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Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-18-0294

IN THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

Nova Maday, *Plaintiff-Petitioner*,	)	
	)	On Appeal from Circuit Court of Cook County, Chancery Division Case No. 17 CH 15791
	)	Trial Judge: Hon. Thomas R. Allen
Township High School District 211 *Defendant-Respondent*.	)	

MOTION OF AIDS FOUNDATION OF CHICAGO, ASSOCIATION OF LATINO MEN FOR ACTION, CENTER ON HALSTED, CHICAGO COUNCIL OF LAWYERS, CITIZEN ACTION, EDWIN F. MANDEL LEGAL AID CLINIC, EQUALITY ILLINOIS, EQUIP FOR EQUALITY, PFLAG MCHENRY, PRAIRIE PRIDE COALITION, THE CHICAGO LAWYERS COMMITTEE FOR CIVIL RIGHTS, AND THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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March 22, 2018

The AIDS Foundation of Chicago, Association of Latino Men for Action, Center on Halsted, Chicago Council of Lawyers, Citizen Action, Edwin F. Mandel Legal Aid Clinic, Equality Illinois, Equip for Equality, PFLAG McHenry, Prairie Pride Coalition, The Chicago Lawyers Committee for Civil Rights, and The Roderick and Solange MacArthur Justice Center (collectively, "Proposed *Amici*"), respectfully move pursuant to Illinois Supreme Court Rule 345 for leave to file a brief as *Amici Curiae* in support of Petitioner Nova Maday's petition for review.

Attached hereto are: (1) the proposed brief of *Amici Curiae* and (2) a proposed order.

Interests of the Proposed *Amici*

Amici are a group of civil and human rights organizations. In the many decades *Amici* have collectively served the people of Illinois—through representation, legislative advocacy, direct support, public education, and more—they have been on the front lines in the fight against invidious discrimination. Indeed, *Amici* have represented or assisted thousands of discrimination victims. *Amici* thus have extensive firsthand experience with the harms inflicted by discrimination and the crucial role that the Illinois Human Rights Act ("IHRA") plays in protecting victims.

Amici are concerned that the Circuit Court's interpretation of the IHRA could have broader implications on the rights of students to be protected against discrimination on the basis of race, gender, ethnicity, disability or other protected categories.

WHEREFORE, Proposed *Amici* respectfully request that the Court grant them leave to file their brief as *Amici Curiae*.

March 22, 2018

Respectfully Submitted,

/s/*James W. Ducayet* _____

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PROOF OF SERVICE

I, Joseph Regalia, an attorney, hereby certify that on March 22, 2018, I caused a true and correct copy of the foregoing Motion and accompanying exhibits to be served via email upon each of the following listed below:

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No. 1-18-0294

IN THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

Nova Maday, *Plaintiff-Petitioner*,	)	
	)	On Appeal from Circuit Court of Cook County, Chancery Division Case No. 17 CH 15791 Trial Judge: Hon. Thomas R. Allen
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NOTICE OF FILING

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PLEASE TAKE NOTICE that on March 22, 2018, we filed with the Clerk of the Appellate Court a Motion for Leave to File a Brief *Amici Curiae* in Support of Petitioner, a copy of which is attached and hereby served upon you.

March 22, 2018

Respectfully Submitted,

/s/*James W. Ducayet* _____

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Exhibit 1
Proposed Brief of Amici

No. 1-18-0294

IN THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

Nova Maday,	)	
	)	
Plaintiff-Petitioner,	)	
	)	
	)	
	)	On Appeal from Circuit
	)	Court of Cook County, Chancery Division
	)	Case No. 17 CH 15791
	)	
	)	
	)	Trial Judge: Hon. Thomas R. Allen
	)	
Township High School District 211	)	
	)	
Defendant-Respondent.	)	

BRIEF OF AIDS FOUNDATION OF CHICAGO, ASSOCIATION OF LATINO MEN FOR ACTION, CENTER ON HALSTED, CHICAGO COUNCIL OF LAWYERS, CITIZEN ACTION, EDWIN F. MANDEL LEGAL AID CLINIC, EQUALITY ILLINOIS, EQUIP FOR EQUALITY, PFLAG MCHENRY, PRAIRIE PRIDE COALITION, THE CHICAGO LAWYERS COMMITTEE FOR CIVIL RIGHTS, AND THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER *AMICI CURIAE* IN SUPPORT OF PETITIONER

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March 22, 2018

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PRELIMINARY STATEMENT

Township High School District 211 adopted an unwritten policy of physically separating in its locker rooms a student whom it perceives to be different based on her fundamental characteristics. It requires that this student—Ms. Maday—use a partitioned area, obviously and visually singling her out among all of her peers. The District and Circuit Court justify this policy under the Illinois Human Rights Act ("IHRA"), because all female students, including Ms. Maday, are allowed to enter and generally use the girl's locker room. The Circuit Court reached this separate-but-equal interpretation by reasoning that because the IHRA requires public accommodations to broadly afford the public with "full and equal enjoyment" of facilities—but narrows jurisdiction to only "denials of access" when it comes to schools—this means that students only have the right to *physical* access of a facility, not *equal* access.

At one level, this case involves seemingly narrow issues of statutory interpretation under the IHRA. *Amici* believe, however, that there are far broader issues as stake. This case goes to the heart of whether and to what extent a school may physically separate and restrict individuals simply because they are perceived to be different based on unwarranted fear and prejudice. Indeed, the reasoning of the Circuit Court—that Ms. Maday was not the victim of actionable discrimination because she had "access" to the locker room—has a disconcerting resonance with arguments made over the years to justify the physical separation of people into different schools or restrooms by race, or to justify the physical separation or exclusion of people from the equal enjoyment of benefits or access to facilities based upon characteristics such as gender, ethnicity, disability or other protected categories.

Amici believe that the Circuit Court's flawed interpretation is inconsistent with the policies animating the IHRA and with fundamental constitutional and statutory principles of

equality. Given *amici's* experience with opposing and challenging discrimination against disfavored groups, we wish to make three points. *First*, we want to highlight for the Court the fundamental and core commitment of Illinois, our sister states, and our Nation to the ideals of equality, and how the IHRA fits within that broader commitment. *Second*, we note the profound harm inflicted by unequal treatment on the basis of fundamental traits and characteristics, especially the unequal treatment of students like Ms. Maday. *Third*, and finally, we register our concern that if not corrected by this Court, the Circuit Court's reasoning would permit under the IHRA the harmful and stigmatizing treatment not just of transgender students but also of students on the basis of other protected categories. We provide examples to demonstrate that these concerns are not merely theoretical—harmful and stigmatizing discrimination against students continues to occur with distressing frequency.

Not so long ago, the U.S. Supreme Court explained why merely requiring schools to provide equal use "with respect to buildings . . . and other 'tangible' factors" at school is not enough. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 492 (1954). The Court emphasized then that allowing students to be treated differently "solely on the basis of [their inherent traits], even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities." *Id.* Treating some students differently than others jeopardizes "qualities which are incapable of objective measurement but which make for greatness in a [] school." *Id.* It "generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone." *Id.*

These concerns remain fully valid today, and are why it is essential that our students are protected to the fullest extent of both federal and state discrimination laws. When the Illinois legislature enacted the IHRA, it was to protect our most vulnerable citizens from the destructive

forces of invidious discrimination. And there is no group more vulnerable and in need of our protection than students.

The Circuit Court's decision should be reversed.

INTERESTS OF AMICI CURIAE

Amici are a group of civil and human rights organizations. In the many decades *Amici* have collectively served the people of Illinois—through representation, legislative advocacy, direct support, public education, and more—they have been on the front lines in the fight against invidious discrimination. Indeed, *Amici* have represented or assisted thousands of discrimination victims. *Amici* thus have extensive firsthand experience with the harms inflicted by discrimination and the crucial role that the IHRA plays in protecting victims.

Amici are concerned that the Circuit Court's interpretation of the IHRA could have broader implications on the rights of students to be protected against discrimination on the basis of race, gender, ethnicity, disability or other protected categories.

ARGUMENT

I. THE POLICIES ANIMATING THE ILLINOIS HUMAN RIGHTS ACT—AS WELL AS SIMILAR HUMAN RIGHTS ACTS ACROSS THE NATION—EMBODY AN ENDURING COMMITMENT TO STAMP OUT ALL FORMS OF DISCRIMINATION.

Illinois has a long history of protecting its citizens from discrimination. *See Chase v. Stephenson*, 71 Ill. 383 (1874) (finding that public school segregation on the basis of race violated Illinois law eighty years prior to the U.S. Supreme Court's decision in *Brown v. Board of Education*); *see also* Ill. Const. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.")

The overriding purpose of anti-discrimination legislation is to allow residents to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Stated more broadly, civil rights laws protect basic human dignity. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Consistent with this purpose, the U.S. Supreme Court has declared that a state's "commitment to eliminating discrimination" is a "goal . . . [that] plainly serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). *Accord E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms.").

The IHRA embodies this principle. It requires that *all persons* be treated equally and prohibits discrimination based on race, religion, ethnicity, sex, disability, or gender, among others. 775 ILCS 5/1-202. "The Act created the broadest civil rights coverage for the people of Illinois in the history of the state." Ill. Human Rights Comm., https://www2.illinois.gov/sites/ihrc (last visited Mar. 22, 2018). The mission statement of the Illinois Department of Human Rights,

the agency responsible for enforcing the IHRA, is "[t]o secure for all individuals within the State of Illinois freedom from unlawful discrimination; and [t]o establish and promote equal opportunity and affirmative action as the policy of this state for all its residents." Ill. Dep't of Human Rights, https://www.illinois.gov/dhr/AboutUs (last visited Mar. 22, 2018). The agency expressly states that "We, the employees of the Illinois Department of Human Rights, believe that everyone has an inalienable right to live free from discrimination of any kind, in every aspect of life." *Id.* This protection does not just extend to "some people"; it extends to all Illinois citizens.[1]

Like Illinois, states across the nation prohibit discrimination against students based on sexual orientation, gender identity, race, ethnicity, disability and other fundamental traits.[2] Thus,

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[1] Before 2006, the IHRA did not apply to schools. 775 ILCS 5/5-101 (2006). *See In the Matter of: Kenedra Spence, Complainant and Cerro Gordo Junior High School, District No. 100, Board of Directors, et al., Respondent*, 1998 WL 105006, at *3 ("[A] public school is [not] a place of public accommodation within the meaning of Section 5-101(A) of the Act"). The Illinois legislature realized that this gap was unacceptable and revised the IHRA's definition of public accommodations to include schools, so as to ensure students would also be protected from discrimination. To be sure, the legislature limited discrimination protections in the academic setting, but only with respect to certain curriculum and related matters. Nowhere is there any suggestion in the IHRA or its history that schools were meant to be immunized for classic discrimination like physically singling a student out because of her transgender identity. *See* legislative notes to the passage of IHRA amendments, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=593&GAID=9&DocTypeID=SB&LegId=28432&SessionID=51&GA=95 (explaining "that the Department's jurisdiction over public accommodations, which includes schools, does not include jurisdiction over charges involving educational curriculum content, course content, or course offerings").

[2] *See, e.g.,* CAL. CIV. CODE § 51; CAL. EDU. CODE § 221.5; Cal. Gender Nondiscrimination Act (AB 887); COLO. REV. STAT. § 24-34-601 *et. seq.*; CONN. PUBLIC ACT NO. 11-55; D.C. Human Rights Act of 1977, § 2-1402.41; IOWA CODE § 216; ME. REV. STAT. tit. 5, §§ 4552, 4592, 4602; Mass. An Act Relative to Gender Anti-Discrimination St.2011 ch.199; Mass. An Act Relative to Transgender Anti-Discrimination St.2016 ch.134; MASS. GEN. L. CH. 76, § 5; M.S.A. § 363A; NEV. S.B. 188; N.J.S.A. 10:5-12; N.M. STAT. § 28-1-7; N.Y. EDUC. LAW ART. 2; N.Y. EDUC. LAW § 3201-a; 2015 O.R.S. 659A.403; 9 V.S.A. § 4502; RCW 49.60; WIS. STAT. § 118.13. *See generally,* Human Rights Coalition, https://www.hrc.org/state-maps/education (last visited Mar. 22, 2018).

for example, Maine's Human Rights Act seeks to prevent unlawful educational discrimination on the basis of sex, disability, national origin, race, or sexual orientation. 5 M.R.S. §§ 4552, 4592, 4602. In *John Doe et al v. Regional School Unit 26,* the Maine Supreme Court stated that schools cannot "dictate the use of bathrooms in a way that discriminates against students in violation of [the Maine Human Rights Act]." 86 A.3d 600, at ¶ 19 (Maine 2014). It held that the school's decision to ban a transgender student from using the girl's bathroom constituted discrimination based on her gender identity and thus violated the state's antidiscrimination law. *Id.* at ¶ 22. In another case, a child with a disability alleged that a school denied him access to the playground because of his disability. *Fitzpatrick v. Town of Falmouth,* 321 F. Supp. 2d 119 (D. Maine 2004). The court found that his discrimination claim was sufficient to survive a motion to dismiss. *Id.* at 129-30.

And there are many other examples. *See e.g., Doe ex rel. Subia v. Kansas City, Mo. School Dist.,* 372 S.W.3d 43 (Mo. Ct. App. 2012) (finding that Missouri's anti-discrimination statute prohibits student-on-student sexual harassment); *Wolff v. Beauty Basics, Inc.,* 887 F. Supp. 2d 74 (D.D.C. 2012) (finding that plaintiff, who was deaf, sufficiently alleged that a beauty school conditioned her enrollment on her ability to find an American Sign Language interpreter in violation of District of Columbia's anti-discrimination statute); *Great Falls Public Schools v. Johnson,* 305 Mont. 200 (Montana 2001) (reinstating the Montana's Human Rights Commission ruling under the state's anti-discrimination law that the school discriminated against a student with a disability when it provided her with far less access to school facilities than her classmates).

Illinois's antidiscrimination laws are part of a long, hard-fought national movement to ensure that all people, regardless of race, religion, ethnicity, disability, gender, and other

protected characteristics, are able to fully and equally enjoy the freedoms and benefits of our democratic society. We will not rehash this fight at length, as many others have done so before us. *See, e.g., University of Texas Southwestern Medical Center v. Nassar,* 133 S. Ct. 2517 (2013) (discussing importance of Title VII protections in preventing invidious discrimination); Juan Williams, *The 1964 Civil Rights Act Then and Now*, Hum. Rts., Summer 2004, at 6 ("Forty years after the passage of the 1964 Civil Rights Act, it is hard to understand and even remember the furious battle over the passage of that law."). Suffice it to say that protecting people from discrimination has been a priority in our Nation for decades as we have striven to "achieve our historic commitment to creating an integrated society." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (internal quotation marks and citation omitted).

II. DISCRIMINATING AGAINST STUDENTS INFLICTS PSYCHOLOGICAL AND SOCIAL HARMS THAT THE IHRA IS MEANT TO PREVENT.

There are important reasons behind our State's and our Nation's commitment to equality. As many courts and social scientists have recognized, serious harms flow from unequal or discriminatory treatment on the basis of fundamental traits and characteristics—especially when that harm is inflicted against elementary and high school students. In schools, the "norms, values, and expectations that support people feeling socially, emotionally, and physically safe" are all key predictors of student engagement, student mental and physical health, and academic achievement.[3] And maintaining this environment is even more important right now. Today's

[3] *See* Nat'l Sch. Climate Ctr., *School Climate Research Summary* 2-3 (Aug. 2012), Nat'l Educ. Ass'n, *Research Brief: Importance of School Climate* 1 (2013), https://www.nea.org/assets/docs/15584_Bully_Free_Research_Brief-4pg.pdf; Nat'l Sch. Climate Council, *The School Climate Challenge* 5 (2007); David Osher, et al, *Improving Academic Achievement Through Improving School Climate and Student Connectedness* (Apr. 14, 2009); Adam Voight, Gregory Austin, & Thomas Hanson, *A Climate for Academic Success* (2013);

students are buckling under unprecedented levels of stress at school. A recent study concluded that about half of high school students suffer from "chronic stress."[4] These increased stress levels are driving up rates of depression, anxiety, and a host of other medical afflictions.[5] Singling students out in front of their peers—visibly and obviously—will only increase this pressure.

The costs of discrimination in our schools are well documented. *See* Patrick Pauken and Philip T.K. Daniel*, Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 Ed. Law Rep. 759, 771–72 (2000). Discrimination against students contributes to a host of negative outcomes for youth, including decreased educational aspirations, academic achievement, self-esteem, and sense of belonging in school, and increased absenteeism and depression.[6]

Alex Kajitani, *The #1 Factor That Determines A Toxic or Thriving School Culture*, Educ. Week Teacher (Apr. 27, 2016), https://goo.gl/6s0q1V; Taica Hsu, *How I Support LGBTQ+ Students at My School*, Am. Educator, Winter 2016-2017, at 20-22, https://goo.gl/VW7gGM.

[4] Noelle R. Leonard et. al., *A multi-method exploratory study of stress, coping, and substance use among high school youth in private schools*, Front. Psychol., 23 July 2015, *available at* https://www.frontiersin.org/articles/10.3389/fpsyg.2015.01028/full.

[5] *Id*.

[6] *See* Joseph G. Kosciw, Emily A. Greytak, Mark J. Bartkiewicz, Madelyn J. Boesen & Neal A. Palmer, *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, and Transgender Youth in Our Nation's Schools*, 3-5 (2012); Steven R. Aragon, et al., *The Influences of Peer Victimization on Educational Outcomes for LGBTQ and Non–LGBTQ High School Students*, 11 J. LGBT YOUTH 1 (2014); Arnold H. Grossman, et al., *Lesbian, Gay, Bisexual, and Transgender Youth Talk about Experiencing and Coping with School Violence: A Qualitative Study*, 6 J. OF LGBT YOUTH 24 (2009)*; see also* Connecticut Safe School Coalition, *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Law,* available at http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf ("Requiring a transgender or gender non-conforming student to use a separate, non-integrated space (as opposed to providing a requested alternative), threatens to publicly identify the student as transgender as well as marginalize and stigmatize him or her. Such treatment is likely to result in the deprivation of an equal educational environment for the student and is to be avoided unless such an accommodation is affirmatively sought by the student.").

Singling out students "send[s] a message" that "there is something inherently flawed about" them. M. Dru Levasseur, Esq., *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 996 (2015). When students cannot use a locker room or restroom like everyone else can, they often avoid using these facilities altogether. This is linked to medical problems and diminished educational outcomes. *See* Laura J. Wernick et al., *Gender Identity Disparities in Bathroom Safety and Wellbeing Among High School Students* (Fordham Univ. Working Paper, Jan. 7, 2017). In short, singling out students "is the kind of 'badge of inferiority' that antidiscrimination laws . . . forbid." Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 Wis. J.L. Gender & Soc'y 301, 309 (2013).

This explains the plethora of cases over the years concerning schools discriminating against students by singling them out based on their gender identity or other protected characteristics and forcing them to use separate bathrooms or locker rooms. *See, e.g., Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034 (7th Cir. 2017) (holding that singling out transgender student by denying the student use of restrooms is discrimination); *Kelly v. Guinn*, 456 F.2d 100, 106-08 (9th Cir. 1972); *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown University,* 536 A.2d 1 (D.C. 1987); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *B. of Educ. v. United States Department of Education*, 208 F. Supp. 3d 850, 341 Ed. Law Rep. 236 (S.D. Ohio 2016). And this is also why government agencies have stated that students should not be singled out based on their gender identity by forcing them to use a separate bathroom. Occupational Safety & Health Admin., Dep't of Labor, *A Guide to Restroom Access* (2015), http://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf; *Mathis v. Fountain-Fort Carson*

Sch. Dist. #8, Charge No. P20130034X, at 7, 13-14 (Colo. Civil Rights Div. June 17, 2013) (Colorado Division of Civil Rights found that a school discriminated on the basis of both sex and gender identity when it singled out Coy Mathis and required she use the nurse's bathroom rather than the girls' bathroom).

When schools are inclusive and do not single out students, both students and educators benefit. Robert Felner et al., *Middle School Improvement and Reform: Development of a School-Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 J. of Educ. Psychol. 570, 571 (2003); *John Rosales, Positive School Cultures Thrive When Support Staff Included*, NEA Today (Jan. 10, 2017). Indeed, decades of research demonstrates that students benefit socially from participating in an inclusive school environment.[7] And students report "more positive levels of . . . quality of school life in schools that [are] more supportive of cultural pluralism and diversity." Robert Felner et al., *Middle School Improvement and Reform: Development of a School-Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 J. of Educ. Psychol. 570, 571 (2003).

Students also benefit academically from inclusive settings.[8] When schools adopt inclusive policies and practices, all students have better outcomes. *See* N. Eugence Walls et al., *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 Youth & Society

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[7] Kathleen Whitbread, *What Does the Research Say About Inclusive Education?,* Wrightslaw (1998-2016); Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?,* 6 Future of Children 77, 91 (1996). Students who feel a sense of belonging in school are less likely to have mental health problems and later substance abuse. Lyndal Bond, et al., *Social and School Connectedness in Early Secondary School as Predictors of Late Teenage Substance Use, Mental Health, and Academic Outcomes*, 40 J. of Adolesc. Health 357.e9, 357.el6 (2007).

[8] *See* Open Soc'y Found., *The Value of Inclusive Education* (Oct. 2015); Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students With and Without Disabilities and Their Educators,* 20 Remedial & Special Educ. 114, 114 (1999).

307, 323-25 (2010); *see also* Stephen T. Russell, *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers' Perspectives*, 54 J. Sch. Psychol. 29 (2016).

III. THE CIRCUIT COURT'S REASONING, IF ADOPTED, WOULD PERMIT UNDER THE IHRA THE HARMFUL AND STIGMATIZING TREATMENT NOT JUST OF TRANSGENDER STUDENTS BUT ALSO OF STUDENTS ON THE BASIS OF OTHER PROTECTED CHARACTERISTICS.

The Circuit Court ruled that for purposes of the IHRA, schools need only provide students with some sort of "access" to their school, not "equal use" of their school. If not corrected by this Court, the Circuit Court's approach could result in an interpretation of the IHRA that renders it toothless against all types of discrimination faced by Illinois students—producing absurd outcomes at odds with the purpose of the Act and thwarting the mission of the very Department charged with its enforcement. The Circuit Court's approach to the IHRA will permit schools to require certain students to eat at separate tables in the cafeteria, or to use designated stalls in the restroom. It might no longer be actionable discrimination under the IHRA to tell a student with a disability—say, a student in a wheelchair—that so long as she can enter into a room, that is good enough.[9]

All of this would be fundamentally inconsistent with our State's and our Nation's commitment to equality, *see* Part I, *supra*, and contribute to unacceptable stigmatization and social harm, *see* Part II, *supra*. As discussed below, the gap in the IHRA created by the Circuit

[9] The Circuit Court admitted that it is "undeniable" that Ms. Maday does not have "full and equal" use of the locker room, like her peers do. January 25, 2018 Preliminary Injunction Hearing Tr. at 21. If there was any doubt about whether physically singling out students like this and treating them differently than their peers is discrimination generally, courts around the nation—including the Seventh Circuit—have already said so. *See, e.g., Whitaker by Whitaker*, 858 F.3d at 1034 (holding that singling out transgender student is discrimination); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016) (same); *John Doe et al v. Regional School Unit 26,* 2014 ME 11 (Maine Jan. 30, 2014).

Court's reasoning can be illustrated by imagining how the IHRA might apply to a variety of real-world situations under the Circuit Court's approach.

Some types of discrimination on the basis of race or ethnicity may no longer be actionable under the IHRA. In a case brought in the United States District Court for the Eastern District of California, *T.V. v. Sacramento City Unified Sch. Dist.,* No. 2:15-CV-00889-KJM-AC, 2016 WL 397604, at *1 (E.D. Cal. Feb. 2, 2016), plaintiff students made credible claims that the Sacramento City Unified School District split up classes under the guise of a "Gifted" program, and intentionally singled out students of racial minorities into the non-gifted group. *Id.* And "specific facts and anecdotes support[ed]" these claims: "the non-[gifted] class was referred to as the 'ghetto' class, and the school administration did nothing to ameliorate that characterization; Hispanic students were incorrectly labelled as English as Second Language students, even though they did not speak Spanish; and the school principal [said one student would have done better on standardized testing if the test had] a little more 'Tupac in it.'" *Id.* at 4-5 (denying motion to dismiss); *see also Snyder ex rel. R.P. v. Frankfort-Elberta Area Sch. Dist.,* No. 1:05-CV-824, 2006 WL 3613673, at *1 (W.D. Mich. Dec. 11, 2006) (denying summary judgment on claims that school intentionally discriminated against a third grader on account of her race by preventing her from using the same bathrooms as other kids).

An example closer to home is *People Who Care v. Rockford Bd. of Educ.*, 851 F. Supp. 905, 912 (N.D. Ill. 1994), *aff'd in part, rev'd in part*, 111 F.3d 528 (7th Cir. 1997). There, evidence showed that an Illinois school intentionally discriminated against students based on their race through the use of testing and tracking practices. *Id.* What is more, the school publicly labeled students based on this testing. *Id.* at 913-14. "[T]he evidence clearly support[ed]" the school singling students out like this "for all of the student body to see." *Id.* The court concluded

that "[n]ot only [wa]s th[e] evidence compelling, it [wa]s astonishing, and completely uncontroverted." *Id.* (denial of motion for summary judgment).

In each of these examples, the Circuit Court's reading of the IHRA would condone these practices where students were ostensibly allowed access to the school, but subjected to discriminatory treatment within the school. And these cases are not outliers. Statistical studies confirm that widespread racial and ethnic discrimination continues to be practiced in our schools. For example, one study concluded that in all but one state, schools are far more likely to suspend minorities than white students. Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 Ed. Law Rep. 759, 776 (2000). Equally concerning, students face discrimination each day in the form of peer harassment that some schools ignore or even encourage—all of which might not be actionable under the lower court's interpretation of the IHRA. In *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cty., OK*, 334 F.3d 928, 931 (10th Cir. 2003), for instance, a claim was allowed to proceed alleging that a school "allowed the presence of offensive racial slurs, epithets, swastikas, and the letters 'KKK' inscribed in school furniture and in notes placed in African American students' lockers and notebooks." *Id.*

Some types of religious discrimination may no longer be actionable under the IHRA. Discrimination on the basis of religion remains widespread. In *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 357-58 (S.D. N.Y. 2014), a school district allegedly allowed gross discrimination against three Jewish students. *Id.* These students were shown swastikas, told they should have been burned in the Holocaust, and were slapped, physically restrained, and pummeled with coins. *Id.* The students begged their school for help—and the school ignored them. *Id.* at 344-45.

Likewise, in *Al-Rifai v. Willows Unified Sch. Dist.,* No. 2:10-CV-02526, 2013 WL 2102838, at *1 (E.D. Cal. May 14, 2013), students allegedly discriminated against a group of Muslim siblings "with a steady barrage of vulgar names, terrorist labels, sexually explicit suggestions and racial epithets." *Id.* When the students "repeatedly made teachers and members of the school administration aware of the verbal abuse," not only did the teachers and administrator allegedly fail to act, but the school officials "tacitly encouraged" the harassment. *Id.*; *see also, e.g., Zeno v. Pine Plains Cent. Sch. Dist.,* 702 F.3d 655 (2d Cir. 2012) (unaddressed ethnic harassment in school).

These students were not denied physical "access" to the school or its facilities. Under the Circuit Court's reasoning, the IHRA would offer them no protection.

Some types of discrimination based on disability may no longer be actionable under the IHRA. Schools are regularly sued for discrimination against students with disabilities. For example, in a recent case, high school students harassed a special-needs student for nearly a year, culminating in the harassers allegedly pummeling the student with footballs and tackling him until he developed internal hemorrhaging that required surgery. *K.R.S. v. Bedford Cmty. Sch. Dist.*, 109 F. Supp. 3d 1060, 1070 (S.D. Iowa 2015). A federal district court permitted claims to proceed to trial because there was genuine evidence suggesting that the school had not halted the discriminatory abuse despite knowing of it for months. *Id.* at 1080*; see also Serventi v. Bucks Tech. High Sch.*, 225 F.R.D. 159, 163-64 (E.D. Pa. 2004) (a Pennsylvania school settled after discriminating against students with learning disabilities).

In a New York case, evidence suggested that a student with developmental disabilities was "thrown to the ground," "body slammed," held down and beaten with binders, and called various demeaning names. *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343,

348, 360-61 (S.D.N.Y. 2005). The evidence suggested that "this abuse was known to teachers and administrators in the District," but continued for nearly a year until the victimized student had to drop out of school. *Id.*

In a recent New Jersey case, a school district was told by a medical expert about "a pattern of taunting and unwanted sexual touching . . . and attempts to force [a student with a disability] to have sex." *Lockhart v. Willingboro High Sch.,* 170 F. Supp. 3d 722, 736-37 (D.N.J. 2015). The victimized student had significant mental disabilities. *Id.* The school district was allegedly aware of an "unusually high incidence of violence toward students with disabilities in [its] high school's classrooms" from the district's own report database—but did little to protect the student. *Id.*; *see also* Patrick Pauken, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 Ed. Law Rep. 759, 776 (2000) (reviewing studies showing widespread practice of discriminating against students with disabilities through uneven discipline practices). Once again, an interpretation of the IHRA as requiring only physical access to school facilities would offer no recourse for the treatment experienced by these students.

Some types of gender, gender identity, and sexual orientation discrimination may no longer be actionable under the IHRA. Finally, and closest to the facts of this case, students face discrimination regularly because of their gender, gender identity, or sexual orientation. Indeed, overt gender-based discrimination by a teacher—of which the school was aware and discouraged the student from reporting—was the subject of the U.S. Supreme Court decision in *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 64 (1992). The state of bullying and harassment in schools based on students' sexual orientation and gender identity is horrific, particularly when school administrators are not there to help. For example, in *Roe ex rel. Callahan v. Gustine Unified Sch.*

Dist., 678 F. Supp. 2d 1008, 1026 (E.D. Cal. 2009), a student was "pinned down and sexually assaulted [] with an air hose, [] hit with a pillow carrying a foreign object . . . and called [homophobic] epithets." *Id.* School officials allegedly knew about discrimination like this. *Id.* at 1014-27. But they did nothing. *Id.* Or take *Doe v. Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 479 (D.N.H. 1997), where two students were repeatedly sexually assaulted—and school officials told the students not to tell their parents so the school could avoid "lawsuits." *Id.*; *see also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633, 649 (1999) (evidence showed that a school district was aware that one of its high school students was regularly sexually harassing and even assaulting a female student and the school did nothing to stop it for five months.").

Another example is *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1069-70 (D. Nev. 2001). A freshman high school student appeared on a television show to discuss his experiences as a gay student. *Id.* Then the discriminatory abuse began. Several students approached him at school, calling him demeaning homophobic slurs. *Id.* The students "lassoed him around the neck and suggested dragging him behind a truck." *Id.* The student "escaped to a classroom and used an internal phone to report the incident" to his vice principal. *Id.* "After waiting nearly two hours," the vice principal arrived and responded to the incident "with laughter." *Id.* Later, in the student's English class, his peers allegedly wrote a homophobic slur on the whiteboard while his teacher looked on. *Id.* Another time, the student's principal allegedly told him "to keep quiet about his sexual orientation" and "to 'stop acting like a fag.'" *Id.*

Unfortunately, incidents like these are not rare. Alana Flores, a ninth grader at Britton Middle School in California, tells an all-too-typical story. Stacy Finz, *Emerging from a Secret: Taunts and Internal Conflict Pushed Student to the Brink*, S.F. Chron., June 12, 2000, at A1. Students began to leave Alana notes in her locker that said things like "[y]ou don't belong here,"

and that she should die. *Id.* One student confronted Alana with a photo of a man and woman engaging in intercourse and told her, "[t]his is the way you should be doing it." *Id.* The abuse culminated in another student leaving a photo in Alana's locker of a woman bound and gagged with her throat slashed. *Id.* Alana took the photo to her vice principal, asking for his help. *Id.* The vice principal asked her, "[w]ell, are you a gay?" *Id.* When Alana said she was not, the vice principal responded, "[w]ell, if you're not gay, why are you crying?" *Id.* He then reportedly tore up the photo and told Alana to stop "bring[ing] me this trash." *Id.* Alana attempted suicide sometime later. *Id.*

In a study conducted by the Gay, Lesbian, and Straight Education Network consisting of interviews with 904 gay, lesbian, bisexual, or transgender youth from forty-eight states and the District of Columbia, 84.3% of students reported hearing the remarks "faggot" or "dyke" frequently. Gay, Lesbian, and Straight Education Network, The 2001 National School Climate Survey, available at http://www.glsen.org (Oct. 10, 2001). Nearly half the students reported physical harassment because of their sexual orientation, while a little over twenty percent reported being physically assaulted because of it. *Id.*[10] But most concerning is that in that same study, 81.8% of those interviewed "reported that faculty or staff never intervened or intervened only some of the time *when present when homophobic remarks were made*." *Id.*

* * *

[10] In another study, 80% of such students experienced harassment because of their sexual orientation. Scott L. Hershberger & Anthony R. D'Augelli, *The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay, and Bisexual Youth*, 31 Developmental Psychol. 65, 67 (1995). *See also* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, at 33 (2011), *available at* http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (reporting that 78% of students who identify as transgender report being harassed while in grade K-12).

All of these examples are simply the cases that happened to be presented to a court or garnered press coverage. They are undoubtedly just a fraction of the true extent of discrimination inflicted on students every day. *Amici's* concern is that, should this Court uphold the Circuit Court's crabbed interpretation of the IHRA, students who find themselves facing similar sorts of harmful and stigmatizing treatment could lose important protections afforded by the IHRA. Perhaps some of these students may be able to rely on other federal or state protections—but perhaps not. In the case of victims of many types of gender-based discrimination, for example, federal law may be of less help given the recent withdrawal of guidance on gender-identity discrimination under Title IX and given the challenges of filing a federal court lawsuit.[11] And even when another statute might apply, the notion that all statutory protections are created equal is misguided. For example, the IHRA resolution process is designed to be user-friendly, free of costs, capable of navigating without and attorney, and to afford relief to claimants far quicker than state or federal litigation.[12] Removing the IHRA's protections for students in Illinois would be a significant loss.

In any event, reliance on other laws should not be necessary. Given our State's and our Nation's fundamental commitment to equality and non-discrimination, and the profound harms visited on students and society from such discrimination, this Court should decline to endorse the Circuit Court's reading of the IHRA, which would effectively take away from the students of our State an important source of protection against harmful discrimination.

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[11] *See* Department of Justice, Dear Colleague Letter, February 22, 2017, https://www.insidehighered.com/sites/default/server_files/files/colleague-201702-title-ix.docx (rescinding guidance that suggested gender-identity discrimination is actionable under Title IX).

[12] *See* Illinois Department of Human Rights, *IDHR Charge Filing Process*, https://www.illinois.gov/dhr/filingacharge/pages/faq_section_iii.aspx.

CONCLUSION

This Court should reverse the denial of the preliminary injunction. The District's actions here violated the IHRA, particularly given the other means by which the District could have addressed the situation.

March 22, 2018

Respectfully Submitted,

/s/*James W. Ducayet*

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 20 pages and 4906 words.

/s/*Joseph Regalia*

Exhibit 2
Proposed Order

No. 1-18-0294

IN THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

Nova Maday, *Plaintiff-Petitioner*, Township High School District 211 *Defendant-Respondent*.	)))))))))))))))	On Appeal from Circuit Court of Cook County, Chancery Division Case No. 17 CH 15791 Trial Judge: Hon. Thomas R. Allen

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ORDER ON MOTION OF AIDS FOUNDATION OF CHICAGO, ASSOCIATION OF LATINO MEN FOR ACTION, CENTER ON HALSTED, CHICAGO COUNCIL OF LAWYERS, CITIZEN ACTION, EDWIN F. MANDEL LEGAL AID CLINIC, EQUALITY ILLINOIS, EQUIP FOR EQUALITY, PFLAG MCHENRY, PRAIRIE PRIDE COALITION, THE CHICAGO LAWYERS COMMITTEE FOR CIVIL RIGHTS, AND THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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March 22, 2018

This matter coming to be heard on the motion of for leave to file their proposed brief as *Amici Curiae* in support of Petitioner, the motion is hereby GRANTED / DENIED.

Date: _____ Entered:_____

JUSTICE