A158214

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

MEGHAN MURPHY,

Appellant,

v.

TWITTER, INC. AND TWITTER INTERNATIONAL COMPANY,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF SAN FRANCISCO

(CASE NO. CGC-19-573712)

THE HONORABLE ETHAN P. SCHULMAN

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF NATIONAL CENTER FOR LESBIAN RIGHTS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., GLBTQ LEGAL ADVOCATES & DEFENDERS, TRANSGENDER LAW CENTER, AND THE HUMAN RIGHTS CAMPAIGN IN SUPPORT OF RESPONDENTS

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI

Pursuant to California Rules of Court, Rule 8.200(c), proposed *amici curiae* National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Inc., GLBTQ Legal Advocates & Defenders, Transgender Law Center, and the Human Rights Campaign (collectively "*Amici*"), respectfully request leave to file this amicus brief in support of Respondents Twitter, Inc. and Twitter International Company. No party, or counsel for any party, has authored this brief in whole or in part. No person or entity other than counsel for *Amici* made a monetary contribution intended to fund the preparation or submission of this brief.

Amici are nonprofit organizations with an interest in ensuring the equal treatment of lesbian, gay, bisexual, transgender, and queer people in California and across the nation. The proposed amicus brief will assist the Court in deciding this matter by providing additional context regarding the importance to transgender people of open and welcoming online spaces, the harms associated with refusing to respect transgender peoples' names and pronouns, and the role that policies prohibiting online harassment can play in securing a vibrant and inclusive internet.

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education.

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Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal access to spaces—both physical and online—for LGBTQ people. NCLR is currently representing transgender young people in two separate cases defending the authority of schools to discipline educators using the incorrect pronouns and honorifics when referring to transgender students in their class. NCLR is involved in and supporting similar cases in different contexts as well, such as employment.

Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal regularly litigates and advocates on behalf of transgender people who have faced discrimination and harassment on the basis of their gender identity.

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated in state and federal courts to counter myths and stereotypes about transgender people.

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Transgender Law Center (TLC) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming ("TGNC") people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Representing over three million member, the **Human Rights Campaign (HRC)** works for a world where LGBTQ people are ensured of their basic rights, and can be open, honest and safe at home, at work, and in the community.

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INTRODUCTION

Amici submit this brief to provide the Court with additional context regarding the importance of policies that protect transgender individuals from abuse and harassment including policies that prohibit the intentional misuse of a transgender person's name and pronouns.

Online communities play a critically important role in enabling transgender people to connect with one another, build networks and communities, and participate in public debate and discussion. However, transgender people also often face disproportionate abuse and harassment online, including hate speech, slurs, and targeted efforts by other users to disparage their identity, experience, and existence as transgender individuals by deliberately assigning them the wrong gender or name—forms of verbal harassment sometimes referred to as "misgendering" and "deadnaming," respectively, including in Twitter's user code of conduct at issue in this case. The prevalence and severity of such abuse can substantially impair transgender people's ability to access online spaces and communities, denigrates their identity, and in some cases can be associated with adverse mental health outcomes; it can also adversely affect the vibrancy of online communities themselves, by depriving those communities of full and open participation of transgender users, who may feel reluctant to speak up or engage in discussions for fear of attracting such abuse. Service providers have valid and well-founded interests, as expressed in Twitter's own policy,

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in having rules that foster greater participation. And policies by social media companies that prohibit the use of their online platforms to target and denigrate other users on the basis of their gender identity—provided they can be meaningfully enforced when necessary—play an important role in ensuring that such spaces are available for transgender people to express themselves freely.

The Appellant in this litigation has framed her claims as an individualized challenge to the application of Twitter's policies to her particular postings and denies that "this case is about allowing [Twitter] to fight 'harassment.'" Appellant's Reply Br. at 12. However, the relief she seeks, as well as the consequences of some of the arguments she presents in support of her appeal, if accepted by the Court, would have the effect of undermining these important protections for Twitter users more generally—and could also make it more difficult for other service providers to keep their online communities fully accessible to transgender users. *Amici* urge the Court to apply Section 230 of the Communications Decency Act to give appropriate weight to the importance of allowing providers to create and enforce policies against online abuse and harassment.

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ARGUMENT

I. THE INTERNET HAS PLAYED AN INTEGRAL ROLE IN THE GROWTH AND DEVELOPMENT OF A COMMUNITY FOR TRANSGENDER PEOPLE.

The ability to access and freely participate in online services and communities is of substantial importance to transgender people. The transgender community's increased political, social, and cultural visibility over the last decade[1] has coincided with the growing influence of the internet in general—and social media platforms in particular—in Americans' daily lives.[2] Online communities have played, and continue to play, vital roles as tools for information sharing, social cohesion, political development, and psychological and emotional support within the transgender community.

Although exact numbers are difficult to come by, transgender people are not a large group, accounting (according to one survey) for less than one percent of the adults in the United States.[3] Because that relatively small

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[1] *See, e.g.,* Katy Steinmetz, *The Transgender Tipping Point,* TIME, May 29, 2014, https://time.com/magazine/us/135460/june-9th-2014-vol-183-no-22-u-s/ (cover story); *HRC National Survey of Likely Voters*, HUMAN RIGHTS CAMPAIGN (Mar. 24, 2016) https://www.hrc.org/resources/hrc-national-survey-of-likely-voters (finding that 35% of Americans personally knew a transgender person in 2016, an increase from 22% in 2015 and from 17% in 2014).

[2] *See* Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RESEARCH CTR at 2 (2018) https://www.pewresearch.org/internet/2018/03/01/social-media-use-in-2018/ (showing consistent upward trend in usage across platforms, especially from 2012 to 2016).

[3] Andre R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, THE WILLIAMS INST. at 3 (2016),

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population is dispersed throughout the country, many transgender people lack the privilege of in-person community building with others in their immediate vicinity. This is particularly true for transgender people who live outside of major cities.[4] The ability to connect through online communities has played an important role in bridging this gap and has functioned as a critical tool for transgender people, particularly young transgender people, to build supportive social networks and access resources.

Transgender people often faced extreme challenges in trying to connect with one another before the availability of online spaces. The lack of social acceptance made communication and community building difficult and trans-specific educational resources hard to find. Local groups often had to resort to clandestine strategies to connect with each other and share educational resources. One group snuck fake cards into card catalogs at public libraries, which listed cross-dressing and trans-specific resources.[5]

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https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

[4] WHERE WE CALL HOME: TRANSGENDER PEOPLE IN RURAL AMERICA, MOVEMENT ADVANCEMENT PROJECT (Nov. 2019), https://www.lgbtmap.org/file/Rural-Trans-Report-Nov2019.pdf (finding that one in six transgender people live in a rural area and detailing the added challenges they face); *see also* Luke A. Boso, *Rural Resentment and LGBTQ Equality*, 71 FLA. L. REV. 919 (2019) (discussing the clash between LGBTQ rights and rural communities in America).

[5] Henry Giardina, *An Oral History of the Early Trans Internet*, GIZMODO (July 9, 2019), https://gizmodo.com/an-oral-history-of-the-early-trans-internet-1835702003.

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Another account details a local newsletter circulated by a local organization, distributed in brown, unmarked packaging.[6] The few periodicals in circulation were not widely available and often were sold only in adult bookstores.[7] Due to the absence of visible communities and role models, young transgender people frequently lacked meaningful access to educational materials or support groups, and transgender people without access to a local community were often forced to either to endure social isolation or to suppress their identities.

Against this historical backdrop, the ability to connect with other transgender people and to develop online communities has had an enormously positive educational, psychological, and social impact on this population.[8] Social media has opened up new channels of communication through which transgender people can connect, create, share content of mutual interest, and distribute educational materials. For example, platforms like Reddit allow users to connect on transgender-specific forums such as r/transgenderteens, r/trans, and r/asktransgender. There are regional forums

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[6] Andre Cavalcante, *"I Did it All Online:" Transgender Identity and the Management of Everyday Life,* 33 CRITICAL STUDIES IN MEDIA COMMC'N (2016).

[7] *Id.*

[8] Communications scholars have extensively catalogued the history of the "transgender Internet." *See generally* Oliver L. Haimson et. al., *Tumblr Was a Trans Technology: The Meaning, Importance, History, and Future of Trans Technologies,* FEMINIST MEDIA STUD. (2019).

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(r/GLBTChicago), forums for sex education (r/lgbtsex), and forums for transgender individuals in specific careers, such as computer programming (r/TransHack).[9] And transgender people have also used platforms such as YouTube to generate and share both entertainment and educational content, ranging from children's programs to "vlogs" (video blogs) capturing peoples' transition narratives.[10]

Access to online resources and communities has helped ease the process of coming out for many transgender people and has facilitated self-education.[11] This education promotes the health and well-being of

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[9] *See* "List of General Transgender Subreddits," *r/FtMResourceCenter,* REDDIT (Jul. 29, 2019) https://www.reddit.com/r/FtMResourceCenter/comments/cjkkrb/list_of_general_transgender_subreddits/

[10] Marissa Higgins, *A Brilliant Way to Teach Kids About LGBTQ Issues*, *'Queer Kid Stuff' on YouTube is the LGBTQ Channel We All Need, No Matter How Old or Young You Are,* BUSTLE (Nov. 14, 2016), https://www.bustle.com/articles/195093-queer-kid-stuff-on-youtube-is-the-lgbtq-channel-we-all-need-no-matter-how-old; Eve Deshane, *This Is My Voice: YouTube and the Transgender Autobiography*, THE ATLANTIC (Oct. 14, 2014), https://www.theatlantic.com/technology/archive/2014/10/this-is-my-voice-youtube-and-the-transgender-autobiography/381368/.

[11] For instance, the r/asktransgender forum on Reddit has over 140,000 subscribers and hundreds of daily comments seeking guidance on transition; one "pinned" (permanent) post provides a comprehensive list of clinics that provide low-cost hormone therapy. *See r/asktransgender*, REDDIT, https://www.reddit.com/r/asktransgender/ (last visited Aug. 10, 2020), (post at top of page listing "every single informed consent clinic in the country."); *see also* SUSAN'S PLACE, https://www.susans.org/forums/index.php (last visited Aug. 10, 2020), (similar transgender forum providing transition advice and a discussion space).

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transgender people by providing critical information about accessing medical care and on navigating society as a transgender person. For example, the importance of accurate information about sexuality and health for transgender people cannot be overstated. Nearly 22% of transgender women in the U.S. are living with HIV.[12] But unfortunately, most health classes do not include information about LGBTQ people or relationships.[13] This puts the burden on transgender people to educate themselves, and given the real world isolation many transgender people face, this education often must take place through social media channels.

Social media also creates spaces for transgender people to engage in social, political, and cultural discussions with people who share their experiences. Facebook groups help transgender people connect with each other in their area and plan events.[14] Transgender people can find inspiration by following other transgender people on Instagram, like Nikkie de Jager, a makeup artist with 14.2 million followers, or Laverne Cox, an actress and

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[12] *Transgender People and HIV: What We Know*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/transgender-people-and-hiv-what-we-know.

[13] *See A Call to Action: LGBTQ Youth Need Inclusive Sex Education*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/a-call-to-action-lgbtq-youth-need-inclusive-sex-education.

[14] *See, e.g.*, Curtis M. Wong, *11 Facebook Groups Every LGBT Person Should Know*, HUFFPOST: QUEER VOICES (Oct. 21, 2015) (listing three national trans-specific groups, each with thousands of members).

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prominent political activist, who has over 4 million.[15] The online "crowdfunding" site GoFundMe has also created opportunities for transgender people (and others) to pool financial resources to help other transgender people afford transition-related medical care.[16]

Access to these online spaces—whether for community-building, education, emotional and social validation, political organizing, or entertainment—can play critical psychological and emotional support roles for many transgender people, particularly transgender youth.[17] As noted in Part II below, transgender people often face discrimination and harassment (both big and small) in their daily lives, whether from peers or from institutions like schools, healthcare providers, and employers. When they face these challenges, they often turn to social media and digital communication for support and for help. A 2019 survey by the Trevor

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[15] NikkieTutorials (@nikkietutorials), INSTAGRAM, https://www.instagram.com/nikkietutorials/?hl=en (last visited Aug. 10, 2020); Laverne Cox (@lavernecox), INSTAGRAM, https://www.instagram.com/lavernecox/?hl=en (last visited Aug. 10, 2020).

[16] *Be Yourself: Gender Confirmation Surgery Fundraising,* GOFUNDME, https://www.gofundme.com/c/gender-confirmation-surgery-fundraising (last visited Jul. 15, 2020) (collecting testimonials of transgender people who have crowdfunded surgeries, and listing dozens of open funds).

[17] *See* Yolanda N. Evans et. al., *Understanding Online Resource Use by Transgender Youth and Caregivers: A Qualitative Study*, 2 TRANSGENDER HEALTH 129, 134–35 (2017) (describing the importance of online mental health support groups to transgender youth identity formation and well-being).

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Project (an organization devoted to combatting suicide prevention) found that 98% of LGBTQ youth valued LGBTQ–oriented online spaces for mental health and crisis support, and the researchers noted a "strong digital preference" among respondents asked about strategies for coping with mental health issues and discrimination.[18] Another study of online support group use among transgender people found that sharing experiences and asking for and providing help were the most common motivations for participating in such groups; some described the online communities as their main form of social interaction in which they can interact as members of the gender with which they identify.[19] Indeed, for some transgender people, internet communities and social media are the *only* places where their identities are recognized.[20] Online communities and social networks—like

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[18] NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH , TREVOR PROJECT, at 6 (2019), https://www.thetrevorproject.org/wp-content/uploads/2019/06/The-Trevor-Project-National-Survey-Results-2019.pdf.

[19] *See* Sabrina Cipolletta et. al., *Online Support for Transgender People: An Analysis of Forums and Social Networks*, 25 HEALTH & SOC. CARE COMMUNITY 1542, 1545–46 (2017) (surveying users of online transgender support groups in Italy); Evans et. al., *supra* note 17, at 129.

[20] *See, e.g.*, Kari Larsen, *Transgender and Non-binary Communities Online: "Thank God for Wikipedia and Google*," PENNLIVE (Jan. 5, 2019), https://www.pennlive.com/midstate/2015/11/transgender_people_and_the_int.html ("I'm pretty sure the first time I heard anything that wasn't derogatory was on an internet forum" (quoting a nonbinary young adult in central Pennsylvania)); *see also id.* (sharing other reflections on the importance of online communication for transgender people's mental health).

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Facebook, Reddit, Twitter, and others—are therefore critical not only as knowledge bases and platforms for social and political organization for the transgender community, but also as avenues for preserving members' psychological and emotional well-being.

II. TRANSGENDER PEOPLE EXPERIENCE SIGNIFICANT VERBAL ABUSE THAT CAN INHIBIT THEIR FULL PARTICIPATION IN ONLINE COMMUNITIES.

Transgender people have been able to make significant progress in recent years, both in obtaining increased legal protections against discrimination[21] and in shifting public awareness and attitudes toward LGBTQ people.[22] Despite this progress, however, many transgender people continue to face significant harassment and lack of acceptance.

Discrimination and prejudice remain fixtures of daily life for many transgender people. Less than half of Americans believe it is even possible to be transgender,[23] and nearly a third think society has "gone too far" in

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[21] *Bostock v. Clayton County*, No. 17-1618, 17-1623, 18-107, 2020 WL 3146686 (2020) (holding that discrimination based upon an employee's transgender status is actionable under Title VII of the Civil Rights Act).

[22] Jacob Poushter & Nicholas Kent, *The Global Divide on Homosexuality Persists*, PEW RESEARCH CENTER (June 25, 2020), https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/ (describing an increase in acceptance from 49% acceptance in 2007 to 72% in 2019).

[23] Anna Brown, *Republicans, Democrats Have Starkly Different Views On Transgender Issues,* PEW RESEARCH CENTER (Nov. 8, 2017), https://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats/.

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accepting transgender people.[24] The vast majority of transgender people living in America today find it necessary to take steps to avoid mistreatment in the workplace, such as keeping their gender identity private, delaying their gender transition, or quitting their job.[25] 90% of transgender employees report having experienced some form of harassment or mistreatment related to their identity on the job.[26] Sometimes the discrimination takes the form of official state action, such as laws restricting transgender peoples' ability to access public accommodations consistent with their gender identity or obtain government-issued identity documents with their correct name and gender marker.[27] Of particular concern, transgender youth face an extremely hostile environment at school, with nearly 84% reporting being bullied or harassed at school because of their gender or identity.[28] Hostility to transgender

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[24] *Id.*

[25] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality, (Dec. 2016) at 11, https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

[26] U.S. COMM'N ON CIVIL RIGHTS, WORKING FOR INCLUSION: TIME FOR CONGRESS TO ENACT FEDERAL LEGISLATION TO ADDRESS WORKPLACE DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AMERICANS (2017) at 11.

[27] *See, e.g.*, An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations, 2016 N.C. Sess. Laws 3.

[28] *See* Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth In Our Nation's Schools,* GLSEN (2018) at 95.

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people also frequently results in violence; so far, in 2020 alone at least 28 transgender people have been murdered.[29] This violence disproportionately impacts transgender women of color, and especially Black transgender women.[30] Troublingly, courts sometimes allow ignorance and hateful attitudes towards transgender people to excuse such violence in what has become known as the "trans panic defense."[31]

Harassment of transgender people, unfortunately, is pervasive and can endure throughout their entire lives, both in person and online.

A. Intentionally Misusing a Transgender Person's Name and Pronouns Are Both Forms of Harassment.

Twitter's policy appropriately prohibits harassment of transgender people, including deliberately referring to a transgender woman as a man or by a prior male name, or to a transgender man as a woman or by a prior female name. The policy refers to these practices as "misgendering" and "deadnaming." "Misgendering" a transgender person is a term sometimes used to refer to using the pronoun that differs from the person's gender

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[29] *Murders of Transgender People in 2020 Surpasses Total for Last Year in Just Seven Months*, NAT'L CTR. TRANSGENDER EQUALITY (Aug. 7, 2020), https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months.

[30] *Id.*; *see also* James et. al., *supra* note 25.

[31] Alexandra Holden, *The Gay/Trans Panic Defense: What It Is, and How to End It*, AM. BAR ASSOC. (Apr. 1, 2020), https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/.

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identity.[32] For example, misgendering a transgender woman means using male pronouns instead of female pronouns (referring to her as "him"), and misgendering a transgender man means using female pronouns instead of male pronouns. "Deadnaming" is a term sometimes used to designate the practice of referring to or addressing a transgender person using the name they used before they transitioned, which in most cases is a gender-specific name associated with their sex assigned at birth.

These practices are harassing and offensive. Everyone understands that it is usually both intended and considered insulting to intentionally refer to a non-transgender woman as a man and vice versa. For transgender women and men, this type of insult has particular salience. The purpose and effect of deliberately using the wrong pronouns or name to refer to a transgender person are to demean the person and negate their identity. By continually referring to a transgender woman as a man or vice versa, a user conveys that the person's identity is not worthy of respect. Denigrating transgender people, and conveying that they should not be taken seriously *because of their transgender status*, lies at the core of both practices, which disrespects and stigmatizes transgender identity. In addition, these practices may "out" a user as transgender, disclosing to other users that a particular

[32] *See* KC Clements, *What Does It Mean to Misgender Someone?* HEALTHLINE (Oct. 19, 2017) https://www.healthline.com/health/transgender/misgendering (non-academic overview).

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user is transgender and exposing them to even greater mistreatment and harassment.

Transgender people are as diverse as any other group, and being subject to harassment or verbal abuse in the online context may not cause all users to withdraw from a social media platform or self-censor in response to offensive conduct. Contrary to Appellant's argument, the mere allegation that a particular individual was not deterred from continued participation in online debates by Appellant's conduct has no bearing on the legitimacy of Twitter's policy, nor does it mitigate the negative impact of such conduct on the broader universe of transgender and other users and on the general accessibility and vitality of online discourse. Harassment based on one's gender identity is inherently denigrating. As Twitter has rightly determined, permitting such harassment on its platform would take a very real mental and emotional toll on transgender people, particularly transgender youth, and would undermine its goal of encouraging the free flow of expression and ideas from diverse groups.

Not surprisingly, courts and regulatory agencies have recognized that deliberately refusing to use the correct pronouns or name to refer to a transgender person is a form of sex-based harassment.[33] For instance, the

[33] *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *11 (E.E.O.C. Apr. 1, 2015) ("Persistent failure to use [an] employee's correct name and pronoun may constitute unlawful, sex-based harassment if such

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Equal Employment Opportunity Commission ("EEOC") has held that these practices, in the employment context, can violate Title VII. In *Lusardi v. McHugh*, supervisors intentionally referred to an employee by the wrong name and pronouns.[34] In reaching the conclusion that these actions constituted sex-based harassment,[35] the EEOC cited guidance from the Office of Personnel Management that advised "[c]ontinued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender . . . may undermine the employee's therapeutic treatment, . . . is contrary to the goal of treating transitioning employees with dignity and respect[, may] breach the employee's privacy, and may create a risk of harm to the employee."[36] Courts have reached the same conclusion under other federal statutes prohibiting discrimination.[37] Other government

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conduct is either severe or pervasive enough to create a hostile work environment.").

[34] *Id.* at *3.

[35] *Id.* at *11.

[36] *Id.*

[37] *See, e.g.*, *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp.3d 1090, 1099-1100 (S.D. Cal. 2017) (persistently using the wrong pronouns could constitute a violation of Section 1557 of the Affordable Care Act); *Bd. of Ed. Of the Highland Local School District v. U.S. Department of Education*, 208 F.Supp.3d 850 (S.D. Ohio 2016) (granting transgender student's motion for preliminary injunction ordering the school district, in part, to refer to her by the correct name).

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entities, such as the state of California[38] and the New York City Commission on Human Rights[39] have followed suit and clarified that misgendering and deadnaming can violate laws against discrimination based upon sex or gender identity.[40]

Being constantly publicly identified as transgender against one's wishes is in itself harmful and limits transgender peoples' ability to use social media platforms. When the user of a social media platform targets another user, it has the effect of stigmatizing that user and calling negative attention to them. This stigma and negative attention not only are objectively offensive, but also can lead to a barrage of hateful comments directed at the transgender user. Allowing users to refuse to respect a transgender person's name and pronouns amplifies the harm of this harassment.

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[38] CAL. HEALTH & SAFETY CODE § 1439.51 (West 2018) (prohibiting the repeated and intentional misgendering of residents in long-term care facilities).

[39] *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression*, NYC Comm'n on Human Rights (updated Feb. 15, 2019) at 4-5. https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf; *see* N.Y.C. ADMIN. CODE § 8-102.

[40] *Amici* note that Appellant's Reply Brief suggests that it is unreasonable to expect her or other Twitter users to "somehow have guessed" that Twitter's prohibition against targeted harassment would operate to prohibit the deliberate misgendering of specific other Twitter users. Appellant Reply Br. at 16. However, the principle that misgendering a transgender person is a form of harassment has been recognized in a variety of other contexts.

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The significant harms caused by this harassment are well known. According to the American Psychological Association, being deliberately referred to by the wrong name or pronouns causes "distress and despair."[41] And individuals who are targeted by this mistreatment may experience long-term negative mental health impacts.[42] Conversely, use of a transgender person's gender and chosen name is associated with positive outcomes.[43] One study, for instance, found that transgender youth who are referred to by their chosen name experience a dramatic decrease in depression and suicidal thoughts,[44] with substantial reductions in those adverse consequences associated with each new context (*i.e.*, at school, work, home, or with friends) in which a transgender youth was called their chosen name.[45]

Being singled out for this type of harassment can also exacerbate the heightened stress and anxiety that many transgender people experience

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[41] Lisa Bennett, *Pioneering Care for Transgender People*, APA MONITOR ON PSYCH., (Nov. 2018) https://www.apa.org/monitor/2018/11/care-transgender.

[42] *See, e.g.*, Robin Dembroff & Daniel Wodak, *He/She/They/Ze,* 5 ERGO 371, 376 (2018) (misgendering can result in "serious physical and psychological health problems" like depression and suicidal ideation); Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 STIGMA & HEALTH 53, 58 (2018).

[43] *See* Stephen T. Russell et al., *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503 (2018).

[44] *Id.*

[45] *Id.* at 504.

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already as a result of coping with anti-transgender bias and hostility. One online survey found that many transgender people experience depression and anxiety associated with social stigma,[46] and that while many try to avoid such stigma by not disclosing that they are transgender,[47] concealing their transgender status often leads to "hypervigilance" and "a preoccupation with hiding," both of which increase stress.[48] In the era of social media, protecting one's privacy has become increasingly difficult.[49] These stressors contribute to the alarmingly high rates of suicide and suicide attempts by transgender people.[50]

B. Transgender People Face Disproportionate Abuse and Harassment Online, Adversely Impacting Their Access to Online Spaces.

The online communities that serve critical educational, social, political, and support functions for the transgender community are not

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[46] Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population,* 103 AMERICAN JOURNAL OF PUBLIC HEALTH 943 (2013).

[47] *Id.* at 944.

[48] *Id.*

[49] *See, e.g.*, Elizabeth McConnell et al., *"Everybody Puts Their Whole Life on Facebook": Identity Management and the Online Social Networks of LGBTQ Youth*, 15(6) INT'L J. ENVTL. RES. PUB. HEALTH 1078 (2018) (detailing the phenomenon of "context collapse").

[50] Ann P. Haas et al., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults*, NAT'L TRANSGENDER DISCRIMINATION SURV. (2014) (indicating that the rate of suicide attempts among transgender adults is 41%).

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immune from the same discriminatory behaviors that contribute to the abuse and harassment that transgender people must often confront in "offline" daily life. Private harassment online and in social media remains a widespread obstacle to the informational, social, political, and emotional support benefits of these platforms described in Part I.

The scale of this phenomenon is vast. A 2019 study reviewed ten million posts about transgender people on the internet over the span of three and a half years.[51] Of the ten million posts, one and a half million expressed hostility to transgender people.[52] These included numerous slurs, with the word "tranny" being used over a million times.[53] For many transgender people, using the internet to find information, participate in political and cultural dialogue, and give and receive help to and from others members of their community, can mean having to wade through and endure abusive language directed towards their community or towards them personally.

Such abusive language's potential to chill transgender people's online engagement is no small matter, either for the health and well-being of the transgender community, or for the vibrancy of online spaces that suffer when transgender people are less willing to engage in discussions for fear of

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[51] BRANDWATCH & DITCH THE LABEL, EXPOSED: THE SCALE OF TRANSPHOBIA ONLINE (2019), https://www.brandwatch.com/reports/transphobia/.

[52] *Id.*

[53] *Id.*

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attracting unwelcome harassment and abuse. This problem can be particularly acute for transgender people of color, who—due to the dual scourges of racism and hostility to transgender people—are particularly vulnerable to becoming targets for hostile online conduct.[54]

In light of the potential chilling effect of abusive and disparaging language, it is entirely reasonable for online platforms to adopt the position taken by Twitter's policy against harassment: that the vibrancy of the online communities suffers if people are "afraid to speak up" out of concern that doing so will invite personalized and targeted harassment or abuse, particularly abuse that centers around their membership in a group that must regularly confront hostility and social stigma.[55] And Twitter's policy rightly recognizes that some groups, including transgender individuals, are "disproportionately targeted with abuse online" and such abuse "can jeopardize their ability to express themselves."

[54] For instance, transgender people of color are murdered at disproportionate rates. *See* Gina Martinez & Tara Law, *Two Recent Murders of Black Trans Women in Texas Reveal a Nationwide Crisis, Advocates Say*, TIME (June 5, 2019), https://time.com/5601227/two-black-trans-women-murders-in-dallas-anti-trans-violence/. Transgender people of color also face workplace discrimination at a disproportionate rate. *See* James et. al., *supra* note 25, at 10-11.

[55] Twitter General Guidelines and Policies, "Abusive Behavior," available at https://help.twitter.com/en/rules-and-policies/abusive-behavior.

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As Congress recognized when it enacted Section 230, and as much evidence also shows, harassment stifles free and open discourse.[56] Twitter's policy is consistent with the approach of many other online platforms that have created similar terms of service, guidelines, or policies to prevent online abuse.[57] Importantly, these policies recognize that online spaces are more vibrant and welcoming when free of harassing and disparaging behavior.[58]

Policies that prohibit online harassment on the basis of gender identity similarly play an important role in making online spaces welcoming and accessible to transgender people, and in enabling online spaces to benefit from their contributions. Twitter's recognition that these principles prohibit users from targeting individual transgender users by intentionally misusing

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[56] *See* Danielle K. Citron, *Why Combating Online Abuse is Good for Free Speech* in *Free Speech in the Digital Age* (Susan Brison and Katharine Gelber, eds. 2019)

[57] *See, e.g.*, Reddit Content Policy, *available at* https://www.redditinc.com/policies/content-policy ("Everyone has a right to use Reddit free of harassment, bullying, and threats of violence."); Instagram Community Guidelines, *available at* help.instagram.com/477434105621119 ("We remove content that contains credible threats or hate speech, content that targets private individuals to degrade or shame them, personal information meant to blackmail or harass someone, and repeated unwanted messages.").

[58] *See* Reddit, Account and Community Restrictions, "Do not threaten, harass, or bully," *available at* https://www.reddithelp.com/hc/en-us/articles/360043071072 ("Reddit is a place for conversation, and in that context, we define this behavior as anything that works to shut someone out of the conversation through intimidation or abuse, online or off."); Instagram Community Guidelines ("We've spent a lot of time thinking about the different points of view that create a safe and open environment for everyone.").

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their incorrect names or pronouns is in line with the positions taken by the EEOC, numerous state governments, and the research consensus. It is therefore hardly a novel or unfamiliar proposition, and it should surprise neither objective observers nor users of the platform that Twitter would consider the deliberate use of improper names and pronouns to refer to transgender people to be forms of prohibited harassment.

III. THE EFFECTIVENESS OF POLICIES THAT PROTECT USERS FROM ONLINE HARASSMENT DEPENDS UPON PROVIDERS BEING ABLE TO ENFORCE THEM IN PRACTICE.

Amici seek to assist the Court in understanding the importance of protecting transgender individuals from online harassment and abuse, which falls squarely within the core purposes of Section 230(c) of the Communications Decency Act ("CDA"). Section 230 seeks "to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material." *Hassell v. Bird*, 5 Cal. 5th 522, 534 (2018) (citation omitted); *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1099–100 (9th Cir. 2009). Both of those goals are furthered by policies such as the ones adopted by Twitter to protect its transgender users. In applying the statute, courts should take care not to adopt any interpretation that would prevent or deter platforms from enforcing such policies to protect their users from abusive behavior in practice. *Amici* urge the Court to consider certain principles in guiding application of the statute here.

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First, enforcement of anti-harassment policies furthers Section 230's purpose to encourage providers' moderation of offensive content by removing the previous threat of state-law liability that had deterred them from engaging in such moderation. Congress passed Section 230 to limit websites' liability from "blocking and screening offensive material," and was animated specifically by a state court decision in New York that had held an online service provider liable precisely because the provider had been involved in actively screening and editing materials posted by users.[59] Thus, "Congress sought to immunize the removal of user-generated content," *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (emphasis omitted), and "to encourage service providers to self-regulate the dissemination of offensive material over their services." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 44 (2006) (citation omitted). The statute itself reflects this purpose. Section 230(c) is aptly titled "Protection for 'Good Samaritan' blocking and screening of offensive material" 47 U.S.C. § 230(c); *Fair Hous. Council,* 521 F.3d at 1163–64 ("Indeed, the section is titled "Protection for 'good samaritan' blocking and screening of offensive material' and . . . the substance of section 230(c) can

[59] Congress passed Section 230 in large part to prevent outcomes like the one in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 30163/94, 1995 WL 323710 (N.Y. Sup. Ct. Nassau Cnty. 1995), which had held that an online service provider could be liable for a defamatory post by one of its users because of its exercise of editorial discretion to moderate content.

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and should be interpreted consistent with its caption."). Encouraging the implementation and enforcement of policies that prohibit harassment and abuse of other users on online platforms, such as the Twitter policy at issue in this litigation, therefore falls squarely within this core statutory purpose.

Second, policies of the sort at issue in this case also advance Section 230's goal of furthering free expression. Congress saw the internet as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). It recognized that the internet was an "extraordinary advance in the availability of educational and informational resources to [American] citizens." *Id*. § 230(a)(1). Section 230 would help websites "avoid the chilling effect upon Internet free speech" that would arise from threatening platforms with tort liability, *Delfino v. Agilent Techs., Inc*., 145 Cal. App. 4th 790, 802–03 (2006), and "promote the free exchange of information and ideas over the Internet." *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1122 (9th Cir.2003).

These goals are furthered when providers are able to ensure that unchecked harassment and abuse do not deter participation by individuals who are targeted based on characteristics such as their race, religion, national origin, sexual orientation, or gender identity. The law has continually recognized the communicative and connective importance of the internet for marginalized groups and communities with specific interests or causes. *See*

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Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851–52 (1997) (discussing the "thousands" of different internet groups "each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls"); *see also Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 690–91 (2010) (recognizing the importance of "social-networking sites" in connecting specific interest groups). Social media has the power to amplify these often-silenced voices. *Reno*, 521 U.S. at 870 (helping a person become "a town crier with a voice that resonates farther than it could from any soapbox").

The internet's potential to facilitate connection and expression by marginalized groups has particular salience for members of the transgender community, whose ability to engage in social and political discourse has benefited tremendously from the connections and community-building opportunities made available by online spaces. Policies that protect users of online services from harassment, by securing an environment in which people can freely and openly participate without fear of becoming the targets of online abuse, are particularly important for enabling full participation by members of marginalized groups that are disproportionately the targets of hostility.

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Third, the practical ability of online platforms to moderate content to protect users in general (and transgender users in particular) from undue forms of harassment and abuse, and to create environments in which users feel comfortable participating freely and openly in discussions, depends in part upon ensuring that litigants cannot cause platforms to second-guess every enforcement decision for fear of inviting litigation. Section 230 would do very little to protect incentives for online service providers to self-regulate and moderate content if the immunity the statute provides can be easily overcome by creative pleading.

This principle is particularly important for transgender users, who are often the targets of offensive and harassing behavior, such as that alleged here. Persons who engage in discrimination and harassment against transgender individuals frequently claim, as Appellant does here, that they are exempt from anti-discrimination and anti-harassment policies that protect transgender people due to their political or religious beliefs. Thus, even where supportive institutions protect against discrimination and harassment on the basis of gender identity, they are frequently forced to engage in costly and time-consuming litigation simply to defend against these specious claims.[60] Ensuring that the law does not allow policies that protect against

[60] Even in the context of state action (which the policies of a private platform are not), the First Amendment does not authorize individuals to violate otherwise permissible laws or policies that prohibit discrimination against or harassment of an individual merely because

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abuse and harassment to be easily undermined or circumvented, therefore, is particularly critical for transgender people, as they are not only disproportionately the targets of abuse and bullying, but also disproportionately the focus of efforts to challenge their right to be protected against such conduct in the first place.

Courts have observed that Section 230 is meant to give platforms breathing room by providing "robust" immunity to buttress service providers' discretion about how to enforce and implement content moderation policies. *Carafano*, 339 F.3d at 1123; *Doe v. Internet Brands, Inc*., 824 F.3d 846, 852 (9th Cir. 2016) (allowing platforms to "self-regulate offensive third party content without fear of liability"). Importantly, they have also emphasized the importance of ensuring that Section 230 can be invoked as a defense early in litigation, since the statutory policy of encouraging providers to moderate content on their platforms would be frustrated if a provider had to endure significant exposure to liability, and expend large amounts of time, effort, and legal expenses every time its enforcement decisions were challenged. *See*, *e.g.*, *Fair Hous. Council*, 521 F.3d at 1174-75 (providers should not "face death by ten thousand duck-

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they wish to "send a message" by doing so. To the contrary, courts have long rejected such arguments. *See, e.g.*, *Meriwether v. The Trustees of Shawnee State University*, Np. 1:18-cv-753, 2020 WL 704615 (S.D. Ohio Mar. 16, 2020) (dismissing First Amendment claim by professor challenging enforcement of policy prohibiting harassment of transgender students).

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bites," and CDA immunity "must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles"); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc*., 591 F.3d 250, 255 (4th Cir. 2009) (citation omitted) ("We thus aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'").[61]

In this case, the Appellant's briefing characterizes her claims as an individualized challenge to the reasonableness of Twitter's application of its policies to a particular set of tweets she had posted. However, Appellant seeks to prevent Twitter from *ever* enforcing its policies protecting transgender users against other users who harass them by using improper names and pronouns that seek to negate and demean the transgender person's identity. Indeed, the first claim for relief in her complaint is for an injunction ordering "that Twitter cease and desist from enforcing its unannounced and viewpoint discriminatory 'misgendering' rule," and her second is for the

[61] *See also, e.g., Brittain v. Twitter, Inc.,* No. 19-CV-00114-YGR, 2019 WL 2423375, at *1 (N.D. Cal. June 10, 2019) (dismissing suit under Section 230 immunity of user who sought to challenge the termination of his accounts); *Fed. Agency of News LLC v. Facebook, Inc*., 432 F. Supp. 3d 1107, 1116 (N.D. Cal. 2020) (determining Facebook was immune under Section 230 after taking down posts that violated its terms of service).

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court to require Twitter to reverse every enforcement action ever taken under those policies. *See* Complaint at 40-41.

In sum, Appellant seeks an injunction preventing Twitter from protecting its transgender users against the deliberate use of the wrong pronouns or names *at all*. In addition to the impact of such an outcome on Twitter's policy specifically, it could deter other platforms from enforcing similar policies, out of fear of inviting similar liability or loss of their CDA immunity. This outcome would substantially undercut the purpose of the CDA to provide online service providers with flexibility to moderate offensive content on their platforms—and the burdens of such a result would be borne disproportionately by transgender users, many of whose ability to fully avail themselves of the benefits of those online communities would be severely impaired.

CONCLUSION

Amici welcome the opportunity to assist the Court with understanding the importance to transgender people of policies that enable their full and open participation in online spaces, and with the recognition that deliberate misuse of a person's name or pronouns is an abusive and denigrating practice that service providers have valid and important interests in prohibiting.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies pursuant to Rule 8.204(c)(1) of the California Rules of Court that the enclosed brief is produced using 13-point Roman type and, including footnotes, and excluding portions excluded by Rule 8.204(c)(3), contains 7,260 words. Counsel used Microsoft Word in preparing the brief, and relies on that program's computer word count.

DATED: August 13, 2020 JENNER & BLOCK LLP

By: /s/ Zeb C. Zankel

ZEB C. ZANKEL

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PROOF OF SERVICE

I, Zeb Zankel, state:

I am over the age of eighteen and not a party to this action. My business address is Jenner & Block LLP, 633 West 5th Street, Suite 3600, Los Angeles, CA 90071. On August 13, 2020, I served the following document(s):

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF NATIONAL CENTER FOR LESBIAN RIGHTS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., GLBTQ LEGAL ADVOCATES & DEFENDERS, TRANSGENDER LAW CENTER, AND THE HUMAN RIGHTS CAMPAIGN IN SUPPORT OF RESPONDENT

by electronically filing this Application through the Court's TrueFiling service. Pursuant to California Rules of Court Rule 8.212(c)(1), I have also caused to be mailed a copy of this Application to the superior court clerk for delivery to the trial judge.

Service List:

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