.

⁹ Abigail Hess, *If You Want to be a CEO Later, Play Sports Now*, CNBC (Jan. 11, 2017), www.cnbc.com/2017/01/11/want-to-be-a-ceo-later-play-sports-now.html.

¹⁰ *Id.* (referencing an Ernst & Young survey of 821 high-level executives that found that 90% of women sampled played sports and that, among women currently holding a C-suite position, this proportion rose to 96%).

2. H.B. 500 Harms Transgender Employees

While not directly affected by the law’s regulation of student athletics, adult transgender employees are harmed by the discriminatory message the law communicates. By passing H.B. 500, the State of Idaho has told transgender people of all ages and gender identities that they are less worthy than cisgender individuals—that they are less than full members of the community. Transgender adult employees, moreover, cannot rest assured that they also will not be subjected to similar discrimination by the state.

This attitude, when wholeheartedly endorsed by a state’s government, likely trickles down to the rest of society. “Structural stigma provides the context and identifies which members of society are devalued. It also gives a level of permission to denigrate or attack particular groups, or those who are perceived to be member of certain groups in society.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010); see also Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 Am. J. Pub. Health 813, 815–16 (2013) (explaining that stigma can have “a corrosive

influence on health” and can harm a person’s social relationships and self-esteem).

B. Anti-Transgender Discrimination Harms *Amici*’s Ability to Recruit and Retain Employees

Amici strive to recruit and retain exceptional talent and are deeply concerned that Idaho’s law—with its potential copycats—will harm their ability to attract the best applicants. Qualified employees in general prefer to live in areas that do not discriminate against transgender people. This preference is widespread and held by both transgender and cisgender recruits. Indeed, large swaths of the professional, “creative” class—comprising 50 million scientists, engineers, entrepreneurs, researchers, academics, architects, designers, artists, lawyers, and managers—specifically look for communities that are open to diversity as a place to make their home. Human Rights Campaign, *2014 Municipal Equality Index: A Nationwide Evaluation of Municipal Law* 6 (2014), available at <http://tinyurl.com/h3fqlyx>. Regardless of job title, employees benefit from being in an environment

where individuals from diverse backgrounds can communicate and work together to achieve common goals.

Idaho's law sends the opposite message. No matter what pro-diversity policies *amici* themselves adopt, the existence of discriminatory laws will discourage potential employees from moving to Idaho. Businesses that operate in Idaho, or who operate in states and communities that adopt similar policies, will be at a disadvantage when it comes to hiring and retaining the employees they need to make their business successful.

C. Anti-Transgender Discrimination Harms *Amici*'s Interest in a Well-Prepared Workforce

Amici rely on America's education system to prepare the workforce of the next generation with the right skills and values to become productive employees. Laura Jimenez, *Preparing American Students for the Workforce of the Future*, Center for American Progress (Sept. 14, 2020), <https://tinyurl.com/y3l5am3o>. Education is the “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” *Brown*, 347 U.S. at 493.

Students who are excluded from athletics and other extracurricular activities and who are otherwise stigmatized will not be well prepared to enter the workforce. Furthermore, students who have learned that exclusion and stigma are appropriate responses to transgender people will also be unprepared to enter the workforce. As stated *supra*, amici are committed to fostering open and welcoming corporate environments, both as a matter of equality and economics. “LGBT-supportive policies and supportive workplace environments are associated with less discrimination and a greater likelihood that LGBT people will be out at work. Both outcomes have been linked to greater workplace engagement, improved psychological health, increased productivity, and job satisfaction.” Christy Mallory et al., *The Economic Impact of Stigma and Discrimination against LGBT People in Georgia* 36, UCLA: The Williams Inst. (Jan. 2017), available at <https://tinyurl.com/y36m8s4h>. A student who has been taught by a state government to discriminate against transgender people will be a poor fit for such an environment. In contrast, a student who has learned the value of tolerance will be ready to participate as an employee alongside diverse co-workers. See Amrit Thapa et al., *School*

Climate Research Summary: August 2012 4, National School Climate Center (2012), available at <https://tinyurl.com/k4jal4h>.

D. Anti-Transgender Discrimination Harms *Amici's* Bottom Line

Studies have shown that diversity is good for business and that discrimination, conversely, harms business. Brad Sears et al., UCLA: The Williams Inst., *Economic Motives for Adopting LGBT Related Workplace Policies* (2011), available at <https://escholarship.org/uc/item/2nr871sf> (“92% of the leading companies in the U.S. [adopted pro-diversity policies based on] a general argument that diversity is good for business[.]”). LGBT-friendly policies are tied to increases in firm values, productivity, and profitability. See Catalyst, *Why Diversity and Inclusion Matter: Quick Take 6* (2020), available at <http://tinyurl.com/o2hqrsd>. When government policy discriminates against transgender people, it harms businesses’ employees, undermining those businesses’ ability to hire and retain employees, and sabotages their success in the next generation. Such a policy can lead to “lower profits.” Joint Economic Committee Democratic Staff, 113th Cong., *The Economic Consequences of Discrimination Based on Sexual Orientation and Gender Identity*

(2013), *available at* <https://tinyurl.com/y5my8rts>. This harms not only employees and their families but the larger community.

CONCLUSION

Because the challenged statute is inconsistent with existing policy and law and harms economic interests, we urge that the decision of the District Court be affirmed.

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FOR THE NINTH CIRCUIT

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