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11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **IN AND FOR THE COUNTY OF SACRAMENTO**

13 DEPARTMENT OF FAIR EMPLOYMENT AND  
14 HOUSING, an agency of the State of California,

15 Plaintiff,

16 vs.

17 AMERICAN PACIFIC CORPORATION, a  
18 Nevada Corporation, dba, AMPAC FINE  
19 CHEMICALS; and Does ONE through TEN,  
20 Inclusive,

21 Defendants.

22 NICK LOZANO, Real Party in Interest.

Case No. 34-2013-00151153

**BRIEF AMICI CURIAE OF  
TRANSGENDER LAW CENTER, ACLU  
FOUNDATION OF NORTHERN  
CALIFORNIA, INC., EQUALITY  
CALIFORNIA, GAY-STRAIGHT  
ALLIANCE NETWORK, GENDER  
SPECTRUM AND NATIONAL CENTER  
FOR LESBIAN RIGHTS IN SUPPORT  
OF PLAINTIFF'S OPPOSITION TO  
DEMURRER**

DATE: March 11, 2014  
TIME: 2:00 p.m.  
DEPARTMENT: 53  
JUDGE: Hon. David I. Brown

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**INTERESTS OF AMICI**

Amici are nonprofit organizations engaged in legal, policy, and educational work on issues affecting the transgender community: Transgender Law Center, the ACLU Foundation of Northern California, Inc., Equality California, Gay-Straight Alliance Network, Gender Spectrum, and National Center for Lesbian Rights. Together, amici co-sponsored California’s School Success and Opportunity Act (“AB 1266”), which Defendant references in its Demurrer to Complaint, and co-sponsored or supported all the other transgender civil rights legislation in California over the past 15 years. Collectively, amici counsel transgender individuals with employment or education discrimination claims, engage in policy advocacy regarding workplace protections for transgender people, and assist educational institutions in the creation of nondiscrimination policies and practices to safeguard the rights of transgender and gender non-conforming students. As a result, amici are deeply familiar with the development and implementation of California nondiscrimination law as it pertains to employment and education, specifically.

AB 1266 was plainly intended as a restatement of, not a departure from, existing education non-discrimination law which has for years protected transgender students’ right to access sex-segregated activities, programs, and facilities. To suggest that this restatement evinces intent by the Legislature to exclude transgender workers’ access to sex-segregated spaces from the reach of the Fair Employment and Housing Act (“FEHA”) is both a misapplication of the law, and disregards the Legislature’s goal of creating workplaces free from unlawful gender identity-based discrimination. For these reasons and others set forth in our analysis below, we urge the Court to deny Defendant’s Demurrer to Complaint.

**SUMMARY OF ARGUMENT**

Nick Lozano (“Lozano”) is a transgender man who in September 2011 was offered the position of Operations Technician by AMPAC Fine Chemicals (“AMPAC”

1 or “Defendant”) at its Rancho Cordova, California facility. Plaintiff is the California  
2 Department of Fair Employment and Housing (“DFEH” or “Plaintiff”), the state agency  
3 charged with enforcing the FEHA. Mr. Lozano is the real party in interest. Cal. Gov’t  
4 Code § 12965.

5 Defendant manufactures and produces commercial-scale pharmaceutical  
6 ingredients. Operations Technicians perform duties related to the production of chemicals  
7 and are encouraged to shower at the end of their shifts in order to prevent tracking  
8 chemicals outside the workplace. There is agreement that Mr. Lozano presented as male  
9 and dressed in accordance with his male gender identity during his job interview, and that  
10 after he was offered the position and while he was in the process of providing background  
11 information, he voluntarily disclosed that he is a transgender man and that he planned to  
12 undergo sex reassignment surgery in the future. Defendant made further inquiries into Mr.  
13 Lozano’s gender transition, eventually deciding that Mr. Lozano had a “female body.” In  
14 October 2011, Defendant informed Mr. Lozano that it was conditioning its employment  
15 offer upon his using the women’s locker room and restroom until he completed his gender  
16 transition by having sex reassignment surgery. Defendant allegedly based its condition on  
17 concerns that it could be held liable if other employees or their spouses objected to Mr.  
18 Lozano’s usage of the men’s locker room and rest room. Mr. Lozano then rejected  
19 Defendant’s job offer and filed a complaint with the DFEH alleging sex and gender  
20 identity-based discrimination and failure to prevent discrimination. Defendant filed the  
21 instant demurrer, arguing that the FEHA does not prohibit restroom and locker room use  
22 based upon biological gender.

23 Amici urge the court to deny Defendant’s demurrer. Defendant relies heavily on a  
24 recently enacted amendment to the California Education Code that restates and clarifies  
25 existing nondiscrimination law and does not change it. The legislative history of the FEHA,  
26 the relevant law in this case, shows clearly that the Legislature intended no exception from  
27 the state’s gender identity nondiscrimination law for sex-segregated spaces. The recent  
28



1 amendment to the Education Code, AB 1266, simply reiterates that non-discrimination  
2 requirements apply in the specific context of sex-segregated programs, activities, and  
3 facilities. Furthermore, recent decisions interpreting analogous state and federal  
4 nondiscrimination laws confirm that California’s gender identity nondiscrimination law  
5 must be understood to prohibit employers from excluding transgender people like Mr.  
6 Lozano from sex-segregated spaces that correspond to their gender identity.

## 7 ARGUMENT

### 8 **I. California Nondiscrimination Law Requires Access To Sex-Segregated** 9 **Spaces Based On Gender Identity.**

10  
11 California law provides comprehensive protection from discrimination for  
12 transgender people, with statutes prohibiting discrimination on the basis of gender identity  
13 in employment, housing, education, public accommodations, insurance contracts, and hate  
14 crimes.<sup>1</sup> There are no statutory exceptions to any of these laws for sex-segregated spaces  
15 and facilities. The legislative history of California’s employment, public accommodations,  
16 and education laws in particular manifest a deep-seated commitment to protecting  
17 transgender Californians from any kind of discrimination that treats them differently from  
18 others of the same gender identity.

### 19 **A. The FEHA Has Evolved Over The Past 50 Years To Offer Expansive** 20 **Employment Nondiscrimination Protections To California Workers.**

21  
22 In 1959, the California Legislature passed the Fair Employment Practices Act  
23 (“FEPA”),<sup>2</sup> the predecessor to the FEHA. The goal of the FEPA was to prohibit

24  
25 <sup>1</sup> See California Fair Employment and Housing Act, Cal. Gov’t. Code §12940(a) (employment) and Cal.  
26 Gov’t. Code § 12955(a) (housing); Unruh Civil Rights Act, Cal. Civ. Code § 51(b) (public  
27 accommodations); California Insurance Gender Nondiscrimination Act, Cal. Health and Safety Code §  
28 1365.5(b) (health insurance contracts); The California Student Civil Rights Act, Cal. Ed. Code §200 et  
seq. (education); Ralph Act, Cal. Civ. Code § 51.7, Cal. Penal Code § 422.55(a)(2) (hate crimes).

<sup>2</sup> Former Cal. Labor Code § 1410 et seq., 1959 Cal. Stats. ch. 121 § 1, repealed by 1980 Cal. Stats. ch.  
992 § 11.

1 discrimination in the terms and conditions and privileges of employment, and in hiring  
2 and firing, on the basis of race, creed, national origin or ancestry. In 1980 the FEPA was  
3 combined with the Rumford Fair Housing Act of 1964 and was renamed the Fair  
4 Employment and Housing Act (“FEHA”),<sup>3</sup> which was strengthened over time to prevent  
5 harassment, discrimination, and retaliation. In addition to providing an avenue of  
6 redress, the FEHA now requires employers to act affirmatively to combat discrimination  
7 by providing sexual harassment training, by making reasonable accommodations for  
8 pregnant women and those with childbirth-related medical conditions, and by providing  
9 for family, medical, and pregnancy-related leave.<sup>4</sup> The FEHA’s protections have also  
10 expanded to include numerous other bases including gender, gender identity, and gender  
11 expression.<sup>5</sup>

12 As a result, the FEHA is one of the strongest employment nondiscrimination  
13 laws, state or federal, in the country. It is clear from the statute’s evolution that  
14 California lawmakers sought to create workplaces free from discrimination and  
15 harassment by expanding the FEHA’s application, not by restricting it.<sup>6</sup>

16 **B. The Gender Nondiscrimination Acts Of 2003 And 2011 Amended The**  
17 **FEHA To Specifically Identify Gender Identity As A Protected Category**  
18 **Without An Exception For Sex-Segregated Spaces.**

19 California’s Legislature first adopted explicit protections from employment  
20 discrimination for transgender people through the Gender Nondiscrimination Act of

21 <sup>3</sup> Former Health & Saf. Code § 35700 et seq., 1963 Cal. Stats. ch. 1853 § 2, amended by 1968 Cal. Stats.  
22 ch. 944, 1974 Cal. Stats. ch. 1224, 1975 Cal. Stats. chs. 280, 1189, 1977 Cal. Stats. chs. 1187, 1188, 1978  
Cal. Stats. ch. 380, repealed by 1980 Cal. Stats. ch. 992 § 8.

23 <sup>4</sup> Katherine C. Huibonhoa et al., *Celebrating the FEHA’s 50<sup>th</sup> Anniversary: A Review of the Most*  
*Significant Cases*, CALIFORNIA LABOR AND EMPLOYMENT BULLETIN (Jan. 2009), *available at*  
24 <http://www.paulhastings.com/assets/publications/1166.pdf>.

25 <sup>5</sup> California Department of Fair Employment and Housing,  
[http://www.dfeh.ca.gov/Publications\\_FEHADescr.htm](http://www.dfeh.ca.gov/Publications_FEHADescr.htm).

26 <sup>6</sup> See Senate Judiciary Committee, Report on AB 877, 2011-2012 Regular Session (June 14, 2011) (“Over  
27 time, [the Fair Employment and Housing Act and the Unruh Civil Rights Act] have evolved to include  
28 other characteristics such as medical condition, marital status, and sexual orientation to generally reflect  
the state's public policy against discrimination in all forms.”), *available at*  
[http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0851-0900/ab\\_887\\_cfa\\_20110613\\_142402\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0851-0900/ab_887_cfa_20110613_142402_sen_comm.html).

1 2003. That bill, sponsored by amicus Equality California,<sup>7</sup> amended the FEHA by  
2 importing the definition of “gender” that was used in the California Penal and Education  
3 Codes. The amendment clarified that the FEHA’s prohibition against discrimination  
4 based on “sex” included discrimination based on gender identity. Prior to the amendment,  
5 sex was defined as “including, but not limited to, pregnancy, childbirth, or medical  
6 conditions related to pregnancy or childbirth.”<sup>8</sup> After the FEHA was amended, the  
7 definition of sex in the statute referenced the definition of “gender” in California Penal  
8 Code Section 422.76, which defined gender as a person’s “identity, appearance, or  
9 behavior, whether or not that identity, appearance, or behavior is different from that  
10 traditionally associated with the person’s sex at birth.”<sup>9</sup> The bill’s sponsor, Assembly  
11 Member Mark Leno, specifically identified the need to combat discrimination based upon  
12 sex stereotypes relating to physical characteristics, noting that the bill was intended to  
13 “protect men who are seen as ‘too feminine’ and women perceived as ‘too masculine.’”<sup>10</sup>

14 In an attempt to further clarify that transgender Californians are protected from  
15 employment discrimination, the FEHA was amended again in 2011. Amici Equality  
16 California and Transgender Law Center again co-sponsored this legislation. The Gender  
17 Nondiscrimination Act of 2011 removed the reference to Penal Code Section 422.76,  
18 instead directly enumerating “gender identity” and “gender expression” among the  
19 FEHA’s protected categories.<sup>11</sup> Cal. Gov’t Code § 12940(a).

20 Defendant’s attempt to prohibit Mr. Lozano from using the men’s locker room is  
21 clearly contrary to the Legislature’s efforts to prohibit discrimination based upon gender  
22

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23 <sup>7</sup> Formerly known as the California Alliance for Pride and Equality.

24 <sup>8</sup> Senate Judiciary Committee, Report on AB 196, 2003-2004 Regular Session (June 17, 2003), *available*  
25 *at* [http://leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0151-0200/ab\\_196\\_cfa\\_20030619\\_133744\\_sen\\_comm.html](http://leginfo.ca.gov/pub/03-04/bill/asm/ab_0151-0200/ab_196_cfa_20030619_133744_sen_comm.html).

26 <sup>9</sup> Currently, Cal. Pen. Code § 422.56(c).

27 <sup>10</sup> Senate Judiciary Committee, Report on AB 196, 2003-2004 Regular Session (June 17, 2003), *available*  
28 *at* [http://leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0151-0200/ab\\_196\\_cfa\\_20030619\\_133744\\_sen\\_comm.html](http://leginfo.ca.gov/pub/03-04/bill/asm/ab_0151-0200/ab_196_cfa_20030619_133744_sen_comm.html).

<sup>11</sup> AB 887, 2011-2012 Leg. Reg. Sess. (Cal. 2011), *available at*  
[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201120120AB887&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB887&search_keywords=)

1 identity and sex stereotyping. Mr. Lozano is a transgender man. His body may be  
2 different than that of a non-transgender man in some ways, but this fact does not erase his  
3 maleness or his rights under California law. Indeed the legislative record shows that it is  
4 specifically this type of misconduct – discrimination based upon an employee’s perceived  
5 nonconformity with gender stereotypes, including physical characteristics – that the  
6 Legislature sought to prohibit when it amended the FEHA in 2003 and 2011.

7           Significantly, the FEHA explicitly permits an employer to maintain reasonable  
8 appearance, grooming, or dress standards that are sex-specific, provided that a  
9 transgender employee is able to appear or dress in a manner consistent with the  
10 employee’s gender identity. Cal. Gov’t. Code § 12949. This is the only reference to sex-  
11 specific employment practices in the FEHA, and it clearly demonstrates the  
12 Legislature’s intent that a transgender employee be treated in a manner consistent with  
13 their gender identity. Moreover, it would make no sense for the Legislature to protect  
14 Mr. Lozano’s right to dress consistently with his male gender identity while permitting  
15 an employer to prohibit him from using a restroom or locker room that corresponds with  
16 that gender identity.<sup>12</sup>

17           **C. California Public Accommodations Nondiscrimination Law Provides “Full**  
18           **and Equal” Privileges To Transgender People Without Exception For Sex-**  
19           **Segregated Spaces.**

20           The Gender Nondiscrimination Act of 2011 also amended the Unruh Civil Rights  
21 Act to explicitly prohibit discrimination in public accommodations on the basis of gender  
22 identity or gender expression. The Unruh Act is sweeping in its intent: to ensure that “all  
23 persons are free and equal” and “entitled to the full and equal accommodations,  
24 advantages, facilities, privileges, and services in all business establishments of every kind

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25 <sup>12</sup> Employee access to a restroom is mandated by the Occupational Safety and Health Administration  
26 (“OSHA”). 29 CFR 1910.141(c)(1)(i). *See* Mem. from John B. Miles, Jr., Dir., Directorate of Compliance  
27 Programs to Regional Administrators, State Designees re: Interpretation of 29 CFR 1910.141(c)(1)(i):  
28 Toilet Facilities (April 6, 1998) (“The employer may not impose unreasonable restrictions on employee  
use of the facilities.”), *available at*  
[https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=22932](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932).

1 whatsoever.”<sup>13</sup> The extension of the Gender Nondiscrimination Act to public  
2 accommodations is further evidence of the Legislature’s intent to provide transgender  
3 people with broad protection from discrimination, including in facilities like locker  
4 rooms and restrooms.

5 Although no published decision has considered the FEHA’s application to  
6 transgender employees, the Unruh Act has been applied to transgender customers. In  
7 2006, the Fair Employment and Housing Commission (“FEHC”) found that a Salinas  
8 nightclub had violated the law when it denied entrance to a transgender woman because  
9 she was wearing a skirt. The club had enacted a dress code that required men and  
10 transgender women to wear pants, allegedly in response to fighting among club patrons  
11 and prostitution on the premises.<sup>14</sup> The FEHC found unpersuasive the night club’s  
12 assertion that the dress code was necessary to prevent fighting and criminal activity  
13 because it was based upon sex stereotypes of how men and women should appear and  
14 bore no rational relationship to the safety and security of the business.<sup>15</sup>

15 Defendant’s fears concerning Mr. Lozano’s right to use the men’s locker room  
16 and related facilities are similarly irrational. Defendant states that permitting such usage  
17 would place it in a “precarious position” because a male employee would “need only to  
18 claim a female gender identity in order to disrobe, shower, and perform bodily functions  
19 with his female co-workers.” Defendant mistakes the nature of gender identity. Gender  
20 identity is a person’s deeply rooted understanding of his or herself as male or female. A  
21 person’s gender identity cannot be changed temporarily or at will for the purpose of  
22 sexual harassment. And if misconduct did occur, there is nothing to prevent Defendant  
23 from enforcing policies prohibiting sexual harassment. Defendant’s assertion that it could  
24 be liable for a constructive discharge if a male employee quit because his wife objected to  
25

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26 <sup>13</sup> Cal. Civ. Code § 51 et seq.

27 <sup>14</sup> *Dept. Fair Emp’t. & Hous. v. Marion’s Place*, Case Nos. U-200203 C-0008-00-s, C 03-04-070, 06-01-  
P, 2006 WL 1130912 (Cal. Fair Employment & Housing Comm’n, Feb. 1, 2006).

28 <sup>15</sup> *Id.* at \*9.

1 him “disrobing with a biological female” is similarly unfounded: a wife could have a  
2 similar objection to her spouse working late nights alone with an attractive female co-  
3 worker, and no cause for constructive discharge would arise. Finally, it would be  
4 irrational of lawmakers to enact legislation permitting Mr. Lozano the right to access the  
5 men’s restroom as an AMPAC customer, but not the men’s restroom and locker room as  
6 an employee.

7 **II. The School Success And Opportunity Act (AB 1266) Restates Existing**  
8 **California Nondiscrimination Law Ensuring Access To Sex-Specific**  
9 **Facilities Based Upon Gender Identity.**

10 Defendant asserts that the enactment of AB 1266 created a “new right” for  
11 California’s transgender students to access sex-specific facilities, and that Mr. Lozano  
12 believes this new right has been extended to him under the FEHA despite the absence of  
13 a similar amendment. However, the legislative record makes it abundantly clear that the  
14 purpose of AB 1266 was to provide specific guidance to school districts to ensure their  
15 compliance with existing nondiscrimination law.<sup>16</sup> Moreover, the history and evolution  
16 of the nondiscrimination provisions in the California Education Code show that it has  
17 long protected transgender students’ right to have their gender identity recognized.<sup>17</sup>

18 Where there is any uncertainty about how a statute should be interpreted, the  
19 Court looks first to the Legislature’s intent to determine the purpose of the law.<sup>18</sup> The  
20 legislative history of AB 1266 leaves no doubt that the purpose of the law was to  
21 reiterate existing law to ensure that transgender students have access to sex-segregated

22 \_\_\_\_\_  
23 <sup>16</sup> See, e.g., Senate Education Committee, Report on AB 1266, 2013-14 Regular Session (June 12, 2013),  
24 available at [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-  
25 1300/ab\\_1266\\_cfa\\_20130610\\_160930\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_cfa_20130610_160930_sen_comm.html) (“Although current California law already  
26 protects students from discrimination in education based on sex and gender identity, many school districts  
27 do not understand and are not presently in compliance with their obligations to treat transgender students  
28 the same as all other students in the specific areas addressed in this bill.”).

<sup>17</sup> See, e.g., Cal. Ed. Code §201, Cal. Ed. Code §210.7, Cal. Ed. Code § 222, Cal. Ed. Code §234, Cal. Ed.  
Code §234.5.

<sup>18</sup> See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387. (“[O]ur  
first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose  
of the law.”).

1 programs, activities, and facilities based upon their gender identity. For example, the  
2 purpose of the bill was described in the analysis of the Senate Education Committee:

3           Although current California law already protects students from  
4 discrimination in education based on sex and gender identity, many  
5 school districts do not understand and are not presently in compliance  
6 with their obligations to treat transgender students the same as all  
7 other students in the specific areas addressed in this bill. As a result,  
8 some school districts are excluding transgender students from sex-  
9 segregated programs, activities, and facilities. Other school districts  
struggle to deal with these issues on an ad hoc basis. Current law is  
deficient in that it does not provide specific guidance about how to  
apply the mandate of non-discrimination in sex-segregated programs,  
activities, and facilities.<sup>19</sup>

10 The history surrounding the bill makes clear that AB 1266 was intended as a  
11 clarification of, not a departure from, existing California nondiscrimination law.

12           Prior to AB 1266, California law protected transgender students from discrimination  
13 and harassment. For example, the California Education Code ensures that all students have  
14 the right to participate fully in the educational process free from discrimination and  
15 harassment. Cal. Ed. Code § 201(a), Cal. Ed. Code § 220. Like the FEHA, the Education  
16 Code specifically identifies gender identity and gender expression as prohibited bases for  
17 discrimination. Cal. Ed. Code § 210.7. These categories were added to the Education Code as  
18 a result of the passage of the Student Safety and Violence Prevention Act of 2000, which also  
19 created a new right for a student to file an official complaint based upon gender identity-  
20 based harassment.<sup>20</sup> In 2007, the Student Civil Rights Act further strengthened California  
21 education nondiscrimination law by including in the education code a reference to the  
22 definition of “gender” that appeared in the Penal Code, as well as by requiring the state’s

23 \_\_\_\_\_  
24 <sup>19</sup> Senate Education Committee, Report on AB 1266, 2013-14 Regular Session (June 12, 2013), *available*  
at [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-1300/ab\\_1266\\_cfa\\_20130610\\_160930\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_cfa_20130610_160930_sen_comm.html). *See also* Statement of Assemblymember Tom  
25 Ammiano, Senate Education Committee, Hearing on AB 1266 (June 12, 2013), *available at*  
<http://www.youtube.com/watch?v=DA7r9bVpayQ> (“AB 1266 clarifies existing law by requiring all  
26 students in K-12 be able to participate in school programs, activities, and use facilities in accordance with  
that student’s gender identity.”).

27 <sup>20</sup> AB 537, 1999-2000 Leg. Reg. Sess. (Cal. 1999), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_0501-0550/ab\\_537\\_bill\\_19991010\\_chaptered.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0501-0550/ab_537_bill_19991010_chaptered.html).

1 Department of Education to regularly monitor what steps school districts must take to ensure  
2 compliance with the existing state nondiscrimination law.<sup>21</sup> In 2011, the Gender  
3 Nondiscrimination Act mandated the inclusion of the term “gender identity” in all relevant  
4 sections of the Education Code.<sup>22</sup>

5 While the California Education Code clearly included gender identity as a  
6 protected category it did not, prior to AB 1266, specifically identify every possible  
7 educational program or activity to which its nondiscrimination protections applied. In  
8 some school districts, the absence of specific language concerning sex-segregated  
9 programs, activities, and facilities created confusion that hindered compliance with  
10 California law and enabled discriminated against transgender students by denying them  
11 access based upon gender identity. As a result, transgender students were not afforded  
12 the same opportunities to succeed in school as non-transgender students, a result that  
13 was both unlawful, and detrimental to the youths’ well-being: “No student can learn if  
14 they feel like they have to hide who they are in school, or if they are singled out for  
15 unequal treatment. Denying transgender students equal treatment based on their gender  
16 identity denies them the right to a safe and supportive learning environment.”<sup>23</sup>

17 Providing additional guidance to school districts to ensure their compliance with  
18 existing law was a motivating reason for the legislation, as AB 1266’s author,  
19 Assemblymember Tom Ammiano, stated in his testimony before the Senate Education  
20 Committee:

21 Although current California law already protects students from  
22 discrimination in education based on sex and gender identity, many  
23 school districts are not in compliance with these requirements. AB 1266  
24 clarifies existing law by requiring all students in K-12 be permitted to  
25 participate in school programs, activities, and use facilities in accordance  
with that student's gender identity -- to ensure compliance with current

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26 <sup>21</sup> SB 777, 2007-2008 Leg. Reg. Sess. (Cal. 2007) available at  
[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200720080SB777&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200720080SB777&search_keywords=)

27 <sup>22</sup> Cal. Gov’t Code § 12940(a).

28 <sup>23</sup> Statement of Assemblymember Tom Ammiano, Senate Education Committee, Hearing on AB 1266  
(June 12, 2013), available at <http://www.youtube.com/watch?v=DA7r9bVpayQ>.



1 law and guarantee transgender students have the same opportunities to  
2 participate and succeed as others. . . .

3 Schools across California, including some of the state's largest school  
4 districts, are in compliance with existing law by already accepting and  
5 supporting their transgender students and allowing them equal access to  
6 school activities and facilities based on their gender identity. . . . Making  
7 this requirement clear would help parents and students understand their  
8 rights, while also helping schools comply with the law -- reducing  
9 conflict and the potential for litigation while protecting students' health  
10 and well-being.<sup>24</sup>

11 He also noted that, because this was already required by existing law, "This bill does  
12 not require schools to create new programs or new facilities for any students, and  
13 therefore would not have any fiscal impact."<sup>25</sup>

14 In its comments in support of the legislation, amicus and AB 1266 sponsor  
15 Transgender Law Center also noted that the bill would benefit school districts as well  
16 as transgender students:

17 While existing California law already broadly prohibits discrimination  
18 against transgender students, AB 1266 will make sure that schools  
19 understand their responsibility for the success and well-being of all  
20 students and that parents and students understand their rights. . . . AB  
21 1266 will make it clear to school districts, teachers, parents and students  
22 that California's nondiscrimination law requires public schools to respect  
23 a transgender student's identity in all school programs, activities, and  
24 facilities.<sup>26</sup>

25 Indeed, it was well established that California nondiscrimination law prior to AB  
26 1266 included access to sex-specific facilities based on gender identity. For instance, in  
27 2009 this Court rejected a challenge to the California Student Civil Rights Act brought  
28 by anti-LGBT groups in opposition to this exact provision of the law.<sup>27</sup> In *California*

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24 Statement of Assemblymember Tom Ammiano, Senate Education Committee, Hearing on AB 1266  
(June 12, 2013), available at <http://www.youtube.com/watch?v=DA7r9bVpayQ>.

25 *Id.*

26 Letter from Transgender Law Center to Assemblymember Tom Ammiano (April 9, 2013), available at  
<http://transgenderlawcenter.org/archives/9900>.

27 *California Education Committee, LLC v. O'Connell*, No. 34-2008-00026507-CU-CR-GDS (Cal. Super.  
Ct. June 8, 2009), available at [http://transgenderlawcenter.org/issues/youth/california-education-  
committee-llc-v-jack-oconnell-decision](http://transgenderlawcenter.org/issues/youth/california-education-committee-llc-v-jack-oconnell-decision).

1 *Education Committee v. O'Connell*, opponents of the law raised concerns nearly  
2 identical to Defendant AMPAC's in the instant case: namely, that complying with the  
3 law would interfere with schools' obligations to "protect[] the privacy and safety of all  
4 students from persons of the opposite sex."<sup>28</sup> The plaintiffs argued that a seventh grade  
5 boy's constitutional privacy rights were violated when a transgender boy who was  
6 "biologically female" was permitted to use the boys' locker room due to the  
7 requirements of state law. *Id.* The Court granted the state's demurrer, holding that the  
8 student's privacy rights had not been violated when it could not be demonstrated that the  
9 transgender student had engaged in any improper conduct. *Id.*

10 Similarly, courts and government agencies across the country share the  
11 California Legislature's understanding that laws that generally prohibit discrimination  
12 against transgender people must be understood to ensure access to sex-specific facilities  
13 based upon gender identity. Recent decisions by the Maine Supreme Court<sup>29</sup> and the  
14 Colorado Division of Human Rights,<sup>30</sup> as well as a consent agreement entered into by  
15 the U.S. Department of Education's Office for Civil Rights and the U.S. Department of  
16 Justice's Civil Rights Division,<sup>31</sup> have all affirmed that nondiscrimination laws  
17 prohibiting discrimination on the basis of gender identity require that a transgender  
18 student must be permitted to access the restroom and locker room that matches his or  
19 her gender identity.

20 In June 2013, several months before the passage of AB 1266, the Colorado  
21 Division of Civil Rights found that a school district had violated the state's gender  
22 identity nondiscrimination law when it denied a six year-old transgender girl access to

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25 <sup>28</sup> *Id.*

<sup>29</sup> *Doe v. Regional School Unit 26*, No. Pen-12-582, 2014 WL 325906 (Maine January 30, 2014).

<sup>30</sup> *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Colo. Div. Civ. Rights (June 2013), available at  
26 [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf).

<sup>31</sup> Resolution Agreement, Arcadia Unified Sch. Dist.-U.S. Dep't.of Educ., Office of Civil Rights -U.S.  
27 Dep't. of Justice, Civil Rights Div., July 24, 2013, available at  
28 <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

1 the girls' restroom.<sup>32</sup> Similar to California and Maine, the Colorado nondiscrimination  
2 law simply prohibited discrimination against transgender students and did not  
3 specifically address restroom access.<sup>33</sup> The Division of Civil Rights determined that the  
4 school district had violated her rights by treating her differently from the other girls.  
5 Moreover, it found that depriving the student of restroom access created a  
6 discriminatory learning environment:

7         Despite having access to other restrooms, by not permitting the charging  
8 party to use the girls' restroom the Respondent created an environment  
9 rife with harassment and inapposite to a nurturing school atmosphere.  
10 This deprives the Charging Party of the acceptance that all students  
11 require to excel in their learning environments, creates a barrier where  
12 none should exist, and entirely disregards the Charging Party's gender  
13 identity.<sup>34</sup>

14 The agency therefore ruled that the transgender girl must be permitted to use the girls'  
15 restroom with her peers.

16         In July 2013, also before AB 1266 was passed, the U.S. Department of  
17 Education Office of Civil Rights and the U.S. Department of Justice's Civil Rights  
18 Division reached a resolution with California's Arcadia Unified School District after it  
19 prohibited a seventh grade transgender boy from using the boys' locker room and  
20 restrooms, instead requiring him to use the nurse's office restroom as a restroom and to  
21 change for gym class. The school also refused to permit him to stay in a communal cabin  
22 with other boys on an overnight school trip, instead requiring him to stay in a cabin  
23 alone with his father as a chaperone.<sup>35</sup> The U.S. Departments of Justice and Education  
24 investigated the school district for violating the student's right to be free from

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25 <sup>32</sup> *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Colo. Div. Civ. Rights (June 2013), available at  
26 [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf).

27 <sup>33</sup> Colo. Rev. Stat. § 24-34-601(2).

28 <sup>34</sup> *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Colo. Div. Civ. Rights (June 2013), available at  
[http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf).

<sup>35</sup> U.S. Dept. of Justice Civil Rights & U.S. Dept. of Educ. Office for Civil Rights, Letter to Asaf Orr re  
Conclusion of Investigation in DOJ Case No. DJ169-12C-79, OCR Case No. 09-12-1020 (July 24, 2013),  
available at [http://www.nclrights.org/wp-](http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Notification_Letter_07.24.2013.pdf)  
[content/uploads/2013/09/Arcadia\\_Notification\\_Letter\\_07.24.2013.pdf](http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Notification_Letter_07.24.2013.pdf).

<sup>35</sup> *Id.* at 2.

1 discrimination on the basis of his transgender status under Title IX’s general prohibition  
2 of sex discrimination.<sup>36</sup> The consent decree ensured that the boy would be provided with  
3 access to the boys’ restroom and locker room and treated in all ways equal with his male  
4 classmates.<sup>37</sup>

5 Most recently, in January 2014, the Maine Supreme Judicial Court held that a  
6 school district violated the state Human Rights Act’s prohibition on discrimination  
7 based on gender identity when it prohibited a fifth-grade transgender girl from using the  
8 girls’ restroom at her school.<sup>38</sup> Although her parents and the school had previously  
9 agreed for her to have access to the girls’ restroom consistent with her gender identity,  
10 the school changed its mind and required her to use a gender-neutral restroom after the  
11 guardian of one of her classmates objected to her using the girls’ restroom. The court  
12 held that, in so doing, the school had violated the transgender girl’s rights under Maine’s  
13 nondiscrimination law that, like California’s FEHA, simply prohibited discrimination  
14 based on transgender status but did not specifically discuss how that law applied in the  
15 context of sex-segregated facilities.<sup>39</sup>

16 That AB 1266 restated and did not change California law is also evident from the  
17 number of California school districts that already had policies in place requiring access  
18 to programs and activities based upon a student’s gender identity, policies they believed  
19 mandated by pre-AB 1266 Education Code provisions. Those included Los Angeles,  
20 San Francisco, and San Rafael.<sup>40</sup> Additionally, the California Interscholastic Federation  
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22 <sup>36</sup> *Id.* at 2.

23 <sup>37</sup> *Id.* at 7.

24 <sup>38</sup> *Doe v. Regional School Unit 26*, No. Pen-12-582, 2014 WL 325906 (Maine Jan. 30, 2014).

25 <sup>39</sup> Me. Rev. Stat. Ann. tit. 5 § 5-4592(1).

26 <sup>40</sup> Los Angeles Unified School District Reference Guide: Transgender and Gender-Variant Students -  
27 Ensuring Equity and Nondiscrimination (September 9, 2011), *available at*  
28 [http://notebook.lausd.net/pls/ptl/docs/PAGE/CA\\_LAUSD/FLDR\\_ORGANIZATIONS/STUDENT\\_HEALTH\\_HUMAN\\_SERVICES/SHHS/HUMAN\\_RELATIONS\\_HOME\\_PAGE/HUMAN\\_RELATIONS\\_BULLETINS\\_MEMOS/TRANSGENDER%20%20GENDER%20NONCONFORMING%20STUDENTS-REF-1557%201%209-9-11.PDF](http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/STUDENT_HEALTH_HUMAN_SERVICES/SHHS/HUMAN_RELATIONS_HOME_PAGE/HUMAN_RELATIONS_BULLETINS_MEMOS/TRANSGENDER%20%20GENDER%20NONCONFORMING%20STUDENTS-REF-1557%201%209-9-11.PDF); San Francisco Unified School District, Article 5: Nondiscrimination for Students and Employees (Adopted April 21, 2004), *available at*  
<http://www.transgenderlaw.org/college/sfusdpolicy.htm>; San Rafael City Schools, Sexual

1 adopted a policy in early 2013—prior to the passage of AB 1266—that made clear that  
2 transgender students must be permitted to participate on sports teams according to their  
3 gender identity.<sup>41</sup>

4 Furthermore, shortly after AB 1266 passed, a referendum was proposed to repeal  
5 it.<sup>42</sup> Proponents collected enough signatures to trigger a full recount,<sup>43</sup> however on  
6 February 24, 2014 the California Secretary of State reported that there were not enough  
7 valid signatures obtained during the full recount to qualify the measure for the ballot.<sup>44</sup>  
8 Despite this uncertainty, however, school districts across the state have moved to enact  
9 policies in line with the policy reflected in the law, because they understand that such  
10 policies are required by state and federal nondiscrimination law generally regardless of  
11 the outcome of the referendum.<sup>45</sup> Indeed, the California School Boards Association  
12 issued a model policy to all districts in California that would guarantee transgender  
13 students access to sex-segregated facilities and activities on the basis of the student’s  
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19 Orientation/Gender Identity Harassment (Adopted December 8, 2008), *available at*  
20 <http://transstudent.org/downloads/SanRafaelCitySchool%20District%20RegSS-1.pdf>.

21 <sup>41</sup> California Interscholastic Foundation, State Constitution and Bylaws §300(D), “Gender Identity  
22 Participation,” (Adopted February 2013), *available at*  
23 [http://www.cifstate.org/images/PDF/State\\_Constitution\\_and\\_Bylaws/300\\_Series.pdf](http://www.cifstate.org/images/PDF/State_Constitution_and_Bylaws/300_Series.pdf).

24 <sup>42</sup> Seth Hemmelgarn, *AB 1266 Repeal Effort Stays Alive*, Bay Area Reporter (Jan. 9, 2014), *available at*  
25 <http://www.ebar.com/news/article.php?sec=news&article=69381>.

26 <sup>43</sup> Christopher Cadelago, *Transgender Rights Referendum Moves To Full Signature Count*, Sacramento  
27 Bee (Jan. 8, 2014), *available at* <http://blogs.sacbee.com/capitolalertlatest/2014/01/transgender-rights-referendum-moves-to-full-signature-count.html>.

28 <sup>44</sup> Bob Egelko, *Referendum Challenging Transgender Rights Law Fails to Make Ballot*, San Francisco  
Chronicle (Feb. 24, 2014), *available at* <http://www.sfchronicle.com/bayarea/article/Referendum-challenging-transgender-rights-law-5263999.php>

<sup>45</sup> *E.g.*, San Mateo County Office of Education, Revised Model Gender Nondiscrimination Policy to  
Support Implementation of AB1266 (adopted Nov. 13, 2013), *available at*  
<http://www.smcoe.k12.ca.us/Superintendent/Documents/AB1266.pdf>; Berkeley Unified School District,  
Gender Identity and Access policy (adopted Dec. 11, 2013), *available at*  
<http://supportallstudents.files.wordpress.com/2013/09/gender-ar-bp.pdf>

1 gender identity.<sup>46</sup> The CSBA policy specifically notes that access is required under  
2 existing California law regardless of the outcome of any referendum.<sup>47</sup>

3 In sum, it is clear that AB 1266 provided a restatement of and not a departure from  
4 existing California nondiscrimination law. As co-sponsors of that measure, amici can  
5 confirm that AB 1266 was simply intended to reiterate existing nondiscrimination law to  
6 make sure that school districts were aware that transgender people in California are  
7 entitled to access sex-segregated programs, activities, and facilities on the basis of their  
8 gender identity.

9 **III. Conclusion**

10 For the foregoing reasons, amici respectfully request that the Court deny  
11 Defendant's Demurrer to Complaint and permit this important case to go forward.

12  
13 Respectfully submitted,

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18 February 25, 2014

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26 \_\_\_\_\_  
27 <sup>46</sup> CSBA Nondiscrimination/Harassment Sample BP (Feb. 2014), *available at*  
28 <http://d3n8a8pro7vhm.cloudfront.net/supportallstudents/pages/26/attachments/original/1393265745/model1.pdf> and CSBA Nondiscrimination/Harassment Sample AR (Feb. 2014), *available at*  
<http://d3n8a8pro7vhm.cloudfront.net/supportallstudents/pages/26/attachments/original/1393265760/model2.pdf?1393265760>.

<sup>47</sup> CSBA Nondiscrimination/Harassment Sample BP, at 1 (Feb. 2014) (“[A]n attempt is currently in progress to qualify a referendum on AB 1266 for the November 2014 ballot. Even as the eventual outcome is unknown as of this writing, the following guidelines are designed to implement other existing state and federal laws that prohibit discrimination, harassment, intimidation, and bullying against students based on their real or perceived gender identity and/or gender expression regardless of whether or not the referendum attempt is successful.”), *available at*  
<http://d3n8a8pro7vhm.cloudfront.net/supportallstudents/pages/26/attachments/original/1393265745/model1.pdf>.

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