WMST GU4506
Gender Justice
Professor Katherine Franke
Columbia University
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Course Reader – Volume 3

II. Gender, Sex, and Sexual Orientation

April 1: Is Transgender Discrimination a Form of Sex Discrimination:

- *Ulane v. Eastern Airlines, Inc*., 742 F.2d 1081 (7th Cir. 1984)
- *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012)
- *G.G. v. Gloucester County School Board*, brief of the ACLU (February 23, 2017)

April 8: Sex Work

- Gira Grant, Melissa. **"**The NYPD Arrests Women for Who They Are and Where They Go — Now They're Fighting Back." The Village Voice. November 22, 2016.
- The Village Voice. "Interactive Map: See Where the NYPD Arrests Women Who Are Black, Latina, Trans, and/or Wearing Jeans" (Go to URL (Village Voice): https://bit.ly/2hVYPV0)
- Complaint, *D.H. v. City of New York.* United States District Court, Southern District of New York. (September 30, 2018). (SKIM)

April 15: Decriminalization of Sex Work

- Amnesty International. "Policy on state obligations to respect, protect, and fulfil the human rights of sex workers". *www.amnestyusa.org*. August 11, 2015.
- Lambda Legal. "LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Sex Work." *LambdaLegal.org*. August 20, 2015
- Moran, Rachel." Buying Sex Should Not Be Legal," *The New York Times*. August 29, 2015
- Woods, Tyron P. *"*The Antiblackness of 'modern-day slavery' Abolitionism*." Open Democracy*. October 10, 2014
- Mullin, Frankie. "The difference between decriminalisation and legalisation of sex work*." Newstatesman*. October 19, 2015.
- Law, Victoria. "Advocates Gather in New York City to Demand Decriminalization of Sex Work" *Rewire.News*. February 26, 2019.
- Decrim NY. "Legislative Priorities: New York State Bills for the 2019-2020 Legislative Session." https://decrimny.org/Advocacy.

Advice of Rights" form was not executed until 10:30–10:35 p.m., approximately 30–35 minutes after the search of the suitcase, and approximately an hour and 15 minutes after his arrival at the airport. Judge Steckler's opinion looked at the facts carefully, noting inconsistencies as to what discussions took place and their placement in time vis-a-vis the signing of the forms—the "Interrogation, Advice of Rights" form and the "Constitutional Rights Warning: Search by Consent" form. The evidence supports his conclusion that before the consent and the search, the detention had matured into a seizure of Verrusio's person following which there was not a timely nor clearly proved giving of the *Miranda* warning.

[2] On review our role is to accept the district court's factual findings unless they are clearly erroneous. *United States v. Santucci*, 674 F.2d 624 (7th Cir.1982); *United States v. Conner*, 478 F.2d 1320 (7th Cir.1973). The determination of whether the consent to search was free and voluntary must be made with reference to the totality of the circumstances and not merely with regard for whether one form or another was signed. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The trial judge has the opportunity to observe the demeanor of the witnesses and to assess their credibility. It was peculiarly within the scope of his responsibilities to weigh any conflicts in the evidence. His discussion of these conflicts bears witness to his performance of that responsibility. His decision that Verrusio had not been given all of his rights before his personal seizure further matured into an evidentiary seizure is amply supported by the evidence and in particular by the time notation on the "Interrogation, Advice of Rights" form. The judge's decision reflects what appear from the record to have been a lack of credibility on the part of the agents and irreconcilable inconsistencies between the narrations of events by Agent McGivney and Officer Leske. Finally, the propriety of this decision collaterally was corroborated by an exhibit the judge admitted into evidence. It was a government report excluded from discovery by Agent McGivney. This report stated that the government initially declined prosecution based on Assistant United States Attorney Kennard Foster's decision that the evidence could not be used because the search of Verrusio's suitcase was faulty.

We find that the district court approximately granted the defendant's motion to suppress. Accordingly, the decision is affirmed.

AFFIRMED.

Karen Frances ULANE, Plaintiff-Appellee,

v.

EASTERN AIRLINES, INC., a Delaware corporation, Defendant-Appellant.

No. 84–1431.

United States Court of Appeals, Seventh Circuit.

Argued June 5, 1984.

Decided Aug. 29, 1984.

Rehearing and Rehearing In Banc Denied Nov. 16, 1984.

Transsexual brought suit alleging that employer airline violated Title VII by discharging her from her position as pilot. The United States District Court for the Northern District of Illinois, 581 F.Supp. 821, John F. Grady, J., ruled in favor of employee on count alleging that she was discriminated against as employee and on count alleging that she was discriminated against as transsexual, and employer ap-

pealed. The Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that: (1) Title VII does not protect transsexuals, and (2) even if transsexual was considered female, trial judge made no factual findings necessary to support conclusion that employer discriminated against her on this basis.

Reversed.

Dean A. Dickie, Sachnoff, Weaver & Rubenstein, Ltd., Chicago, Ill., for plaintiff-appellee.

David M. Brown, Gambrell & Russell, Atlanta, Ga., for defendant-appellant.

Before CUMMINGS, Chief Judge, WOOD, Circuit Judge, and DUMBAULD, Senior District Judge.*

HARLINGTON WOOD, Jr., Circuit Judge.

Plaintiff, as Kenneth Ulane, was hired in 1968 as a pilot for defendant, Eastern Air Lines, Inc., but was fired as Karen Frances Ulane in 1981. Ulane filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission, which subsequently issued a right to sue letter. This suit followed. Counts I and II allege that Ulane's discharge violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17 (1982): Count I alleges that Ulane was discriminated against as a female; Count II alleges that Ulane was discriminated against as a transsexual. The judge ruled in favor of Ulane on both counts after a bench trial.[1] 581 F.Supp. 821. The court awarded her[2] reinstatement as a flying officer with full seniority and back pay, and attorneys' fees. This certified appeal followed pursuant to Federal Rule of Civil Procedure 54(b).

FACTUAL BACKGROUND

Counsel for Ulane opens their brief by explaining: "This is a Title VII case brought by a pilot who was fired by Eastern Airlines for no reason other than the fact that she ceased being a male and became a female." That explanation may give some cause to pause, but this briefly is the story.

Ulane became a licensed pilot in 1964, serving in the United States Army from that time until 1968 with a record of combat missions in Vietnam for which Ulane received the Air Medal with eight clusters. Upon discharge in 1968, Ulane began flying for Eastern. With Eastern, Ulane progressed from Second to First Officer, and

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

1. Counts III through IX, which allege violations of 42 U.S.C. §§ 1985(3), 1986, 18 U.S.C. § 371 (conspiracy), and 45 U.S.C. § 184 (Railway Labor Act), defamation, and intentional or reckless causing of emotional and mental distress, have not yet been tried.

2. Since Ulane considers herself to be female, and appears in public as female, we will use feminine pronouns in referring to her.

also served as a flight instructor, logging over 8,000 flight hours.

Ulane was diagnosed a transsexual[3] in 1979. She explains that although embodied as a male, from early childhood she felt like a female. Ulane first sought psychiatric and medical assistance in 1968 while in the military. Later, Ulane began taking female hormones as part of her treatment, and eventually developed breasts from the hormones. In 1980, she underwent "sex reassignment surgery."[4] After the surgery, Illinois issued a revised birth certificate indicating Ulane was female, and the FAA certified her for flight status as a female. Ulane's own physician explained, however, that the operation would not create a biological female in the sense that Ulane would "have a uterus and ovaries and be able to bear babies." Ulane's chromosomes,[5] all concede, are unaffected by the hormones and surgery. Ulane, however, claims that the lack of change in her chromosomes is irrelevant.[6] Eastern was not aware of Ulane's transsexuality, her hormone treatments, or her psychiatric counseling until she attempted to return to work after her reassignment surgery. Eastern knew Ulane only as one of its male pilots.

3. Transsexualism is a condition that exists when a physiologically normal person (*i.e.*, not a hermaphrodite—a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This discomfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role. The diagnosis is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia. *See* Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 26, 1983, 10:00 a.m., at 35–37; *see generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 302.5x (3d ed. 1980); Edgerton, Langman, Schmidt & Sheppe, *Psychological Considerations of Gender Reassignment Surgery,* 9 Clinics in Plastic Surgery 355, 357 (1982); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma,* 7 Conn.L. Rev. 288, 288 n. 1 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law,* 56 Cornell L.Rev. 963, 963 n. 1 (1971).

To be distinguished are homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress, *i.e.*, dress as females, for sexual arousal rather than social comfort; both homosexuals and transvestites are content with the sex into which they were born. *See Diagnostic and Statistical Manual of Mental Disorders* § 302.30; Wise & Meyer, *Transvestism: Previous Findings and New Areas for Inquiry,* 6 J. of Sex & Marital Therapy 116, 116–20 (1980); Comment, 7 Conn.L.Rev., *supra,* at 292; Comment, 56 Cornell L.Rev., *supra,* at 963 n. 3.

4. Sex reassignment surgery for male-to-female transsexuals "involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics," such as breast development. Comment, 56 Cornell L.Rev., *supra* note 3, at 970 n. 37 (citations omitted); *see also* Jones, *Operative Treatment of the Male Transsexual,* in Transsexualism and Sex Reassignment 313, 314–16 (R. Green & J. Money eds. 1969); Stoller, *Near Miss: "Sex Change" Treatment and Its Evaluation,* in Eating, Sleeping, and Sexuality 258, 259 (M. Zales ed. 1982); Shaw, *Sex-change Capital: Surgeon is Town's Top Draw,* Chicago Tribune, Aug. 14, 1984, § 5, at 1, 3, col. 3.

5. The normal individual has 46 chromosomes, two of which designate sex. An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered. Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria,* 1983 Medic.Trial Tech.Q. 167, 170.

6. Biologically, sex is defined by chromosomes, internal and external genitalia, hormones, and gonads. Wise, *supra* note 5, at 169. Chromosomal sex cannot be changed, and a uterus and ovaries cannot be constructed. This leads some in the medical profession to conclude that hormone treatments and sex reassignment surgery can alter the evident makeup of an individual, but cannot change the individual's innate sex. *See, e.g.,* Wise, *supra* note 5, at 170; Stoller, *supra* note 4, at 273; Comment, Cornell L.Rev., *supra* note 3, at 970 n. 37. Others disagree, arguing that one must look beyond chromosomes when determining an individual's sex and consider factors such as psychological sex or assumed sex role. Comment, 7 Conn.L.Rev., *supra* note 3, at 290–91 & n. 6, 292 (psychological sex may be most important factor); Comment, Cornell L.Rev., *supra* note 3, at 965. These individuals conclude that post-operative male-to-female transsexuals do in fact qualify as females and are not merely "facsimiles." *E.g.,* Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 27, 1983, 10:35 a.m., at 226 & 252.

LEGAL ISSUES

A. *Title VII and Ulane as a Transsexual.*

[1] The district judge first found under Count II that Eastern discharged Ulane because she was a transsexual, and that Title VII prohibits discrimination on this basis.[7] While we do not condone discrimination in any form,[8] we are constrained to hold that Title VII does not protect transsexuals, and that the district court's order on this count therefore must be reversed for lack of jurisdiction.

Section 2000e–2(a)(1) provides in part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to ... discharge any individual ... because of such individual's ... sex ....

Other courts have held that the term "sex" as used in the statute is not synonymous with "sexual preference." *See, e.g., Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (per curiam); *De Santis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329–30 (9th Cir.1979); *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 326–27 (5th Cir.1978); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir.1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978). The district court recognized this, and agreed that homosexuals and transvestites do not enjoy Title VII protection, but distinguished transsexuals as persons who, unlike homosexuals and transvestites, have sexual *identity* problems; the judge agreed that the term "sex" does not comprehend "sexual preference," but held that it does comprehend "sexual identity." The district judge based this holding on his finding that "sex is not a cut-and-dried matter of chromosomes," but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.[9] The district judge further supported his broad view of Title VII's coverage by recognizing Title VII as a remedial statute to be liberally construed. He concluded that it is reasonable to hold that the statutory word "sex" literally and scientifically applies to transsexuals even if it does not apply to homosexuals or transvestites.[10] We must disagree.

Even though Title VII is a remedial statute, and even though some may define "sex" in such a way as to mean an individual's "sexual identity," our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex. *See United States Department of Labor v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir.1981). The district judge did recognize that Congress manifested an intention to exclude homosexuals from Title VII coverage. Nonetheless, the judge defended his conclusion that Ulane's broad interpretation of the term "sex" was reasonable and could therefore

7. Not all of the experts who testified agreed that Ulane is a transsexual. (Although doctors attempt to perform sex reassignment surgery only on transsexuals—as opposed, for example, on transvestites or schizophrenics, that an individual has undergone such surgery is not determinative of whether he or she is a true transsexual. *See supra* note 3 and sources cited therein.) If Ulane is not a transsexual, then she is a transvestite. Even in the trial judge's view, transvestites are not covered by Title VII.

8. Eastern presented a substantial amount of testimony and evidence at trial to prove that Ulane's discharge was not due to discrimination against her either as a transsexual or as a female, but we need not reach that issue.

9. The judge did recognize that there may be some argument in the medical community about the definition of sex that he adopted. *See, e.g., supra* notes 5 & 6.

10. Judge Grady explained:

> I have no problem with the idea that the statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex. It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, "sex."

be applied to the statute by noting that transsexuals are different than homosexuals, and that Congress never considered whether it should include or exclude transsexuals. While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.

[2] It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.

When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. "Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir.1977) (citations omitted); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1167 (1971). This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. *See Bradford v. Peoples Natural Gas Co.*, 60 F.R.D. 432, 434–35 & n. 1 (W.D.Pa.1973).

The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation.

Members of Congress have, moreover, on a number of occasions, attempted to amend Title VII to prohibit discrimination based upon "affectational or sexual orientation." [11] Each of these attempts has failed. While the proposed amendments were directed toward homosexuals, *see, e.g., Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 1–2 (1982) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., author of bill); *Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. 6 (1980) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., coauthor

11. *E.g., 94th Congress:* H.R. 166, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 5452, 94th Cong., 1st Sess. (1975); *95th Congress:* H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 775, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 8269, 95th Cong., 1st Sess. (1977); *96th Congress:* H.R. 2074, 96th Cong., 2d Sess. (1980); *97th Congress:* H.R. 1454, 97th Cong., 2d Sess. (1982).

of bill), their rejection strongly indicates that the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals. Furthermore, Congress has continued to reject these amendments even after courts have specifically held that Title VII does not protect transsexuals from discrimination. *Compare* H.R. 1454, 97th Cong., 2d Sess. (1982) (hearing held on Jan. 27, 1982) *with Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. Jan. 8, 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir.1977); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md.1977); *Grossman v. Board of Education*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J.1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 261, 50 L.Ed.2d 181 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978); *see also United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981) (Congress is presumed to know the law and judicial interpretations of it); *United States v. Ambrose*, 740 F.2d 505 at 514 (7th Cir.1984) (Wood, J., concurring and dissenting) (same).

[3] Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress. In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. *See Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir.1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute). This we must not and will not do.

Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

Our view of the application of Title VII to this type of case is not an original one. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (per curiam), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir.1977), the only two circuit court cases we found that have specifically addressed the issue, both held that discrimination against transsexuals does not fall within the ambit of Title VII.[12] In *Sommers*, Budget Marketing fired an anatomical male who claimed to be female once Budget Marketing discovered that he had misrepresented himself as female when he applied for the job. In *Holloway*, Arthur Andersen, an accounting firm, dismissed the plaintiff after he informed his superior that he was undergoing treatment in preparation for sex

12. For examples of district courts that have refused transsexuals Title VII protection, see *Terry v. EEOC*, 25 Empl.Prac.Dec. (CCH) ¶ 31,638, at 19,732–33 (E.D.Wis.1980); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md.1977); *Grossman v. Board of Education*, 11 Fair Empl.Prac.Cas. (BNA) 1196, 1199 (D.N.J.1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 261, 50 L.Ed.2d 181 (1976); *Voyles v. Ralph K. Davies, Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978).

change surgery. We agree with the Eighth and Ninth Circuits that if the term "sex" as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.

B. *Title VII and Ulane as a Female.*

[4] The trial judge originally found only that Eastern had discriminated against Ulane under Count II as a transsexual. The judge subsequently amended his findings to hold that Ulane is also female and has been discriminated against on this basis. Even if we accept the district judge's holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on this basis. All the district judge said was that his previous "findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female." This is insufficient to support a finding that Ulane was discriminated against because she is *female* since the district judge's previous findings all centered around his conclusion that Eastern did not want "[a] *transsexual* in the cockpit" (emphasis added).

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. If Eastern had considered Ulane to be female and had discriminated against her because she was female (*i.e.*, Eastern treated females less favorably than males), then the argument might be made that Title VII applied, *cf. Holloway v. Arthur Andersen*, 566 F.2d at 664 (although Title VII does not prohibit discrimination against transsexuals, "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII") (dicta), but that is not this case. It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual [13]—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.

Since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexuals, we reverse the order of the trial court and remand for entry of judgment in favor of Eastern on Count I and dismissal of Count II.

REVERSED.

13. Because of our holding in section A, however, we need not and do not decide whether Eastern did actually discriminate against Ulane because of her transsexuality.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Mia Macy,
Complainant,

v.

Eric Holder,
Attorney General,
Department of Justice,
(Bureau of Alcohol, Tobacco, Firearms and Explosives),
Agency.

Appeal No. 0120120821

Agency No. ATF-2011-00751

DECISION

On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND[1]

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

[1] The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"),[2] the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.[3]

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011,[4] she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

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[2] It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a "joint employment" relationship may exist where both the Agency and the "staffing firm" may be deemed employers. The Commission makes no determination at this time as to whether or not a "joint employment" relationship exists in this case as this issue is not presently before us.

[3] On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency's Personnel Security Branch had received Complainant's completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he "hope[d] to finish your investigation the first of next week."

[4] In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency's EEO Counselor on May 5, 2011. However, the EEO Counselor's report indicates that the initial contact occurred on May 10, 2011.

else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation.[5] Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office." The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy." The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at http://www.justice.gov/jmd/ps/chpt4-1.html (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

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[5] The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping." However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination - one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims -- is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination

based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim "based on sex (female)" as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC's Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant's complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping." In response to her complaint, the Agency stated that claims of gender identity discrimination "cannot be adjudicated before the [EEOC]." See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency's communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII's sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint's procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC's responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government's efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination *based on ...sex ....*" 42 U.S.C. § 2000e-16(a) (emphasis added). *Cf.* 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the

statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230-31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." Schwenk, 204 F.3d at 1201-02; see also Price Waterhouse, 490 U.S. at 254-55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.'" See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.[6]

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." See Schwenk, 204 F.3d at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not

[6] There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, see Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways.[7] And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

[7] See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' – i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201-02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner "considered herself a transsexual and that she planned to seek sex reassignment surgery in the future." Id. at 1202. According to the court, the guard had targeted the transgender prisoner "only after he discovered that she considered herself female[,]" and the guard was "motivated, at least in part, by [her] gender"—that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor." Id. On these facts, the Ninth Circuit readily concluded that the guard's attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure "to conform to socially-constructed gender expectations." Id. at 1201-02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females - i.e., "as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity" - is actionable discrimination "because of sex." Id. (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank's refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

Similarly, in Smith v. City of Salem, the plaintiff was "biologically and by birth male." 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). Id. Smith's co-workers began commenting that her appearance and mannerisms were "not masculine enough." Id. Smith's employer later subjected her to numerous psychological evaluations, and ultimately suspended her. Id. at 569-70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, "both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual." Id. at 571 (emphasis added).

The district court rejected Smith's efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on "transsexuality." Id. The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court's conclusion:

> cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex

> stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574–75.[8]

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition." Id. at 1320–21. According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, the Eleventh Circuit explained:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality,* 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

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[8] See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'" and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes'").

> Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).[9]

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." Id. at 305. In any case, Schroer was "entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping . . . ." Id.[10]

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

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[9] But see Etsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4-5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

[10] The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is "*literally* discrimination 'because of . . . sex.'" Schroer, 577 F. Supp. 2d at 308; see also id. at 306-07 (analogizing to cases involving discrimination based on an employee's religious conversion, which undeniably constitutes discrimination "because of . . . religion" under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

> [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; see also Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility,[11] by a desire to protect people of a certain gender,[12] by assumptions that disadvantage men,[13] by gender stereotypes,[14] or by the desire to accommodate other people's prejudices or discomfort.[15] While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the Price Waterhouse Court

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[11] See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination "because of sex"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[12] See Int'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

[13] See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

[14] See, e.g., Price Waterhouse, 490 U.S. at 250-52.

[15] See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

noted, while "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment action, the central question is always whether the "employer actually relied on [the employee's] gender in making its decision." Id. at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title VII in this manner does not create a new "class" of people covered under Title VII—for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318-19 (noting that "all persons, whether transgender or not" are protected from discrimination and "[a]n individual cannot be punished because of his or her perceived gender non-conformity").

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on . . . sex," and such discrimination therefore violates Title VII. [16]

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

[16] The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that "[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of . . . sex" under Title VII." EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

—v.—

G.G., by his next friend and mother, DEIRDRE GRIMM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Gloucester County School Board's policy, which prohibits school administrators from allowing boys and girls who are transgender to use the restrooms that other boys and girls use, constitutes "discrimination" "on the basis of sex" under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)?

2. Whether the Department of Education's conclusion that 34 C.F.R. § 106.33 does not authorize schools to exclude boys and girls who are transgender from the restrooms that other boys and girls use—as set forth in an opinion letter, statement of interest, and amicus brief—is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997)?

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INTRODUCTION

Gavin Grimm ("Gavin") is a 17-year-old boy who is a senior at Gloucester High School in Gloucester, Virginia. He is transgender and has been formally diagnosed with gender dysphoria. In accordance with his prescribed medical treatment, Gavin has received testosterone hormone therapy and undergone chest reconstruction surgery. He has legally changed his name, and he has a Virginia ID card and an amended birth certificate stating that he is male. He appears no different from any other boy his age and uses the men's restrooms at restaurants, shopping malls, the doctor's office, the library, movie theaters, and government buildings.

When Gavin came out as a boy, administrators at his school agreed he should use the boys' restrooms, just as he does outside of school. With their support, Gavin did so for almost two months without incident. But in response to complaints from some adults in the community, the Gloucester County School Board (the "Board") overruled its own administrators and enacted a new policy targeting students it deemed to have "gender identity issues." The policy's purpose, design, and inevitable effect was to treat Gavin differently from other boys and exclude him from the restrooms that all other boys use. JA 69.

Under the Board's policy, Gavin is excluded from the common restrooms and publicly stigmatized as unfit to use the same restrooms as all other students. That discriminatory treatment has far-reaching consequences for Gavin, interfering with his ability to access the educational opportunities of high school more generally. At school, at work, or in

society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community.

Title IX and its regulations allow schools to provide restroom facilities "on the basis of sex," 34 C.F.R. § 106.33, but those restrooms must be equally available to all boys and all girls, including boys and girls who are transgender. The only way Gavin can access those restrooms is if he uses the same common restrooms as other boys. That is the only option that provides restrooms on the basis of sex without "subject[ing]" Gavin "to discrimination." 20 U.S.C. § 1681(a). It is, therefore, the only option that complies with Title IX.

STATEMENT OF THE CASE

A. Factual Background.[1]

When Gavin was born, the hospital staff identified him as female, but from a young age, Gavin knew that he was a boy. JA 65. Like other boys, Gavin has a male gender identity. JA 61.

Everyone has a gender identity. JA 86. It is an established medical concept, referring to "a person's deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female." *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862

[1] The uncontroverted facts alleged in the Complaint and declarations must be taken as true on both a motion to dismiss and a motion for preliminary injunction. *See Schindler Elev. Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 n.2 (2011); *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976).

(Dec. 2015) ("APA Guidelines"), https://goo.gl/JJ98l3. Most people have a gender identity that matches the sex they are identified as at birth. But people who are transgender have a gender identity that differs from the sex they are identified as at birth.[2]

Like many transgender students, Gavin succeeded at school until the onset of puberty, when he began to suffer debilitating levels of distress. JA 65. By the end of his freshman year of high school, Gavin's distress became so great that he was unable to attend class. *Id.* Gavin came out to his parents as a boy and, at his request, began seeing a psychologist with experience counseling transgender youth. *Id.*

The psychologist diagnosed Gavin with gender dysphoria, a condition marked by the persistent and clinically significant distress caused by incongruence between an individual's gender identity and sex identified at birth. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 5th edition (302.85) (5th ed. 2013). Although gender

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[2] Guidelines from the American Psychological Association no longer use the term "biological sex" when referring to sex identified at birth, usually based on a cursory examination of external anatomy. *See* APA Guidelines at 861-62. "Biological sex" is an inaccurate description of a person's sex identified at birth because there are many biological components of sex "including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual." *Radtke v. Misc. Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund,* 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012). In addition, research indicates that gender identity has a biological component. *See* AAP Amicus. When the components of sex do not all align as typically male or typically female, individuals live their lives according to gender identity. *See* interACT Amicus.

dysphoria is a serious medical condition, it "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender & Gender Variant Individuals* (2012), at https://goo.gl/iXBM0S.

There is a medical and scientific consensus that the proper treatment for gender dysphoria is for boys who are transgender to live as boys and for girls who are transgender to live as girls.[3] That includes using names and pronouns consistent with one's identity, and grooming and dressing in a manner typically associated with that gender. When medically appropriate, treatment also includes hormone therapy and surgery. JA 88.[4] The goal of

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[3] *See, e.g.*, Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198 (July 2013) ("AAP Policy"), https://goo.gl/Fk3fZ5; Am. Med. Ass'n, *Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients* (2016), https://goo.gl/lG50xS; Am. Psychiatric Ass'n, *Position Statement on Access to Care for Transgender and Gender Variant Individuals* (2012), https://goo.gl/U0fyfv; Am. Psychological Ass'n, *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, 64 Am. Psychologist 372-453 (2008), https://goo.gl/8idKBP; Wylie C. Hembree, et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94(9) J. Clinical Endocrinology & Metabolism 3132-54 (Sept. 2009) ("Endocrine Society Guidelines"), https://goo.gl/lOroQj.

[4] Under widely accepted standards of care, chest reconstruction surgery is authorized for 16-year-olds but genital surgeries are generally not recommended for minors. *See* World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 21 (7th ed. 2012), https://goo.gl/WiHTmz.

treatment is to eliminate the debilitating distress. *Id*. If left untreated, gender dysphoria can lead to anxiety, depression, self-harm, and even suicide. JA 93. When gender dysphoria is properly treated, transgender individuals experience profound relief and can go on to lead healthy, happy, and successful lives. *See* Am. Acad. of Pediatrics Amicus ("AAP Amicus"); Dr. Ben Barnes Amicus (describing life experiences of transgender Americans).

The ability of transgender individuals to live consistently with their identity is critical to their health and well-being. JA 89-90; Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198, 201 (July 2013)("AAP Policy"); APA Guidelines at 846-47. Because so much of their daily lives takes place at school, transgender students' activities at school have a particularly significant impact on their ability to thrive. *See* Am. Psychological Ass'n & Nat'l Ass'n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015) ("APA & NASP Resolution"), https://goo.gl/AcXES2.

As part of treatment for Gavin's gender dysphoria, Gavin's psychologist helped him begin living as a boy and referred him to an endocrinologist to be evaluated for hormone therapy. JA 66-67. The psychologist also gave Gavin a "treatment documentation letter" confirming that he was receiving treatment for gender dysphoria and stating that he should be treated as a boy in all respects, including when using the restroom. JA 66. Based on his treatment protocol, Gavin legally changed his

name to Gavin and began using male pronouns. JA 67. He wore his clothing and hairstyles in a manner typical of other boys and began using the men's restrooms in public venues, including restaurants, libraries, and shopping centers, without encountering any problems. *Id.*

In August 2014, before beginning his sophomore year, Gavin and his mother met with the high school principal and guidance counselor to explain that Gavin is transgender and, consistent with his identity and medical treatment, would be attending school as a boy. JA 67-68. At that time, the Board did not have policies addressing transgender students. *See* App. 2a. Gavin initially requested to use a restroom in the nurse's office, but soon felt stigmatized and isolated using a different restroom from everyone else. JA 68.

After a few weeks of using the restroom in the nurse's office, Gavin sought permission to use the boys' restrooms. On October 20, 2014, with the principal's support, Gavin began using the boys' restrooms, and he did so for seven weeks without incident. *Id.* The principal and superintendent informed the Board but otherwise kept the matter confidential. *Id.*; App. 3a.[5]

Some adults in the community, however, learned that a boy who is transgender was using the boys' restrooms at school. JA 68. They contacted the Board to demand that the student (who was not publicly identified as Gavin until later) be barred

[5] Gavin uses a home-bound program for physical education and, therefore, does not use the school locker rooms. JA 68.

from the boys' restrooms. JA 68-69. The Board has not disclosed the nature or source of the complaints.

The Board considered the matter at a private meeting and took no action for several weeks. App. 3a-4a. Apparently unsatisfied with the results of the private meeting, one Board member alerted the broader community by proposing a policy for public debate at the Board's meeting on November 11, 2014. JA 69. The policy's operative language stated:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. The policy categorically prohibits administrators from allowing any boy who is transgender to use any boys' restroom (or allowing any girl who is transgender to use any girls' restroom). The policy does not define "biological gender."[6]

The school gave Gavin and his parents no notice that the Board would discuss his restroom use at its meeting. JA 70. After learning about the meeting through social media, Gavin and his parents decided to speak against the proposed policy. JA 69-70. Gavin told the Board:

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[6] Petitioner sometimes refers to genital characteristics, Pet. Br. 11, sometimes to chromosomes, *id.* at 28, sometimes to reproductive organs, *id.*, and sometimes to characteristics that "subserve biparental reproduction," *id.* at 32.

> I use the restroom, the men's public restroom, in every public space in Gloucester County and others. I have never once had any sort of confrontation of any kind.
>
> . . .
>
> All I want to do is be a normal child and use the restroom in peace, and I have had no problems from students to do that—only from adults.
>
> . . .
>
> I did not ask to be this way, and it's one of the most difficult things anyone can face.
>
> . . .
>
> I am just a human. I am just a boy.

Recorded Minutes of the Gloucester Cty. Sch. Bd., Nov. 11, 2014, at 25:00 – 27:22 ("Nov. 11 Minutes"), https://goo.gl/dXLRg7. The Board deferred voting on the policy until its next meeting. JA 71.

Before its next meeting, the Board issued a press release announcing plans for "adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms." App. 3a. In addition, the press release announced "plans to designate single stall, unisex restrooms . . . to give all students the option for even greater privacy." *Id.* The Board also acknowledged that it had reviewed guidance from the Department of Education advising schools that transgender students should generally be treated consistently with their gender identity. App. 1a-2a.

Speakers at the December Board meeting nonetheless demanded that Gavin be excluded from the boys' restrooms, and they threatened to vote Board members out of office if they refused to pass the new policy. JA 72. With Gavin in attendance, several speakers pointedly referred to Gavin as a "young lady." *Id.* One speaker called Gavin a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* "Put him in a separate bathroom if that's what it's going to take," said another. Recorded Minutes of the Gloucester Cty. Sch. Bd., Dec. 9, 2014, at 58:56 ("Dec. 9 Minutes"), https://goo.gl/63Vi4Q.

The Board passed the policy by a 6-1 vote. JA 72. The dissenting Board member warned that the policy conflicted with guidance and consent agreements from the Department of Justice and the Department of Education. *See* Dec. 9 Minutes at 2:07:02.

The Board subsequently converted a faculty restroom and two utility closets into single-user restrooms. JA 73. Although any student is allowed to use those restrooms, no one actually does so. JA 73-74; Pet. App. 151a. Everyone knows they were created for Gavin. JA 74; Pet. App. 151a. The converted single-user restrooms are located far away from Gavin's classes and the restrooms used by his classmates. JA 73; Pet. App. 150a-151a.

Using the single-stall restrooms would also be demeaning and stigmatizing. They signal to Gavin and the world that he is different, and they send a public message to all his peers that he is not fit to be treated like everyone else. JA 74, 91-92; Pet. App. 151a. In the words of one of the policy's supporters,

the separate restrooms divide the students into "a thousand students versus one freak." Dec. 9 Minutes at 1:22:53.

Of course, the prospect of using the girls' restrooms is unimaginable for Gavin. JA 73-74. It would not only be humiliating; it would also conflict with Gavin's treatment for gender dysphoria, placing his health and well-being at risk. JA 73-74, 90. The girls' restrooms are just as untenable for Gavin as they would be for any other boy.

Gavin does everything he can to avoid using the restroom at school. JA 74. As a result, he has developed painful urinary tract infections and is distracted and uncomfortable in class. *Id.* If Gavin has to use the restroom, he uses the nurse's restroom, but he feels ashamed doing so. *Id.* Everyone who sees Gavin enter the nurse's office knows he is there because he has been barred from the restrooms other boys use. *Id.*; Pet. App. 151a-152a. It makes him feel "like a walking freak show" and "a public spectacle" before the entire community. Pet. App. 150a-151a.

Any teenager, whether transgender or not, would be harmed by being singled out and shamed in front of his peers. JA 90-93; AAP Amicus. But transgender students are particularly vulnerable. JA 90-91. Preventing transgender students from living in a manner that is consistent with their gender identity puts them at increased risk of debilitating depression and suicide. *See id.*; AAP Amicus. According to a nationally recognized expert in the treatment of gender dysphoria who evaluated Gavin, the policy "places him at extreme risk for

immediate and long-term psychological harm." JA 74-75, 94.[7]

The Board's policy has been in place since December of Gavin's sophomore year; he is now a senior, scheduled to graduate in June 2017.[8] During that time, Gavin has continued to receive treatment for gender dysphoria. In December 2014, Gavin began hormone therapy, which has altered his physical appearance and deepened his voice. JA 67. In June 2015, Gavin received an ID card from the Virginia Department of Motor Vehicles identifying him as male. JA 80-82. In June 2016, Gavin had chest reconstruction surgery. Following that surgery, the Virginia courts issued an order legally changing his gender under state law, and the Virginia Department of Health issued an amended birth certificate listing Gavin's sex as male.[9]

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[7] The preliminary injunction record was compiled in July 2015, after Gavin's sophomore year. On remand, Gavin will present evidence of the continued harm he has endured under the policy. For example, Gavin's distress under the policy was so severe that he spent several months taking online courses at an off-site facility so as to avoid being stigmatized in front of his classmates at school. Gavin has also been unable to attend school events where there are no accessible single-user restrooms for him to use.

[8] After graduation, Gavin will remain subject to the policy for purposes of any alumni activities or attendance at school events.

[9] On review of a motion to dismiss, this Court may take judicial notice of these documents as public records. *See Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986); Wright & Miller, *et al.*, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004). On January 28, 2017, respondent filed a request to lodge these documents with the Court.

Despite all this, the Board continues to exclude Gavin from the common boys' restrooms.[10]

B. Experience of Other Transgender Students.

Boys and girls who are transgender are attending schools across the country. While transgender students have long been part of school communities, it is only in the last couple decades that there has been more widespread access to the medical and psychological support that they need. *See* AAP Amicus. Beginning in the early 2000s, as a result of advances in medical and psychological care, transgender youth finally began to receive the treatment necessary to alleviate the devastating pain of gender dysphoria and live their lives in accordance with who they really are. *See* Endocrine Society Guidelines at 3139-40.

With hormone blockers and hormone therapy, transgender students develop "physical sexual attributes," Pet. Br. 20, typical of their gender identity—not the sex they were identified as at birth. Hormone therapy affects bone and muscle structure,

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[10] The Board's position is even more extreme than the controversial North Carolina statute challenged in *Carcaño v. McCrory*, No. 1:16-CV-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016), which establishes a concept of "biological sex" defined as the sex "stated on a person's birth certificate." N.C. Gen. Stat. Ann. § 143-760. Under the North Carolina statute, "transgender individuals may use facilities consistent with their gender identity—notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery—as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States." *Carcaño*, 2016 WL 4508192, at *6 n.13.

alters the appearance of a person's genitals, and produces secondary sex characteristics such as facial and body hair in boys and breasts in girls. *See* Endocrine Society Guidelines at 3139-40. Transgender children who receive hormone blockers never go through puberty as their birth-designated sex. *Id.* at 3140-43. For example, a boy who is transgender and receives hormone blockers and hormone therapy will develop the height, muscle mass, and bone structure typical of other boys. He will be exposed to the same levels of testosterone as other boys as he goes through puberty. *Id.*

Many transgender students begin school without classmates and peers knowing they are transgender. Many others transfer to a new school after transitioning. Requiring these students to use separate restrooms forces them to reveal their transgender status to peers or to constantly make up excuses for using separate restrooms. *See, e.g.*, *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *2-3 (S.D. Ohio Sept. 26, 2016), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016) (recounting testimony from a girl who is transgender in elementary school that "when other students line up to go to the restroom, she leaves the line to go to a different restroom, and other kids say, 'Why are you going that way? You're supposed to be over here.'" (internal quotation marks and brackets omitted)); *see also* Transgender Student Amicus; School Administrators Amicus.

When excluded from the common restrooms, transgender students often avoid using the restroom entirely, either because it is too stigmatizing or too

difficult to access. They suffer infections and other negative health consequences as a result of avoiding urination. JA 90. The exclusion also increases their risk of depression and self-harm. *Id.*; *Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016), *appeal docketed*, No. 16-3522 (7th Cir. Sept. 26, 2016) (suicidal ideation, depression, migraines, attempts to avoid urination).

In addition to the documented medical harms, limiting transgender students to single-user restrooms has practical consequences. In many schools, the single-user restrooms (if they exist at all) are far away and difficult to access. With only a few minutes between classes, and long distances to travel, transgender students frequently have trouble using the restroom and attending class on time. *See Highland*, 2016 WL 5372349, at *3 (for fourth-grade girl who is transgender to use staff restroom, "a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class"); *Whitaker*, 2016 WL 5239829, at *2 (boy who is transgender could not use single-user restrooms because they "were far from his classes and because using them would draw questions from other students"); *see also* Transgender Student Amicus.

In light of these harms, the American Psychological Association and the National Association of School Psychologists have adopted resolutions calling upon schools to provide transgender students "access to the sex-segregated facilities, activities, and programs that are consistent with their gender identity." APA & NASP Resolution.

The National Association of Secondary School Principals, the National Association of Elementary School Principals, and the American School Counselor Association have taken the same position. *See* Gender Spectrum, Transgender Students and School Bathrooms: Frequently Asked Questions (2016), https://goo.gl/Z4xejp; Nat'l Ass'n of Secondary Sch. Principals, *Position Statement on Transgender Students* (2016) ("NASSP Statement"), https://goo.gl/kcfImn.

Those recommendations are consistent with policies that already exist across the country. Institutions ranging from the Girl Scouts[11] and Boy Scouts[12] to the United States military[13] to the Seven Sisters colleges[14] to the National Collegiate Athletic Association[15] already recognize boys who are transgender as boys and recognize girls who are transgender as girls.

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[11] *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, https://goo.gl/364fXI ("[I]f the child is recognized by the family and school/community as a girl and lives culturally as a girl, then Girl Scouts is an organization that can serve her in a setting that is both emotionally and physically safe.").

[12] *See* Boy Scouts of America, *BSA Addresses Gender Identity* (Jan. 30, 2017), https://goo.gl/WxNoGY.

[13] *See* Dep't of Def. Instruction No. 1300.28: In-Service Transition for Transgender Service Members (June 30, 2016), https://goo.gl/p9xsaB.

[14] *See* Susan Svrluga, *Barnard Will Admit Transgender Students. Now All 'Seven Sisters' Colleges Do.*, Wash. Post (June 4, 2015), https://goo.gl/g0rALA.

[15] Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2.

C. Title IX and 34 C.F.R. § 106.33.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

Pursuant to Congress's delegation of authority, the Department of Health, Education, and Welfare ("HEW") promulgated implementing regulations, which were subsequently adopted by the Department of Education (the "Department"), the agency with primary responsibility for enforcing Title IX.[16] The regulations state, as a general matter, that schools may not, on the basis of sex, "provide aid, benefits, or services in a different manner" or "[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31. In certain narrow circumstances, the regulations permit differential treatment on the basis of sex, but only so long as the differential treatment does not subject anyone to discrimination in violation of the statute. One of those regulations authorizes schools to "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.[17]

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[16] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52858-01.

[17] There is no statutory exception for single-sex restrooms. Petitioner mistakenly asserts that the restroom regulation

The restroom regulation was enacted in 1975. Thereafter, as a growing number of transgender students began to medically and socially transition, schools sought guidance regarding which restrooms these students should use. App. 10a.

In 2010, the Department began soliciting information from schools about the experience of transgender students. App. 10a. In 2013, after several years of study, the Department concluded that the only way to ensure that transgender students are not "subjected to discrimination" prohibited under Title IX is to allow transgender students to use the same common restrooms as other students, in keeping with their gender identity. App. 13a-14a. The Department also concluded that transgender students could be integrated into common restrooms while accommodating the privacy of all students in a non-stigmatizing manner. *Id.*

Since 2013, the Department has advised schools that they may not, consistent with Title IX and 34 C.F.R. § 106.33, discriminate against students who are transgender. In 2013 and 2014, the Department resolved two enforcement actions against school districts to protect transgender

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implements one of Title IX's statutory exceptions, Pub. L. 92-318 § 907 (codified at 20 U.S.C. § 1686), which authorizes schools to provide "separate living facilities." Pet. Br. 8. That statutory provision is implemented by a different regulation, 34 C.F.R. § 106.32, which is titled "Housing" and specifically references Pub. L. 92-318 § 907 as a source of authority. In contrast, the restroom regulation does not reference the statutory exception for living facilities.

students' access to common restrooms that match their identity. Pet. App. 124a. In 2014, the Department also advised schools in a guidance document that "a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Pet. App. 100a-101a.

After the Board adopted its new policy, the Department issued an opinion letter—which petitioner refers to as the "Ferg-Cadima letter"—reaffirming the Department's position that the restroom regulation does not authorize schools to exclude boys who are transgender from the boys' restrooms or girls who are transgender from the girls' restrooms. Pet. App. 121a-125a. The next month, the United States filed a statement of interest elaborating on its interpretation of Title IX in *Tooley v. Van Buren Pub. Sch.*, No. 2:14-CV-13466 (E.D. Mich. Feb. 20, 2015). App. 62a. The United States filed an additional statement of interest before the district court in this case, Pet. App. 160a-82a, and an amicus brief before the Fourth Circuit, App. 40a-67a.

The Department's interpretation of the statute and regulation is consistent with the interpretations of other agencies that enforce statutory protections against sex discrimination, including interpretations promulgated after extensive notice-and-comment rulemaking. Pet. App. 24a.[18]

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[18] *See* Discrimination on the Basis of Sex, Final Rule, RIN 1250-AA05, 81 Fed. Reg. 39,108-01 (June 15, 2016) (to be codified at

D. Proceedings Below.

The day after the 2014-15 school year ended, Gavin filed a complaint and motion for preliminary injunction against the Board, arguing that the Board's new policy discriminates against him on the basis of sex, in violation of Title IX and the Equal Protection Clause. JA 1, 61-79. The Complaint seeks injunctive relief and damages for both claims. JA 78.

The district court denied Gavin's motion for a preliminary injunction and granted the Board's cross-motion to dismiss the Title IX claim. Pet. App. 82a-117a. The Board's cross-motion to dismiss the Equal Protection claim is still pending. Pet. App. 13a n.3.

Gavin appealed the denial of a preliminary injunction and asked the Fourth Circuit to exercise pendent appellate jurisdiction over the dismissal of his Title IX claim. Pl.'s C.A. Br. 1. The Fourth Circuit reversed the dismissal of the Title IX claim and vacated the denial of a preliminary injunction. Pet. App. 7a.

Applying *Auer v. Robbins*, 519 U.S. 452 (1997), the court determined that the Department's

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41 C.F.R. pt. 60-20); Family Violence Prevention and Services Programs, Final Rule, 81 Fed. Reg. 76,446 (Nov. 2, 2016) (to be codified at 45 C.F.R. pt. 1370); Nondiscrimination in Health Programs and Activities, Final Rule, RIN 0945–AA02, 81 Fed. Reg. 31,376 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Final Rule, 81 Fed. Reg. 64,763, 64,779 (Sept. 21, 2016) (to be codified at 22 C.F.R. pt. 5).

interpretation of 34 C.F.R. § 106.33 was not plainly erroneous or inconsistent with the regulation's text. Pet. App. 13a-24a. The court also concluded that the Department's interpretation reflected its fair and reasoned judgment and was not a post-hoc litigating position. Pet. App. 23-24a.

The court noted that privacy interests of other students regarding nudity would not be implicated by "[Gavin's] use—or for that matter any individual's appropriate use—of a restroom." Pet. App. 25a-26a n.10. Students who want even greater privacy, the court noted, may also use one of the new single-stall restrooms. Pet. App. 37a-38a (Davis, J., concurring).

Senior Judge Davis concurred and emphasized that "[t]he uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, [Gavin] experiences daily psychological harm that puts him at risk for long-term psychological harm." Pet. App. 37a.

Judge Niemeyer dissented. Pet. App. 40a-60a. He did not identify any privacy concerns raised by the facts of this case and acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a. Judge Niemeyer instead focused on transgender students' use of locker rooms and potential exposure to "private body parts" in that setting. Pet. App. 52a.

After the Fourth Circuit's ruling, the Department of Education and Department of Justice issued a "Dear Colleague letter" providing guidance to school districts on how to provide transgender students equal access to school resources, as required by Title IX. Pet. App. 126a-142a. The Department

also provided examples of school policies from across the country that integrate transgender students into single-sex programming and facilities.[19]

On remand, the district court entered a preliminary injunction allowing Gavin to use the boys' restrooms at school, Pet. App. 71a-72a, and the district court and Fourth Circuit denied the Board's request to stay the injunction pending appeal, Pet. App. 73a-81a.

On August 3, 2016, this Court granted the Board's application to stay and recall the mandate and stay the preliminary injunction pending disposition of the Board's petition for certiorari. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).[20]

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[19] U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2, 7-8 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM.

[20] Following this Court's stay, an additional five district courts have evaluated whether the Department's interpretation of 34 C.F.R. § 106.33 is entitled to deference. All but one agreed with the Fourth Circuit. *See Whitaker*, 2016 WL 5239829, at *3; *Highland*, 2016 WL 5372349, at *18; *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *see also Carcaño*, 2016 WL 4508192, at *13 (following *G.G.* as binding precedent). *But see Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), *appeal docketed*, No. 16-11534 (5th Cir. Oct. 21, 2016).

Two of those courts issued preliminary injunctions to transgender students based both on *Auer* deference and the courts' independent interpretation of Title IX and the Equal Protection Clause. *See Highland*, 2016 WL 5372349, at *8-19;

SUMMARY OF ARGUMENT

I. Under the plain text of Title IX, Gavin has stated a claim on which relief can be granted. Under the Board's policy, Gavin is "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a). Gavin simply asks the Court to apply the statute as written.

A. The Board's policy discriminates against Gavin by excluding him from the common boys' restrooms. Gavin cannot use the girls' restrooms. To do so would be deeply stigmatizing, impossible as a practical matter, and it would be directly contrary to his medical treatment for gender dysphoria. His only other option is to use the nurse's office or separate single-user restrooms that no other student is required to use.

Whitaker, 2016 WL 5239829, at *3-4. The Sixth and Seventh Circuits denied the school districts' motions to stay those injunctions pending appeal. *See Dodds v. U.S. Dep't of Educ.*, No. 16-4117, 2016 WL 7241402, at *2 (6th Cir. Dec. 15, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, ECF 19 (7th Cir. Nov. 10, 2016).

Lower courts have also held that excluding men who are transgender from men's restrooms and women who are transgender from women's restrooms violates Title VII. *See Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016).

By forcing Gavin, and Gavin alone, to use these separate facilities, the Board's policy humiliates and stigmatizes Gavin in front of his peers and marks him as unfit to use the same restrooms as everyone else. This discriminatory treatment has far-reaching consequences. According to experts in child health and welfare, singling out transgender students and excluding them from common restroom facilities has a devastating impact on their physical and mental well-being and their ability to thrive in school.

B. The Board's discriminatory treatment of Gavin is "on the basis of sex." The policy uses the undefined criterion of "biological *gender*" to target students who are transgender and exclude them from common restrooms. The sole purpose and effect of the policy is to single out Gavin for different treatment from other boys. By targeting Gavin in this manner, the policy discriminates against him because of the sex-based characteristics that make him transgender. And the policy treats him differently because his transgender status contravenes sex-based stereotypes and assumptions, a long-recognized form of sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[21] Accordingly, the Board's discriminatory treatment of Gavin as a boy who is transgender is "on the basis of sex."

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[21] This Court looks to its Title VII precedents when interpreting Title IX. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). To the extent there are differences between the two statutes, Title IX is broader. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

C. Petitioner argues that Title IX provides no relief to Gavin because the legislators who passed the statute were "principally motivated to end discrimination against women," Pet. Br. 6, not sex discrimination against transgender individuals. But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Although Congress may not have had a boy like Gavin in mind, the statute's literal terms protect all persons from all sex-based discrimination.

D. The restroom regulation, 34 C.F.R. § 106.33, does not authorize the Board's discriminatory policy. While the regulation authorizes *differential* treatment on the basis of sex, it cannot—and does not purport to—authorize *discrimination*. Accordingly, the regulation authorizes schools to provide separate restrooms for boys and girls, but it does not allow schools to use additional sex-based criteria to exclude transgender students from those common restrooms. By singling out transgender students and excluding them from the common restrooms, the Board's policy does what the statute forbids.

II. Petitioner seeks to justify its discriminatory policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But administrative concerns cannot justify discrimination forbidden by the statute. And, in any event, the actual experience of schools, colleges, athletic organizations, and other institutions across the country shows that schools can integrate transgender individuals without any of these

speculative concerns arising. Petitioner's allegedly intractable problems have simple solutions, and none of them is actually relevant to Gavin and his use of the restroom.

A. Gavin has never argued that the Board should accept his "mere assertion" that he is transgender. He has provided ample corroboration from his doctors, his parents, and his state identification documents. He is following a treatment protocol from his healthcare providers in accordance with widely accepted standards of care for treating gender dysphoria. If school administrators have legitimate concerns that a person is pretending to be transgender, a letter from the student's doctor or parent can easily provide corroboration.

B. Schools need not—and cannot—discriminate in order to protect the privacy interests of students. Gavin's use of the restrooms does not implicate any privacy concerns related to nudity, especially in light of the simple urinal dividers and privacy strips the Board installed. Difference can be discomfiting, but it cannot justify discrimination based on "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

C. Petitioner's speculation about locker rooms and sports teams is similarly unfounded. School districts across the country have addressed these issues without categorically banning transgender students. Indeed, school athletic associations—including the National Collegiate Athletic Association and the Virginia High School

League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams.

III. The Department agrees that its regulation does not authorize the Board's discriminatory policy, and its interpretation provides an additional reason for rejecting the Board's argument. None of petitioner's arguments for withholding *Auer* deference withstands scrutiny.

IV. Finally, the doctrine of constitutional avoidance cannot support the Board's interpretation of Title IX and the restroom regulation. *Pennhurst* does not apply to Gavin's claims for injunctive relief, and the Board has long been on notice that it is potentially liable for any form of intentional discrimination under the statute.

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

ARGUMENT

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). Even if the Department's guidance documents are withdrawn by the new administration, *see* Pet. Br. 25, the meaning of Title IX and 34 C.F.R. § 106.33 will remain the same. Respondent agrees with petitioner that this Court can—and should—resolve the underlying question of whether the Board's policy violates Title IX.

I. THE BOARD'S POLICY VIOLATES THE PLAIN TEXT OF TITLE IX.

The "starting point in determining the scope of Title IX is, of course, the statutory language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Under the plain text of the statute, Gavin has stated a claim on which relief can be granted: He has been "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a).

A. The Board's Policy Subjects Gavin To Discrimination.

Before the Board adopted its new policy, Gavin was treated the same as other boys. But because he is transgender, the Board's new policy singles Gavin out for different treatment and bars him from using the common restrooms for boys. Instead, he is relegated to single-stall facilities that no other student uses. He, and only he, must use restrooms that humiliate him in front of his peers and stigmatize him as unfit to use the same restrooms as others. He, and only he, is "subjected to discrimination" "on the basis of sex" under the policy. 20 U.S.C. § 1681(a).

1. Forcing Gavin to use the girls' restrooms subjects him to discriminatory treatment.

Gavin is recognized as a boy by his family, his medical providers, the Virginia Department of Health, and the world at large. He has medically and socially transitioned, and he interacts with his teachers and peers as the boy that he is.

Additionally, he is receiving hormone therapy, has had chest reconstruction surgery, and changed his sex to male both on his state-issued identification card and his birth certificate. To confirm his medical care, he also supplied school administrators with a "treatment documentation letter" from his psychologist.

Although petitioner asserts that Gavin is permitted to use the girls' restrooms, Pet. Br. 39, petitioner does not explain how Gavin could actually do so. He can no more use a girls' restroom than could any other boy at Gloucester High School. If Gavin attempted to enter the girls' restrooms, he would create a disturbance and possibly a confrontation with other students or staff who would (accurately) perceive him as a boy intruding upon the girls' restrooms. Additionally, sending Gavin to the girls' restrooms would contravene his medical treatment and stigmatize him as unfit to use the common restrooms all other boys use.

By excluding Gavin from the boys' restrooms, the Board's policy therefore excludes Gavin from using *any* common restrooms. And the Board's policy recognizes this fact. It is premised on the understanding that students "with gender identity issues" will be provided "an alternative . . . facility," JA 69—not that boys who are transgender would use the girls' restrooms. Placing Gavin in the girls' restrooms would undermine the very privacy expectations regarding single-sex restrooms that the Board claims to be protecting.

2. Forcing Gavin to use single-stall restrooms subjects him to discriminatory treatment.

Forcing Gavin into the single-stall restrooms stigmatizes him as unfit to use the same restrooms as others and undermines his medical treatment. No other student is required to use the separate restrooms, and no other student does so. JA 73-74.

The single-stall restrooms are not an accommodation for Gavin as petitioner suggests. Pet. Br. 21. Rather, they were designed to "[p]ut him in a separate bathroom," away from other students. Dec. 9 Minutes at 58:56. The Board's policy sends a message to Gavin and the entire school community that Gavin is unacceptable and not fit to use the same restrooms as others. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on sex "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that refusal to recognize marriages of same-sex couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition"). Using separate restrooms makes Gavin feel like "a public spectacle" and "a walking freak show." Pet. App. 150a-151a.

Our laws have long recognized the "daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625

(1984). "[D]iscrimination itself, . . . by stigmatizing members of the disfavored group[,] . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

Title IX, which protects the equal dignity of all students, regardless of sex, requires courts to take these social realities into account. *Compare Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (claiming that assumption that racial segregation "stamps the colored race with a badge of inferiority" exists "solely because the colored race chooses to put that construction upon it"); *with Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (recognizing that racial segregation of students "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"). *See also* NAACP LDF Amicus. By any objective measure, the Board's policy subjects Gavin to discrimination.

3. The Board's policy deprives Gavin of equal educational opportunity.

Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of'" educational programs and activities on the basis of sex. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)). These specific prohibitions "help give content to the term 'discrimination' in [the educational] context." *Id.* Here, as elsewhere, "discriminatory treatment exerts a pervasive

influence on the entire educational process." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

"The most obvious example" of a Title IX violation is "the overt, physical deprivation of access to school resources." *Davis*, 526 U.S. at 650. At work or at school, access to a restroom is a basic necessity of life. The Occupational Health and Safety Administration has long recognized that "adverse health effects . . . can result if toilets are not available when employees need them."[22]

When boys who are transgender are not allowed to use the boys' restrooms and girls who are transgender are not allowed to use the girls' restrooms, they often avoid using restrooms altogether because the restrooms they are allowed to use are either too stigmatizing or too difficult to access. This can lead to significant health problems and interfere with a student's ability to learn and focus in class. *See* School Administrators Amicus; Transgender Student Amicus. It is also common for the exclusions to increase students' risk of depression and self-harm. *See Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker*, 2016 WL 5239829, at *1 (depression, migraines, suicidal ideation, attempts to avoid urination).

According to experts in mental health, education, and child welfare, the humiliation of being forced to use separate restrooms significantly interferes with transgender students' ability to participate and thrive in school. It disrupts their

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[22] Memorandum on the Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), https://goo.gl/86s5IC.

course of medical treatment; it can compromise their privacy and "out" them as transgender to community members and peers; and it impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. *See* JA 91-92; AAP Amicus. Developing these skills is a fundamental part of the educational process for all adolescents. *See* GLSEN Amicus.

In addition to the policy's harmful stigma, the limited number of single-stall restrooms at Gloucester High School also has practical consequences for Gavin's access to the school's educational benefits. Because the single-stall restrooms and the nurse's office are located far from Gavin's classes, being forced to use separate restrooms means that he is physically unable to take a restroom break between classes without being late and unable to take a restroom break during class without missing a significant amount of class time. Pet. App. 150a-151a. Transgender students in other cases have encountered similar problems. *See Highland*, 2016 WL 5372349, at *3; *Whitaker*, 2016 WL 5239829, at *2.[23]

These harms have been recognized before. "For more than a decade the women of Harvard Law had to sprint across campus to a hastily converted basement janitors' closet." Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*,

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[23] Although forcing Gavin to use separate facilities would stigmatize him and undermine his medical treatment no matter how many facilities were installed, this is not a case in which every set of boys' and girls' restrooms is accompanied by an equally accessible single-user facility. Pet. App. 150a-51a.

53 J. Legal Educ. 475, 479 (2003). Similarly, women entering previously all-male work environments "often discover[ed] that the facilities for women [were] inadequate, distant, or missing altogether." *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (Rovner, J., dissenting). This disparity could "affect their ability to do their jobs in concrete and material ways," even if it sometimes struck men as "of secondary, if not trivial, importance." *Id.* *See also* Justice Sandra Day O'Connor, "'Out Of Order' At The Court: O'Connor On Being The First Female Justice," NPR (March 5, 2013), https://goo.gl/4llXNV ("In the early days of when I got to the court, there wasn't a restroom I could use that was anywhere near that courtroom.").

At school, at work, or in society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community. *See* Transgender Student Amicus; Dr. Ben Barnes Amicus.

B. The Board's Discrimination Is "On The Basis of Sex."

The Board's discriminatory treatment of Gavin is explicitly "on the basis of sex." The Board's policy states that restrooms "shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility." JA 69. The policy adopts an undefined criterion of "biological gender"—a facially sex-based term—for the purpose of excluding transgender students from the restrooms that everyone else uses.

The express purpose and sole effect of the Board's policy is to target Gavin because he is transgender. The preface to the policy recites that "some students question their gender identities," and the only function of the policy is to move those students out of the common restrooms and into "an alternative . . . facility." JA 69. The policy was passed as a direct response to Gavin's use of the boys' restrooms, and the goal of the policy was to "[p]ut him in a separate bathroom." Dec. 9 Minutes at 58:56.

The change in policy had no effect on other students, all of whom continue to use the same restrooms they used before. Transgender students are the only students who are affected. *Cf. City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("The proper focus of the . . . inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[24]

By targeting Gavin for different treatment because he is transgender, the policy impermissibly discriminates "on the basis of sex."[25]

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[24] As discussed *infra* II.A., the Board does not have any generally applicable "objective physiological criteria" for defining what it calls "biological gender," Pet. Br. 39, and cannot explain how the term applies to people who are not transgender.

[25] The vast majority of lower courts have already recognized that discrimination against transgender individuals is discrimination "on the basis of sex." As Senior Judge Davis noted in his concurrence, "[t]he First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination

A person's transgender status is an inherently sex-based characteristic. Gavin is being treated differently because he is a boy who was identified as female at birth. The incongruence between his gender identity and his sex identified at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination "on the basis of sex." *Cf.* interACT Amicus (describing intersex conditions).

Similarly, discrimination against people because they have undergone a gender transition is inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes not just discrimination against boys and girls, but also discrimination against boys who have undergone a gender transition from the sex identified for them at birth. *Cf. Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy).

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against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Pet App. 78a (Davis, J., concurring). *See* App. 52a (collecting cases); Impact Fund Amicus.

In addition, discrimination against transgender people is sex discrimination because it rests on sex stereotypes and gender-based assumptions. By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed, "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Unlike other boys, Gavin had a different sex identified for him at birth. He therefore upsets traditional assumptions about boys, and the Board has singled him out precisely because of that discomfort.

Discriminating against Gavin for upsetting those expectations is sex discrimination. As this Court recognized in *Price Waterhouse*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. at 251 (plurality).[26] Sex discrimination is prohibited by Title IX and other statutes precisely because "[p]ractices that classify [students] in terms of . . . sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

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[26] *Price Waterhouse* thus "eviscerated" earlier lower court decisions that wrongly limited sex discrimination to discrimination based on biological characteristics. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (discussing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984)).

These protections are not limited to "myths and purely habitual assumptions," but also apply to generalizations that are "unquestionably true." *Id.* at 707. To be sure, most boys are identified as boys at birth. It is only a small group of boys for whom this is not true. But generalizations that are accurate for most boys cannot justify discrimination against boys who "fall outside the average description." *Cf. United States v. Virginia*, 518 U.S. 515, 550 (1996). "Even a true generalization about the class is an insufficient reason" to discriminate against "an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708.

Thus, discriminating against Gavin because he is a boy who is transgender discriminates against him on the basis of sex. The fact that the sex discrimination is targeted exclusively at students who are transgender does not change it from discrimination on the basis of sex to a distinct form of discrimination on the basis of being transgender. This Court's precedents make clear that sex discrimination does not have to affect *all* boys or *all* girls the same way in order to be "on the basis of sex." *See Price Waterhouse*, 490 U.S. at 257-58 (discrimination against women who are "macho" and "abrasive" is based on sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against women with children is based on sex); *cf. Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (Title VII does "not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her . . . sex were [not injured].").

The same is true here. The Board's discrimination against Gavin because he is a boy who is transgender is discrimination on the basis of sex, even if no other boy is affected.

C. Title IX's Broad Text Cannot Be Narrowed By Assumptions About Legislative Intent.

Relying heavily on assumptions about legislative intent, petitioner argues that Gavin's claim falls outside the scope of Title IX because the legislators who passed the statute were "principally motivated to end discrimination against women." Pet. Br. 6. But this Court long ago rejected that approach to statutory interpretation. As Justice Scalia explained on behalf of a unanimous Court in *Oncale*: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79.

Here, too, the legislators who passed Title IX may have been "principally motivated to end discrimination against women," Pet. Br. 6, but they wrote a broad statute that protects all "person[s]" from discrimination "on the basis of sex." 20 U.S.C. § 1681(a). The statute is not limited to discrimination against women and extends to sex discrimination "of whatever kind." *Oncale*, 523 U.S. at 80. Indeed, this Court has repeatedly instructed courts to construe Title IX broadly to encompass "a wide range of intentional unequal treatment." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Sex-based discrimination that harms transgender individuals is a "reasonably comparable evil" that

falls squarely within the statute's plain text. *Oncale*, 523 U.S. at 79; s*ee* Impact Fund Amicus; Nat'l Women's Law Ctr. Amicus.

There is no question that our understanding of transgender people has grown since Congress passed Title IX. But "changes, in law or in world" may "require [a statute's] application to new instances," *West v. Gibson*, 527 U.S. 212, 218 (1999), and a broadly written statute "embraces all such persons or things as subsequently fall within its scope," *De Lima v. Bidwell*, 182 U.S. 1, 217 (1901). *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980); *Browder v. United States*, 312 U.S. 335, 339 (1941).

For example, Title IX protects students from sexual harassment even though, when Congress enacted the statute, "the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis*, 526 U.S. at 664 (Kennedy, J., dissenting). "If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945).

Petitioner argues that sex discrimination against transgender people is implicitly excluded from Title IX because Congress passed unrelated statutes in 2009 and 2013 that explicitly protect individuals based on "gender identity." *See* Pet. Br. 34 (citing 18 U.S.C. § 249(a)(2) and 42 U.S.C. § 13925(b)(13)(A)). This "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*

LLC, 562 U.S. 223, 242 (2011). Congress's use of the term "gender identity" in 2009 and 2013 says little about what Congress intended in 1972. "When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (internal quotation marks and ellipses omitted).

Failed proposals to add language explicitly to protect transgender individuals are even less probative. *See United States v. Craft*, 535 U.S. 274, 287 (2002). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). *Cf. Massachusetts*, 549 U.S. at 529-30 ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant . . . in 1970 and 1977.").

By 2010, when Congress first considered the Student Non-Discrimination Act, which included express protection for gender identity, lower courts had already held that transgender individuals are protected by existing statutes prohibiting sex discrimination. *See Glenn*, 663 F.3d at 1317-19 (collecting cases). In this context, "another reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer*, 577 F. Supp. at 308. *See* Members of Congress Amicus.

D. The Restroom Regulation Does Not Authorize The Board's Discriminatory Policy.

Petitioner argues that its discriminatory policy is authorized by 34 C.F.R. § 106.33. Pet. Br. 21. The Board assumes that as long as it can show that its new policy assigns restrooms based on "sex," the policy is authorized no matter how discriminatory or harmful it may be.

But a regulation cannot authorize what the statute it implements prohibits. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 62 (2011). The restroom regulation must be read "with a view to [its] place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (internal citation and quotation marks omitted). Unlike the statutory exemptions in 20 U.S.C. § 1681(a), the restroom regulation does not state that the statute's ban on sex-based discrimination "shall not apply" to restrooms. To the contrary, the regulation specifically states that single-sex restrooms may be provided *only* if the facilities are "comparable" for all students. 34 C.F.R. § 106.33. Interpreting the regulation to authorize sex-based distinctions that are discriminatory, as petitioner suggests, would go beyond the regulation's plain text and bring the regulation into conflict with Title IX.

As the Department explained in its amicus brief below, the regulation authorizes schools to provide separate restrooms for boys and girls because it is a social practice that "does not disadvantage or stigmatize any student." App. 60a n.8. This *differential* treatment is authorized as long as it is truly comparable; *discriminatory* practices that deny

equal treatment to all students are not. Gavin does not challenge the provision of separate restrooms. It is not the existence of sex-separated restrooms that harms Gavin, but the Board's new policy that is designed solely to prevent him from using those restrooms.

Before it passed its new policy, the Board provided access to common restrooms in a manner that was consistent with the statute. The Board then abandoned that nondiscriminatory practice and adopted a new policy designed to exclude transgender students from restrooms used by other students. That new policy does what the statute forbids. It "subject[s] [Gavin] to discrimination," "exclude[s] [him] from participation," and "denie[s] [him] the benefits" of school. 20 U.S.C. § 1681(a).

Petitioner wrongly asserts that the regulation permits schools to adopt any restroom policies they wish so long as the criteria are based on sex in any way. But the Board makes a concession that underscores the flaw in its argument. The Board admits that if it created a policy that limited access to restrooms based on "behavioral peculiarities" related to sex—that is, admitting only boys who behaved in stereotypically masculine ways to the boys' restrooms and only girls who behaved in stereotypically feminine ways to the girls' restrooms—that would violate Title IX's statutory language under *Price Waterhouse*. See Pet. Br. 31-32 n.11.

This concession illustrates the error in petitioner's argument that it can create any policy for restroom access as long as it uses some dictionary's definition of the word sex. As petitioner

acknowledges, a policy assigning restrooms based on sex stereotypes would impermissibly discriminate on the basis of sex by denying certain students access to the common single-sex restrooms, thereby violating Title IX. Similarly, by singling out Gavin for different treatment because he is a boy who is transgender, the Board's policy provides restrooms on the basis of sex in a discriminatory manner.

Accordingly, petitioner's focus on various dictionary definitions of "sex" is beside the point. The regulation does not authorize schools to discriminate against a group of students on the basis of sex, regardless of which dictionary definition the school chooses.

Even if the scope of "sex" in the regulation were relevant here, petitioner's argument about the meaning of "sex" in 1972, Pet. Br. 20, misapprehends history, this Court's precedents, and how the Board's own policy operates.

First, the plain meaning of sex in 1972 extended beyond physical characteristics such as anatomy or chromosomes. The term "sex" referred to men and women in general, including both physical differences and cultural ones. *See* "sex, n., 4a," OED Online, Oxford University Press (defining sex as "a social or cultural phenomenon, and its manifestations" and collecting definitions dating back to 1651).[27]

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[27] In 1972 there was no common distinction between "sex" and "gender." At the time, the term "gender" was used primarily as a grammatical classification, not as a term to describe people. *See* "gender, n., 3a," OED Online, Oxford University Press; *see also* Am. Heritage Dictionary 1187 (1973) (defining sex to

Second, this Court has made clear that the statutory term "sex" is not limited to physical traits, but extends to behavioral and social characteristics. *See Price Waterhouse*, 490 U.S. at 251; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing "mutually reinforcing" stereotypes about the roles of men and women). Petitioner offers no explanation for why the term "sex" should be interpreted more narrowly in the regulation than in the statute. Indeed, petitioner argues that the two terms should be interpreted identically. Pet. Br. 47.

Third, as a factual matter, the Board's policy does not assign restrooms based on "physiological sex." Pet. Br. 27. Many transgender individuals, including Gavin, have physiological and anatomical characteristics typically associated with their identity, not the sex identified for them at birth. *See* Endocrine Society Guidelines at 3140-43. Due to his medical treatment, Gavin has a typically male chest, facial hair, and testosterone circulating in his body. Petitioner assumes that HEW would have wanted Gavin to use the girls' restrooms, but that is hardly self-evident.

Gavin is recognized by his family, his medical providers, the Virginia Department of Health, and the world at large as a boy. Allowing him to use the

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include "psychological differences that distinguish the male and the female"); Webster's Seventh New Collegiate Dictionary 795 (1970) (defining sex to include "behavioral peculiarities" that "distinguish males and females"); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (collecting definitions).

same restrooms as other boys is the only way to provide him single-sex restrooms without discrimination. It is, therefore, the only way to do so that is consistent with the regulation and the underlying requirements of Title IX.

II. PETITIONER'S POLICY ARGUMENTS DO NOT JUSTIFY ITS DISCRIMINATION AGAINST GAVIN.

Petitioner justifies its sweeping policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But policy arguments and administrative convenience cannot override Title IX's unqualified prohibition of sex-based discrimination. In any event, petitioner's speculations conflict with the reality that school districts, women's colleges, the military, and the Boy Scouts and Girl Scouts already treat boys and girls who are transgender the same as other boys and girls. *See supra* nn.11-15. Petitioner's "intractable problems" have simple solutions, and in any event, are not applicable to Gavin and his use of restrooms.

A. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Require The Board To Accept A Student's "Mere Assertion" Of Gender Identity.

Petitioner asserts that allowing Gavin to use the boys' restrooms would mean that any student could gain access to a restroom "simply by announcing their gender identity." Pet. Br. 37. Gavin has never asked the Board to allow him to use the restrooms based on a "mere assertion" that he is a boy. Gavin supplied school administrators a

"treatment documentation letter" from his psychologist. He has legally changed his name, is undergoing hormone therapy, had chest reconstruction surgery, and received a state ID card and birth certificate stating that he is male. His status as a transgender boy is not in dispute.

Petitioner's speculation about "obvious and intractable problems" caused by individuals falsely claiming to be transgender "for less worthy reasons," Pet. Br. 37, is unfounded, and, indeed, contradicted by the actual experiences of school districts across the country. *See* School Administrators Amicus; *Cf. Carcaño*, 2016 WL 4508192, at *5 (evidence shows that "transgender individuals have been quietly using facilities corresponding with their gender identity"); *Students & Parents for Privacy*, 2016 WL 6134121, at *39 (evidence shows that transgender students used restrooms for three years without other students noticing or complaining).

Transgender students do not gain access to the restrooms for the day by "simply announcing their gender identity." Pet. Br. 37. Usually, students and their parents meet with school administrators to discuss the student's transgender status and plan a smooth social transition, just as Gavin and his mother did here. *See* School Administrators Amicus; NASSP Statement, *supra*. Allowing Gavin to use the same restrooms as other boys does not mean "that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion." *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014); *accord Students & Parents for Privacy*, 2016 WL 6134121, at *26 (rejecting same argument).

Nor does allowing Gavin to use the same restrooms as other boys require school administrators to guess a student's gender identity based on sex stereotypes. Pet. Br. 39. If a school has a legitimate concern that a student is falsely claiming to be transgender, a letter from a doctor or parent can easily provide corroboration. *See* School Administrators Amicus; U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM (discussing additional ways to confirm a person's transgender status).[28]

In truth, it is the Board's policy that raises intractable administrative problems. *See* interACT Amicus. How will the policy apply if a student is not known to be transgender in the school community, either because he transitioned before entering school or because he moved from another district? As the Fourth Circuit noted, without "mandatory verification of the 'correct' genitalia before admittance to a restroom," the Board must "assume 'biological sex' based on appearances, social expectations, or explicit declarations." Pet. App. 24a n.8 (internal quotation marks omitted).[29]

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[28] Although Gavin was able to amend his birth certificate, that is not possible for transgender youth in states that require genital surgery or provide no mechanism for changing the gender listed on a birth certificate. *See Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015) (discussing "onerous and in some cases insurmountable obstacles" for some transgender individuals seeking to amend their birth certificates).

[29] In support of its assertions regarding "practical problems," petitioner cites to an amicus brief from McHugh & Mayer. Pet.

Nor does the Board appear to have "objective physiological criteria" for defining what it calls "biological gender." Pet. Br. 39; *see Carcaño*, 2016 WL 4508192, at *15 (agreeing that "the Board policy in *G.G.* did not include any criteria for determining the 'biological gender' of particular students"). Petitioner continues to equivocate about how it would define the "biological gender" of a person who has had genital surgery. Pet. Br. 30-31 n.9. Petitioner also cannot say how it would define the "biological gender" of individuals with intersex traits who may have genital characteristics, chromosomes or internal reproductive organs that are neither typically male nor typically female. Pet. Br. 30-31 n.9; *see* interACT Amicus. To be sure, such circumstances are rare, but so is being transgender. *See* Williams Institute Amicus.

B. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Violate The Privacy Of Other Students.

There are no privacy concerns related to nudity implicated by the facts of this case. As the Fourth Circuit explained, Gavin's "use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in cases involving nudity. Pet. App. 25a n.10. Even the dissent below acknowledged that "the

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Br. 41 n.17. The assertions in that amicus brief have been rejected by the mainstream medical community as reflected in the AAP amicus brief. To the extent that there is any dispute about these facts, they must be resolved in favor of respondent.

risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a (Niemeyer, J., dissenting). *Accord Highland*, 2016 WL 5372349, at *17 (rejecting argument that transgender student's use of restrooms would violate privacy of others); *Whitaker*, 2016 WL 5239829, at *6 (same); *cf. Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing woman who is transgender to use women's restrooms created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present").

The Board has also taken steps "to give all students the option for even greater privacy." App. 3a. It has installed partitions between urinals and privacy strips for stall doors. All students who want greater privacy for any reason may also use one of the new single-stall restrooms. Pet. App. 11a; *accord* Pet. App. 37-38a (Davis, J., concurring).[30]

Petitioner attempts to draw support from *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), but the case only undermines petitioner's argument. The parties in *Virginia* agreed that including women in the Virginia Military Institute would require adjustments such as "locked doors and coverings on windows." *Id.* at 588. This Court

[30] Excluding transgender students from the common restrooms instead of making these sorts of minor adjustments would be "unreasonable and discriminatory." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412-13 (1979) (interpreting similar language in Rehabilitation Act of 1973); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 612 (1999) (Kennedy, J., concurring in the judgment).

concluded that these minor changes to provide "privacy from the other sex" would not disrupt the essential nature of the program and could not justify excluding women from admission. *Id.* at 550 n.19. The teaching of the case is not that privacy justifies discrimination. It is that privacy interests, where actually implicated, must be accommodated in a manner that does not exclude individuals from equal educational opportunity. *See id.* at 555 n.20. The same is true here.

Moreover, if the goal of the policy is to promote privacy, that goal is not advanced by placing Gavin in the girls' restrooms. As noted above, many students transition before entering a particular school and are not known to be transgender. And even when they are known by their friends to be transgender, students at large high schools, colleges, or universities will often use restrooms in which no one else knows them, much less their transgender status. A boy who is transgender will be far more disruptive to expectations of privacy if he is forced to use the girls' restrooms than if he uses the same restrooms as other boys.

Difference can be discomfiting, but there are ways to respond to that discomfort without discrimination. Gloucester High School has installed additional privacy protections and provides a private restroom for anyone uncomfortable using the same restroom as Gavin (or any other student). Schools have many ways to accommodate privacy, but Title IX does not permit them to categorically exclude transgender students from common restrooms based on "some instinctive mechanism to guard against people who appear to be different in some respects

from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). *Cf. Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 283 n.9 (1987) (recounting how students with disabilities were excluded from school because their appearance allegedly "produced a nauseating effect" on classmates); *see also* NAACP LDF Amicus.[31]

C. The Board's Speculation About Other "Intractable Problems" Is Unfounded.

1. Locker rooms.

The dissent below focused primarily on the specter of nudity in locker rooms, Pet. App. 53a, but this case involves only access to restrooms, which do not implicate such concerns. Even in the context of locker rooms, the dissent's speculations about inevitable exposure to nudity do not reflect the actual experience of students in many school districts. *See* School Administrators Amicus. In many schools, students preparing for gym class change into t-shirts and gym shorts without fully undressing. They often do not shower; at Gloucester High School, there are

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[31] Religiously affiliated schools may exempt themselves from Title IX. 20 U.S.C. § 1681(a)(3). Petitioner's *amici* raise concerns that students at secular schools may have religious objections to sharing restroom facilities with transgender students. Those objections can be accommodated by providing additional privacy options, but "when that sincere, personal opposition becomes" official school policy, "the necessary consequence is to put the imprimatur of the [school] itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

no functional showers at all. *See* Dec. 9 Minutes at 2:12:37; *see also Students & Parents for Privacy*, 2016 WL 6134121, at *28 (transgender students and non-transgender students used same locker rooms without ever seeing "intimate parts" of one another's bodies); Transgender Student Amicus.[32]

In any event, schools across the country already include transgender students in locker rooms while accommodating the privacy of all students in a non-stigmatizing manner. *See* School Administrators Amicus; *Examples of Policies* at 7-8. Experience has shown that there are many ways to address privacy concerns without a "blanket ban that forecloses any form of accommodation for transgender students other than separate facilities." *Carcaño*, 2016 WL 4508192, at *15. *See Students & Parents for Privacy*, 2016 WL 6134121, at *29 (privacy accommodations prevented any risk of "involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth").

Moreover, although petitioner argues that it would be absurd for a girl who is transgender to use the girls' locker room, petitioner does not attempt to argue it would be appropriate for such a girl—who may have undergone puberty as a girl, developed breasts and be indistinguishable from any other girl—to use the boys' locker room. The only logical conclusion from petitioner's arguments is that transgender students are inherently incompatible

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[32] Transgender students have their own sense of modesty and often go to great lengths to prevent exposure of any anatomical differences between themselves and other students. *See* GLSEN Amicus; School Administrators Amicus.

with common facilities and must be excluded from those facilities entirely. Indeed, the policy is premised on the understanding that transgender students will use "an alternative . . . facility," away from everyone else. JA 69.

2. Athletic teams.

Petitioner also asserts that transgender students could not plausibly participate on sports teams consistent with their gender identity because doing so would give them a competitive advantage. But athletic associations—including the NCAA and the Virginia High School League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams without requiring genital surgery. *See* Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2; Va. High Sch. League, Criteria for VHSL Transgender Rule Appeals, https://goo.gl/fgQe2l.

III. THE DEPARTMENT'S INTERPRETATION OF 34 C.F.R. § 106.33 SHOULD RECEIVE *AUER* DEFERENCE.

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). In any event, none of the Board's arguments for withholding deference withstands scrutiny.

A. The Department's Interpretation Includes More Than The "Ferg-Cadima Letter."

Petitioner argues that deference is unwarranted when an agency interpretation comes from a low-level official or is issued in response to ongoing litigation. Pet. Br. 60-61. It is true that *Auer* deference is not warranted when an opinion letter does not reflect the fair and reasoned judgment of the agency or is a post hoc rationalization to defend past agency action under attack. *Auer*, 519 U.S. at 462.

But this is not a case about a lone opinion letter, and the Department's view was not developed in the context of a challenge to agency action. The Ferg-Cadima letter was neither the first time, nor the last time, that the Department explained its interpretation of 34 C.F.R. § 106.33. *See* App. 14a-23a (summarizing enforcement actions and guidance). It also thoroughly explained its interpretation in two statements of interest and in an amicus brief before the Fourth Circuit. Pet. App. 160a-82a; App. 40a-67a. The Fourth Circuit specifically relied upon the amicus brief as a basis for its decision. Pet. App. 16a-19a, 23a-24a. And these amicus briefs are independently entitled to deference under *Auer*. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 214 (2011). Thus, petitioner's assertion that the Department's interpretation was "issued for the first time in an effort to affect the outcome of a specific judicial proceeding" is inaccurate. Pet. Br. 60.

B. The Restroom Regulation Is Not A "Parroting" Regulation.

The mere fact that the regulation and the statute both use the term "sex" does not turn the regulation into a "parroting regulation" that "does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). *See* Pet. Br. 46-49. There is no statutory analog to 34 C.F.R. § 106.33. The decision to permit differential treatment in the context of restrooms is "a creature of the Secretary's own regulations." *Gonzales*, 546 U.S. at 256.

Moreover, the Fourth Circuit did not allow the Department to define "sex" as gender identity throughout the statute, as petitioner suggests. *See* Pet. Br. 48-49. Rather, it deferred to the Department's judgment that, in the context of providing access to common restrooms, the only way to provide restrooms on the basis of sex in a nondiscriminatory manner is to let transgender students use restrooms that match their gender identity.

C. The Department Appropriately Interpreted The Regulation In Light Of Changed Circumstances.

Petitioner discounts the Department's interpretation as a newfound position. Pet. Br. 53. But this is not a situation in which "an agency's interpretation of a . . . regulation . . . conflicts with a prior interpretation" and is thus "entitled to considerably less deference." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). The Department has not reversed earlier guidance

indicating that the exclusion of transgender students is permitted. Instead, the "issue in these cases did not arise until recently," once transgender students became able to medically and socially transition at school. *Talk Am.*, 564 U.S. at 64. The agency's position has been consistent from the outset.

Petitioner argues that *Auer* deference should extend only to interpretations that "would have been foreseeable at the time the regulation was promulgated." Pet. Br. 53. But the purpose of regulatory guidance is to interpret regulations in light of new circumstances. For example, in *Talk America*, this Court deferred to the FCC's "novel interpretation of its longstanding interconnection regulations," explaining that "novelty alone is not a reason to refuse deference." 564 U.S. at 64. It was appropriate for the FCC to interpret the regulations to address an issue "that did not arise until recently." *Id.* The same is true here.

Nor is this a situation in which the Department's interpretation would "impose potentially massive liability on [a party] for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). There is no risk of "massive liability" because, under *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), the Department lacks power to seek disgorgement of funds disbursed before it issued its interpretation. And under *Barnes v. Gorman*, 536 U.S. 181 (2002), private parties may not seek punitive damages. Moreover, even if there were insufficient notice for damages, lack of notice does not relieve parties of their prospective obligation to

"conform their conduct to an agency's interpretations once the agency announces them." *Christopher*, 132 S. Ct. at 2168.[33]

D. Petitioner's Procedural Arguments Are Foreclosed By *Perez*.

In arguing that the Department failed to follow proper procedures, petitioner repeats the same arguments that this Court rejected in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). *See* Pet. Br. 55-63. Like petitioner here, the respondent in *Perez* argued that "because an agency's interpretation of its own regulations may be entitled to deference under *Auer*," those interpretations "have the force of law" and should require notice-and-comment rulemaking. *Perez*, 135 S. Ct. at 1208 n.4. This Court rejected that argument, explaining that "[e]ven in cases where an agency's interpretation receives *Auer* deference . . . it is the court that ultimately decides whether a given regulation means what the agency says." *Id.* at 1208. *Auer* deference does not transform an agency's informal interpretation of its regulations into binding law.

Petitioner also argues that "members of the public would have wanted to comment on this 'novel' question." Pet. Br. 53. Again, *Perez* rejected the same argument: "Beyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are

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[33] As explained in respondent's opposition to the motion for divided argument, West Virginia's arguments based on *Nat'l Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2601 (2012), have never been briefed by the parties or addressed by any court.

best or most likely to further some vague, undefined public good." *Perez*, 135 S. Ct. at 1207 (internal quotation marks and brackets omitted).

IV. PETITIONER HAS NOT BEEN DEPRIVED OF FAIR NOTICE UNDER *PENNHURST*.

Finally, the Board cannot bolster its interpretation by resorting to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and the doctrine of constitutional avoidance. Pet. Br. 41-43. For Title IX's private cause of action, *Pennhurst* affects only the availability of "money damages," not "the scope of the behavior Title IX proscribes." *Davis*, 526 U.S. at 639; *accord Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("Our central concern . . . is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." (internal quotation marks and brackets omitted)).

Pennhurst thus provides no defense to Gavin's claim for injunctive relief or subsequent enforcement actions by the Department to terminate future funding. "[A] court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money," and then "the recipient has the option of withdrawing and hence terminating the prospective force of the injunction."

Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y., 463 U.S. 582, 596 (1983) (White, J.).[34]

Moreover, even with respect to money damages, the plain terms of Title IX put funding recipients on notice that the statute covers all forms of intentional discrimination, including in the context of restrooms. Any reader of the statute and regulations can see that restrooms are not included in the list of statutory exceptions to Title IX's prohibition on "discrimination." Consistent with that statutory prohibition, the regulation authorizes certain differential treatment for purposes of restrooms but does not override the statute's prohibition on discrimination.

But even if the regulation were ambiguous on that point, there is no inconsistency between requiring Congress to speak with a clear statement under *Pennhurst* and deferring to an agency's interpretation of its own regulations under *Auer*. In *Bennett v. Kentucky Department of Education* this Court made clear that *Pennhurst* does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications of the requirements." 470 U.S. at 669. Rather, in the context of an ongoing program, notice is provided "by the statutory provisions, regulations, and other guidelines provided by the Department at t[he] time" each disbursement of funds is received. *Id.* at 670. The recipient is not required to disgorge funds

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[34] Gavin's claims for injunctive relief will not become moot when he graduates in June 2017 because he will remain subject to the Board's policy when attending alumni events or school events.

already received, but agency guidelines can clarify ambiguities for any future disbursements. *Id.*

That distinction is critical. As alleged in the Complaint, the Board was made aware of the Department's interpretation of the regulation before it enacted the policy at issue in this case. JA 71. When it chose to disregard that interpretation, the Board proceeded at its own risk.

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006), did not overturn these settled principles. In *Arlington*, the Court interpreted the scope of remedies available under the Individuals with Disabilities in Education Act, which allows prevailing plaintiffs to recover "reasonable attorneys' fees as part of the costs" of a lawsuit. 20 U.S.C. § 1415(i)(3)(B). *Arlington* held that the terms "costs" and "attorneys' fees" did not put recipients on notice that they would be liable for expert fees. 548 U.S. at 297.

Arlington thus applied *Pennhurst* in the context of assessing particular financial penalties. It did not apply *Pennhurst* to narrow the scope of the underlying statute. For that question, the controlling precedent is *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)—a decision that *Arlington* did not limit or overrule.

Jackson reaffirmed a long line of cases holding that recipients of Title IX funding have been put on notice that they are subject to money damages for all forms of intentional discrimination. *Id.* at 181-83. Even though Title IX does not explicitly mention retaliation, *Jackson* held that the statutory text prohibits retaliation because it is a form of

intentional sex discrimination and therefore prohibited. *See id.* The Board has thus been put on notice that it may be liable for damages if found to have engaged in intentional discrimination that violates the statute. Because the discrimination here is indisputably intentional and violates the statute's plain terms, *Pennhurst* poses no barrier.

CONCLUSION

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

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the village VOICE

NEW YORK

The NYPD Arrests Women for Who They Are and Where They Go — Now They're Fighting Back

by MELISSA GIRA GRANT

NOVEMBER 22, 2016

the village VOICE

Sarah Marchando was arrested seven times for loitering. "I can't get stable if every time I turn around I am in jail again." CELESTE SLOMAN

When two officers of the New York Police Department came for her, Sarah Marchando was on a moving bus.

It was May 7, 2015, around 7:30 in the morning. Marchando, who was 27 at the time, had just boarded the B6 in East New York after seeing her boyfriend. He watched her get on the bus. She swiped her MetroCard and took her seat with the morning commuters. "Then, five minutes later, I get a phone call," Marchando told the *Voice*. It was her boyfriend, "telling me, 'You know you have got a detective car behind the bus?' "

the village VOICE

Moments later, "they cut the bus off," Marchando says. "It wasn't like the bus was at a stop." Two officers in plainclothes rushed on. They wouldn't tell her why they were there when she asked, according to a recent lawsuit detailing her arrest. When Marchando didn't immediately go with them, Officer Joseph Nicosia grabbed her and pulled her down the stairs. She tried to stop him from grabbing her arm, the suit says, and one of the officers put her in a chokehold. Six officers ended up involved in the scene. Officer Michael Doyle, the suit states, remarked to the others, "She's back," and "we got her."

"It was just a complete struggle," Marchando said. Cops had wrestled her to the ground. Passersby recorded her arrest as she told police she couldn't breathe.

hospital because I can't breathe and I am throwing up on top of that and I am still sitting in the cell with handcuffs on. I sat in the cell for two and a half hours with handcuffs on before they went and found a female officer." The arrest left her with a sprained wrist, she said, and nerve damage in her right arm.

Marchando was charged with violating a vaguely worded New York law prohibiting "Loitering for the Purpose of Engaging in a Prostitution Offense," a misdemeanor she had been arrested for seven times between 2013 and 2015 in that same precinct. In one loitering case in 2012, she served 45 days on Rikers Island.

"It has been to a point where I have come home from Rikers Island and caught a case less than two days later," she said. "I felt like I was being watched."

That's because she was. Officers in the 75th Precinct knew Sarah Marchando, who is Latina and cisgender, from prior arrests. According to a sworn court complaint, Officer Kelly Quinn said police had observed her for forty minutes that morning before they arrested her, and claimed they saw her "beckon to multiple vehicles passing by with male drivers," "approach a vehicle," and "engage in conversation with a male inside of said vehicle." This was all supposed to be evidence of her "purpose" to commit a prostitution offense. Marchando and her attorneys contest this. She was waiting for a

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Sarah Marchando had lived in a few places in the 75th. For a short time, she was in hotels around an area police told her — after an arrest — was "the Combat Zone." That's the same nickname the police in Cambridge, Massachusetts, where she grew up, used for the old red-light area in Downtown Boston. "Then I moved to Dorchester, started messing with the bad boys. Started getting in trouble." She said Massachusetts was boring, though, and so she came to New York. But now she's had to leave Brooklyn, too.

"It is enough for me to know this is not a safe situation. This is not an OK situation," Marchando said. "I can't continue to be intimidated to come outside, to know that even at seven o'clock in the morning, I am still a target and a priority."

These targeted and repeated arrests are part of a much larger pattern within the NYPD. From 2012 through 2015, nearly 1,300 individuals were arrested in New York City and charged with loitering for the purposes of prostitution. The vast majority are women. Such arrests are not the result of stings, in which undercover officers attempt to solicit sex for money. Neither are they the result of investigations that produce evidence — emails, text messages, online ads — that the women had intended to sell sex. With a loitering arrest, a woman's crime need only exist in the arresting officer's head.

Whether or not she was engaging in prostitution in that moment, or in the past, Marchando still has constitutional rights. So she, along with seven other plaintiffs backed by the Legal Aid Society of New York (which has represented them in loitering cases), filed a class-action civil rights suit this past September, challenging the constitutionality of New York's law on loitering for the purposes of prostitution. Enforcement of the statute, they state, is "based solely on a police officer's subjective determination that the activity was 'for the purpose' of prostitution." That is, if police believe a woman's "purpose" is to sell sex, they will arrest her.

VOICE

"This is a law that is four decades old," said Kate Mogulescu, a supervising attorney in the Legal Aid Society's Criminal Defense Practice, adding that enforcement is "arbitrary and targeted and abusive." Asked about its enforcement of the loitering statute, the NYPD referred the *Voice* to the Law Department, which is defending against the Legal Aid suit. "We are not discussing any aspect of this matter while litigation is pending," Law Department spokesman Nick Paolucci said.

Community and legal advocates have likened the ways police enforce laws against loitering for the purposes of prostitution to stop-and-frisk. But the consequences under the loitering law are steeper. Under stop-and-frisk, Mogulescu said, "many of the police interactions did not lead to an arrest. So although harmful, and a violation of the Constitution and the law, people weren't being swept, necessarily, into the criminal legal system.

"But with the loitering law," she continued, "we have arrests. And we have people who are marked then in the criminal legal system." Overwhelmingly, those people are women of color, cisgender and transgender alike.

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Anti-loitering policing is highly concentrated in five precincts, according to arrest data from Legal Aid and the New York State Division of Criminal Justice Services' arrest statistics. Between 2012 and 2015, the majority of the arrests — 68.5 percent — were made in Bushwick, Belmont/Fordham Heights, East New York, Hunts Point, and Brownsville, neighborhoods where residents are predominantly people of color. In a Brooklyn court where prostitution cases end up, 94 percent of the defendants facing charges of loitering for the purposes of prostitution were black, according to a court monitoring project conducted by the Red Umbrella Project in 2013 and 2014. Overall, according to the State Division of Criminal Justice Services, 85 percent of those arrested for loitering for prostitution between 2012 and 2015 were black or Latina.

Police say these neighborhoods are "prostitution prone." Mogulescu believes that designation is "a self-fulfilling cycle. They make an arrest in a place, therefore that place becomes 'prostitution prone' — and they can make more arrests in that place, because they have already identified it as prostitution-prone." Loitering arrests don't reveal the places sex work happens in the city, only the places where women are most likely to be arrested, whether they are engaged in sex work or not.

Police also cite the women's clothing as evidence of their "purpose" to engage in prostitution: Is it "revealing" or "provocative" clothing? How tight are their leggings? Can you see their cleavage? Officers document this on preprinted supporting depositions, which also ask: How many people was a suspect "engaged in conversation" with? How much currency did she have at the time of arrest? How many condoms? On sworn depositions provided to the *Voice* by Legal Aid, officers itemized the following attire as evidence:

PO Telesca, September 14, 2016, said the woman he arrested was wearing "tight black leggings";

Lieutenant Dave Sieve, March 10, 2016, said a woman he arrested was wearing a "pink + blue sweater hoodie";

PO Figaro said on August 23, 2015, he arrested a woman wearing "mini dress, bra strap showing";

and PO Sieger, in another August 2015 arrest, said the woman was wearing "tight jeans and tight tank showing clevage [*sic*]."

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women do not often fight these charges. Of the close to 1,300 loitering cases between 2012 and 2015, according to Legal Aid, "nearly 400 of the arrests did not lead to convictions." This could mean charges were never filed, or a case was dismissed, or the accused was acquitted. But, as Sarah Marchando and others point out, even if their record is sealed, police do not expunge from their memory the face of a woman they have previously arrested. As a result, they say, they are unable to go out in public without fear of another arrest.

Which is why the Legal Aid suit contends that the city of New York "chooses to enforce" the loitering law "in an unconstitutional manner by using it to police expressions of gender identity and sexuality based on outdated and paternalistic notions of what clothing NYPD officers deem 'revealing' or 'provocative,' with a disproportionate impact on women of color."

"When you have factors like an article of clothing, or the fact that you are one gender and you are talking to people of another gender," Mogulescu said, "you have to expand your view and ask, where is this happening that's *not* being policed? And our answer with the loitering case is, *everywhere*, except these places when the police decide these are the arrests they are going to make."

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Tiffaney Grissom first saw jail for prostitution arrests more than a decade ago in the West Village. "That was the beginning stages of the cleanup," she told the *Voice* in October. Her long dark hair was pulled back, her smooth leather purse on her lap. We were in the Lower Manhattan offices of Legal Aid, not far from where the piers on the city's West Side once stood.

"It was still pretty rough out there. There was no Gansevoort there," Grissom added dryly, referring to the luxury hotel that opened in 2004. As she was growing up in the Village as a young, transgender black woman, the neighborhood she hung out and worked in gentrified around her. "Half the stuff that was out there when I was out there is no longer there. The pizza shops are gone; the sex shops are gone. It is all gone. The bars are gone and going. If they are not gone yet, they are going."

In those days in the Village, Grissom said, it was different: You would make enough money that sitting in jail for a night wasn't the worst thing. "Initially, it was routine. It was kind of like paying your dues." She would plead guilty to the prostitution or loitering charges, get time served or community service, go home, and be back out. "I was just like, 'Oh, in jail again,' " she added with a sigh. "I had a girl who got arrested every single Friday. Every single Friday! It was literally like we knew them by name, they knew us by

Bronx would never be my ideal choice of places to move to. It was just convenient. Then I kind of got stuck in the Bronx." Her boyfriend was there, she said, pausing before going on a highlight-reel recollection of those times. "Living stuff started going up/down. All this ridiculousness."

Her record from the Village remained with her. But between Fordham and Kingsbridge roads, for about a three- or four-block radius, she said, she could go out, maybe pick someone up, see what happened, make some money. "When you go to the area," she said, "it is kind of like the Village outside of the Village.

"It is like you go out there and you don't have to be closeted," she continued. "The girls that are trans don't have to live their closeted trans life. ...In those places, you can be free. ...You don't have to bite your tongue."

Grissom added, "The men that come there...they appreciate trans women. ...Sometimes they have money, sometimes they don't have money." She wouldn't always go out to work; it could be just to hang out, and some of the people she was hanging out with could be working, too.

For a while, Grissom felt like police left her alone, or maybe they just didn't know her

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arrest somebody."

One night in October 2013, she was leaving the Twin Donut on Fordham Road, "where everybody goes...one of the only places you can just go in and sit down when you don't have money." She walked for a while, speaking with a man along the way. After about 30 or 45 minutes, they went their separate ways. It was then that an unmarked police car pulled up alongside her. Officers Bryan Pocalyko and Christopher Savarese demanded she stop and placed her under arrest.

Only after Grissom was arrested and loaded into a police van with another woman who had been arrested that night did she learn that she was charged with loitering for the purpose of prostitution, though she says that at no time had she tried to solicit money for sex.

According to the lawsuit, when Grissom was brought to the 52nd Precinct, Officer Pocalyko refused to believe she was a woman.

"[Officer] Pocalyko unlawfully ordered Ms. Grissom to be strip-searched by a female police officer even though she was not suspected of possessing any drugs or contraband," the suit reads. "The female officer took Ms. Grissom into a bathroom and ordered her to lift her shirt, shake out her bra, and pull her shorts down. This search was for the purpose of confirming whether or not she was female, as her identification indicated."

Later in court, the Legal Aid suit says, one of the officers "alleged that Ms. Grissom's purpose was prostitution because she was observed at a location 'frequented by people engaged in prostitution' and was wearing 'tight short shorts [and a] tight tank top.' "

If Tiffaney Grissom had been doing the same thing, in the same outfit, but in, say, Times Square, would she have been arrested? It depends: In what decade?

New York's law criminalizing loitering for the purpose of engaging in a prostitution offense only dates to 1976. Before the law was passed, the NYPD would use the existing, general anti-loitering laws to target women it wanted to keep off the streets. In one infamous six-month wave of sweeps in 1967 and 1968, police arrested more than three thousand women who either were or were profiled as sex workers, mostly centering on Times Square, driven by panic about street crime. Police said they would charge the women with loitering or disorderly conduct offenses because it was easier than trying to prove they were engaged in prostitution. The Legal Aid Society along with the New York Civil Liberties Union intervened to have some of the loitering cases dismissed.

This crackdown came as the NYPD began to pressure the state to add loitering for the purposes of prostitution to the penal code. "The actions of these individuals have always had a deleterious effect on the business and social life of the community," wrote the department in a 1967 memo. But at the time, civil rights attorneys were testing loitering statutes in the courts. In 1972, the U.S. Supreme Court ruled that a law prohibiting loitering, "vagrancy," and "nightwalking" was unconstitutionally vague. It was after all this that loitering for the purpose of prostitution was added to the New York State penal code. To this day, the NYPD continues to make a few thousand prostitution arrests each year under a variety of statutes, with several hundred for loitering for prostitution

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"manifesting prostitution" after accepting a ride one night from a man who turned out to be an undercover cop, she launched a national campaign against the law. She and her supporters described it as making a crime out of "walking while trans" — very similar to how women describe the NYPD's enforcement of the loitering law. Jones's conviction was overturned on appeal, but the law in Phoenix still stands.

ILLUSTRATION BY WE BUY YOUR KIDS

Eight days after she was pulled off the bus in East New York, Sarah Marchando was

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Marchando said she would have to plan ahead about when to go out just to try to avoid arrest. “You have to keep in the back of your mind that, ‘OK, what is the day?’ Because if it is that type of day, like on Friday nights or Saturday mornings, they are doing prostitution sweeps.”

According to Tiffaney Grissom, “The only thing that you can do to avoid it is just not go outside.”

But she would have to leave the house for court appearances, and a lot of them. At one

was like Tuesdays and Wednesdays it would be Brooklyn. Then, get up on Wednesdays and Thursdays and go to the Bronx. It would be excessive."

"We were always in court," longtime community advocate Lorena Borjas told me. She's the founder of the Lorena Borjas Community Fund, a legal fund for transgender New Yorkers in immigrant communities, which has offered assistance to trans women in Queens targeted in loitering arrests. "I can say that four years ago we were having arrests about every fourteen days," she recalled. "They were specifically focused on the trans community that crosses the Jackson Heights area. Especially with all of the trans girls that this was happening to who were undocumented, they were, of course, running the risk of being deported. When people had to appear in court, they would say, 'Well, I saw you out here last Friday, so now this Friday I am going to arrest you.' "

Borjas explains that what makes Jackson Heights different from East New York or the Bronx is that there, the women most likely to be targeted in anti-loitering policing, members of the Latina trans community, were visible and organized. Borjas did street outreach, sharing "Know Your Rights" cards so they knew how to protect themselves during police encounters. Groups like Make the Road New York have documented the policing of Jackson Heights' LGBTQ Latinx community, highlighting the use of anti-loitering laws to sweep trans Latinas off the street.

"The police were saying a while ago that they wanted to change the face of Jackson Heights," Borjas said. "They wanted to stop drug sales, they wanted to stop people from selling tacos and food in public." All this came at the same time as crackdowns on trans women. "They were saying, 'The face of Jackson Heights is something we are going to change.' According to them, the mentality was that they were going to do this by arresting the whole world."

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As in the West Village when Tiffaney Grissom worked and hung out there, police used anti-loitering laws to "change the face" of neighborhoods. "This kind of policing is very much tied into the gentrification and sort of economic shift in certain areas," said Legal Aid's Mogulescu. "The call for a kind of 'cleanup' of the streets that accompanies that — this is not the only law that's used to do that, but it's a pretty striking example. And because the law allows for such abuse — it's part of the law itself — there's no check on that. So it becomes a very useful tool for getting people off the street." Mogulescu's voice softened. "And we have to think about who those people are."

After all her arrests, Sarah Marchando ended up leaving Brooklyn. She told me she's still trying to keep a steady place to live, still trying to find work. "It wasn't like I could just say, 'Hey, let me go get a job,' because I am not stable. I can't get stable if every time I turn around I am in jail again."

Tiffaney Grissom left the Bronx, too. She estimates that of all her arrests for loitering, about 80 percent of the time, she wasn't even out doing sex work. "Whether you are 'hoing or not 'hoing," she said, "even if you look like you might be trans, you are going to jail."

What she remembers from all the arrests is, "They always give you this whole speech of 'high prostitution-prone area.' " After a while, it was like police thought that was just anywhere she was. "It is a stigma that comes with being trans. You are automatically a

In Jackson Heights, the loitering crackdowns on the community, in some ways, made it all the more determined, said Borjas. "Two years ago we started to do protests and to become more visible so that we could tell the police and the neighborhood, 'We are here. We are not going anywhere. We are your neighbors and your friends. We are your clients. We are the ones that come to buy a cup of coffee in the morning. We go to the supermarket and we, too, need protection, just like you.' "

Tiffaney Grissom didn't have that. After she got arrested twice in the same week, she said, police scolded her. "They were like, 'You are just not getting it through your head.' It is not that I am not getting it through my head; it is, regardless of however many times I get arrested, I still need to eat. This is my livelihood." So she kept working. As a result of one prostitution arrest, she ended up at Rikers. "It was the day before Thanksgiving that I got out. I had on a minidress. It was ridiculous. A minidress, no money....When I had gotten there, I had just shut down. I didn't pee; I didn't eat. I didn't do anything for four days."

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After years of this, both women told me, they were done with pleading guilty. They were done with Rikers. They signed on to be plaintiffs in the case challenging the law itself.

"It took a lot to get here," Marchando told me. "A lot of cases." For one, she needed support to fight her charges. But now, as part of the legal challenge, if they are successful, this could mean the end of so many women ending up in the system in the first place. "I was just going to jail and there were no questions asked," Marchando said. "It needs to change. It is a targeting thing that has to stop, and if nobody says nothing, it is not going to be dealt with."

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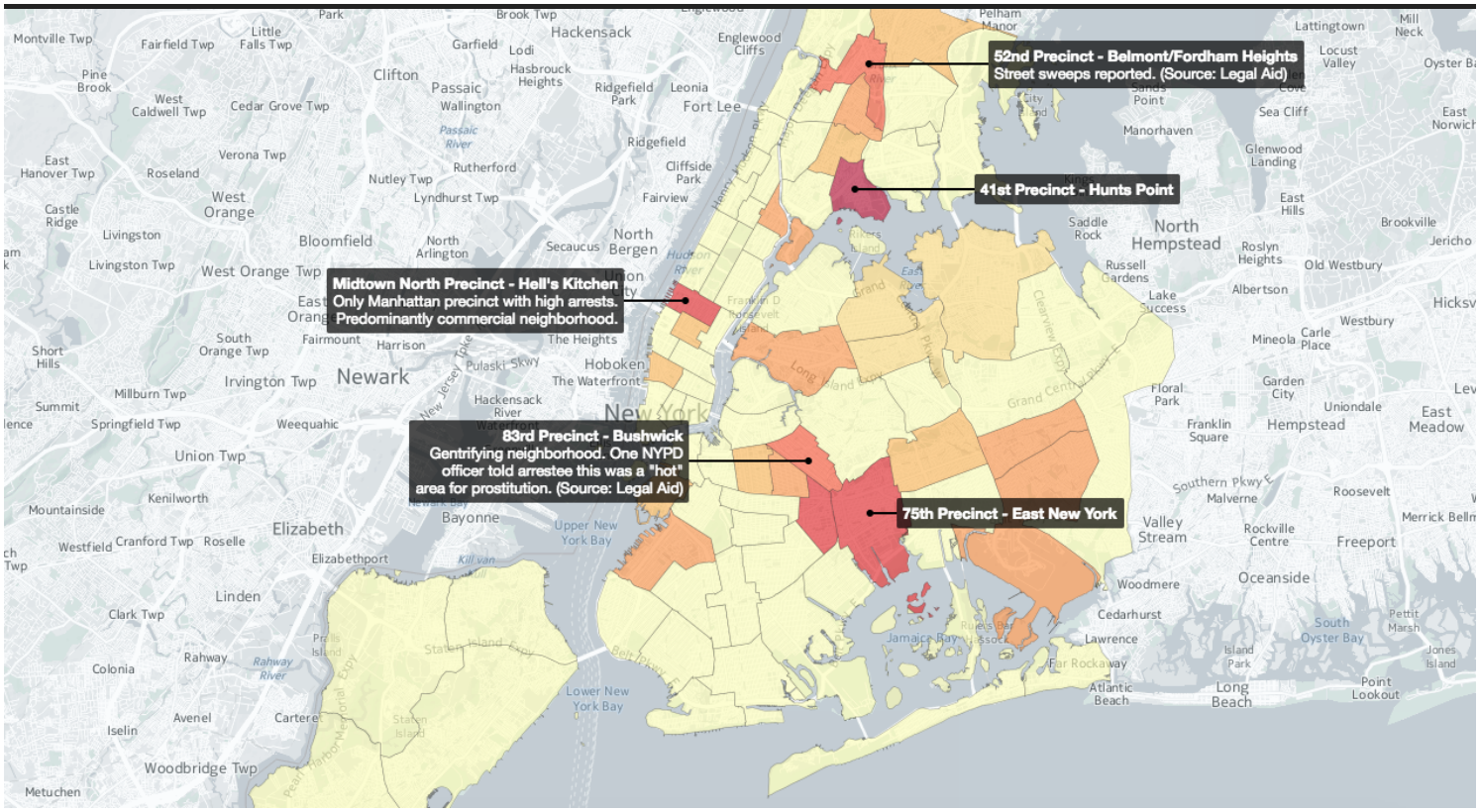
NEW YORK

Interactive Map: See Where the NYPD Arrests Women Who Are Black, Latina, Trans, and/or Wearing Jeans

by MELISSA GIRA GRANT

NOVEMBER 22, 2016



Check out the interactive map below.

Since 1976, it's been a crime to "loiter for the purposes of engaging in a prostitution offense" in New York City. That might sound like the kind of thing that went out of fashion along with XXX marquees in Times Square. But between 2012 and 2015, the NYPD arrested and charged 1,300 people with this misdemeanor.

The Voice obtained arrest data from Legal Aid and the New York State Division of Criminal Justice Services Arrest Statistics for the past three years. This data was then mapped by John Keefe.

Map created by jkeefe

The vast majority of those charged with this offense (81%) are women. Overall, according to New York State Division of Criminal Justice Services Arrest Statistics, 85% of those arrested for loitering for prostitution between 2012 and 2015 were black or Latina.

How exactly do police think they can tell when women are doing something "for the purposes of" prostitution? The law gives the NYPD very wide discretion. From the supporting depositions officers file with each arrest, police list as evidence such wholly innocent behaviors as waving at passers-by, having conversations with someone of a different gender, or wearing tights jeans or baring cleavage.

This September, eight women of color, including cisgender and transgender women, filed a civil rights suit with the support of The Legal Aid Society of New York, challenging the constitutionality of the loitering law. They describe a pattern of targeted and yet arbitrary policing, sweeping women of color from their neighborhoods into jails,

But loitering arrests don't reveal the places sex work happens in the city, only the places where women are most likely to be policed based on their presence alone, whether they are engaged in sex work or not. Between 2012 and 2015, 68.5% of arrests for loitering for the purposes of prostitution were made in just five neighborhoods: Bushwick (83rd Precinct), Belmont/Fordham Heights (52nd Precinct), East New York (75th Precinct), Hunts Point (41st Precinct), and Brownsville (73rd Precinct), neighborhoods where residents are predominantly people of color.

Police say these neighborhoods are "prostitution prone," but as Kate Mogulescu, a supervising attorney in the Legal Aid Society's Criminal Defense Practice, points out, "this is based on a self-fulfilling cycle. They make an arrest in a place, therefore that place becomes 'prostitution prone' – and they can make more arrests in that place, because they have already identified it as prostitution prone."

"It is easier to prove somebody is guilty when it is already on their record," said Sarah Marchando, one of the women suing over the loitering law. "There is really no fight," You can't say, 'Hey, I wasn't doing this!' if you are dressed a certain way."

"The only thing that you can do to avoid it," Tiffaney Grissom, another plaintiff on the suit told me, "is just not go outside."

JUDGE CASTEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 CV 7698

D.H., N.H., K.H. f/k/a J.H., Natasha Martin, Tiffaney Grissom, R.G., A.B. and Sarah Marchando, individually and on behalf of a class of all others similarly situated;

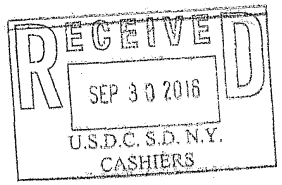
Plaintiffs,

-against-

THE CITY OF NEW YORK, SEAN KINANE, JOSEPH MCKENNA, KAYAN DAWKINS, THOMAS KEANE, MARIA IMBURGIA, KEVIN MALONEY, JOEL ALLEN, DAVE SIEV, BRYAN POCALYKO, CHRISTOPHER SAVARESE, THOMAS DIGGS, JOEL GOMEZ, KEITH BEDDOWS, CHRISTIAN SALAZAR, HENRY DAVERIN, JOSEPH NICOSIA, KELLY QUINN, ALEXIS YANEZ, MICHAEL DOYLE, JOHN/JANE DOE NYPD POLICE OFFICERS #1-14;

Defendants.

COMPLAINT AND
DEMAND FOR A JURY TRIAL



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PRELIMINARY STATEMENT

1. Plaintiffs D.H., N.H., K.H. f/k/a J.H.,[1] Natasha Martin, Tiffaney Grissom, R.G., A.B. and Sarah Marchando ("Named Plaintiffs") bring this civil rights action on behalf of themselves and a class of similarly situated women of color, some of whom are transgender, who have been and may in the future be subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained under New York Penal Law Section 240.37 ("Section 240.37") (the "Plaintiff Class," and together with Named Plaintiffs, "Plaintiffs"), and allege the following on information and belief:

2. This is a civil rights class action that challenges the constitutionality of Section 240.37, Loitering for the Purpose of Engaging in a Prostitution Offense, under which New York City Police Department ("NYPD") officers target and arrest women—primarily women of color, including transgender women—engaged in wholly innocent conduct based on their race, color, ethnicity, gender, gender identity and/or appearance.

3. Since 1976, New York has criminalized loitering in a public place by persons whom the police selectively and subjectively determine are present for the purpose of prostitution.

4. New York enacted Section 240.37, along with several other anti-loitering laws, at a time when street crime was rampant, in order to provide police officers with a "tool to curtail the proliferation of prostitution" and other "maladies" throughout New York.[2]

[1] K.H. is in the process of legally changing her name from J.H.

[2] Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey (June 10, 1976) [hereinafter Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey]; see Murray Schumach, Major Drive on Illicit Sex is Being Drafted by City, N.Y. Times (Sept. 1, 1975), http://www.nytimes.com/1975/09/01/archives/major-drive-on-illicit-sex-is-being-drafted-by-city-city-is.html; see also Tom Goldstein, Experts Say 2 Laws Proposed to Clean Up Times Square Face Constitutional Problems, N.Y. Times (Nov. 3, 1975), http://www.nytimes.com/1975/11/03/archives/experts-say-2-laws-proposed-to-clean-up-times-square-face.html.

5. Many of these loitering statutes have since been struck down as unconstitutional. Section 240.37 remains in force, and the pattern of unlawful arrests under this statute demonstrates that the fears and doubts expressed at the time of its passage about its unconstitutionality and potential for abuse were entirely warranted.[3]

6. Section 240.37 provides in relevant part:

> Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article two hundred thirty of the penal law, shall be guilty of a violation.

7. On its face, Section 240.37 is unconstitutionally overbroad. It criminalizes many forms of constitutionally protected expressive activity, such as attempting "to engage passers-by in conversation," based solely on a police officer's subjective determination that the activity was "for the purpose" of prostitution.

8. The statute is also void for vagueness because it lacks objective criteria and guidelines for determining what conduct is "for the purpose of prostitution." It therefore fails to provide adequate notice of the conduct that will be deemed criminal and gives police officers unfettered discretion to arrest individuals based on subjective determinations of an individual's "purpose," leading to inconsistent and arbitrary enforcement. Consequently, a person of

[3] See, e.g., Letter from Harold Baer, Jr. to Hon. Judah Gribetz, Counsel to the Governor (June 15, 1976) [hereinafter Letter from Harold Baer, Jr. to Hon. Judah Gribetz] (writing on behalf of the State Legislation Committee of the New York State Bar Association and the New York County Lawyers' Association, and noting that although the "prostitution problem . . . has reached critical proportions," Section 240.37 is "unconstitutional" and would invite arbitrary and discriminatory enforcement); N.Y. State Bar Ass'n, Legislation Report, No. 84 (1976) [hereinafter N.Y. State Bar Legislation Report] (demonstrating that Section 240.37 has "deficiencies . . . so glaring as to require our disapproval without regard to questions of the efficacy and underlying policy," and declaring that the law provides a "shortcut" for police, whereby the "standards of probable cause" are "dropp[ed]" and "[w]omen who are suspected of being prostitutes are arrested on sight, not because they are committing any unlawful act but because they are considered 'undesirable'").

ordinary intelligence cannot know if, for example, by speaking to acquaintances on the street or engaging in similarly innocent activity, she risks arrest under Section 240.37.

9. Further, the City of New York (or the "City," and together with all other named individual and Doe defendants ("Individual Defendants"), "Defendants"), through the NYPD, enforces Section 240.37 in a way that impermissibly targets Plaintiffs because of their race, color, ethnicity, gender, gender identity and/or appearance. Specifically, the City has adopted numerous policies, widespread practices and/or customs that result in arbitrary and discriminatory enforcement of Section 240.37 in violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8, 11 and 12 of the New York Constitution, including by:

- Deploying groups of NYPD officers to arrest multiple Plaintiffs under Section 240.37 in "sweeps" that target certain public areas where women of color, and in particular transgender women, are known to gather and socialize;
- Arresting Plaintiffs under Section 240.37 without probable cause, including based merely on the fact that a Plaintiff has been arrested in the past for a prostitution-related offense (even if the charge was dismissed) or that the Plaintiff was present in an area that the NYPD has designated as "prostitution-prone";
- Arresting women of color under Section 240.37 at a higher rate than men or white women because of their race, color, ethnicity, gender, gender identity and/or appearance; and
- Failing to adequately train, monitor, supervise or discipline NYPD officers involved in the enforcement of Section 240.37 to prevent or mitigate these abuses and constitutional violations.

10. Defendants' conduct results in a pattern and widespread practice of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of women of color, including transgender women, engaged in wholly innocent conduct, such as walking in public spaces or speaking with other pedestrians.

11. The overwhelming majority of arrests under Section 240.37 are of women of color, including significant numbers of transgender women. In many instances, charges are eventually dismissed, but the injurious legal, financial, emotional and physical effects of the arrests on Plaintiffs' lives remain.

12. Defendants implement the NYPD's policies, widespread practices and/or customs in an intentionally discriminatory and race-based manner by focusing their enforcement efforts on communities of color. Defendants also discriminatorily acquiesce in, ratify and fail to monitor or rectify these unlawful practices because the victims are transgender and/or women of color.

13. The enforcement of Section 240.37 intimidates, threatens and interferes with Named Plaintiffs' enjoyment of their homes and neighborhoods and their right to associate freely with others. The enforcement is so arbitrary and discriminatory that many Named Plaintiffs are afraid to leave their homes, particularly at night.

14. As examples, on June 6, 2015, Named Plaintiff D.H., an African-American woman who is transgender, was arrested walking in her neighborhood in the Bronx while trying to hail a cab to get home. D.H. is deaf and communicates primarily through typing and sign language. During her walk, she did not interact with anyone or engage in any behavior related to the solicitation of prostitution or other unlawful conduct. She was nevertheless stopped, harassed, arrested and detained by the police as part of a "sweep" of transgender women in the area, and eventually charged with loitering for the purpose of prostitution.

15. Similarly, on June 6, 2015, Named Plaintiff N.H., an African-American woman who is transgender, was arrested in her neighborhood on her way home from buying food and cigarettes at a nearby store. Like D.H., N.H. was arrested as part of a sweep of transgender

women, and one of the arresting officers told those women that if they saw "girls like them"—meaning transgender women—outside after midnight, they would arrest them.

16. On June 13, 2015, Named Plaintiff K.H., an African-American woman who is transgender, was walking home to her apartment when she met another transgender woman. As they walked together, NYPD officers jumped out of an unmarked police car and accosted them. The officers arrested both women on the spot without probable cause.

17. Section 240.37 is unconstitutional, and, as evidenced by the experience of these and the other Named Plaintiffs, including as set forth more fully below, Defendants' policies, widespread practices and/or customs in enforcing it have violated and continue to violate Plaintiffs' rights secured by the constitutions and laws of the United States and the State and City of New York.

18. Plaintiffs seek declaratory relief striking Section 240.37 as unconstitutionally vague and overbroad and declaring that the City's policies, widespread practices and customs in enforcing Section 240.37 in an arbitrary and discriminatory manner violate Plaintiffs' constitutional and statutory rights under federal, state and local law. Plaintiffs also seek injunctive relief prohibiting future enforcement of Section 240.37. In addition, Named Plaintiffs seek compensatory and punitive damages, an award of attorneys' fees and costs and such other relief as this Court deems equitable and just.

JURISDICTION

19. Jurisdiction is conferred upon this Court under 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4), as this is a civil action arising under 42 U.S.C. § 1983 and the United States Constitution.

20. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

21. This Court has jurisdiction over the supplemental claims arising under the laws of the State and City of New York pursuant to 28 U.S.C. § 1367(a), as they are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy.

22. This case is brought to vindicate the public interest, and the resolution of this case will directly affect the rights of all New Yorkers, particularly women of color. Therefore, to the extent that the notice of claim requirement of N.Y. Gen. Mun. Law §§ 50-e and 50-i would otherwise apply to any of the claims stated below, no such notice is required because this case falls within the public interest exception to that requirement.

VENUE

23. Venue is proper in the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events that gave rise to the claims alleged in this complaint occurred in the Counties of Bronx and New York. In addition, Defendants conduct business and maintain their principal place of business in the Counties of Bronx and New York. The NYPD maintains its headquarters at 1 Police Plaza, New York, NY 10007, where many of its policies are created.

PARTIES

I. PLAINTIFFS

24. The Plaintiff Class comprises women of color, some of whom are transgender, who have been or will be subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37, including based on their race, color, ethnicity, gender, gender identity and/or appearance.

25. Named Plaintiff D.H. is a 26-year-old deaf African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

26. Named Plaintiff N.H. is a 36-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

27. Named Plaintiff K.H. is a 32-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

28. Named Plaintiff Natasha Martin is a 38-year-old African-American woman who is transgender and at all relevant times was a resident of Brooklyn, New York.

29. Named Plaintiff Tiffaney Grissom is a 30-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

30. Named Plaintiff R.G. is a 59-year-old Latina woman and at all relevant times was a resident of Bronx, New York.

31. Named Plaintiff A.B. is a 44-year-old African-American woman and at all relevant times was a resident of Brooklyn, New York.

32. Named Plaintiff Sarah Marchando is a 28-year-old Latina woman and at all relevant times was a resident of Queens, New York.

II. DEFENDANTS

33. The City is a municipal entity created and authorized under the laws of the State of New York to maintain, operate and govern a police department, the NYPD, which acts as its agent in the area of law enforcement and for which the City is ultimately responsible. The City assumes the risks incidental to the maintenance of a police force and the employment of police officers. The law enforcement activities of the NYPD are supported, in part, by federal funds.

34. At all relevant times, all Individual Defendants were members of the NYPD, acting in the capacity of agents, servants and employees of the City, and within the scope of their employment as such. At all relevant times, Defendants JOSEPH MCKENNA, KEVIN MALONEY, DAVE SIEV, BRYAN POCALYKO, HENRY DAVERIN, KEITH BEDDOWS, MICHAEL DOYLE and Doe NYPD Officer #13, and potentially one or more of Defendants Doe NYPD Officers #1-12, were sergeants, lieutenants, captains and other high-ranking officials of the NYPD with training, supervisory and policy-making roles.

35. Defendants JOSEPH MCKENNA, KEVIN MALONEY and DAVE SIEV (collectively, the "Sweep Supervisor Defendants") participated in planning, ordering, staffing, supervising and/or approving[4] the sweeps described below which resulted in the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of D.H., N.H, K.H. and/or Natasha Martin, and failed to monitor or reprimand officers involved in those sweeps. Defendants SEAN KINANE, KAYAN DAWKINS, THOMAS KEANE, MARIA IMBURGIA, JOEL ALLEN, DAVE SIEV and Doe NYPD Officers #1-7 (collectively, the "Sweep Officer Defendants") were involved in the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of D.H., N.H, K.H. and/or Natasha Martin as part of a sanctioned sweep, as described in greater detail below. The Sweep Supervisor Defendants and Sweep Officer Defendants are sued in their individual, official and supervisory capacities.

36. Defendants BRYAN POCALYKO, HENRY DAVERIN, KEITH BEDDOWS, MICHAEL DOYLE and Doe NYPD Officer #13 (collectively, the "Non-Sweep Supervisor

[4] Per the 2015 edition of the NYPD Patrol Guide, to approve an arrest, the arrest paperwork and supporting deposition must be reviewed for completeness and accuracy by the desk officer. NYPD Patrol Guide, Arrests – General Processing, Desk Officer, PG 208-03, ¶¶ 26-34 (2015-A Ed.) [hereinafter NYPD Patrol Guide].

Defendants") participated in planning, ordering, staffing, supervising and/or approving the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of Tiffaney Grissom, R.G, A.B. and Sarah Marchando, and failed to monitor or reprimand the officers involved. Defendants CHRISTOPHER SAVARESE, THOMAS DIGGS, JOEL GOMEZ, BRYAN POCALYKO, CHRISTIAN SALAZAR, JOSEPH NICOSIA, KELLY QUINN, MICHAEL DOYLE, ALEXIS YANEZ, and Doe NYPD Officers #8-13 (collectively, the "Non-Sweep Officer Defendants") were involved in the unlawful surveillance stops, questioning, frisks, searches, seizures and/or arrests and detentions of Tiffaney Grissom, R.G, A.B. and Sarah Marchando. The Non-Sweep Supervisor Defendants and Non-Sweep Officer Defendants are sued in their individual, official and supervisory capacities.

37. At all relevant times, Defendant Doe NYPD Officer #14 was an officer in the 52nd precinct. Defendant Doe NYPD Officer #14 was involved in the refusal to provide D.H. with a sign language interpreter in violation of her rights under the Americans with Disabilities Act, New York State Human Rights Law and New York City Human Rights Law.

38. At all relevant times, Individual Defendants were acting under color of state law, including under color of the statutes, ordinances, regulations, policies, customs and/or usages of the City and State of New York.

CLASS ACTION ALLEGATIONS

39. Named Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Federal Rule of Civil Procedure 23.

40. Named Plaintiffs are D.H., N.H., K.H., Natasha Martin, Tiffaney Grissom, R.G., A.B. and Sarah Marchando.

41. This action is properly maintainable as a class action because the requirements of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure are satisfied, as shown below.

42. The class is so numerous that joinder of all members is impracticable. From 2012 through 2015, nearly 1,300 individuals were arrested in New York City under Section 240.37.[5] During those same years, nearly 400 of those arrests did not lead to convictions. In some cases, charges were never filed; in others, charges were dismissed; and in others, the accused was acquitted.

43. Joinder is also impracticable because many members of the Plaintiff Class are not aware that their constitutional and statutory rights have been violated and that they have the right to seek redress in court. Further, many Plaintiff Class members cannot be joined individually because they have been unlawfully surveilled, stopped, questioned, frisked, searched and/or seized by NYPD officers but ultimately were not arrested and detained, and are therefore unknown. There is no appropriate avenue for the protection of these Plaintiff Class members' constitutional and statutory rights other than by means of a class action.

44. The claims alleged on behalf of Named Plaintiffs as Plaintiff Class representatives raise questions of law or fact common to all Plaintiffs, and these questions predominate over individual questions. These common questions include, but are not limited to:

- Whether Section 240.37 is void for vagueness as a result of its failure to provide adequate notice to individuals of objective conduct that would subject them to arrest under the statute and/or guidance to officers;
- Whether Section 240.37 is unconstitutionally overbroad, impermissibly infringing Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 11 and 12 of the New York Constitution;

[5] See N.Y. State Div. of Criminal Justice Servs., New York City Arrests by Precinct for Loitering for Prostitution: PL 240.37 (2012-2015) (unpublished spreadsheet) [hereinafter DCJS Arrest Statistics 2012-2015].

- Whether the City engages in arbitrary and discriminatory enforcement of Section 240.37 in violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 11 and 12 of the New York Constitution;

- Whether the City has violated Plaintiffs' rights to free speech by consciously choosing to enforce Section 240.37 based in large part on protected conduct, including conversations in public and/or Plaintiffs' expression of gender or gender identity;

- Whether the City has consciously chosen to enforce Section 240.37 in violation of Plaintiffs' right to be free from unreasonable searches and seizures by unlawfully surveilling, stopping, questioning, frisking, searching, seizing, and/or arresting and detaining Plaintiffs without reasonable suspicion or probable cause;

- Whether the City has consciously chosen to enforce Section 240.37 in a discriminatory manner based on the race, color, ethnicity, gender, gender identity and/or appearance of Plaintiffs in violation of the New York State Civil Rights Law, the New York State Human Rights Law (the "NYHRL"), the New York City Bias-Based Profiling Law and the New York City Human Rights Law (the "NYCHRL");

- Whether the City knew or should have known that, as a direct and proximate result of such policies, widespread practices and/or customs, the constitutional rights of Plaintiffs would be violated; and

- Whether the City acted with deliberate indifference to Plaintiffs' constitutional rights in failing to rectify such arbitrary and discriminatory enforcement policies, widespread practices and/or customs, including by failing to adequately train, monitor, supervise or discipline officers engaged in the enforcement of Section 240.37.

45. The claims of Named Plaintiffs are typical of the Plaintiff Class they seek to represent, as each Named Plaintiff alleges violations of her federal and state constitutional and statutory rights in connection with law enforcement actions undertaken by NYPD officers pursuant to Section 240.37.

46. The Named Plaintiffs are adequate Plaintiff Class representatives. The violations of law that Named Plaintiffs allege stem from the same course of conduct by Defendants that violated and continues to violate the rights of Plaintiff Class members, and the legal theories under which Named Plaintiffs seek relief are the same as or similar to those on which the

Plaintiff Class will rely. In addition, the harm suffered by Named Plaintiffs is typical of the harm suffered by absent Plaintiff Class members.

47. Named Plaintiffs have the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of other Plaintiff Class members. Counsel for Named Plaintiffs includes attorneys from The Legal Aid Society and the law firm Cleary Gottlieb Steen & Hamilton LLP who are experienced in federal class action litigation, including constitutional and civil rights litigation, and have the resources necessary to pursue this litigation. Counsel for Named Plaintiffs knows of no conflicts among Plaintiff Class members.

48. This action is properly maintainable as a class action under Rule 23(b)(1) of the Federal Rules of Civil Procedure because prosecuting separate actions by individual Plaintiff Class members would create a risk of adjudications with respect to individual Plaintiff Class members that (a) would be inconsistent or varying, and thus establish incompatible standards of conduct for the parties opposing the Plaintiff Class, and/or (b) as a practical matter, would be dispositive of the interests of non-parties or would substantially impair or impede non-parties' ability to protect their interests.

49. This action is properly maintainable as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure because Defendants have acted and/or refused to act on grounds generally applicable to the Plaintiff Class, thereby rendering final declaratory relief and corresponding injunctive relief appropriate with respect to Named Plaintiffs and the Plaintiff Class as a whole. Plaintiffs are entitled to injunctive relief to end Defendants' policies, widespread practices and/or customs of surveiling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs for loitering for the purpose of prostitution under Section 240.37, including, and especially, based on impermissible and/or insufficient grounds.

FACTUAL ALLEGATIONS

I. SECTION 240.37 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, WHICH LEADS TO ARRESTS FOR CONSTITUTIONALLY PROTECTED BEHAVIOR

A. Section 240.37 Is Void for Vagueness

50. Section 240.37 is unconstitutionally vague under the Due Process clause of the Fourteenth Amendment because it is a criminal statute that fails to give citizens notice of the specific conduct it prohibits. Furthermore, Section 240.37 fails to provide law enforcement with clear guidelines or standards to prevent arbitrary policing.

51. Section 240.37 fails to provide any objective criteria to determine what conduct is for the "purpose" of prostitution. Absent objective criteria, such determinations are based entirely on a police officer's subjective views, making it all but impossible for an individual to know when "beckon[ing] to" or "engag[ing] passersby in conversation," or other commonplace, innocent conduct enumerated in the statute, may be deemed for the "purpose" of prostitution, and to conform her behavior accordingly.

52. Section 240.37 also gives police officers unfettered discretion in determining whether conduct—otherwise innocent and/or constitutionally protected—is carried out for the "purpose" of prostitution. "Purpose," unlike "criminal intent," is not defined in New York's Penal Law, affording the NYPD immense discretion to assume an individual's "purpose" without ever having to prove a *mens rea* element. Thus, Plaintiffs are subjected to the whims of police officers who may determine that their conduct is for the "purpose" of prostitution for any of a substantial number of reasons not enumerated in the statute and unascertainable by Plaintiffs.

53. By allowing officers' subjective views to be determinative of whether a person's actions demonstrate a specific intent to engage in prostitution, Section 240.37 fails to provide

individuals with the notice required under the Due Process Clause to tailor their conduct to the confines of the law and avoid arrest.

54. Furthermore, the purported guidance provided in the NYPD Patrol Guide is equally vague and otherwise flawed, thereby increasing arbitrary enforcement. For instance, the NYPD Patrol Guide instructs officers that an arrestee's "clothing" is "pertinent" to the probable cause inquiry. At the same time, the NYPD Patrol Guide does not provide any objective criteria regarding what types of attire may or may not have probative value for purposes of establishing probable cause, thus encouraging officers to make arrests based on individual, subjective opinions regarding what clothing someone who might be "loitering for the purpose of prostitution" would wear. In pre-printed affidavits provided by prosecutors (also referred to as supporting depositions), which prompt the arresting officer to describe "revealing" or "provocative" clothing, officers often respond by citing a wide range of innocuous attire, such as "jeans," a "black pea coat" or a pair of leggings.

1. *Legislative History and Previous Legal Challenges to Section 240.37*

55. The broad discretion afforded to police officers in effecting arrests under Section 240.37 has given rise to substantial constitutional concerns and controversy since the law's adoption. Section 240.37 was enacted by the New York Legislature in 1976 as a means of eradicating what were then high rates of prostitution by making it easier for police to arrest potential prostitutes.[6]

56. At the time Section 240.37 was first proposed, numerous commentators, including politicians, bar and other legal associations and advocacy groups expressed grave concerns that

[6]Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey, supra note 2; Schumach, supra note 2; Goldstein, supra note 2.

the statute would be unconstitutional. See, e.g., Thomas Poster, Fears About Police Abuses Keep Prostie Bill on Hook, N.Y. Daily News, Mar. 18, 1976, at 41 (reporting that New York senators "have raised serious civil liberty questions" about a proposed draft of Section 240.37 and expressed concerns that the law "contains police powers that are too sweeping"); Schumach, supra note 2 (quoting executive director of NYCLU's concern that Section 240.37 would enable police to "set up a dragnet of the streets"); N.Y. Civil Liberties Union, 1976 Legislative Memorandum 20-A (arguing Section 240.37 is "far too vague and thus susceptible of arbitrary and selective enforcement"); N.Y. State Bar Legislation Report, supra note 3 ("By giving the police discretion to arrest anyone whom they think manifests such intent [to engage in prostitution] the bill attempts to make it a crime to be 'undesirable'. . . . It thus oversteps several constitutional bounds at once."); Letter from Harold Baer, Jr. to Hon. Judah Gribetz, supra note 3 (writing on behalf of the State Legislation Committee of the New York State Bar Association and the New York County Lawyers' Association that Section 240.37 is "unconstitutional" and would be "difficult to enforce"); see also Hechtman, Practice Commentaries, N.Y. Penal Law § 240.37 (McKinney Supp. 1978) ("Critics have argued that the proscribed conduct, such as beckoning to, stopping or engaging passersby in conversation, is a trap into which unwary innocent persons, particularly women, may fall."); Letter from Michael R. Juviler, New York Office of Court Administration, to Hon. Judah Gribetz, Counsel to the Governor (May 20, 1976) (expressing concern that the term "for the purpose of" in Section 240.37 is "not a defined culpable mental state").

57. Shortly after Section 240.37 was enacted, its constitutionality was challenged on the limited grounds that it "encourag[ed] police to use unfettered discretion in making arrests based solely on circumstantial evidence [and] require[ed] them to infer criminality from wholly

innocent or ambiguous activity in which free citizens must necessarily engage to lead normal lives." People v. Smith, 44 N.Y.2d 613, 619 (1978) (internal quotation marks omitted). While the New York Court of Appeals ultimately rejected that challenge, it made clear that it was not addressing a due process claim for lack of notice. Nor was it possible for the Court of Appeals to evaluate the subsequent four decades of evidence demonstrating arbitrary and discriminatory enforcement of the statute.

2. *Constitutional Developments Since Section 240.37 Was Last Challenged*

58. In the intervening four decades since Smith, several of New York's "loitering-plus" statutes,[7] even those purporting to "detail[ ] the prohibited conduct and limit[ ] [themselves] to one crime," id. at 620, have been declared unconstitutional. See, e.g., Davis v. City of New York, 902 F. Supp. 2d 405, 421-22 (S.D.N.Y. 2012) (striking down as unconstitutionally vague a public housing rule prohibiting loitering by residents in the lobby, roof, hallway or stairs because it "prohibits a vast swath of 'conduct that is inherently innocent,' it fails to give [public housing] residents notice of what precise conduct is prohibited, and it 'places complete discretion in the hands of the police to determine whom they will arrest'" (quoting People v. Bright, 71 N.Y.2d 376, 383 (1988))); Loper v. N.Y.C. Police Dep't, 802 F. Supp. 1029, 1048 (S.D.N.Y. 1992) (holding that a statute that prohibited loitering, remaining or wandering in public for the purpose of begging impermissibly chills a person's First Amendment rights); Bright, 71 N.Y.2d at 382 (striking down as unconstitutionally vague a statute prohibiting

[7] In 1972, the Supreme Court struck down as unconstitutionally vague a law prohibiting loitering, holding that the ordinance "makes criminal activities which by modern standards are normally innocent," such as "[n]ightwalking," "loafing," or "wandering or strolling from place to place." Papachristou v. Jacksonville, 405 U.S. 156, 162-64 (1972). Shortly thereafter, the New York State Legislature passed a series of "loitering-plus" laws, including Section 240.37, nicknamed as such because they included additional elements beyond simple loitering in order to avoid the constitutional deficiencies identified in Papachristou.

loitering "in any transportation facility, or . . . sleeping therein" for failure to provide notice or sufficient police enforcement guidelines).

59. Further, courts in six other states (Florida, Nevada, Alaska, Oklahoma, Missouri and Virginia) have held that statutes nearly identical to Section 240.37, proscribing loitering for the purpose of prostitution, are unconstitutionally vague and/or overbroad. For example, in striking Alaska's loitering-plus statute, the Supreme Court of Alaska wrote that, given the statute's "excessive discretion, inviting by its inexactitude arbitrary enforcement and uneven application," the court could "think of no construction which will save the statute from this infirmity." Brown v. Municipality of Anchorage, 584 P.2d 35, 38 (Alaska 1978). See also Silvar v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 129 P.3d 682, 684 (Nev. 2006); Wyche v. State, 619 So.2d 231, 234 (Fla. 1993); West Palm Beach v. Chatman, 112 So.3d 723, 725 (Fla. Dist. Ct. App. 2013); Coleman v. City of Richmond, 364 S.E.2d 239 (Va. Ct. App. 1988); Christian v. Kansas City, 710 S.W.2d 11 (Mo. Ct. App. 1986); Profit v. City of Tulsa, 617 P.2d 250 (Okla. Crim. App. 1980).

3. *New York Courts Have Been Unable to Remedy Violations of Plaintiffs' Constitutional Rights Attributable to Section 240.37's Infirmities*

60. When processing Section 240.37 arrests, officers and prosecutors rely on a pre-printed affidavit in which officers simply "check the boxes" that apply, indicating whether: the arrest location is known for prostitution; the defendant was on the street; the defendant was in close proximity to stores or restaurants (either open or closed); the defendant stopped motorists who were not livery, taxi or bus drivers; the defendant was standing somewhere other than a bus stop or taxi stand; the officer has previously seen the defendant in the same location engaged in the same conduct; and/or the officer has previously arrested the defendant for prostitution-related offenses.

61. The pre-printed affidavits filled out by arresting officers typically fail to articulate allegations sufficient to conclude that a female defendant was in fact loitering for the purpose of prostitution. None of the choices on the pre-printed affidavit from which an arresting officer can select reflects any criminal activity, much less activity that is indicative of prostitution. New York courts have expressed exasperation at the NYPD's "slavish reliance" on this "pre-printed, check-off-type supporting deposition to expedite the processing" of a Section 240.37 accusatory instrument, which often "render[s] the accusatory instrument a legal nullity." People v. Perry, Dkt. No. 2014CN003368, at *1 (N.Y. Crim. Ct. 2014) (quoting People v. McGinnis, 972 N.Y.S.2d 882 (N.Y. Crim. Ct. 2013)).[8]

62. Courts have also emphasized that the government's reliance on the fact that a defendant has previously been arrested for loitering for prostitution amounts to "emblazon[ing]" a "scarlet letter" on the defendant, thus violating core principles of a "free society."

63. Despite these decisions by courts expressing concern about the NYPD's arrests under Section 240.37, the NYPD has not reformed its policing practices with respect to Section 240.37, and the statute continues to give rise to improper and unconstitutional policing of women of color.

B. Section 240.37 Is Unconstitutionally Overbroad

64. The right to speak freely with others—whether the speaker be wealthy or poor, the listener a man or woman, and the conversation in a classroom or on a street corner—is a fundamental freedom in this country. So too is the freedom to express one's gender identity

[8] Additionally, check-box forms "[facilitate] post-hoc justifications for stops where none may have existed at the time of the stop . . . . '[T]he overwhelming belief of experts [is] that a narrative field in which the officers describe the circumstances for each stop would be the best way to gather information that will be used to analyze reasonable suspicion' and, relatedly, 'prevent[] racially biased policing.'" Floyd v. City of New York, 959 F. Supp. 2d 668, 681 (S.D.N.Y. 2013) (quoting Susan Hutson, Independent Police Monitor, Review of the New Orleans Police Department's Field Interview Policies, Practices and Data: Final Report 45 (Mar. 12, 2013)).

through her attire, without fear of police surveillance or arrest. Section 240.37 interferes with Plaintiffs' exercise of these fundamental freedoms through the statute's overbroad criminalization of constitutionally protected expression.

65. By its plain terms, Section 240.37 criminalizes protected expressive activity by prohibiting individuals from repeatedly "attempt[ing] to engage passers-by in conversation." While courts have interpreted the prohibitions on "conversation" to be limited to those conversations that are "for the purpose of prostitution," the vagueness of that phrase, see supra Section I.A., renders it meaningless and ineffective as a limiting construction. The lack of objective criteria as to what constitutes activity "for the purpose of prostitution" effectively sweeps *all* conversations that occur in a public place as falling within the ambit of the statute. Because an officer may determine that a conversation is "for the purpose of prostitution" for any one of countless reasons having nothing to do with the content of the conversation—such as the neighborhood in which it takes place or the speaker's attire or gender, among others—merely talking to others in public becomes an activity in which Plaintiffs no longer feel free to engage, fearing that doing so may put them at risk of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained.

66. A sampling of supporting depositions filled out by NYPD officers following arrests of Named Plaintiffs under Section 240.37 validates these concerns. As grounds justifying the arrests, many of the supporting depositions include allegations that the defendant engaged in conversation with male passersby—yet *none* lists any information regarding the content of those conversations. Plainly then, *any* conversation may be used to justify an arrest, making it all but certain that a substantial number of arrests involve conversations wholly unrelated to prostitution. Moreover, the simple fact that Plaintiffs *can* be arrested under Section 240.37 for

conversations unrelated to prostitution based on other attendant circumstances, including those over which Plaintiffs have no control (such as the neighborhood or time of day), serves to chill protected expressive activity by Plaintiffs.

67. The expression of Plaintiffs' gender identity through their choice of dress and hair style is similarly chilled by Section 240.37. Plaintiffs have a liberty interest in their personal appearance, including in deciding what clothes to wear and how to style their hair, nails and other physical attributes. Yet, Plaintiffs' clothing choices, and officers' subjective interpretation of those choices, have been and continue to be the basis for arrests under Section 240.37. Transgender Plaintiffs in particular have a constitutionally protected interest in communicating their gender identity to the public, including through grooming and clothing decisions that send a message to the world that they are female regardless of the sex they were assigned at birth. By choosing to dress and present themselves in a manner that expresses their gender identity as women, transgender Plaintiffs are engaging in expressive conduct protected by the First Amendment. The NYPD's decision to enforce Section 240.37 by arresting transgender Plaintiffs on the basis of these choices impermissibly infringes on and chills transgender Plaintiffs' protected First Amendment conduct. As the New York Times succinctly put it: "If you are a 35-year-old biological woman wearing the $715 metallic platform peep-toe pumps you just bought at Barneys to lunch at Café Boulud, you are well-dressed; if you were born Joaquin, have changed your name to Marisol and put yourself together with a similar verve, you are a prostitute."[9]

[9] Ginia Bellafante, Arrests by the Fashion Police, N.Y. Times (Apr. 5, 2013), http://www.nytimes.com/2013/04/07/nyregion/arrests-by-the-fashion-police.html.

68. Further, Section 240.37 is overbroad for the additional reason that any legitimate application of the statute is merely duplicative of preexisting criminal prohibitions. New York separately prohibits prostitution and, under various provisions of New York Penal Law, officers may arrest individuals for solicitation of prostitution (P.L. § 230.00) and for attempted prostitution (P.L. § 110.00). Rather than addressing independent, additional criminal activity, Section 240.37 serves only to chill constitutionally protected expressive conduct.

II. THE CITY HAS POLICIES, WIDESPREAD PRACTICES, AND/OR CUSTOMS OF DISCRIMINATORY AND ARBITRARY ENFORCEMENT OF SECTION 240.37

69. The City consciously chooses to enforce Section 240.37 and to do so in an unconstitutional manner by using it to police expressions of gender identity and sexuality based on outdated and paternalistic notions of what clothing NYPD officers deem "revealing" or "provocative," with a disproportionate impact on women of color. The City's unconstitutional enforcement of Section 240.37 in this manner takes many forms. For example, the City uses unconstitutional sweeps to enforce Section 240.37; unlawfully surveils, stops, questions, frisks, searches, seizes and/or arrests and detains Plaintiffs for constitutionally protected conduct; routinely engages in unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs without reasonable suspicion or probable cause and discriminates against protected classes in its enforcement of Section 240.37.

70. Furthermore, the City has failed to curtail policies, widespread practices and/or customs that contribute to the constitutional violations, such as maintaining performance goals and arrest quotas for officers and sanctioning arrest sweeps in minority neighborhoods. It has also failed to take corrective action in the hiring, retention or supervision of its officers despite notice of their routine violations of individuals' constitutional rights. The City has also failed to

adequately train, audit, monitor, supervise and discipline police officers engaged in law enforcement actions pursuant to Section 240.37 to prevent constitutional violations and discriminatory enforcement.

A. The City Engages in Discriminatory Enforcement Practices Against Transgender Women of Color, Including by Using "Sweeps," Performance Goals and Arrest Quotas to Unlawfully Target Transgender Women of Color for Arrest Under Section 240.37

71. Transgender individuals experience high levels of discrimination in places of public accommodation. Studies show that over half of transgender individuals nationwide report being verbally harassed and disrespected in public, with 22% of African-American respondents reporting having been a victim of physical assault.[10] Transgender women of color are often unlawfully subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37 under circumstances in which men, white women and cis-gender women are not subjected to such law enforcement actions.

72. As a result of this ongoing discrimination, many transgender individuals live, work and/or socialize near one another. The communities they create are safe spaces in which they can socialize with minimal harassment and discrimination. One such community exists in the catchment of the 52nd precinct in the Bronx, in the neighborhood surrounding the intersection of 192nd Street and Davidson Avenue, which borders Monroe College. The NYPD is aware that this area is inhabited and/or frequented by many transgender individuals.

73. The City has a policy, widespread practice and/or custom whereby its officers conduct "sweeps" in which a particular precinct deploys a group of officers to a particular

[10] Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 5, 124 (2011).

location to arrest as many women as possible—in particular, women of color and transgender women—for Section 240.37 offenses.

74. Two such sweeps were conducted in the 52nd precinct on June 6-7 and 13-14, 2015. In a span of just over two hours on June 6, 2015, Defendants Keane, Dawkins, Kinane and Doe NYPD Officers #1-3 arrested at least eight transgender women, including D.H. and N.H. Defendant McKenna approved the arrests of D.H. and N.H. At the precinct, one of the arresting officers told the women that they had been conducting a sweep to let "girls like them" and their friends know that if the police saw them outside after midnight, they would arrest them.

75. One week later, in the same location, on the night of June 13, 2015, Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and non-party Officer Monge arrested at least six transgender women in a span of 25 minutes, including Plaintiff K.H. At least seven similar sweeps—and potentially many more—have been conducted by NYPD officers in the past three years in Brooklyn, the Bronx and Queens as a result of the City's policies, widespread practices and/or customs.

76. The City further has a policy, widespread practice and/or custom of enforcing performance goals and arrest quotas that cause officers to arrest Plaintiffs under Section 240.37 without probable cause.

77. The use of performance goals and quotas pushes officers to aggressively, and often unlawfully, undertake law enforcement activity in order to be considered for promotions and other career incentives. Indeed, the City imposes requirements that officers issue, make or fill out a certain number of summons, arrests and stop forms within specified time periods.[11]

[11] See Floyd, 959 F. Supp. 2d at 599-600.

78. These policies lead to disproportionate enforcement of Section 240.37 against marginalized groups such as Plaintiffs. As described by a former NYPD officer, these policies impact "the most vulnerable . . . [members of the] LGBT community, . . . the black community, . . . those people that have no vote, that have no power."[12] As another officer explained, "when you put pressure on cops to come up with numbers . . . it's the black, it's the Hispanic, it's the LGBT community. We go for the most vulnerable."[13]

79. Officers are warned that failure to comply with numerical activity standards will result in adverse employment actions.[14]

80. Once arrested, transgender women of color endure further discriminatory and unlawful treatment at the hands of the NYPD, including verbal abuse by officers and other detainees. Moreover, once these women have been arrested under Section 240.37, they are subject to a higher risk of re-arrest, as shown below.

81. Plaintiffs have repeatedly been victims of this practice. They experience heightened police surveillance and activity, false arrests and discrimination. Many transgender Plaintiffs fear leaving their homes, particularly at night, due to the City's policy, widespread practice and/or custom of targeting them for arrest under Section 240.37.

[12] Sarah Wallace, I-Team: NYPD Lieutenant Latest Cop to Say Department Enforces Quota, NBC News (Apr. 1, 2016), second video at 2:16-2:24, http://www.nbcnewyork.com/investigations/NYPD-Lieutenant-Says-There-Are-Quotas-I-Team-Wallace-374307721.html. See also Am. Compl., Raymond v. City of New York, No. 15-CV-6885(LTS) (S.D.N.Y. filed Aug. 31, 2015), ECF No. 31.

[13] Alison Fox, Edwin Raymond, NYPD officer: Department quotas dangerous, AM N.Y. (Mar. 1, 2016), http://www.amny.com/news/edwin-raymond-nypd-officer-department-quotas-dangerous-1.11527625.

[14] Floyd, 959 F. Supp. 2d at 599-600.

B. The City Has a Policy, Widespread Practice and/or Custom of Unlawfully Arresting Plaintiffs Under Section 240.37 Without Probable Cause

82. In addition to targeting transgender Plaintiffs for arrest under Section 240.37 without probable cause in sweeps, the City has a policy, widespread practice and/or custom whereby its officers unlawfully arrest Plaintiffs without probable cause by, inter alia, (1) arresting individuals based on a prior arrest under Section 240.37 and P.L. § 230.00 (prostitution), regardless of the outcome of the prior charge; (2) arresting individuals for being present in areas the police arbitrarily designate as "prostitution-prone"; and (3) arresting Plaintiffs after observing them for short periods of time and while Plaintiffs are engaged in innocent conduct.

83. The NYPD Patrol Guide instructs officers effecting arrests under Section 240.37 to "[i]nform [the] assistant district attorney of actions or any additional pertinent information," including whether the defendant is a "known prostitute" or "[c]onsorts with known prostitutes or pimps."[15] By including an arrestee's status as a "known prostitute" among the categories of "pertinent information" showing an intent to engage in prostitution, the NYPD has unlawfully created a policy, widespread practice and/or custom of arresting individuals for loitering for the purpose of prostitution merely because they have previously been arrested for the same offense or another prostitution-related offense, *even if charges were ultimately dismissed.* As a result of this perverse practice, Plaintiffs who have been wrongfully arrested under Section 240.37 in the past are more vulnerable to additional unlawful arrests in the future, despite the fact that "all official records and papers . . . relating to the arrest" in connection with a dismissed charge are to

[15] NYPD Patrol Guide, supra note 4, at PG 208-45, ¶ 3.

be "sealed and not made available to any person or public or private agency" under Criminal Procedure Law § 160.50.

84. NYPD officers recognize Plaintiffs whom they have previously arrested for prostitution-related charges and arrest those women again without probable cause based merely on the prior arrest, in violation of Plaintiffs' right to be free of unreasonable seizures.

85. Additionally, NYPD officers typically approach women, and in particular women of color, including transgender women, while they are lawfully present in public and request their identification. The officers then use the NYPD database to determine if a woman has previously been arrested for a prostitution-related offense. If she has, the officer will arrest the woman based on the arrest history alone, without any facts suggesting that she was loitering with the intent to engage in prostitution. This self-perpetuating cycle unlawfully prejudices any woman who has ever been arrested, even if the charges underlying her original arrest were dismissed.

86. NYPD officers also make unlawful arrests under Section 240.37 based on Plaintiffs' appearance. For example, when filling out pre-printed affidavits after arrests, officers frequently check the box that the arrestee was "dressed in provocative or revealing clothing . . . ." But often, officers' reliance on a woman's clothing for probable cause is entirely pretextual. NYPD officers cite countless types of clothing in their supporting depositions to justify arrests, many of which are far from "provocative" or "revealing." For instance, descriptions of such "provocative" or "revealing" clothing have included jeans, a black pea coat, a white jacket and a blue and white jump suit.

87. Moreover, in today's cultural and legal landscape, which has changed significantly from that in which the New York Court of Appeals decided Smith, and in which

people freely and frequently express their identity through clothing and appearance, so-called "revealing" clothing has little, if any, probative value. The NYPD's enforcement practices with respect to Section 240.37 highlight this fact: even if an arrestee's clothing actually were "revealing," this type of "dress code" is not policed against men or white women. Only women of color are systematically arrested for wearing clothing that emphasizes their femininity, making clear that "revealing" clothing is used simply as a pretextual justification for arrests without probable cause based on race, color, ethnicity, gender, gender identity and/or appearance. See infra Section II.C.

88. NYPD officers similarly make unlawful arrests under Section 240.37 on the basis of arbitrary designations that an area is "prostitution-prone," even though that designation is based on the NYPD's own dedication of resources to make high numbers of arrests in that area, not how much crime or prostitution actually occurs in that area as compared to another.

89. As a result, the areas where police have previously made prostitution arrests become the same areas that police then characterize as "prostitution-prone" to justify future arrests.

90. Finally, NYPD officers frequently make arrests after observing Plaintiffs engage in lawful conduct for very brief periods of time. For example, Defendant Keane observed N.H. for only five minutes before arresting her. During such brief observation periods, officers cannot establish probable cause to conclude that an individual is loitering, much less to determine whether that individual's conduct is "for the purpose" of engaging in prostitution.

C. The City Has a Policy, Widespread Practice and/or Custom of Discriminating Against Women of Color

91. The City has a policy, widespread practice and/or custom whereby women of color are arrested under Section 240.37 at a much higher rate than men or white women.[16] Women of color are commonly unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 under circumstances in which men and white women are not subjected to such law enforcement activity, such as for merely engaging in conversation with individuals of the opposite gender. Moreover, the unconstitutional policing practices described above occur almost exclusively in low income communities of color.

92. Defendants utilize Section 240.37 to unlawfully effect arrests based on gender. While Section 240.37 is gender- and race-neutral on its face, the discriminatory manner in which it is enforced leads to a significantly disproportionate impact on women of color. Even more telling, women of color are commonly arrested under Section 240.37 based on allegations that they were repeatedly beckoning to, stopping or attempting to stop or engaging in conversation with male passersby. Men engaged in similar behavior are not arrested under the statute. Men commonly attempt to speak to women passing by, attempt to engage those women in conversation and even make comments related to sexual conduct. However, NYPD officers discriminate based on gender by concluding that women engaged in such conduct are seeking to offer sex in exchange for money, and therefore are subject to arrest, while men doing so are merely paying a compliment.

93. Women's liberty interest in making choices about their personal appearance is also disproportionately impacted by the NYPD's enforcement of Section 240.37 as compared to

[16] NYPD identified 85% of the arrestees under Section 240.37 as Black or Latina. DCJS Arrest Statistics 2012-2015, supra note 5.

that of men. While the NYPD commonly arrests women under Section 240.37 for wearing clothing that highlights their femininity, no arrests are made of men for wearing clothing that highlights their masculinity, or based on any aspects of their personal appearance at all.

94. Women of color are disproportionately subject to arrests based on so-called "revealing" clothing as compared to white women who are similarly attired. Indeed, disproportionately arresting women of color for wearing "revealing" clothing is merely one of a number of discriminatory practices by the NYPD, along with labeling heavily minority neighborhoods as "prostitution-prone," that causes Section 240.37 to be used to unlawfully effect arrests based on race.

95. The NYPD's disproportionate targeting of people of color was thoroughly documented in the court's findings in Floyd v. City of New York.[17] In Floyd, the court made numerous findings demonstrating the NYPD's practice of discriminating on the basis of race when implementing its stop-and-frisk policy. First, the court found that the NYPD carried out more stops in areas with a higher percentage of African-American and Hispanic residents.[18] Second, even controlling for the racial composition of the area, African-Americans and Hispanics were more likely to be stopped than whites.[19] Third, African-Americans were more likely to be arrested after a stop for the same suspected crime.[20] Fourth, African-Americans and Hispanics were more likely than whites to be subjected to the use of force.[21]

[17] Floyd, 959 F. Supp. 2d 540.

[18] Id. at 589.

[19] Id.

[20] Id.

[21] Id.

96. In addition to these findings, the court in Floyd also found that the most common reason given for a stop was that it was in a "high crime area."[22] The court recognized that this was a weak indicator of criminal activity, noting that stops were *more* likely to result in arrest where "high crime area" was *not* given as a reason for the stop.[23] As shown above, the City employs substantially the same tactic in designating areas as "prostitution-prone." This practice contributes to the discriminatory enforcement of Section 240.37 in communities of color which have traditionally experienced higher concentrations of law enforcement than other communities.

97. Further illustrating this point, Section 240.37 arrests in New York City are clustered in several particular neighborhoods whose residents are largely people of color. For example, the five NYPD precincts with the most Section 240.37 arrests between 2012 and 2015, accounting for 68.5% of all Section 240.37 arrests during that period, are Bushwick, Brooklyn; Belmont/Fordham Heights, Bronx; East New York, Brooklyn; Hunts Point, Bronx; and Brownsville, Brooklyn, neighborhoods where residents are predominantly people of color.[24]

98. The result of this unlawful enforcement of Section 240.37 is that women of color are subject to arrest for innocent conduct in a manner and with a frequency that others not belonging to this group are not. Specifically, men engaging in the same conduct are much less likely to face unlawful arrest and prosecution under Section 240.37, as are white women. This unequal and discriminatory enforcement violates Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment.

[22] Id. at 574-75.

[23] Id. at 575.

[24] The 41st, 52nd, 73rd, 75th, and 83rd precincts largely encompass the above-mentioned neighborhoods. DCJS Arrest Statistics 2012-2015, supra note 5. Cf. Sharing NYC Police Precinct Data, johnkeefe.net (Apr. 29, 2011), http://johnkeefe.net/nyc-police-precinct-and-census-data.

D. The City Knew or Should Have Known of the Need for Corrective Action to Prevent Constitutional Violations of Plaintiffs' Rights to Free Speech, Equal Protection of the Laws and Freedom from Unreasonable Seizures and False Arrests, and Failed to Take Corrective Action to Prevent Such Violations, Including by Failing to Adequately Train, Monitor, Supervise or Discipline Responsible Officers

99. The City has a policy, widespread practice and/or custom whereby it provides guidance that lacks any objective basis for determining whether conduct is "for the purpose" of prostitution. It affords officers extraordinary discretion in making such determinations that unconstitutionally infringe on Plaintiffs' First, Fourth and Fourteenth Amendment rights without sufficient training, guidelines, monitoring, supervision and accountability to ensure that officers do not abuse their discretion. Further, it is obvious that the failure to take such action will result in such violations of Plaintiffs' rights, especially in light of the "performance goal" and quota policies encouraging aggressive law enforcement activities.

100. As to certain Individual Defendants, prior to the unlawful conduct alleged in the present action, the City had notice that many of these Individual Defendants had engaged in misconduct while carrying out surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of various individuals. For example, Defendants Imburgia, Diggs, Gomez, Nicosia and Yanez, allegedly abused their discretion while carrying out surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of other individuals, prior to the unlawful surveillance, stops, questioning, frisks, searches, seizures, and/or arrests and detention of Named Plaintiffs K.H., R.G. and Sarah Marchando in the present action.[25]

[25]For example, Defendant Imburgia is a named defendant in Cruz v. City of New York, No. 0302146-2015, 2015 WL 3383188 (Sup. Ct. Bronx Cty. May 13, 2015) (false arrest and assault); Defendants Diggs and Gomez are named defendants in Annunziata v. City of New York, No.13-cv-05610-RMB-GWG, at 16-32 (S.D.N.Y. Aug. 12, 2013) (unlawful stop, search, harassment and assault) and a class action, Quinonez v. City of New York, No. 16-cv-04275-KBF (S.D.N.Y. June 8, 2016) (false arrest and imprisonment, malicious prosecution, fabrication of evidence, conspiracy to violate civil rights and failure to intercede); Defendant Diggs is additionally a named defendant in Paniagua v. City of New York , No. 0309159-2011, 2011 WL 5186247 (Sup. Ct. Bronx Cty. 2011) (Trial Pleading)

101. Additionally, the City was aware through multiple lawsuits filed against it that NYPD officers falsely arrested and maliciously prosecuted multiple persons for loitering for the purpose of prostitution with less than probable cause.[26]

102. The City nonetheless failed to adequately train, monitor and supervise NYPD officers making arrests under Section 240.37 or to discipline officers enforcing Section 240.37 in an arbitrary and/or discriminatory manner in violation of Plaintiffs' rights. Instead, the City allowed, and continues to allow, officers to abuse their discretion, resulting in the unlawful and discriminatory targeting of Plaintiffs for law enforcement action on the basis of Plaintiffs' speech or other protected conduct or Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, and unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs without reasonable suspicion or probable cause under Section 240.37 in violation of Plaintiffs' rights.

103. For instance, Defendant Imburgia's paperwork regarding the arrests she made in connection with the sweeps conducted by the 52nd precinct on June 13-14, 2015 places her at

(false arrest, settled in exchange for the payment of $40,000); Defendant Gomez is additionally a named defendant in Haynes v. City of New York , No. 11-CV-4347 (DLC) (S.D.N.Y. June 27, 2011) (false arrest, settled in exchange for the payment of $7,500) and Rodriguez v. City of New York, No. 0302229-2013, 2013 WL 1655517 (Sup. Ct. Bronx, Cty. 2013) (false arrest), and a criminal court judge also granted suppression when Defendant Gomez unlawfully stopped and seized the accused in People v. Pinckney, 32 Misc. 3d 1240(A) (Sup. Ct. Bronx Cty. 2011) (crediting Defendant Gomez's testimony only on cross-examination); Defendant Nicosia is a named defendant in Chavez v. City of New York, No.15-cv-01232-SJ-VMS (S.D.N.Y. Mar. 10, 2015) (unlawful force, search and false arrest), Lebron v. City of New York, 15CV 05008(MKB)(PK) (S.D.N.Y. Feb. 26, 2016) (unlawful seizure and false arrest), and Anderson v. City of New York, 16-cv-00150-ERK-LB (unlawful seizure and entry); and Defendant Yanez is also a named defendant in Anderson.

[26] See Jones v. City of New York, No.11-cv-05735-PGG (S.D.N.Y. Feb. 3, 2012) (transgender woman falsely arrested under Section 240.37 on November 4, 2010 by 52nd precinct officers after leaving a restaurant); Gonzalez v. City of New York, 08-CV 2699 (JBW)(CLP) (E.D.N.Y. Dec. 4, 2008) (woman falsely arrested under Section 240.37 on November 18, 2007 by 72nd precinct while walking to the hospital by officers who falsely stated plaintiff had previous loitering arrest); Gonney v. City of New York, No. 11-cv-00298-RRM-MDG (E.D.N.Y. Jan. 20, 2011) (woman falsely arrested under Section 240.37 on August 29, 2010 while walking in the vicinity of her home in the 73rd precinct).

different locations at the same time. By her own accounts, Defendant Imburgia was arresting an individual at one location at a certain time while simultaneously observing K.H. in a wholly separate location. Nonetheless, Defendant Maloney approved K.H.'s arrest. Similarly, non-party Officer Monge's sworn statement in one case from the same sweep indicates he observed an individual he believed to be loitering from 2:40 a.m. through 3:10 a.m., while arrest paperwork from another case shows that during that same time period, he effectuated the arrests of two other women. With appropriate monitoring and supervision, such abuses could be identified and discouraged by means of appropriate discipline for the officers responsible.

104. The City is also aware—because, among other reasons, it maintains law enforcement activity statistics and records—that transgender women of color are targeted for arrest under Section 240.37 and are systematically discriminated against and mistreated by NYPD officers.

105. Indeed, the City amended the NYPD Patrol Guide in June 2012 "follow[ing] years of complaints about police mistreatment [of transgender women]."[27] However, these amendments have proven insufficient and, in the years since, widespread police abuse and mistreatment of transgender women has continued largely unabated. Plaintiffs have suffered, and continue to suffer, from the deprivation of rights that flows from being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37.

106. Despite its own knowledge of unlawful law enforcement actions under, and discriminatory enforcement of, Section 240.37, the City has failed to take sufficient corrective action to rectify these violations of Plaintiffs' rights, including by: failing to sufficiently train

[27] Noah Remnick, Activists Say Police Abuse of Transgender People Persists Despite Reforms, N.Y. Times (Sep. 6, 2015), http://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.htm.

officers in enforcing Section 240.37 in a non-discriminatory manner and in making arrests under Section 240.37 only where there is probable cause; failing to monitor, supervise and, when appropriate, take disciplinary and/or remedial action against officers who make arrests under Section 240.37 without probable cause on the basis of past arrests or after insufficient periods of observation, or who disproportionately arrest women of color, including transgender women of color engaging in protected First Amendment activity under Section 240.37 or otherwise violate Plaintiffs' rights to free speech, free association or equal protection of the laws; failing to audit arrests under Section 240.37 to determine whether they are made in violation of Plaintiffs' rights to free speech, free association, equal protection of the laws or freedom from unreasonable searches and seizures; and failing to adequately monitor officers who are the subject of multiple civilian complaints.

107. The City's deliberate indifference in failing to take such corrective action was and continues to be a direct and proximate cause of past and ongoing violations of Plaintiffs' rights to free speech, free association and equal protection of the laws, and freedom from unreasonable searches and seizures.

III. NAMED PLAINTIFFS HAVE BEEN TARGETED FOR UNLAWFUL SURVEILLANCE, STOPS, QUESTIONING, FRISKS, SEARCHES, SEIZURES, AND/OR ARREST AND DETENTION UNDER SECTION 240.37

A. Named Plaintiffs Arrested During Sweeps Targeting Transgender Women of Color

1. Named Plaintiff D.H.

108. D.H. is a 26-year-old African-American woman who currently resides in the Bronx. D.H. is deaf and communicates through sign language, writing or texting on her phone.

109. D.H. is a transgender woman. D.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

110. In the early morning on June 6, 2015, D.H. was walking near the corner of Fordham Road and Jerome Avenue and trying to hail a cab to get home. At the time, she was living with her sister in the neighborhood. She was walking with her phone in her hand when she saw an unmarked police car pull up next to her.

111. At no time on June 6, 2015 did D.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

112. Defendants Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 exited the vehicle and approached D.H. She pointed to her ear to indicate that she was deaf and tried to also tell the officers by typing in her phone that she was deaf. Without reading what D.H. had typed on her phone, the officers grabbed her bag and began searching its contents. D.H. could not understand what the officers were saying to her and did not consent to the search.

113. As they took her bag, the officers also took D.H.'s phone and cuffed her hands behind her back. In so doing, the officers made it impossible for D.H. to communicate with them. She did not understand why she was being arrested. D.H.'s arresting officers did not appear to care that D.H. was unable to communicate, and laughed at her.

114. D.H. was placed in the unmarked police car and driven a few blocks to a police van. There were three other transgender women in the van who had already been arrested. D.H. had seen the women in the community and recognized them as transgender women.

115. During this ordeal, D.H. began to experience very sharp pain in her shoulder due to the manner in which her hands were cuffed behind her back. D.H. was screaming in pain, but without any means of communication, she was unable to articulate what was wrong. The officers ignored her screams.

116. D.H. and the three other transgender women were taken to the 52nd precinct, where D.H. spent the remainder of the night in a holding cell with the other women. D.H. attempted to get the attention of numerous officers to obtain a sign language interpreter, but was repeatedly ignored. At one point, Defendant Doe NYPD Officer #14 gave D.H. a pen and paper and she wrote that she needed a sign language interpreter. Despite receiving D.H.'s request for an interpreter in writing, Defendant Doe NYPD Officer #14 and the other officers in the 52nd precinct failed to provide a sign language interpreter to communicate with D.H. as they processed her arrest.

117. In the morning, D.H. was transferred to central booking to await arraignment. D.H. was finally provided with a sign language interpreter and only then did she learn the reason for her arrest and the nature of the charges against her. She was arraigned in the evening on June 6, 2015, and then released.

118. D.H. was devastated by her arrest. After her arrest, she worried about being unlawfully arrested again so she stopped going out at night. D.H. moved out of her neighborhood in July 2015. Since she moved, D.H. has started going out again, but she avoids returning to the area of her arrest, which means she is rarely able to visit her sister or friends.

119. After her arrest, D.H. feels that she can no longer contact the police if she is in need of help because she will be unable to communicate with them and because she fears that they will be hostile toward her. D.H. was shocked by the acts of Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, Doe NYPD Officer #14 and McKenna, and felt violated by their actions.

120. D.H. continued to experience pain in her shoulder for weeks after her arrest.

121. In the supporting deposition accompanying the criminal court complaint charging D.H. with violating Section 240.37, Defendant Kinane falsely alleged that on June 6, 2015, he observed D.H. for 15 minutes "during which time [D.H.] beckoned to passing traffic and stopped or attempted to stop 2 male passersby and 1 male motorist" from "the middle of the street." He also alleged that D.H.'s purpose was prostitution based on her presence at a location "frequented by people engaged in prostitution" and because she was wearing a "short skirt."

122. Defendant McKenna failed to properly review, monitor and supervise Defendant Kinane's, Defendant Doe NYPD Officer #1's and Defendant Doe NYPD Officer #2's unlawful stop, questioning, search and seizure of D.H., and approved D.H.'s arrest.

123. After her initial court appearance, D.H. was forced to return to court three additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against D.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on October 29, 2015. The charges were dismissed and sealed on April 28, 2016.

124. By the actions described above, Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and McKenna targeted and/or sanctioned the targeting of D.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

125. The actions of Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, Doe NYPD Officer #14 and McKenna deprived D.H. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

2. **Named Plaintiff N.H.**

126. N.H. is a 36-year-old African-American woman who currently resides in the Bronx.

127. N.H. is a transgender woman. N.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

128. In the early morning of June 6, 2015, N.H. went to a store on Davidson Avenue near her apartment. After purchasing food and cigarettes, N.H. began to walk home. She had walked only a few blocks when Defendants Dawkins, Keane and Doe NYPD Officer #3 pulled up in a marked police patrol car, jumped out and approached her. They ordered N.H. to put her hands behind her back and then handcuffed her.

129. At no time on June 6, 2015 did N.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

130. When N.H. asked why she was being arrested, the officers refused to explain and simply said, "you know." Defendants Dawkins, Keane, and Doe NYPD Officer #3 placed her in the patrol car and drove around with her for over one hour, and then arrested a Latina woman who was also transgender and put her in the car with N.H. N.H. learned from this woman that she had been arrested for loitering for the purpose of prostitution.

131. At the 52nd precinct, Defendant Dawkins cut off the hood of N.H.'s sweatshirt and attempted to cut the laces out of her boots, permanently destroying both items of clothing and forcing her to remain in socks the entire time she was detained at the precinct. Defendant Dawkins also forcefully pulled N.H.'s earrings out of her ears and attempted to remove N.H.'s wig. Because the wig was attached to N.H.'s own hair, Defendant Dawkins pulled N.H.'s hair, causing her severe pain.

132. Throughout the booking process, Defendant Dawkins and other non-party officers referred to N.H. as a man. N.H. directed the officers to her identification, which identifies her as

female, but the officers, including Defendant Dawkins, persisted in referring to her as a boy or man.

133. N.H. was kept in handcuffs throughout the booking process—a period of approximately one hour—until she was placed in a holding cell with approximately ten other transgender women who had also been arrested for loitering for the purpose of prostitution. The officers continued to refer to N.H. and the other transgender women in the cell as "boys" and "men."

134. One of N.H.'s arresting officers told the women that the police had been conducting a sweep and that if they saw "girls like them" outside after midnight, they would arrest them. When N.H. stated that she lives in the area, the officer told her that she should not go out on Jerome Avenue.

135. At the time of her arrest, N.H. had approximately $60 in her purse. Although the NYPD Patrol Guide requires arresting officers to return to arrestees all currency less than $100, N.H.'s arresting officers did not return these funds to her. Instead, she was forced to go through the arrest process without any money in violation of the arrest procedures established in the NYPD Patrol Guide.

136. N.H. was taken into custody at 2:15 a.m. on June 6, 2015. She was detained for approximately 40 hours before she was arraigned on the evening of June 7. The court set bail at $50, which N.H. would have been able to post immediately had her arresting officers not denied her the return of her funds. As a result, she was forced to spend over 24 hours in detention at the Vernon C. Bain Correctional Center, a New York City Department of Correction facility for adult men. She was finally released in the early morning of June 9, 2015, three days after her arrest.

137. Upon her release, N.H. went to the 52nd precinct to retrieve her personal property, including the keys to her apartment. At the precinct, she was told that the officer responsible for the property was not present and that she would need to return in the morning. Locked out of her own home, N.H. was forced to find another place to sleep that night. The next day, after returning to the precinct without her property, she learned that her keys had been there the whole time. Her jewelry and other personal possessions were never returned.

138. In the supporting deposition accompanying the criminal court complaint charging N.H. with violating Section 240.37, Defendant Keane falsely alleged that, on June 6, 2015, he observed N.H. for five minutes, "during which time [N.H.] beckoned to passing traffic and stopped or attempted to stop 3 male passersby." He further alleged that N.H.'s purpose was prostitution because she was observed previously at a location "frequented by people engaged in prostitution" and was wearing a "blonde wig, tight pants and shirt." Defendant Keane also alleged that he knew that "other officers have previously arrested [N.H.] for prostitution-related offense(s)."

139. Defendant McKenna failed to properly review, monitor and supervise Defendant Keane's, Defendant Dawkins's and Defendant Doe NYPD Officer #3's unlawful stop and seizure of N.H., and approved N.H.'s arrest.

140. After her initial court appearance, N.H. was forced to return to court four additional times over nearly five months, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against N.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on October 29, 2015. The charges were dismissed and sealed on April 28, 2016.

141. Since her arrest, N.H. has tried to avoid going out late at night because the officers told her explicitly that she would be arrested if she did so. She usually reserves for daylight hours even simple errands, such as going to a store, in order to reduce the risk that she will be improperly arrested. As such, the acts of Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna intimidated and threatened N.H.

142. By the actions described above, Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna targeted and/or sanctioned the targeting of N.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

143. The actions of Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna deprived N.H. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

3. **Named Plaintiff K.H.**

144. K.H. is a 32-year-old African-American woman who currently resides in Florida. At the time of her unlawful arrest under Section 240.37, she resided in the Bronx.

145. K.H. is a transgender woman. K.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

146. In the early morning of June 13, 2015, K.H. was walking home to her apartment when she met another transgender woman and started a conversation. As they walked together, K.H. and her friend spoke to only one other person, a woman. As K.H. and her friend continued to walk, Defendants Imburgia, Doe NYPD Officer #4 and Doe NYPD Officer #5 jumped out of an unmarked police car and accosted them. The officers arrested both women on the spot.

147. At no time on June 13, 2015 did K.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

148. K.H. and her friend were placed in a van with two other women. Over the course of the next five minutes, more women were arrested and loaded into the van. The officers then brought all of the detained women to the 52nd precinct. Throughout this ordeal, the handcuffs around K.H.'s wrists were pulled so tightly that they left indentation marks on her wrists and caused her pain. Defendants Imburgia, Doe NYPD Officer #4 and Doe NYPD Officer #5 ignored K.H.'s repeated requests to loosen the handcuffs.

149. At the precinct, K.H. was placed in a holding cell. Once inside the cell, she and the other women with whom she was held were not permitted to use the bathroom. Having no other choice, several women urinated on the floor or in bottles that had been left in the cell.

150. At approximately 7 a.m., K.H. was taken to central booking for her arraignment. She was released at approximately 3 p.m.

151. At the time of her arrest, K.H. had expensive make-up (primers, lipsticks and pencils) and other personal items in her purse. When she returned to the precinct to recover her belongings, her personal items, including the make-up, were no longer in her purse.

152. After her arrest, K.H. became estranged from her transgender friends, whom she believes are now afraid to associate with her because they perceive her to be under scrutiny by the police. Fearing another false arrest, she also avoided leaving her house alone and went outside only with her husband. K.H.'s false arrest was a motivating factor in her decision to move to Florida, as she worried about being unlawfully arrested again in another sweep if she

stayed in the Bronx and wished to end "living in fear." Even after moving, she still believes that she cannot trust the police.

153. In the supporting deposition accompanying the criminal court complaint charging K.H. with violating Section 240.37, Defendant Imburgia falsely alleged that, on June 13, 2015, she observed K.H. for a half hour "during which time [K.H.] beckoned to passing traffic and stopped or attempted to stop three male passersby and two male motorists." She further alleged that K.H.'s purpose was prostitution because she was at a location "frequented by people engaged in prostitution" and was wearing a "tight short black dress."

154. Defendant Maloney failed to properly review, monitor and supervise Defendant Imburgia's, Defendant Doe NYPD Officer #4's and Defendant Doe NYPD Officer #5's unlawful stop and seizure of K.H., and approved K.H.'s arrest.

155. After her initial court appearance, K.H. was forced to return to court five additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against K.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on November 12, 2015 and dismissed and sealed on May 11, 2016.

156. By the actions described above, Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and Maloney targeted and/or sanctioned the targeting of K.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

157. The actions of Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and Maloney intimidated and threatened K.H., deprived her of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

4. **Named Plaintiff Natasha Martin**

158. Natasha Martin is a 38-year-old African-American woman who currently resides in Brooklyn.

159. Ms. Martin is a transgender woman. Ms. Martin communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

160. The night of February 2, 2016, Ms. Martin had visited a friend who lives in Brooklyn. She stayed at her friend's house that evening.

161. The next morning, February 3, 2016, Ms. Martin left her friend's house at approximately 6:30 a.m. She left at the same time as her friend, who had to be at work by 7:00 or 7:30 a.m.

162. Ms. Martin said goodbye to her friend and then walked on the sidewalk for about two blocks before stopping at the corner of Bushwick Avenue and Woodbine Street to smoke a cigarette. She did not encounter or speak to anyone during that time.

163. At no time on February 3, 2016 did Ms. Martin solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

164. Ten minutes later, a marked police van pulled up next to her. Three officers jumped out: two male officers, Defendant Joel Allen and Defendant Doe NYPD Officer #6, both in plainclothes, and a female officer, Defendant Doe NYPD Officer #7, who was wearing a blue uniform.

165. Defendant Doe NYPD Officer #6 asked Ms. Martin what she was doing, and she responded that she was "minding her own business." After the officer told her that her answer

"wasn't good enough," Ms. Martin responded that she was coming from a friend's house.

166. Defendant Doe NYPD Officer #6 then told Ms. Martin that his supervisor, Defendant Dave Siev, had instructed him to arrest her and that the area in which she was standing was a "hot" area for prostitution. Ms. Martin asked him how she was supposed to know that and further asked, "Is it a crime to be on the corner?" Defendant Doe NYPD Officer #6 then asked for her name. When Ms. Martin responded that her name is Natasha, he asked whether that was her "real name." She responded "yes" and gave the officer her driver's license, which says "Natasha Martin" and "female" on it.

167. The officers arrested Ms. Martin and placed her in handcuffs about five minutes after they had first pulled up to her. Ms. Martin's arrest was one of several that were part of a sweep of the neighborhood.

168. As they drove her to the 83rd precinct, Defendant Allen made derogatory comments such as, "which one of you is going to process the he/she?"

169. When they arrived at the precinct, the officers put her in a cell with another woman. There was a third woman in the men's cell nearby. Ms. Martin learned from these women that they had also been arrested in the same sweep for loitering for the purpose of prostitution.

170. Ms. Martin was kept at the precinct for about four hours. Along with the other two women, she was released from the precinct with a desk appearance ticket.

171. In the supporting deposition accompanying the criminal court complaint charging Ms. Martin with violating Section 240.37, Defendant Siev falsely alleged that on February 3, 2016, he "observed [Ms. Martin] . . . remain or wander about in a public place for a period of . . . 8 minutes, during which [Ms. Martin] repeatedly beckoned to passers-by and stopped 3

passers[-]by, engaging in conversation with those passers-by." Ms. Martin did not in fact encounter or speak to anyone after saying goodbye to her friend until she was confronted by Defendants Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7. Defendant Siev further alleged that Ms. Martin's purpose was prostitution because she was at a location "frequented by people engaging in promoting prostitution, patronizing a prostitute, and/or loitering for the purpose of prostitution," was wearing a "white jacket with blue and white jump suit, tight," and because he recovered "8 condoms" from her person.

172. Defendant Siev also noted that his determination that Ms. Martin's purpose was to engage in prostitution was based on the fact that he was "aware that [Ms. Martin] has previously been arrested for violating Penal Law Section 240.37, 230.00, and/or 230.03." However, there are no public records of any previous arrests related to those charges.

173. Defendant Siev failed to properly review, monitor and supervise Defendant Allen's, Defendant Doe NYPD Officer #6's and Defendant Doe NYPD Officer #7's unlawful stop, questioning and seizure of Ms. Martin, and approved Ms. Martin's arrest.

174. Since her arrest, Ms. Martin has been very nervous about going back to the location of her arrest and fears that the police could "jump out at her" at any time. She recalls that the whole experience felt like an "abduction." As such, the acts of Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 intimidated and threatened Ms. Martin, and left her traumatized.

175. After her arrest, Ms. Martin was forced to return to court five additional times under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against Ms. Martin were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on June 1, 2016. The charges are calendared to be dismissed and sealed on December 1, 2016.

176. By the actions described above, Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 targeted and/or sanctioned the targeting of Ms. Martin for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

177. The actions of Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 deprived Ms. Martin of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

B. Named Plaintiffs Targeted for Arrest Under Other Circumstances

178. Defendants have also wrongfully arrested Plaintiffs as part of a general pattern and practice of arbitrary and discriminatory enforcement of Section 240.37. These women were similarly engaging in constitutionally-protected activities or otherwise exercising their rights and not engaging in any prostitution-related activity at the time of their arrests.

5. **Named Plaintiff Tiffaney Grissom**

179. Tiffaney Grissom is a 30-year-old African-American woman who currently resides in New York City.

180. Ms. Grissom is a transgender woman. Ms. Grissom communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

181. Ms. Grissom has been repeatedly followed, stopped, questioned, arrested and detained for loitering for the purpose of prostitution. The majority of her arrests have occurred in the West Village in Manhattan, primarily in the 6th precinct, and often by the same officers. Ms. Grissom has also been arrested in the 52nd precinct.

182. On the night of October 3, 2013, Ms. Grissom was walking from Twin Donut on Fordham Road. As she was walking, she spoke with a man for about 30 to 45 minutes, including

near the corner of West 192nd Street and Grand Avenue. Ms. Grissom and the man then walked in opposite directions. Shortly thereafter, an unmarked police car stopped beside her and Defendants Pocalyko and Savarese exited the car, ordered Ms. Grissom to stop and immediately placed her under arrest. Defendants Pocalyko and Savarese did not stop the man with whom Ms. Grissom had spoken and allowed him to leave the scene without questioning him.

183. At no time on October 3, 2013 did Ms. Grissom solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

184. Ms. Grissom was handcuffed and taken to a police van where she was detained for approximately 30 minutes to an hour until the police arrived with another woman who—as Ms. Grissom later learned—had also been arrested for loitering for the purpose of prostitution.

185. At the 52nd precinct, Defendant Pocalyko repeatedly probed Ms. Grissom with questions relating to her gender and her sex organs. When Ms. Grissom answered Defendant Pocalyko's questions by maintaining that she was a woman, Defendant Pocalyko unlawfully ordered Ms. Grissom to be strip-searched by a female police officer even though she was not suspected of possessing any drugs or contraband. The female officer took Ms. Grissom into a bathroom and ordered her to lift her shirt, shake out her bra and pull her shorts down. This search was for the purpose of confirming whether or not she was female, as her identification indicated. She was then put in a holding cell with three other women, including the woman from the police van. She was detained at the precinct for an additional three to five hours.

186. Ms. Grissom provided her address to the officers processing her arrest, making them aware that she was a resident of the neighborhood and lived about 10 blocks from where she was arrested.

187. In the supporting deposition accompanying the criminal court complaint charging Ms. Grissom with violating Section 240.37, Defendant Pocalyko falsely alleged that, on October 3, 2013, he observed Ms. Grissom for twenty minutes "during which time [Ms. Grissom] beckoned to passing traffic and stopped or attempted to stop . . . 3 male motorists" from "the middle of the street." Pocalyko further alleged that Ms. Grissom's purpose was prostitution because she was observed at a location "frequented by people engaged in prostitution" and was wearing "tight short shorts [and a] tight tank top." Additionally, the complaint corresponding to Ms. Grissom's arrest indicated that Defendant Pocalyko believed Ms. Grissom's purpose was prostitution because she had been convicted of loitering for the purpose of prostitution five years earlier, although nothing in the supporting deposition suggests that Defendant Pocalyko knew this at the time of the arrest.

188. Defendant Pocalyko failed to properly review, monitor and supervise Defendant Savarese's unlawful stop and seizure of Ms. Grissom, and approved Ms. Grissom's arrest.

189. Ms. Grissom believes that the police targeted her because she is a transgender woman. She believes the police have imposed a "dress code" for her to be out in public. In addition to her arrests, she is frequently followed and/or stopped and questioned by police when walking or sitting in public areas. As a result of this harassment and her arrests, Ms. Grissom believes she must constantly be on "high alert" for any police presence and avoid the police. As a result of her arrest and after learning of the sweeps conducted by the police in June 2015, she became scared about socializing in her neighborhood with friends—mostly other transgender women of color—and left her house less often. When she did leave her house, she came home early out of fear that she would be arrested again. Ms. Grissom ultimately moved out of the neighborhood; even after moving, however, Ms. Grissom remains anxious about engaging in

conversation in public for more than brief periods of time and avoids speaking to men in the area of the 52nd precinct and other neighborhoods where women of color and transgender women are targeted by the police for arrest under Section 240.37. As such, the acts of Defendants Pocalyko and Savarese caused Ms. Grissom to feel extremely anxious and powerless.

190. Ms. Grissom contested the Section 240.37 charge in Bronx Criminal Court and was forced to return to court at least six additional times under the threat of having the judge issue a bench warrant for her arrest. On August 13, 2015, the Section 240.37 charge against Ms. Grissom was dismissed on motion of the Bronx District Attorney's Office and sealed.

191. By the actions described above, Defendants Pocalyko and Savarese targeted and/or sanctioned the targeting of Ms. Grissom for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

192. The actions of Defendants Pocalyko and Savarese deprived Ms. Grissom of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

6. **Named Plaintiff R.G.**

193. R.G. is a 59-year-old Puerto Rican-American woman who lives in the Bronx. R.G. lives with and cares for her 28-year-old daughter, who is disabled and unable to live or travel by herself. R.G. has previously been employed as a secretary in a variety of industries, including for a police department in Florida and most recently for a large insurance company in New York.

194. R.G. had never been arrested for any offense before she was unlawfully arrested for loitering for the purpose of prostitution on March 28, 2014.

195. During the afternoon of March 28, 2014, at approximately 2:00 p.m., R.G. was taking a walk less than one mile from her home, which is located in the 41st precinct. As she walked on the sidewalk, smoking a cigarette, an unmarked police car passed her, slowed down to make a U-turn, and pulled up alongside her. Defendants Diggs and Gomez asked her where she was going. They said that they knew what she was doing and that they had seen her stop five cars. R.G. explained to the officers that she was taking a walk and had not stopped any cars. Defendant Diggs told her that if she denied attempting prostitution, he would arrest her for lying. Defendants Diggs and Gomez then asked R.G. whether she had any drugs, and when she replied that she did not, they frisked her and searched her pockets. They then seized R.G.'s purse and began to search its contents without her consent. At the time of the search, R.G. had in her purse some condoms that she had recently obtained for free at her doctor's office. After seeing the condoms, Defendants Diggs and Gomez handcuffed R.G. and placed her under arrest.

196. At no time on March 28, 2014 did R.G. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

197. Also during the arrest, and while still on the street, Defendants Diggs and Gomez asked R.G. for her address, which she provided. R.G.'s apartment building is known to the police as a location for illegal narcotics activity. As soon as Defendants Diggs and Gomez learned her address, they began pressuring her for information about drug sales in her building. When R.G. declined, the officers put her in the patrol car and drove to the 41st precinct. Defendants Diggs and Gomez continued to press R.G. to provide information about narcotics activity in her building while she was in the police car and later detained at the precinct. At one point, Defendants Diggs and Gomez even offered to release her and pay her for information

about crime in her building. R.G. declined and told the officers that she feared for her safety if she were to inform on anyone in her building.

198. At the 41st precinct, R.G. was put on a bench directly next to a men's holding cell and handcuffed to the bench for approximately seven hours. During that time, five or six men inside the cell harassed and taunted R.G. with lewd comments. R.G. did not receive any food or water. She was allowed to use the bathroom only once—under the supervision of an officer who stood in the bathroom stall with her and watched her urinate. R.G. was humiliated and embarrassed by this experience.

199. While processing R.G., Defendants Diggs and Gomez again attempted to solicit information about drug activity in her building. She again refused. In response, Defendant Diggs made offensive comments about her appearance.

200. In the sworn criminal court complaint charging R.G. with violating Section 240.37, Defendant Gomez falsely alleged that, on March 28, 2014, he observed R.G. "beckon to passing motorists and attempt[] to stop five male motorists" and "approach a male motorist, lean her face into said motorist's vehicle and begin speaking to said motorist." Defendant Gomez also falsely alleged that R.G. was wearing "a tight low cut shirt and mini skirt." She was in fact wearing long pants and a long-sleeve blouse. Defendant Gomez did not allege that he observed R.G. for any period of time before arresting her. He further alleged that R.G.'s purpose was prostitution because she was at a location "frequented by people engaged in prostitution."

201. Defendant Beddows failed to properly review, monitor and supervise Defendant Diggs's and Defendant Gomez's unlawful stop, questioning, search and seizure of R.G., and approved R.G.'s arrest.

202. R.G. was eventually released from the precinct with a desk appearance ticket. Her period of unlawful detention left her demoralized, disoriented and worried about her disabled daughter. She could not believe what had happened and thought that it felt like a nightmare. R.G. was distraught and embarrassed by her experience. The arrest had a very harmful impact on her: she suffered depression, anxiety and humiliation that left her feeling helpless, with no energy to find work or even to leave her house much in the weeks after her arrest. Since she was arrested so close to her home, she has also been afraid to leave her home. Approximately one year after her arrest, after the Section 240.37 charge against her stemming from the arrest was dismissed, R.G. saw Defendant Gomez, who indicated that he recognized her and was watching her. R.G. no longer feels like she can trust the police or depend on them for help. As such, the acts of Defendants Beddows, Diggs and Gomez intimidated and threatened R.G.

203. As a result of her arrest, R.G. had to appear in Bronx Criminal Court five times over the course of six months. Each time she was required to be in court, her anxiety and depression around the incident were exacerbated. On November 6, 2014, over seven months after her arrest and after numerous court appearances, the accusatory instrument charging R.G. under Section 240.37 was finally dismissed as facially insufficient pursuant to C.P.L. §§ 100.15(3) and 100.40(1)(c), and R.G.'s case was sealed.

204. By the actions described above, Defendants Beddows, Diggs and Gomez targeted and/or sanctioned the targeting of R.G. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

205. The actions of Defendants Beddows, Diggs and Gomez deprived R.G. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

7. **Named Plaintiff A.B.**

206. A.B. is a 44-year-old African-American woman who currently resides in Brooklyn.

207. On August 13, 2015, an acquaintance of A.B.'s picked her up at around 1:30 a.m. to attend a dance party. The two drove to a local store to buy drinks to take to the party. Afterwards, they got back in the car and resumed driving. Shortly afterward, an unmarked police car pulled them over and three uniformed police officers, Defendants Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9, approached the car in which A.B. was a passenger.

208. The officers opened the passenger door to the car and forcefully removed A.B. from the vehicle by her arm. They asked A.B. how she knew the man with her, and she replied that the man was her acquaintance. The officers apparently did not believe A.B. and told her that he could arrest her for prostitution.

209. The officers asked A.B. if she had ever been arrested. When she replied that she had, the officers returned to their car, apparently to enter A.B.'s name into their computer. While the officers waited for the results, they began questioning A.B.'s acquaintance. He confirmed that A.B. was his acquaintance and that they were going to a party. The officers accused him of being A.B.'s pimp, but they did not arrest him. Instead, they removed A.B.'s belongings from his car without her consent and placed them on the trunk of the police car. A.B. asked the officers to look at the text messages in her phone, which would confirm that she and her acquaintance were planning to go to a party, but the officers ignored her.

210. While A.B. was detained, the officers verbally abused her by using racial slurs and calling her a "prostitute" and a "hooker." A.B. felt emotionally battered, and she informed the officers of her intention to file an official complaint against them. They continued to taunt her.

211. At that point, A.B. asked for the names and shield numbers of Defendants Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9. They laughed at her. The officers then handcuffed her, put her in the unmarked police car, and took her to the 75th precinct for further processing.

212. At no time on August 13, 2015 did A.B. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

213. In the supporting deposition accompanying the criminal court complaint charging A.B. with violating Section 240.37, Defendant Christian Salazar falsely alleged that, on August 13, 2015, he observed A.B. at the corner of Flatlands Avenue and Alabama Avenue "[stopping] only male passers-by." He further alleged A.B.'s purpose was prostitution because she was at an "industrial location" and that he was "aware that the [NYPD] has made numerous arrests for violations of Penal Law Sections 240.37, 230.00 and/or 230.03 at [that] location."

214. Defendant Daverin failed to properly review, monitor and supervise Defendant Salazar's, Defendant Doe NYPD Officer #8's and Defendant Doe NYPD Officer #9's unlawful arrest of A.B.

215. After her initial court appearance, A.B. was forced to return to court two additional times under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against A.B. were dismissed and sealed on September 16, 2015.

216. Since her arrest, A.B. has stopped walking alone in East New York because she fears that she will be wrongfully arrested again. She becomes very anxious whenever she sees police and will often cross to the other side of the street to avoid any contact with them. As such, the acts of Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 intimidated and threatened A.B.

217. By the actions described above, Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 targeted and/or sanctioned the targeting of A.B. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

218. The actions of Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 deprived A.B. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

8. **Named Plaintiff Sarah Marchando**

219. Sarah Marchando is a 28-year-old Latina woman who currently resides in Queens, New York.

220. Ms. Marchando has a long history of prostitution-related arrests, primarily in the East New York neighborhood in Brooklyn. Because of her arrest record, police officers assigned to the 75th precinct, and the related satellite precinct of Police Service Area ("PSA") 2, know Ms. Marchando by face and last name. Because of her criminal record and previous proximity to the precinct, the police target Ms. Marchando for arrest when they see her outside, and she is often arrested for loitering for the purpose of prostitution when engaged in wholly innocent conduct.

May 7, 2015 Arrest

221. For example, on the morning of May 7, 2015, Ms. Marchando met her boyfriend, who was coming home from work, at the BP car wash located on the corner of Flatlands Avenue between Pennsylvania Avenue and Sheffield Avenue. She was wearing a dress that stopped about an inch above her knee-high flat boots. Ms. Marchando and her boyfriend arrived at approximately 7:20 or 7:25 a.m. From there, Ms. Marchando's boyfriend left to run some errands and Ms. Marchando planned to take the bus back to his apartment.

222. At around 7:30 a.m., Ms. Marchando boarded the B6 bus at the corner of Alabama Avenue and Cozine Avenue. Ms. Marchando remained on the bus for five or six stops until it arrived at Wortman Avenue and Ashford Street, approximately 11 blocks from where she had boarded. There, Defendants Nicosia and Doe NYPD Officer #10, dressed in plainclothes, rushed onto the bus. They ordered Ms. Marchando to put her hands behind her back and disembark. Ms. Marchando asked the officers what was happening. They did not answer. After a few seconds, Defendant Nicosia grabbed her by the arm and pulled her down the bus stairs. Ms. Marchando kept asking why she was being arrested but never got a response.

223. At no time on May 7, 2015 did Ms. Marchando solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

224. Once Defendant Nicosia dragged her off the bus, she tried to stop him from pulling on her arm. Defendants Nicosia and Doe NYPD Officer #10 restrained her. One of them put her in a chokehold, which exacerbated her asthma and caused her to vomit. Ms. Marchando repeatedly told the officers that she could not breathe, but they did not release her until two

bystanders who were watching the incident intervened. After she was finally released from the chokehold, her bra was ripped, and she was having trouble breathing and was in substantial pain.

225. Additional police officers arrived at the scene. In total, there were at least six officers involved in Ms. Marchando's arrest, including Defendants Nicosia and Doe NYPD Officer #10 in plainclothes, Defendants Quinn, Doe NYPD Officer #11 and Doe NYPD Officer #12 in uniform, and their supervisor Defendant Doyle, who was dressed in plainclothes. Without telling Ms. Marchando why she was being arrested, the officers placed her in handcuffs and searched her purse. Ms. Marchando requested medical attention, but the officers refused to get her help. Instead Defendant Doyle remarked, "She's back" and "We got her."

226. The officers brought Ms. Marchando to the 75th precinct around 7:45 a.m. where an officer performed a pocket search of Ms. Marchando. She was kept in handcuffs and placed in a holding cell. Still having difficulty breathing, Ms. Marchando asked for her asthma inhaler, but the officers refused to give it to her. At approximately 2:45 or 3:00 p.m., an officer returned and told Ms. Marchando for the first time that she had been arrested for loitering for the purpose of prostitution. She was arraigned around midnight and was finally released after spending approximately 16 hours in custody.

227. After her arrest, Ms. Marchando suffered from ongoing breathing difficulties and pain and swelling in her arm and knee. In addition, the arrest caused Ms. Marchando emotional suffering in that she felt humiliated and unfairly treated. She worried that she would not be able to walk anywhere or utilize public transportation in that neighborhood without facing arrest. Her fears were and are justified, as officers from the 75th precinct arrested her again eight days after this incident, similarly without probable cause or justification.

228. In the sworn criminal court complaint charging Ms. Marchando with violating Section 240.37 on May 7, 2015, Defendant Quinn falsely alleged that he observed Ms. Marchando for 40 minutes, during which time she "beckon[ed] to multiple vehicles passing by with male drivers[,]. . . approach[ed] a vehicle and . . . engage[d] in conversation with a male inside of said vehicle."

229. Defendant Doyle failed to properly review, monitor and supervise Defendant Quinn's, Defendant Nicosia's, Defendant Doe NYPD Officer # 10's, Defendant Doe NYPD Officer #11's and Defendant Doe NYPD Officer #12's unlawful stop, seizure and assault of Ms. Marchando, and approved Ms. Marchando's arrest.

May 15, 2015 Arrest

230. In the early morning of May 15, 2015, Ms. Marchando was on Flatlands Avenue between Pennsylvania Avenue and Sheffield Avenue. She had purchased juice from a nearby store and was listening to music, texting and playing a game on her phone. Defendants Yanez and supervising Doe NYPD Officer #13 approached her and immediately asked if she had ever been arrested for prostitution. When she responded affirmatively, they handcuffed and arrested her.

231. At no time on May 15, 2015 did Ms. Marchando solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

232. Defendants Yanez and Doe NYPD Officer #13 placed Ms. Marchando in a van with six male arrestees. Ms. Marchando was the only female arrestee in the van and remained handcuffed. She was kept in the van for over one hour.

233. At the 75th precinct, Ms. Marchando was searched by a male officer and put in a holding cell. She remained handcuffed in the cell for approximately two hours. During that time, Ms. Marchando asked three different male police officers to remove her handcuffs because she had lost feeling in her right arm. They told her that the handcuffs were necessary because there was no female officer available to search her, even though a male officer had already searched her when she arrived. Approximately one hour after Ms. Marchando's request, a female officer came into the holding cell. She seemed surprised that Ms. Marchando was still handcuffed and performed a search. Ms. Marchando was finally arraigned and released around 11:30 p.m., after spending approximately 18 hours in custody.

234. In the supporting deposition accompanying the criminal court complaint charging Ms. Marchando with violating Section 240.37 on May 15, 2015, Defendant Yanez falsely alleged that he observed Ms. Marchando for 120 minutes "during which time [Ms. Marchando] repeatedly beckoned to passers-by and stopped five-passers-by, engaging in conversation with said passers-by" and that she was "standing in the middle of the road." Yanez further alleged that Ms. Marchando's purpose was prostitution because "the above area is an industrial location" "frequented by people engaging in promoting prostitution" and that he is "aware that [Ms. Marchando] has previously been arrested for violating Penal Law 240.37, 230.00 and/or 230.03" and because he recovered "10 unused condoms" from her person.

235. Defendant Doe NYPD Officer #13 failed to properly review, monitor and supervise Defendant Yanez's unlawful stop and seizure of Ms. Marchando, and approved Ms. Marchando's arrest.

236. After her arrest, Ms. Marchando continued to suffer pain and discomfort in her right arm and emotional harm. As a result of the May 7 and May 15, 2015 arrests,

Ms. Marchando was afraid to go outside in Brooklyn and when there, tried to stay inside her boyfriend's apartment as much as possible to avoid arrest. Ms. Marchando suffers from an anxiety disorder, and her arrests exacerbated her condition. As a result of the harassment by Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 and other members of the 75th precinct, Ms. Marchando temporarily left New York City in September 2015. When she returned to New York in December 2015, she moved to Queens out of fear that she would be targeted for arrest by officers in the 75th precinct. As such, the acts of Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 intimidated and threatened Ms. Marchando.

237. After her arrests on May 7 and May 15, 2015, Ms. Marchando was forced to return to court two additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against Ms. Marchando stemming from the two arrests were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on June 10, 2015. Both cases were dismissed and sealed on December 9, 2015.

238. By the actions described above, Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 targeted and/or sanctioned the targeting of Ms. Marchando for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

239. The actions of Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 deprived

Ms. Marchando of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

CLAIMS FOR RELIEF

I. CLASS CLAIMS

First Claim for Relief

Section 240.37 Is Unconstitutionally Void for Vagueness in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution[28]

240. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

241. Section 240.37 does not provide citizens with adequate notice as to what type of behavior they must avoid in order to avoid arrest under the statute.

242. Plaintiffs have been and continue to be unlawfully subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained for engaging in innocent activities such as walking down the street, sitting on a bench, riding on a public bus and speaking to other individuals on a public street.

243. Section 240.37 lacks adequate guidelines for police, leading to inconsistent and arbitrary enforcement. Neither New York State courts, the City, nor the NYPD have provided adequate guidance to officers as to what type of behavior is criminal under Section 240.37.

244. Section 240.37 is unconstitutionally void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment as applied to Plaintiffs because it provides insufficient notice to citizens of what constitutes illegal behavior under the statute and provides

[28] A copy of this Complaint & Demand for Jury Trial has been served on the New York State Attorney General's Office.

insufficient guidance to law enforcement, resulting in discriminatory and arbitrary enforcement of the statute at the discretion of individual officers.

Second Claim for Relief

Section 240.37 Is Unconstitutional Because It Is Overly Broad, Infringing on the Right to Freedom of Expression Under the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution, the Right to Due Process Under the Fourteenth Amendment to the United States Constitution and the Right Against Unreasonable Searches and Seizures Under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution

245. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

246. A substantial number of law enforcement activities undertaken pursuant to Section 240.37, including surveillance, stops, questioning, frisks, searches, seizures and arrests and detention under Section 240.37 are unconstitutional.

247. Plaintiffs maintain a liberty interest in self-expression and bodily integrity and privacy.

248. Plaintiffs exercise free speech, including the expression of gender identity through choice of clothing, free movement and free association with other citizens.

249. As a result of the unconstitutionally overbroad provisions of Section 240.37 that implicate a substantial amount of constitutionally protected speech and other protected activity, Plaintiffs are forced to live with a heightened risk of law enforcement encounters and experience a real and substantial deterrent to the exercise of these freedoms.

250. Plaintiffs have been deterred from exercising their rights under the First, Fourth and Fourteenth Amendments by restricting their expression through clothing choices, restricting their movement through public spaces and restricting their associations with other people out of fear of future arrest.

251. The substantial unconstitutional applications of Section 240.37 in unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs who are engaged in constitutionally protected speech and other protected activity outweigh any public policy goals of Section 240.37, which are already met through other provisions of New York's Penal Law.

Third Claim for Relief

Municipal Liability for Violations of Plaintiffs' Due Process Rights Under the Fourteenth Amendment to the United States Constitution
(Against the City)

252. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

253. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies and widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner in violation of Plaintiffs' liberty interests in self-expression, bodily integrity and privacy. By unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs, including Named Plaintiffs, under Section 240.37 based in large part on Plaintiffs' appearance and their presence in public areas, Defendants, who are state actors, infringed on Plaintiffs' fundamental freedoms.

254. The City has acted with deliberate indifference to Plaintiffs' Due Process rights under the Fourteenth Amendment in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, leading to unlawful infringement of Plaintiffs' liberty interests in self-expression, bodily integrity and privacy.

255. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 if they engage in constitutionally protected conduct in public areas, and their ability to self-determine their personal appearance in public continues to be chilled.

Fourth Claim for Relief

Municipal Liability for Violations of Plaintiffs' Right to Freedom of Speech Under the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution
(Against the City)

256. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

257. Plaintiffs have a constitutionally protected interest in the exercise of free speech, including the expression of gender identity through choice of clothing, conversations with individuals of any gender and gender identity, free movement and free association with other citizens.

258. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies and widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner in violation of the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution by unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs for Section 240.37 violations based in large part on protected conduct, *i.e.* their clothing, presence in public areas, conversations with others and/or other First Amendment activity, causing constitutional injury and chilling their First Amendment speech, expressive conduct and ability to freely utilize public space.

259. The City has acted with deliberate indifference to Plaintiffs' rights under the First Amendment and Article I, § 8 of the New York Constitution in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, leading to the unlawful infringement of Plaintiffs' right to engage in free speech and other protected First Amendment activity.

260. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 if they engage in constitutionally protected speech in public areas, and their speech continues to be chilled.

Fifth Claim for Relief

Municipal Liability for Violations of Plaintiffs' Right to Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution
(Against the City)

261. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

262. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies, widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner against women of color, some of whom are transgender, based on the race, color, ethnicity, gender, gender identity and/or appearance of Plaintiffs under circumstances in which Section 240.37 is not enforced against men or white women, causing constitutional injury by depriving Plaintiffs of equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, § 11

of the New York Constitution. The City has no legitimate interest in enforcing Section 240.37 in this manner.

263. The City has acted with deliberate indifference to Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment and Article I, § 11 of the New York Constitution in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, causing constitutional injury to Plaintiffs in that they have been, and continue to be, unlawfully subjected to law enforcement activities, including surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention based on race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution.

264. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 on the basis of race, color, ethnicity, gender, gender identity and/or appearance.

Sixth Claim for Relief

Municipal Liability for Unlawful Discrimination Under 42 U.S.C. § 1981
(Against the City)

265. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

266. Pursuant to certain enforcement policies, widespread practices and/or customs, the City has chosen to enforce Section 240.37 in a discriminatory manner, denying Plaintiffs the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by

white citizens of the United States, and subjecting them to disparate forms of punishment, pains, penalties and exactions as compared to white citizens, in violation of 42 U.S.C. § 1981.

267. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs have suffered constitutional injury.

Seventh Claim for Relief

Municipal Liability for Violation of Plaintiffs' Right Against Unreasonable Search and Seizures Under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution
(Against the City)

268. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

269. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies, widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner, seizing persons in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution. These actions have resulted in constitutional injury in that Plaintiffs have been unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 without the requisite reasonable suspicion or probable cause to believe that a criminal offense has been or is being committed.

270. The City has acted with deliberate indifference to Plaintiffs' right to be free from unreasonable searches and seizures in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, causing Plaintiffs to be unlawfully subjected to surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention under Section 240.37 without reasonable suspicion or

probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

271. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

Eighth Claim for Relief

Claims Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.
(Against the City)

272. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

273. The law enforcement services described in this complaint have been funded, in part, with federal funds.

274. Plaintiffs were intended beneficiaries of these law enforcement services.

275. Discrimination based on race in the law enforcement services and conduct described in this complaint is prohibited under 42 U.S.C. § 2000d et seq. The acts and conduct complained of herein by the Defendants were motivated by racial animus and were intended to discriminate on the basis of race, particularly against Blacks and Latinos.

276. As a direct and proximate result of the above-mentioned acts, Plaintiffs have suffered injuries and damages and have been deprived of their rights under the civil rights laws. Without appropriate injunctive relief, these violations will continue to occur.

Ninth Claim for Relief

Respondeat Superior Claim Under New York Common Law
(Against the City)

277. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

278. The conduct of Individual Defendants occurred while they were on duty, acting under the color of law, in and during the course and scope of their duties and functions as NYPD officers and while they were acting as agents and employees of the City.

279. As a result, the City is liable to Plaintiffs for the claims against Individual Defendants under the doctrine of respondeat superior.

Tenth Claim for Relief

Conspiracy to Violate Plaintiffs' Civil Rights Under 42 U.S.C. § 1985
(Against All Defendants)

280. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

281. Defendants from the 52nd precinct agreed to violate certain Plaintiffs' rights by planning and performing sweeps, see supra ¶ 73, during which they planned to arrest certain Plaintiffs for their status as transgender women and deprive them of equal protection under the law. Defendants planned to arrest these Plaintiffs without probable cause to believe they committed a crime, in violation of their First, Fourth and Fourteenth Amendment rights. Defendants from the 52nd precinct took action in furtherance of violating certain Plaintiffs' rights by actually arresting multiple Named Plaintiffs and Plaintiff Class members, as described above, on June 6, 2015 and June 13, 2015, under Section 240.37, and telling them that they were arrested because they were transgender women out in public at night. In taking these actions,

Defendants from the 52nd precinct were motivated by their discriminatory attitudes towards and unlawful bias against transgender women.

282. Unknown high-ranking officers in the NYPD and/or other supervising officers and police officers of other precincts have similar policies, widespread practices and/or customs motivated by discriminatory attitudes and unlawful bias against transgender women of planning and performing sweeps to effectuate Section 240.37 arrests pursuant to which they have agreed to violate transgender Plaintiffs' rights under the First, Fourth and Fourteenth Amendments due to the fact that they are transgender women.

283. As a result of these arrests, Plaintiff Class Members and Named Plaintiffs suffered constitutional injury; were harmed and suffered emotional and psychological distress, deprivation of liberty, embarrassment and shame.

Eleventh Claim for Relief

Violation of the N.Y. Civ. Rights Law §§ 40-c, 40-d and 79-n
(Against All Defendants)

284. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

285. Defendants' prior and continuing acts of discrimination against Plaintiffs, including Defendants' unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, and/or the sanctioning of those law enforcement acts, were carried out on the basis of Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, and therefore subjected Plaintiffs to discrimination in violation of their civil rights, including their right to equal protection of the laws, in violation of New York State Civil Rights Law §§ 40-c and 40-d.

286. Further, Defendants' prior and continuing acts of discrimination against Plaintiffs, including Defendants' unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, and/or the sanctioning of those law enforcement acts, constituted the intentional selection of Plaintiffs for harm in whole or substantial part because of Defendants' beliefs or perceptions regarding Plaintiffs' gender, including their actual or perceived sex, gender identity or expression, race and color, in violation of New York State Civil Rights Law § 79-n. Further, Defendants' sanctioning or acts of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37 constituted intimidation of Plaintiffs on the basis of their gender, including their actual or perceived sex, gender identity or expression, race and color.

287. In addition, Defendants have aided and incited others to unlawfully surveil, stop, question, frisk, search, seize and/or arrest and detain Plaintiffs under Section 240.37 on the basis of Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, in violation of New York State Civil Rights Law §§ 40-c, 40-d and 79-n. Defendants' violations of Plaintiffs' civil rights under the New York State Civil Rights Law are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the New York State Civil Rights Law.

288. Plaintiffs have complied with the procedural requirements of New York State Civil Rights Law § 40-d by serving notice upon the state Attorney General at or before the commencement of the action.

Twelfth Claim for Relief

Violation of the New York State Human Rights Law, New York State Rules and Regulations and New York City Human Rights Law Through Discriminatory Refusal, Withholding and Denial of Public Accommodations, Disparate Impact and Aiding and Abetting Unlawful Discriminatory Practices
N.Y. Exec. Law §§ 296(2), 296(6), 297(9)
N.Y. Comp. Codes R. & Regs. Tit. 9, § 466.13
N.Y.C. Admin. Code §§ 8-107(4)(a), 8-107(6), 8-107(17), 8-502(a)
(Against All Defendants)

289. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

290. The NYPD is a place or provider of public accommodation because it provides services, facilities, accommodations, advantages and privileges through acting in its investigative and custodial capacities, including the supervision and execution of surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention pursuant to Section 240.37. The New York City Commission on Human Rights has not granted the NYPD an exemption to § 8-107(4) based on bona fide considerations of public policy.

291. By sanctioning and/or engaging in sweeps and targeting Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention pursuant to Section 240.37 on the basis of Plaintiffs' actual and/or perceived race, color, ethnicity and/or gender, including their gender identity, self-image, appearance, behavior, expression and/or transgender status, and/or by aiding, abetting, inciting or compelling such conduct, Defendants have refused, denied and withheld from Plaintiffs the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services. Therefore, the acts of Defendants, who are owners, proprietors, managers, superintendents, agents and/or employees of the NYPD and the City, violated Plaintiffs' rights under the NYHRL, N.Y. Exec. Law §§ 296(2) and

296(6), the N.Y. Comp. Codes R. & Regs. Tit. 9, § 466.13 and the NYCHRL, N.Y.C. Admin. Code §§ 8-107(4)(a) and 8-107(6).

292. Defendants have also violated the NYCHRL, N.Y.C. Admin. Code §§ 8-107(17), because their actions, policies, practices or customs, or a group thereof, have a disparate impact on women of color, including transgender women of color, who are protected under the NYCHRL. By targeting Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 on the basis of Plaintiffs' actual or perceived race, color, ethnicity, gender and/or gender identity, including self-image, appearance, behavior, expression and/or transgender status, Defendants' actions, policies, practices or customs, or a group thereof, result in the refusal, denial and withholding from Plaintiffs of the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services on the same terms as non-transgender, male and/or white individuals. Therefore, women of color, including transgender women, are disparately impacted to their detriment by Defendants' actions, policies, practices or customs, or a group thereof.

293. The disparate impact of Defendants' actions, policies, practices or customs, or a group thereof, which bear no relationship to a significant business objective of the NYPD, exceeds the mere existence of a statistical imbalance between women of color and transgender women, and the general population.

294. Plaintiffs have not filed a complaint with the New York City Commission on Human Rights, the State Division on Human Rights, any other court of competent jurisdiction, or any other administrative agency based upon the unlawful discriminatory practices alleged herein.

295. Defendants' violations of Plaintiffs' rights under the NYHRL and NYCHRL are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the NYHRL and NYCHRL.

296. Plaintiffs have served a copy of the complaint upon the authorized representatives of the New York City Commission on Human Rights and Corporation Counsel.

Thirteenth Claim for Relief

Violation of the New York City Bias-Based Profiling Law, N.Y.C. Admin. Code § 14-151
(Against All Defendants)

297. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

298. The City and Individual Defendants who are members of the NYPD police force have engaged, are engaging and continue to engage in bias-based profiling by initiating law enforcement actions against Plaintiffs, including the sanctioning and/or execution of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, on the basis of and in reliance on Plaintiffs' actual or perceived race, color, gender and/or gender identity as the determinative factor. Therefore, Defendants have engaged and continue to engage in the above-described intentional bias-based profiling of Plaintiffs, in violation of the New York City Bias-Based Profiling Law, N.Y.C. Admin. Code § 14-151.

299. Defendants have intentionally engaged in the above-described bias-based profiling of Plaintiffs. Such bias-based profiling is not justified by factors unrelated to unlawful discrimination, and is instead based on Plaintiffs' actual or perceived race, color, gender and/or gender identity. Defendants' above-described bias-based profiling is neither necessary to

achieve a compelling governmental interest nor narrowly tailored to achieve any compelling governmental interest.

300. In addition, Defendants' actions, policies, practices, or customs, or a group thereof, which result in the above-described bias-based profiling of Plaintiffs by Defendants, have a disparate impact on Plaintiffs, based on Plaintiffs' actual or perceived race, color and/or gender.

301. Further, the disparate impact of Defendants' actions, policies, practices or customs, or a group thereof, exceed the mere existence of a statistical imbalance between women of color and transgender women, and the general population. Defendants' actions, policies, practices or customs, or a group thereof, bear no significant relationship to advancing a significant law enforcement objective.

302. Defendants' violations of Plaintiffs' rights under the New York City Bias-Based Profiling Law are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the New York City Bias-Based Profiling Law.

II. CLAIMS BY NAMED PLAINTIFFS

303. With respect to each of the following claims, the conduct of Individual Defendants constituted outrageous and reckless conduct and demonstrated a callous indifference to and willful disregard of Named Plaintiffs' federal and state constitutional rights. Their conduct caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Fourteenth Claim for Relief

Violations of Plaintiffs' Due Process Rights Under the Fourteenth Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

304. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

305. Individual Defendants unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs in violation of their Due Process rights under the Fourteenth Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983. Individual Defendants arrested Named Plaintiffs in violation of their constitutionally protected liberty interest in self-expression and bodily integrity and privacy.

306. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Fifteenth Claim for Relief

Violations of Plaintiffs' Right to Freedom of Speech Under the First Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

307. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

308. The Individual Defendants unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs in violation of their rights under the First Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983. The Individual Defendants arrested Named Plaintiffs for engaging in constitutionally protected expressive conduct, including communicating with others

in public and/or expressing their gender identity in a public place through their choice of clothing.

309. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Sixteenth Claim for Relief

Violation of Plaintiffs' Right to Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution, Article I, § 11 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

310. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

311. Acting under color of state law, Individual Defendants targeted and/or sanctioned the targeting of Named Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on their race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities. The Individual Defendants had no legitimate interest in targeting Named Plaintiffs in this manner.

312. As a direct and proximate result of such Individual Defendants' law enforcement actions, such Named Plaintiffs have been deprived of their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution in violation of 42 U.S.C. § 1983.

313. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Seventeenth Claim for Relief

Violation of Plaintiffs' Right Against Unreasonable Search and Seizures Under the Fourth Amendment to the United States Constitution, Article I, § 12 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

314. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

315. The Individual Defendants intentionally and under color of state law have unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs under Section 240.37 without reasonable suspicion or probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

316. As a direct and proximate result of the acts and omissions of Individual Defendants, Named Plaintiffs have been unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained, and deprived of their rights under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution in violation of 42 U.S.C. § 1983.

317. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Eighteenth Claim for Relief

Unlawful Discrimination Under 42 U.S.C. § 1981
(Against Individual Defendants)

318. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

319. By their above-described actions pertaining to the sanctioning and/or execution of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention of

Plaintiffs under Section 240.37, Individual Defendants denied Named Plaintiffs the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens of the United States, and subjected them to disparate forms of punishment, pains, penalties and exactions as compared to white citizens, in violation of 42 U.S.C. § 1981.

Nineteenth Claim for Relief

Violation of the Americans with Disabilities Act, the New York State Human Rights Law and the New York City Human Rights Law Through Unlawful Discriminatory Practices on the Basis of Disability, 42 U.S.C. § 12132,
N.Y. Exec. Law §§ 296(2), 296(6), 297(9),
N.Y.C. Admin. Code §§ 8-107(4)(a), 8-107(6), 8-107(15)(a), 8-502(a)
(D.H. Against Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer # 2, Doe NYPD Officer #14 and the City)

320. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

321. As stated in paragraphs 290-291 above, the NYPD provides services, facilities, accommodations, advantages and privileges by acting in its investigative and custodial capacities. Defendants are managers, proprietors, superintendents, agents and/or employees of the City and the NYPD, a department of local government and a place and provider of public accommodation. As such, Defendants are prohibited from discriminating on the basis of disability under 42 U.S.C. § 12132, N.Y. Exec. Law §§ 296(2)(a), 296(6), 297(9), and N.Y.C. Admin. Code § 8-107(4)(a), 8-107(6), 8-107(15)(a) and 8-502(a).

322. The New York City Commission on Human Rights has not granted Defendants an exemption based on bona fide considerations of public policy.

323. Plaintiff D.H. has not filed a complaint with the New York City Commission on Human Rights, the State Division on Human Rights, any other court of competent jurisdiction, or any other administrative agency based upon the unlawful discriminatory practices alleged herein.

324. D.H., who is deaf and communicates by sign language, writing or text message on her phone, suffers from a physical and medical impairment that substantially limits one or more major life activities, including her ability to hear, and therefore qualifies as a disability.

325. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 were therefore required to make a reasonable accommodation to enable D.H. to enjoy the rights or privileges of access to the investigative and custodial services provided by the NYPD during D.H.'s arrest.

326. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 knew or should have known that D.H. was deaf at the time of her arrest, based in part on the fact that D.H. gestured to indicate that she was deaf when Defendants Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 approached her during her arrest. Defendant Doe NYPD Officer #14 knew or should have known that D.H. was deaf during her pre-arraignment detention based on the fact that D.H. stated in writing that she needed a sign language interpreter.

327. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14, at the time of D.H.'s arrest and throughout her pre-arraignment detention, intentionally and/or with deliberate indifference failed to provide D.H. with a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating, insofar as the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 denied D.H. a sign language interpreter, denied D.H. the ability to communicate through a writing or texting instrument and prevented D.H. from communicating with her hands by cuffing them behind her back. As a result of her inability to communicate, D.H. was not able to learn of the reason for her arrest until the day after her arrest, when she was brought to central booking. By intentionally denying D.H. any

means of communication during her arrest and detention, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 intentionally and/or with deliberate indifference, discriminated against D.H. on the basis of her disability and denied her the benefit of the services, programs or activities of the NYPD.

328. In addition, by denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating with the police during her arrest, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 denied, refused and withheld from D.H. access to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services on the same terms as individuals without disabilities.

329. By denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating with the police during her arrest, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 refused, denied and withheld from D.H. her right to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services under N.Y.C. Admin. Code § 8-107(4)(a) and N.Y. Exec. Law §§ 296(2), as well as D.H.'s right to a reasonable accommodation, reasonable modification and/or auxiliary aid and service under N.Y.C. Admin. Code §§ 8-107(15)(a) and N.Y. Exec. Law §§ 296(2). The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 have also violated N.Y.C. Admin. Code § 8-107(6) and N.Y. Exec. Law § 296(6) by aiding, abetting and inciting others' acts of denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid for communicating with police during her arrest, and of

denying, refusing and withholding from D.H. access to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services.

330. By their above-described actions, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 also violated D.H.'s right to the benefit of the services, programs or activities of the NYPD, as well as her right to be free from discrimination by Defendants on the basis of disability under 42 U.S.C. § 12132.

331. The City, as the employer of McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 is also liable for those Individual Defendants' unlawful discriminatory practices under 42 U.S.C. § 12132, N.Y. Exec. Law §§ 296(2) and 296(6) and N.Y.C. Admin. Code. §§ 8-107(4)(a), 8-107(6) and 8-107(15)(a), as alleged herein.

332. The City and Defendant McKenna's, Defendant Kinane's, Defendant Doe NYPD Officer #1's, Defendant Doe NYPD Officer #2's and Defendant Doe NYPD Officer #14's violations of D.H.'s rights under the NYHRL, NYCHRL and 42 U.S.C. § 12132 are the actual, direct and proximate cause of injuries suffered by D.H., as alleged herein.

333. Plaintiffs have served a copy of the complaint upon the authorized representatives of the New York City Commission on Human Rights and Corporation Counsel.

Twentieth Claim for Relief

Violation of the Right to Be Free from the Use of Excessive Force Under the Fourth Amendment to the United States Constitution, Article I, § 12 of the New York Constitution and 42 U.S.C. § 1983
(N.H. against Defendant Dawkins)

334. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

335. By pulling N.H.'s earrings and jewelry off of her person, forcibly pulling on her wig and verbally abusing her, Defendant Dawkins used excessive force against Plaintiff N.H.

and deprived her of her rights, remedies, privileges and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. §1983, including, but not limited to rights guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

336. In so doing, Defendant Dawkins acted intentionally and under color of state law.

337. The conduct of Defendant Dawkins caused N.H. pain and suffering, as well as psychological and emotional harm.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

338. Certify this action as a class action on behalf of the proposed Plaintiff Class pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure: all women of color who have been and/or will be surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37 between September 30, 2013 and the present and the date on which the City is enjoined from or otherwise ceases to enforce Section 240.37.

339. Declare that Defendants' acts, practices, policies, customs and/or omissions have deprived Plaintiffs of their rights under the First, Fourth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §§ 1983, 1981; Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132; the Constitution of the State of New York; the New York State Civil Rights Law; the New York State Human Rights Law; the New York City Bias-Based Profiling Law and the New York City Human Rights Law.

340. Declare that Section 240.37 violates the United States Constitution and the New York Constitution on its face and as applied;

341. Issue preliminary and permanent injunctions restraining the City and its employees, agents and successors from enforcing Section 240.37;

342. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to D.H. in an amount to be determined at trial against the City and Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 jointly and severally, together with interest and costs;

343. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to N.H. in an amount to be determined at trial against the City and Defendants Dawkins, Keane, McKenna and Doe NYPD Officer #3, jointly and severally, together with interest and costs;

344. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to K.H. in an amount to be determined at trial against the City and Defendants Imburgia, Maloney, Doe NYPD Officer #4 and Doe NYPD Officer #5, jointly and severally, together with interest and costs;

345. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Natasha Martin in an amount to be determined at trial against the City and Defendants Allen, Siev, Doe NYPD Officer #6 and Doe NYPD Officer #7, jointly and severally, together with interest and costs;

346. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Tiffaney Grissom in an amount to be determined at trial against the City and Defendants Savarese and Pocalyko jointly and severally, together with interest and costs;

347. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to R.G. in an amount to be determined at trial against the City and Defendants Diggs, Gomez and Beddows, jointly and severally, together with interest and costs;

348. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to A.B. in an amount to be determined at trial against the City and Defendants Salazar, Daverin, Doe NYPD Officer #8 and Doe NYPD Officer #9, jointly and severally, together with interest and costs;

349. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Sarah Marchando in an amount to be determined at trial against the City and Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13, jointly and severally, together with interest and costs;

350. Award punitive damages to D.H. in an amount to be determined at trial against Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of D.H.'s rights as set forth above;

351. Award punitive damages to N.H. in an amount to be determined at trial against Defendants Dawkins, Keane, McKenna and Doe NYPD Officer #3, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of N.H.'s rights as set forth above;

352. Award punitive damages to K.H. in an amount to be determined at trial against Defendants Imburgia, Maloney, Doe NYPD Officer #4 and Doe NYPD Officer #5, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of K.H.'s rights as set forth above;

353. Award punitive damages to Natasha Martin in an amount to be determined at trial against Defendants Allen, Siev, Doe NYPD Officer #6 and Doe NYPD Officer #7, whose

actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Martin's rights as set forth above;

354. Award punitive damages to Tiffaney Grissom in an amount to be determined at trial against Defendants Savarese and Pocalyko, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Grissom's rights as set forth above;

355. Award punitive damages to R.G. in an amount to be determined at trial against Defendants Diggs, Gomez and Beddows, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of R.G.'s rights as set forth above;

356. Award punitive damages to A.B. in an amount to be determined at trial against Defendants Salazar, Daverin, Doe NYPD Officer #8 and Doe NYPD Officer #9, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of A.B.'s rights as set forth above;

357. Award punitive damages to Sarah Marchando in an amount to be determined at trial against Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Marchando's rights as set forth above;

358. Order reasonable attorneys' fees and costs to be paid by Defendants pursuant to 28 U.S.C. § 2414; 42 U.S.C. § 1988; the Americans with Disabilities Act, 42 U.S.C. § 12133; the N.Y. Civ. Rights Law § 79-n(4); the New York City Bias-Based Profiling Law, N.Y.C. Admin.

Code § 14-151(d)(3) and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-502(g); and

359. Grant such other and further relief as the Court deems just and equitable.

Dated: New York, New York
September 30, 2016

Respectfully submitted,

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August 11, 2015

POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT, AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS (INTERNATIONAL BOARD)

The International Council

REQUESTS the International Board to adopt a policy that seeks attainment of the highest possible protection of the human rights of sex workers, through measures that include the decriminalization of sex work, taking into account:

1. The starting point of preventing and redressing human rights violations against sex workers, and in particular the need for states to not only review and repeal laws that make sex workers vulnerable to human rights violations, but also refrain from enacting such laws.
2. Amnesty International's overarching commitment to advancing gender equality and women's rights.
3. The obligation of states to protect every individual in their jurisdiction from discriminatory policies, laws and practices, given that the status and experience of being discriminated against are often key factors in what leads people to engage in sex work, as well as in increasing vulnerability to human rights violations while engaged in sex work and in limiting options for voluntarily ceasing involvement in sex work.
4. The harm reduction principle.
5. States have the obligation to prevent and combat trafficking for the purposes of sexual exploitation and to protect the human rights of victims of trafficking.
6. States have an obligation to ensure that sex workers are protected from exploitation and can use criminal law to address acts of exploitation.
7. Any act related to the sexual exploitation of a child must be criminalized. Recognizing that a child involved in a commercial sex act is a victim of sexual exploitation, entitled to support, reparations, and remedies, in line with

international human rights law, and that states must take all appropriate measures to prevent sexual exploitation and abuse of children.

8. Evidence that sex workers often engage in sex work due to marginalization and limited choices, and that therefore Amnesty International will urge states to take appropriate measures to realize the economic, social and cultural rights of all people so that no person enters sex work against their will or is compelled to rely on it as their only means of survival, and to ensure that people are able to stop sex work if and when they choose.

9. Ensuring that the policy seeks to maximize protection of the full range of human rights – in addition to gender equality, women's rights, and non-discrimination – related to sex work, in particular security of the person, the rights of children, access to justice, the right to health, the rights of Indigenous peoples and the right to a livelihood.

10. Recognizing and respecting the agency of sex workers to articulate their own experiences and define the most appropriate solutions to ensure their own welfare and safety, while also complying with broader, relevant international human rights principles regarding participation in decision-making, such as the principle of Free, Prior, and Informed Consent with respect to Indigenous peoples.

11. The evidence from Amnesty International's and external research on the lived experiences of sex workers, and on the human rights impact of various criminal law and regulatory approaches to sex work.

12. The policy will be fully consistent with Amnesty International's positions with respect to consent to sexual activity, including in contexts that involve abuse of power or positions of authority.

13. Amnesty international does not take a position on whether sex work should be formally recognized as work for the purposes of regulation. States can impose legitimate restrictions on the sale of sexual services, provided that such restrictions comply with international human rights law, in particular in that they must be for a legitimate purpose, provided by law, necessary for and proportionate to the legitimate aim sought to be achieved, and not discriminatory.

The policy will be capable of flexible and responsive application across and within different jurisdictions, recognizing that Amnesty entities may undertake work on different aspects of this policy and can take an incremental approach to this work (in accordance with and within the limits of this policy) based on assessments of specific legal and policy contexts.

The International Board will ensure that, following the release of the final research report, Sections and structures have an opportunity to review and give feedback on the final draft policy before it is adopted.

Lambda Legal
making the case for equality

BLOG

LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Sex Work

By Lambda Legal
AUGUST 20, 2015

Comments

Today, several LGBT rights organizations across the country issued the following joint statement in support of Amnesty International's August 11th resolution supporting sex worker human rights.

Joint Statement in Support of Amnesty International Resolution:

As LGBT rights organizations in the United States, we join to applaud and support Amnesty International's recent resolution to protect the human rights of sex workers by calling for decriminalization of sex work, while simultaneously holding states accountable in preventing and combatting sex trafficking, ensuring that sex workers are protected from exploitation, and enforcing laws against the sexual exploitation of children.

For many LGBT people, participation in street economies is often critical to survival, particularly for LGBT youth and transgender women of color who face all-too-common family rejection and vastly disproportionate rates of violence, homelessness, and discrimination in employment, housing, and education.

Transgender people engage in sex work at a rate ten times that of cisgender women, and 13% of transgender people who experience family rejection have done sex work (source). Whether or not they participate in sex work, LGBT people are regularly profiled, harassed, and criminalized based on the presumption that they are sex workers, contributing to the high rates of incarceration and police brutality experienced by these communities. As Amnesty International has clearly set forth, its resolution takes into account the negative impact of criminalization on the safety of sex workers, and furthermore, states remain obligated to protect the human rights of victims of trafficking and can use criminal law to address exploitation (source and source).

When LGBT people are prosecuted for sex work, they face alarmingly high rates of harassment and physical and sexual abuse behind bars. One study found that 59% of transgender people in California men's prisons report having experienced sexual assault while in custody (source). Alternative diversion program alternatives are frequently based on moral judgment, sending the message that there is something wrong with people who are just trying to survive, and do nothing to address the actual needs of sex workers, including those sex workers who might prefer to be doing other kinds of work.

Laws criminalizing sexual exchange—whether by the seller or the buyer—impede sex workers' ability to negotiate condom use and other boundaries, and force many to work in hidden or remote places where they are more vulnerable to violence. Research and experience have shown that these laws serve only to drive the industry further underground, make workers less able to negotiate with customers on their own terms, and put those who engage in criminalized sex work at higher risk for abduction and sex trafficking. And as UNAIDS and the World Health Organization have recognized, criminalization also seriously hampers efforts to prevent and treat HIV/AIDS—efforts in which people involved in the sex trades are crucial partners.

We look forward to working together, with sex workers and sex workers' rights advocates, and with Amnesty International, to replace laws that criminalize sex work with public policies that address sex workers' real economic and safety needs.

In solidarity,

Transgender Law Center

Gay & Lesbian Advocates & Defenders (GLAD)

Lambda Legal

National Center for Lesbian Rights

National Center for Transgender Equality

SEE ALSO: AMNESTY INTERNATIONAL, SEX WORK

Opinion | OP-ED CONTRIBUTOR

Buying Sex Should Not Be Legal

By RACHEL MORAN AUG. 28, 2015

DUBLIN — HERE in my city, earlier this month, Amnesty International's international council endorsed a new policy calling for the decriminalization of the global sex trade. Its proponents argue that decriminalizing prostitution is the best way of protecting "the human rights of sex workers," though the policy would apply equally to pimps, brothel-keepers and johns.

Amnesty's stated aim is to remove the stigma from prostituted women, so that they will be less vulnerable to abuse by criminals operating in the shadows. The group is also calling on governments "to ensure that sex workers enjoy full and equal legal protection from exploitation, trafficking and violence."

The Amnesty vote comes in the context of a prolonged international debate about how to deal with prostitution and protect the interests of so-called sex workers. It is a debate in which I have a personal stake — and I believe Amnesty is making a historic mistake.

I entered the sex trade — as most do — before I was even a woman. At age 14, I was placed in the care of the state after my father committed suicide and because my mother suffered from mental illness.

Within a year, I was on the streets with no home, education or job skills. All I had was my body. At 15, I met a young man who thought it would be a good idea for me to prostitute myself. As "fresh meat," I was a commodity in high demand.

For seven years, I was bought and sold. On the streets, that could be 10 times in a night. It's hard to describe the full effect of the psychological coercion, and how deeply it eroded my confidence. By my late teens, I was using cocaine to dull the pain.

I cringe when I hear the words "sex work." Selling my body wasn't a livelihood. There was no resemblance to ordinary employment in the ritual degradation of strangers' using my body to satiate their urges. I was doubly exploited — by those who pimped me and those who bought me.

I know there are some advocates who argue that women in prostitution sell sex as consenting adults. But those who do are a relatively privileged minority — primarily white, middle-class, Western women in escort agencies — not remotely representative of the global majority. Their right to sell doesn't trump my right and others' *not* to be sold in a trade that preys on women already marginalized by class and race.

The effort to decriminalize the sex trade worldwide is not a progressive movement. Implementing this policy will simply calcify into law men's entitlement to buy sex, while decriminalizing pimping will protect no one but the pimps.

In the United States, prostitution is thought to be worth at least $14 billion a year. Most of that money doesn't go to girls like my teenage self. Worldwide, human trafficking is the second largest enterprise of organized crime, behind drug cartels but on a par with gunrunning.

In countries that have decriminalized the sex trade, legal has attracted illegal. With popular support, the authorities in Amsterdam have closed down much of the city's famous red light district — because it had become a magnet for criminal activity.

In Germany, where prostitution was legalized in 2002, the industry has exploded. It is estimated that one million men pay to use 450,000 girls and women every day. Sex tourists are pouring in, supporting "mega-brothels" up to 12 stories high.

for those who want to get out of it. These women are trapped.

There is an alternative: an approach, which originated in Sweden, that has now been adopted by other countries such as Norway, Iceland and Canada and is sometimes called the "Nordic model."

The concept is simple: Make selling sex legal but buying it illegal — so that women can get help without being arrested, harassed or worse, and the criminal law is used to deter the buyers, because they fuel the market. There are numerous techniques, including hotel sting operations, placing fake ads to inhibit johns, and mailing court summonses to home addresses, where accused men's spouses can see them.

Since Sweden passed its law, the number of men who say they have bought sex has plummeted. (At 7.5 percent, it's roughly half the rate reported by American men.) In contrast, after neighboring Denmark decriminalized prostitution outright, the trade increased by 40 percent within a seven-year period.

Contrary to stereotype, the average john is not a loner or a loser. In America, a significant proportion of buyers who purchase sex frequently have an annual income above $120,000 and are married. Most have college degrees, and many have children. Why not let fines from these privileged men pay for young women's counseling, education and housing? It is they who have credit cards and choices, not the prostituted women and girls.

Amnesty International proposes a sex trade free from "force, fraud or coercion," but I know from what I've lived and witnessed that prostitution cannot be disentangled from coercion. I believe the majority of Amnesty delegates who voted in Dublin wished to help women and girls in prostitution and mistakenly allowed themselves to be sold the notion that decriminalizing pimps and johns would somehow achieve that aim. But in the name of human rights, what they voted for was to decriminalize *violations* of those rights, on a global scale.

The recommendation goes before the board for a final decision this autumn. Many of Amnesty's leaders and members realize that their organization's credibility and integrity are on the line. It's not too late to stop this disastrous policy before it harms women and children worldwide.

Rachel Moran is the founder of Space International, which advocates the abolition of the sex trade, and the author of the memoir "Paid For: My Journey Through Prostitution."

A version of this op-ed appears in print on August 29, 2015, on Page A19 of the New York edition with the headline: Buying Sex Should Not Be Legal.

The antiblackness of 'modern-day slavery' abolitionism

TRYON P. WOODS 10 October 2014

Antiblack racism underwrites the contemporary movement against "modern-day slavery." The anti-slavery movement is haunted by the specter of racial slavery even while it feeds off it parasitically.

The contemporary movement against 'modern-day slavery' makes a grave analytical and political error that, unfortunately, is all too common in our antiblack world. By 'antiblack world,' I refer to how blackness continues to represent danger and sexual savagery. It is the mark of the least desirable, the position against which all other oppressed subjects calibrate their humanity—as in, *as hard as my life may be, at least I am not black*.

Black people collectively generate no respect, honor, or value, let alone 'rights' or power—not because they are poor, live under corrupt governments, or live during a time of population explosion (all leading explanations for the emergence of 'modern-day slavery'), but rather simply because of their existence as such. As much as blackness is the mark of the non-human, it is also the negation of 'womanhood' and 'manhood.' Long after anti-colonial movements the world over have permanently discredited white supremacy, the principle of antiblackness remains stubbornly intact: it is best to be white; but if that proves beyond reach, *at least do not be black*.

Antiblackness is the product of racial slavery. The enduring effect of this is that the slave is both paradigmatically black *and* construed in terms of a bestial and openly vulnerable sexuality. This spectre of blackness, understood as sexual savagery, is present whenever the discourse of 'slavery' is evoked, even when the subjects are racialized as non-black or white. The essential failure of organizations fighting against 'modern-day slavery' to recognize even the basic features of the relationship between antiblackness and slavery produces a

number of serious consequences.

Flagellation of a Female Samboe Slave (1796) by William Blake. Wikimedia/Public domain.

First, the movement against 'modern-day slavery' deploys non-racial language to define the racialized realities that it addresses, an approach that solidifies the existing racial regime. If we situate our analysis within the archive of the black social movement, we learn that the best way to preserve the racial *status quo* is to simply re-present it in non-racial terms. An abundance of empirical evidence reveals that twenty-first century American society is as racially hierarchical as it has ever been. Several recent books demonstrate this well, such as *Racism without racists: Colorblind racism and the persistence of inequality in the United States* by Bonilla-Silva or *The shame of the nation: The restoration of apartheid schooling in America* by Jonathan Kozol. Whites are the single most segregated racial group, and wealth, health, education, and employment disparities have increased rather than diminished in the post-civil rights era.

Yet this evidence remains unpersuasive in the face of the prevailing non-racial logic, which maintains any remaining inequities are due to something other than racism.

The non-racial language of the 'modern-day slavery' discourse is particularly deceptive when it comes to the power relations in which the violent carnality of 'race' is simultaneously the normative process by which 'sex' is conferred.

Given western civilization's basis in the sexual plunder of slavery and colonialism, it is unsurprising that today's anti-slavery movement is inordinately preoccupied with women's sexual victimization. For instance, the focus on white women from eastern Europe working in commercial sex recalls the fight by British and US feminists against trafficking in prostitutes in the late nineteenth and early twentieth century, and what they termed at the time the 'white slave trade.' In both the earlier period and the contemporary one, the name of 'slave' marks these women as socially dangerous because of the implied proximity to blackness. It also labels them as victims undeserving of their plight, all the better to broaden the scope of state surveillance of sexuality.

Second, the anti-slavery movement is ahistorical. Again, black history is a corrective. Abolitionism against racial slavery showed us how 'rescue' movements are always self-referential: they aim at the salvation of the rescuer, not the rescued. White abolitionists frequently argued that slavery was an abomination because it made whites lazy and morally weak. W.E.B. DuBois reminds us that the American Civil War began as a war to *preserve* slavery, to keep it *in* the Union, not to abolish it; and it only *became* a war to end slavery as a result of the self-activity of the enslaved Africans themselves who stole away their labors from the South and forced the issue of abolition on the North. Anti-slavery does not necessarily mean anti-racist, and 'rescue' missions must be politically suspect.

Third, the moral authority that anti-slavery mobilizes today partly stems from the memory of black liberation that it implicitly draws upon—all the while explicitly distancing itself from black historical struggle. The movement often contrasts the 'facts' of 'modern-day slavery' with those of the 'old' (racial) slavery in order to emphasize how much worse the situation is today. The moral imperative of abolitionism today, therefore, rests not simply in objections to human oppression. It is also tied to white people's unconscious memories as the

perpetrators of racial slavery. Anti-slavery today seeks to exorcise this history. As such, it is anything but non-racial, despite its language.

Fourth, while slavery is evoked to cloak contemporary abolitionism with a political saliency and emotional urgency that only memory of *the* foundational institution of the modern world can sustain, there is a decided absence of solidarity with actual black suffering today.

Part of this problem lies with an incorrect understanding of slavery itself. Racial slavery was never simply supreme labor exploitation, or even being held captive. It was foremost about the accumulation and usefulness of black bodies for all manner of desire, whim, fantasy, or need of white society. Racial slavery was primarily a symbolic economy, an arrangement of meanings about who was human, which bodies had integrity, who could deploy violence with impunity, and the interdependence of 'freedom' and slavery.

As the political economy has changed with time, the symbolic economy of antiblackness persists. The ubiquitous spectacle today of the police killing unarmed black people in the street, in their homes, and in stores reiterates the *ongoing* power relations of slavery.

Where is the anti-slavery movement when black people are being gunned down today by both state and civil society? Where are the abolitionists now when the black community endures all manner of premature death? Where is agitation over 'modern-day slavery' when black schools are degraded and then closed altogether?

I suggest that the invisibility of black struggle today highlights how the current anti-slavery movement hinges on assertions of Africans' culpability in both racial slavery and its 'modern-day' version. In this narrative, African agents foist slavery upon an unwilling west and Africa is construed, again, as the locus of criminality and barbarism. In short, the current abolitionists are prosecuting their cause using the original terms of racial slavery, many centuries later.

The primary corrective for the problems of the anti-slavery movement is the same as for the problem of the antiblack world generally: solidarity with black historical struggle. For instance, lessons from black history that are relevant to the 'modern-day slavery' question include: 1) law is not a viable avenue for social redress: reform ends up extending, rather than ameliorating, black suffering; 2) work will not set you free: black people's hard labor had little bearing on black self-efficacy, to the point where now, given the rates of black unemployment and incarceration, black people are more valuable to the economy idled and quarantined in ghettos or prisons; 3) self-defense is a prerequisite for self-determination: the unrelenting public spectacles of black vulnerability at the hands of the law and the unceasing reiteration of black pathology are meant to disqualify any expression of black self-possession.

These lessons directly confront the anti-slavery movement's priority on human rights as the privileged vector for justice; they address the movement's arbitrary distinction between 'slavery' conditions and all other conditions of 'work' under capitalism, including labor that has been rendered surplus altogether from the global economy; and they call into question the implicit requirement that the legitimate subjects of 'modern-day slavery' are passive victims, rather than people engaged in various modes of self-authored activity, including armed resistance.

Ultimately, what is called into question is the very conception of justice on which this movement trades. As a result of *racial* slavery the very existence of the modern era is unjust. The search for justice within an unjust paradigm, therefore, is premature at best, since we have yet to adequately explain the paradigm. Before we can conceive of justice, then, we must focus on *ethics*, on accurately explaining relations of power, including those in which the movement to end 'modern-day slavery' arises.

NewStatesman

JUSTIN TALLIS/AFP/GETTY

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The difference between decriminalisation and legalisation of sex work

There is a crucial distinction between these two terms that is frequently blurred in the debate around the different models.

By Frankie Mullin

Sex work divides feminist opinion like few others issues. The ideological clash – prostitution as violence against women vs simply a job – may never be resolved but where debate coalesces, around proposed legal systems, ideas become concrete and can be logically hashed out.

Largely, both sides agree that criminal sanctions against sex workers themselves should be lifted. At present, while selling sex is legal in the UK, women who work together for safety can be prosecuted for brothel-keeping and thousands end up with criminal records for loitering and soliciting.

Some claim, however, that people (usually men) buying sex should be criminalised, as is the case in Sweden. Others argue that this endangers sex workers, forcing them to work in secluded, dangerous conditions so that clients can go undetected.

Tension is escalating as the English Collective of Prostitutes (ECP) prepares to hold an evidence-gathering symposium in Parliament on 3 November, heralding a campaign for full decriminalisation. The ECP campaign mirrors that of MSP Jean Urquhart who, backed by sex worker organisations and health charities, is calling for sex work to be decriminalised in Scotland. In the other corner will be the End Demand campaign, which wants the government to follow Sweden by implementing a Sex Buyer Law.

So let the battle commence, but let it do so on clearly-defined terms. The ECP and Urquhart are campaigning for *decriminalisation*. This is not – as has been suggested in countless media reports – *legalisation*.

Insisting on clarification isn't petty quibbling. The models are so distinct that when York Union last week changed the title of its debate to "This House believes the legalisation of prostitution would be a disaster", both sides thought they were arguing in favour of the motion. Sex worker and activist Laura Lee, who was up against outspoken abolitionist Julie Bindel at the debate, had to "tear up her notes" when it emerged that York Union actually meant "decriminalisation", something Lee wholeheartedly supports.

The York mix-up wasn't unique. Since Amnesty released its draft proposal for the decriminalisation of sex work, countless articles have conflated the terms, inaccurately holding up Germany and the Netherlands as examples of "decriminalisation gone wrong".

Some clarification: under *legalisation*, sex work is controlled by the government and is legal only under certain state-specified conditions. *Decriminalisation* involves the removal of all prostitution-specific laws, although sex workers and sex work businesses must still operate within the laws of the land, as must any businesses.

Clear examples of a legalised system in Europe come from the Netherlands and Austria; a murkier example from Germany. In the Netherlands, brothels have been legal since 2000, but only if they comply with specific requirements and, in some cases, undergo regular visits from the police. Street workers must operate in designated areas, outside which they will be committing a criminal offence.

In Austria, most regions require sex workers to register, either directly with the police or, via a brothel owner. A national agreement stipulates that every sex worker must undergo a weekly health check, evidence of which must be provided in a compulsory booklet. Both of these measures, says Amnesty International, are human rights violations.

The situation is more confusing in Germany as federal states implement wildly different approaches, ranging from de facto forced registration in Bavaria to Munich's almost city-wide no-prostitution zones. Elsewhere, licensing requirements support the much-publicised "mega brothels" at the expense of smaller operations which don't have the resources to comply. The German government is currently debating bringing in compulsory medical examinations.

For some sex workers, these models of legalisation have brought benefits, including access to the welfare state and better negotiating rights with bosses. For others – and, in particular, those who are already marginalised – life has got harder. State-imposed regulations have created a two-tier system, so that the undocumented or those who use drugs now work in clandestine, almost invariably less safe, conditions. These systems increase the power of managers, who know that women have few options for where they can work.

Accurate trafficking statistics are notoriously hard to come by and definitions can be slippery. In the Netherlands, coercion is more likely to take place outside the regulated spaces, although the Dutch government states:"It also happens that prostitutes who are exploited according to Dutch standards do not see themselves as a victim of exploitation." In Germany, the most reliable figures come from by the Federal Criminal Police Office, which suggests that, since the Prostitution Act, the number of victims has declined. According to Eurostat's latest report, the German per-capita rate of trafficking between 2010 and 2012 was lower than that of Sweden.

But here's the thing: these are not the models that human rights and sex worker-led organisations across the world are advocating. The only country to have fully decriminalised sex work is New Zealand. According to research, both street-based and indoor sex workers there report better relationships with the police and say they feel safer. Indoor workers are protected by employment

laws and can take employers to court. Contrary to fears, decriminalisation has not led to overall growth of the industry and trafficking has not increased.

This, then, is what sex worker-led organisations are calling for. Simply for prostitution-specific criminal law to be dropped and sex work treated as any other business. No one is demanding that the industry be allowed operate in legal grey area. Just as sex workers would be protected by labour, health and safety, human trafficking and other relevant law, so they would have to abide by it.

Crucially, legal systems shape public perception. While any element of an industry is criminalised, stigma is fuelled. One study suggests that men who see prostitution as just another sector of work are less likely to be violent. The ripple effect of legislation becomes "even more" significant in the global south, says Dr Prabha Kotiswaran, Senior Lecturer in Criminal Law at King's College, London.

"Stigma surrounding sexual labour is so strong in an Indian context and the criminal law adds to the stigma," Kotiswaran says. "There's a huge gap between what the law claims to do and what it actually does; how it's used socially if not legally. Criminal law is frequently used to threaten a whole range of marginalised groups: transgender people, young people, gay people, sex workers."

In their warring hearts, those in both camps share concern for the safety of sex workers. What differs is belief on how this can be brought about. It is right that debate should happen – much is at stake – but without clarity as so what each side is calling for, the conversation is nothing but farce. It is decriminalisation, not legalisation, for which sex workers around the world are fighting.

Editor's note, 21 October: this article originally referred to the wrong host for the debate at York. This has been corrected.

ANALYSIS HUMAN RIGHTS

Advocates Gather in New York City to Demand Decriminalization of Sex Work

Feb 26, 2019, 11:18am Victoria Law

Roughly 150 advocates came together on Monday to announce the launch of Decrim NY, a sex-worker led coalition of LGBTQ, immigrant rights, harm reduction, and criminal justice groups.

Decrim NY coalition supporters gathered to express their support of state bills to decriminalize sex work throughout New York state.
Victoria Law

As a teenager in the foster care system, Jessica Raven experienced sexual abuse several times. Each time, she found no recourse. At age 15, she ran away. That was when she began trading sex.

"I decided that I was better off on my own, on the streets, deciding who had access to my body," Raven, executive director of the Audre Lorde Project, told *Rewire.News* on Monday. The one time that she tried to enter a shelter, she was returned to the same abusive foster home that she had fled.

Raven was among the roughly 150 advocates who gathered in Manhattan, New York, on Monday to announce the launch of Decrim NY, a sex-worker-led coalition of LGBTQ, immigrant rights, harm reduction, and criminal justice groups. Coalition supporters also gathered to express their support of state bills to decriminalize sex work throughout New York state.

"We know that trans folks, particularly trans folks of color, experience high rates of employment discrimination and turn to sex work [to] survive. The same thing is true for many youth experiencing homelessness, especially queer and trans youth who trade sex at five to seven times the rate of their heterosexual counterparts," Raven said.

"The solution to that problem is making sure that people have access to the resources they need to survive, not criminalization. We shouldn't be pouring money into policing and the criminal legal system," she continued.

One bill, S 2253, would repeal the penal statute relating to "loitering for the purposes of prostitution," which police have used to profile, harass, and criminalize women of color, particularly trans women of color.

New York Assembly Health Committee Chair Richard Gottfried (D-New York City), who also spoke at the rally, is the sponsor of A 982, which would allow judges to vacate trafficking survivors' past convictions from prostitution or other acts related to their trafficking status. The bill is currently in the Assembly's code committee.

At the rally, New York state Sens. Jessica Ramos (D-New York City) and Julia Salazar (D-New York City) announced they were planning to introduce a bill to rewrite the state's penal code to decriminalize sex work altogether.

"Trying to stop sex work should not be the business of the criminal justice system," Gottfried told *Rewire.News*. "It only makes the situation worse—driving it underground only increases exploitation and abuse and only makes it harder to stop human trafficking and abuse of minors. This is essentially harm reduction—and it's long overdue."

When asked how this would work in practice, Gottfried countered, "How often do you get arrested for asking people questions at press conferences?"

"Never, because it's not against the law," he continued. "If it's not against the law, then police officers won't arrest people."

Although statewide data is not readily available, the number of arrests for prostitution in New York City have decreased 65 percent from 2012 to 2018: from 4,000 arrests to 1,500. But that doesn't mean police are leaving sex workers—or the people they perceive to be engaged in sex work—alone. In the first ten months of both 2017 and 2018, the city's number of arrests for loitering for the purposes of prostitution surged. According to a 2016 lawsuit filed by the Legal Aid Society, many of those targeted are trans women and women of color. Between 2012 and 2015, 85 percent of those arrested for loitering for the purposes of prostitution were Black or Latina.

For Jennifer Orellana, a community leader at Make the Road New York, decriminalization would be a relief from the constant police harassment and threat of arrest. Orellana originally studied to be a nurse in Puerto Rico, but upon graduation, she found pervasive job discrimination because of her trans identity. Even after she found a job, she still faced stigma and discrimination. After a colleague verbally assaulted her in front of her co-workers and patients, Orellana had enough and moved to New York City. There, she turned to sex work, which provided her with the economic

stability that nursing had not.

"It gave me the freedom to be my own boss," she told the crowd during Monday's launch. "I have the right to make decisions about my body and that is why I am here today."

But the most difficult part of the profession, she said, "is the constant police harassment and fear of arrest." Her last arrest was in 2018, when an undercover police officer set her up for a sting; eight police officers knocked down the door of her apartment and arrested her for sex work. "It was much more forceful than what I witnessed on television," she recalled.

Jared Trujillo is a public defender at the Legal Aid Society as well as a former sex worker. Many of his clients have been arrested for sex work. "In New York City, trans and queer kids, particularly trans and queer kids of color, engage in sex work at seven times the rate of their cisgender and heterosexual peers," he reminded the crowd. "They might do that for survival. They might do that for equity over their bodies. But whatever the reason, over-policing them is not the solution. It creates stigma. It discourages them from getting the health care that they need. Prosecuting them will only give them records that will follow them for their entire lives. It could complicate their immigration status, to find housing, to find work."

For many sex workers—particularly youth, as Jessica Raven learned—finding resources such as housing, health care, and employment mean going through a system that threatens to send them back to the abusive and violent places they initially fled.

If sex work were decriminalized, this would mean that Trujillo's clients, many of whom are trans, could get access to those resources more easily. They could walk down the street and not be policed for being themselves. He recounts a recent client who was arrested for wearing hot pants. "It would mean people are not harassed by vice [police]. It would mean that people would have access to services without having to go through human trafficking intervention courts," which are set up to process—and at times prosecute—people arrested for sex work. "It would mean that their actual dignity is respected and that policing isn't the solution to 'helping people.'"

Cecilia Gentili, who came to the United States from Argentina in the early 2000s, is adamant that sex work saved her life. When she first arrived, as an undocumented trans woman, she met a man who persuaded her into engaging in street-based sex work. But soon the persuasion became coercion. Sex work also got her away from that man—and the situation. Gentili began advertising

online, which meant she could screen her clients beforehand and manage the situation. It also meant she didn't have to rely on someone else to ensure her safety.

But with last year's passage of SESTA-FOSTA laws that ostensibly fight human trafficking by targeting websites used by sex workers, those kinds of opportunities have become fewer and fewer.

"I know how much sex work helped me get through and get me to where I am today," said Gentili, who until recently was the managing policy director of the GMHC and is now a member of Decrim NY. She understands the importance of enabling sex workers to take ownership of their bodies and their actions—and the importance of decriminalization. "As a transgender woman, as a person who was undocumented, I found myself in Rikers Island for doing sex work. And right after Rikers, I was sent to immigrant [detention] with ICE." Noting the anti-trans sentiment that remains prevalent throughout Argentina, she said, "This criminalization of sex work could have sent me to a country where I would have been killed right away. Do we care for people or do we care for another arrest?"

Criminalization has affected other immigrant communities as well. According to the Urban Justice Center, New York City arrests of Asian-identified people charged with prostitution have increased 2,700 percent from 12 in 2012 to 336 in 2016. At times, police raids have led to not only arrest, immigrant detention, and threats of deportation, but also to tragically preventable deaths, such as the 2017 death of Yang Song, a massage parlor worker who fell to her death while trying to escape a police raid in Queens.

Julie Xu is an organizer with Red Canary Song, a coalition of immigrants and sex workers, including migrant massage workers, formed in the wake of Song's death. Holding a sign in Chinese that read, "Working to live, nothing to be ashamed of," Xu said at the rally that there have been more police raids as well as more community stigma around massage parlor work, which is a common form of work among Asian migrant women.

"There is a difference between human labor trafficking and migrant parlor work," she reminded the crowd. While she acknowledges that there are instances of exploitation and coercive labor in massage parlors, she argued that "the vast majority of massage parlor workers are working by choice and necessity. Being a migrant makes it more necessary to work for an agency rather than being self-employed due to language difficulties and immigration status. By no means are all

migrant workers being trafficked." Increased policing of massage parlors has led to more violence, robbery, and exploitation—but fear of arrest prevents workers from reporting these instances to the police.

But if sex work were decriminalized, as the proposed bills intend, sex workers need not fear reporting abuse, robbery, and other forms of violence to the police. Conversely, they would no longer be targets for those who know that criminal statutes make them vulnerable to police violence, including police themselves.

As Ramos and Salazar stated in their *Daily News* op-ed, "We aim to repeal statutes that criminalize consensual sexual exchange between adults and create a system that erases prostitution records for sex workers and sex trafficking survivors so they can move on with their lives."

That's what the advocates forming Decrim NY are hoping for as well. "Whether we are trading sex by choice, by circumstance, by coercion, we all need the same things: We need safety from violence, freedom from criminalization, and access to basic needs like housing and health care," Raven said. "We can all be safe."

(http://bit.ly/2ALkaWZ)

Topics and Tags:

Criminalization of Sex Work, Law and Policy, Sex Workers, Sex Workers Rights

New York State Bills for the 2019-2020 Legislative Session

Legislative Priorities

Decrim NY is pushing the New York State Legislature to (1) expand the relief available for human trafficking victims who have criminal records resulting from their victimization (A00982/S03818) and (2) repeal the loitering for the purposes of prostitution law (A00654/S02253). These bills are critical to protecting the health and safety of those involved in the commercial sex industry by circumstance, coercion, or choice, and those exploited in all forms of labor. These bills would offer meaningful change to the NY criminal legal system and help reduce the harm caused by the policing of prostitution and the criminalization of trafficked individuals.

- Bills A00654/S02253 (Paulin/Hoylman) would repeal New York's loitering for the purposes of prostitution law, which was enacted in 1976 and has been incredibly damaging to the lives of countless New Yorkers by cycling them in and out of the criminal legal system. Its repeal sends the message that NYS values civil rights and dignity for those policed for being in the commercial sex industry and for those profiled as engaging in commercial sex. The law on its face has been unevenly and discriminatorily applied, especially to TGNCNB people, and repeal is necessary to protect against harmful arrests. This allows police to interpret lawful behavior such as "repeatedly" waving at a person in a vehicle, wearing a mini skirt, or talking to people in the streets as cause to arrest for loitering for the purpose of prostitution.
- Bills A00982/S03181 (Gottfried/Lanza) would expand the relief available to survivors of human trafficking who have criminal records for crimes their traffickers have compelled them to commit. Currently, New York State law only allows trafficking survivors to clear prostitution-related convictions from their records, although many are convicted of other types of offenses during the course of their trafficking. These bills expand the relief available to survivors by allowing them to move to vacate all types of criminal convictions resulting from their trafficking and exploitation.

If your organization would like to sign on in support of these two bills, please fill out this form!

Comprehensive Decriminalization of the Sex Trades
Decrim NY is working with Assembly Health Committee Chair Gottfried, Senate Labor Committee Chair Ramos, and Women's Health Committee Chair Salazar to draft and introduce a bill that substantially rewrites anti-prostitution penal codes to repeal laws

that harm people in the sex trades while preserving anti-trafficking laws that protect survivors (especially minors) and hold exploiters accountable.