

In the
**United States Court of Appeals
for the Fifth Circuit**

BARBARA WYATT
Plaintiff-Appellee

v.

RHONDA FLETCHER and CASSANDRA NEWELL,
Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division
Civil Action No. 6:10-cv-674
Magistrate Judge John D. Love

**Brief of the National Association of Social Workers, the National Association
of School Psychologists, the American School Health Association, the
American Society for Adolescent Psychiatry, and the Children's Advocacy
Institute as Amici Curiae in Support of Affirmance**

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**SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS,
CORPORATE DISCLOSURE STATEMENT, AND STATEMENT OF
PARTY PARTICIPATION**

Barbara Wyatt v. Rhonda Fletcher and Cassandra Newell, No. 11-41359

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Under Federal Rule of Appellate Procedure 29(c) and 26.1, Amici curiae the National Association of Social Workers, the National Association of School Psychologists, the American School Health Association, the American Society for Adolescent Psychiatry, and the Children's Advocacy Institute certify that they are non-profit or not-for-profit corporations, or unincorporated associations, with no parent corporations or publicly traded stock.

Under Federal Rule of Appellate Procedure 29(c)(5), Amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to preparation or submission of this brief.

Dated: June 20, 2012

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae the National Association of Social Workers, the National Association of School Psychologists, the American School Health Association, the American Society for Adolescent Psychiatry, and the Children's Advocacy Institute are leading public interest organizations whose missions focus on the mental health and physical welfare of children and adolescents. With expertise in child welfare legal and policy issues, Amici respectfully submit this brief to assist the Court in addressing the central questions raised in this case. All parties have consented to the filing of this amicus brief.

The **National Association of Social Workers** ("NASW") is the largest organization of professional social workers in the world, with 145,000 members and fifty-six chapters. The NASW, Texas Chapter has 5,835 members. Created in 1955 by the merger of seven predecessor social work organizations, NASW aims to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purpose, NASW promulgates professional standards and the NASW Code of Ethics, supports and publishes research, provides continuing education and advocates for sound policies relating to its membership's core capabilities, responsibilities and mission. NASW and its members are particularly committed to improving the lives of the most vulnerable members of the family unit, children. NASW supports the

right of the individual to self-disclose, or to not disclose, sexual orientation and encourages the development of supportive practice environments for lesbian, gay, and bisexual clients and colleagues.

The **National Association of School Psychologists** (“NASP”) represents school psychology and supports school psychologists to enhance the learning and mental health of all children and youth. NASP advocates for the value of school psychological services and for appropriate research-based education and mental health services for all children, youth, and families. It embraces and respects diversity at all levels and aims to enhance its responsiveness to populations whose diversity may be expressed in terms of race, ethnicity, gender and gender expression, sexual orientation, socioeconomic status, ability, religion, and/or language. NASP supports equal opportunities for all youth to participate in and benefit from school-based educational and mental health services regardless of sexual orientation, gender identity, or gender expression.

The **American School Health Association** (“ASHA”) is a multidisciplinary, worldwide organization of over 2,000 administrators, counselors, health educators, physical educators, psychologists, school health coordinators, school nurses, school physicians, and social workers. ASHA aims to build the capacity of its members to plan, develop, coordinate, implement, evaluate, and advocate for effective school health strategies that contribute to optimal health and academic

outcomes for all children and youth. One of its core beliefs is that schools should be safe, nurturing environments that facilitate learning for all students, regardless of their actual or perceived sexual orientations. ASHA has recognized the deleterious impact that victimization can have on children's educational outcomes and passed a resolution recommending implementation of school-wide bullying prevention initiatives, including the establishment of a caring school climate that does not tolerate bullying.

The **American Society for Adolescent Psychiatry** ("ASAP") is a national organization of psychiatrists and other mental health professionals, serving to address the special needs of teenagers and young adults. ASAP is the only national psychiatric organization focused solely on the mental health, wellbeing and advocacy of adolescents. Dedicated to the prevention and treatment of mental health disorders in adolescents and young adults, ASAP acts both as a professional network for its members and as a specialized community providing certification in adolescent psychiatry, educational development, and publication of the peer-reviewed journal *Adolescent Psychiatry*. ASAP members have worked on various issues of concern to lesbian, gay, bisexual and transgender adolescents including bullying, therapeutic interventions in family rejection of LGBT youth, and same-sex parenting. ASAP recognizes the importance of sexuality in adolescent

development, the particular need for sensitivity in issues of confidentiality, and the right of youth to supportive and accepting environments.

The **Children's Advocacy Institute** is a part of the University of San Diego School of Law. Founded in 1989, it is an academic center and advocacy law firm representing the interests of children in California and nationally. It teaches law students child-related law, operates clinics representing children in dependency and delinquency courts, brings litigation on behalf of children, and operates legislative and agency advocacy operations in Sacramento and Washington, D.C.

Amici are familiar with the parties' presentation of the issues and believe that additional argument on those matters is necessary. Though concurring in the Appellee's legal analysis, Amici's discussion of the issues does not duplicate that briefing. Rather, Amici draw on their knowledge of, and experience with, the health and welfare of children and adolescents, using it to show that the Court should affirm the decision of the district court.

INTRODUCTION

After twelve-year-old Samuel Brinton mentioned to his father that he was attracted to one of his male friends, he woke up in the emergency room. His father had punched him hard enough to knock him out. Paul Bentley, “*Tiny Needles Were Stuck into My Fingers and I was Electrocuted*”: *Victim of Baptist Gay Conversion Therapy Describes How He was Tortured at 12*, Daily Mail Online (Oct. 7, 2011, 4:22 EST), <http://www.dailymail.co.uk/news/article-2046324/Victim-gay-conversion-therapy-describes-tortured-aged-12.html>. Brinton’s father beat him several more times and has more recently threatened Brinton, now in his twenties, that he will shoot him if he ever returns to the family’s home. *Id.*

Brinton’s tragic story is extreme but, sadly, not unusual. Prejudice, harassment, and physical violence are pervasive problems not just for lesbian, gay, bisexual, and transgender (“LGBT”) youth, but also those who are perceived to be LGBT. For these marginalized students, the threat comes from peers as well as authority figures, such as school teachers and administrators as well as leaders of faith organizations. But as Brinton’s unfortunate story demonstrates, the threat also comes from family members. Indeed, many parents who learn that their children are LGBT react with verbal harassment or physical violence. See Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49, 50

(2011) (“Thirty percent suffer family violence after ‘coming out.’”); Michael J. Higdon, *To Lynch a Child: Bullying & Gender Nonconformity in Our Nation’s Schools*, 86 Ind. L. J. 827, 857 (2011) (“[S]tatistics reveal that one-third of LGBT youth has faced both verbal and physical abuse from family members as a result of the child’s perceived sexual orientation.”). Others evict their children from their homes, refuse to financially support them, or even cut ties with them altogether. *See, e.g.*, Marc Fisher, *When Sexuality Undercuts a Family’s Ties*, Washington Post, Feb. 13, 2005, at C1 (reporting that politician Alan Keyes did all three of these things to his lesbian daughter, Maya).

Such negative reactions are startlingly common: some reports indicate that fifty percent of gay adolescents experience some form of parental rejection. *See* Bennett L. Singer & David Deschamps, *Gay & Lesbian Stats: A Pocket Guide of Facts & Figures* 77 (1994). Perhaps for this reason, adolescents often reveal their sexual orientations to others before telling their parents—if they choose to inform their parents at all. *Cf.* Sara Jeruss, *Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. Rev. 853, 855 (2009) (“[I]t may be developmentally critical for a gay teen to disclose her identity to her peers or to other adults before disclosing her identity to her parents.”).

This important choice—whether and when to disclose information about her sexual orientation—was stripped from minor S.W. not once, but twice: *first*, when appellants Rhonda Fletcher and Cassandra Newell ruthlessly interrogated S.W. and forced her to reveal this deeply personal information, fearfully, against her wishes; and *second*, when Appellants disclosed S.W.’s sexual orientation to her mother, appellee Barbara Wyatt. These actions had profound effects: S.W.’s relationship with her mother was “[a]bsolutely one hundred percent destroyed” “for a period of time” because Mrs. Wyatt was admittedly “very hard on her.” (R.2 at 593-94.)¹ S.W. and her mother did not speak “for months,” and S.W.’s relationships with her sister and other family members were also affected. (*See id.*) S.W. became “depressed and anxious,” “started skipping school,” and “even cut [her]self and contemplated suicide.” (R.2 at 576.)

That Appellants disclosed S.W.’s sexual orientation to her parent, rather than to strangers, does not mitigate the seriousness of the violation here. Adopting such a view does not just disregard the independent violation that occurred when Appellants subjected S.W. to interrogation and forced her to “out” herself to them—a violation that could happen to youth *regardless of sexuality*, including those who are not actually LGBT but are perceived to be. But it also contradicts

¹ In this brief, the record on appeal is cited at “R.1” or “R.2,” for Volumes 1 and 2 respectively, followed by page number.

the facts—which, again, reveal that S.W.’s relationship with her mother broke down after the incident—and the wealth of social science research showing that many LGBT youth fare as badly or worse than S.W. after coming out or being outed. “Once they adopt homosexual identities, lesbians and gay males are confronted with the issue of stigma and its management.” Richard R. Troiden, *Homosexual Identity Development*, 9 J. Adolescent Health Care 105, 110 (1988). And all too often, LGBT adolescents—particularly those who did not make the choice to embrace such an identity—are ill-prepared to deal with the stigma constructively. “The quality of life of many same sex attracted young people is compromised by hostility, invisibility and alienation in their daily lives.” Lynne Hillier & Doreen Rosenthal, Special Issue on Gay, Lesbian and Bisexual Youth, 24 J. Adolescence 1, 3 (2001). Some, like S.W., see their family relationships and their performance in school suffer. Others eschew school entirely in the face of taunting and harassment and turn to drugs or alcohol or even attempt suicide. The negative effects can be long-lasting; recent research has linked familial rejection of LGBT teens to depression and drug use later in life. See Caitlin Ryan, David Huebner, Rafael M. Diaz & Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009).

Accordingly, “the right not to have intimate facts concerning one’s life disclosed without one’s consent . . . is a venerable one” that Amici urge be recognized and protected here. *Bartnicki v. Vopper*, 200 F.3d 109, 122 (3d Cir. 1999), *aff’d*, 532 U.S. 514 (2000). Mental health advocates, including Amicus the National Association of Social Workers, “support[]the right of the individual to self-disclose, or to not disclose, sexual orientation.” Nat’l Ass’n of Soc. Workers, *Social Work Speaks* 219, 222 (9th ed., 2012). So does the jurisprudence of the Supreme Court—which has long recognized that the constitutional right to privacy encompasses an individual’s “interest in avoiding disclosure of personal matters,” *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)—and of this Court, which has held that “plaintiffs undeniably have an interest in restricting the disclosure of information” such as “allegations of homosexuality.” *Am. Civil Liberties Union of Miss., Inc. v. Mississippi*, 911 F.2d 1066, 1070 (5th Cir. 1990). This right to informational privacy, grounded in the Fourteenth Amendment, “protects against the unauthorized collection, storage, use, and disclosure of personal information in ways that would embarrass or otherwise compromise the individual concerned.” Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 Colum. Hum. Rts. L. Rev. 759, 765 n.23 (2011). It applies “both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public.”

Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 789-90 (9th Cir. 2002). Appellants violated both aspects of S.W.’s right to informational privacy first when they made her disclose sensitive personal information to them and then when they divulged the information to her mother, without consent.

S.W.’s youth does not diminish the scope of her right to informational privacy. “Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). Teens are particularly compromised by adverse reactions to their sexual orientations, whether within their family unit or within the school environment. The “peculiar vulnerability of children,” *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), in this context counsels in favor of diligently protecting their right to informational privacy. Amici therefore urge the Court to do so here.

ARGUMENT

I. This Court Should Reaffirm That Youth Have a Right to Informational Privacy Regarding Sexual Orientation.

The Supreme Court has long recognized that the federal constitutional right to privacy not only protects individuals’ right to make decisions about highly personal matters such as reproduction, but also protects their right to control the nature and extent of sensitive personal information released about them. *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from

unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Whalen*, 429 U.S. at 599-600 (recognizing that constitutional right to privacy encompasses an individual’s “interest in avoiding disclosure of personal matters”); *see also Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000) (describing informational privacy as the “right not to have intimate facts concerning one’s life disclosed without one’s consent”). Courts across the country have determined that sexual orientation and activity fall within the ambit of this right.²

Indeed, “[i]t is difficult to imagine a more private matter than one’s sexuality.” *Sterling*, 232 F.3d at 196. Even the Sixth Circuit, which has “narrowly construed the informational-privacy right,” has recognized that such a right exists “where the information released was of a sexual, personal, and humiliating nature,” or “where the release of personal information could lead to bodily harm.” *Summe v. Kenton Cnty. Clerk’s Office*, 604 F.3d 257, 270 (6th Cir. 2010). Information

² *E.g.*, *Wolfe v. Shaefer*, 619 F.3d 782, 785 (7th Cir. 2010) (“The courts of appeals, including this court, have interpreted *Whalen* to recognize a constitutional right to privacy of medical, sexual, and perhaps other categories of information”); *Sterling*, 232 F.3d at 196 (concluding that “sexual orientation was an intimate aspect of . . . personality entitled to privacy protection under *Whalen*”); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (concluding that the Constitution “does indeed protect the right to maintain the confidentiality of one’s transsexualism”); *Am. Civil Liberties Union of Miss.*, 911 F.2d at 1070; *Eastwood v. Dep’t of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (finding that the right to privacy “is implicated when an individual is forced to disclose information regarding personal sexual matters”).

about sexual orientation meets both these criteria: the information is sexual and personal in nature and, as described below, frequently leads to bodily and psychological harm upon disclosure. Information about adolescents' still-developing sexual identities is no less worthy of protection than that of individuals only a few months older, and it may even be worthy of more protection given adolescents' vulnerabilities. *Compare* Himmelstein & Brückner at 54 (“[M]any young women’s sexualities are fluid and not amenable to rigid classification.”), and Joseph J. Wardenski, *A Minor Exception? The Impact of Lawrence v. Texas on LGBT Youth*, 95 J. Crim. L. & Criminology 1363, 1373 (2005), with *Sterling*, 232 F.3d at 192, 196 (finding that an eighteen-year-old’s right to informational privacy was violated by an officer’s mere threat to disclose his homosexuality to his family).

In short, the privacy right at issue here—informational privacy in one’s sexual orientation—is not new, nor is its protection a novel application of constitutional jurisprudence, as this Court has already recognized. *See Am. Civil Liberties Union of Miss., Inc.*, 911 F.2d at 1069-70. Going further, all three Courts of Appeals to have directly considered the issue have found that the constitutional right to informational privacy extends to minors as well. *See Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178-81 (3d Cir. 2005); *In re Crawford*, 194 F.3d 954, 959 (9th Cir.

1999); *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780 (9th Cir. 1991).³ Most of these courts have implicitly recognized that minors’ right to informational privacy is as robust as adults’. Both the Third and Ninth Circuits have applied their Circuit-specific, multi-factor balancing tests to evaluate the informational privacy rights of adults and minors alike. Though these courts did not specifically address minors’ right to privacy in the context of sexual orientation, their broad approaches to minors’ general informational right to privacy suggest that sensitive information about minors’ sexualities should also be protected with the utmost care.

There is no question—and there has been none for decades—that the constitutional right to privacy encompasses an individual’s “interest in avoiding disclosure of personal matters,” *Whalen*, 429 U.S. at 599-600, including sexuality, *Am. Civil Liberties Union of Miss.*, 911 F.2d 1069-70. For the reasons below, Amici believe it is critical that the Court reaffirm that right as it applies to youth who are LGBT or perceived to be LGBT.

II. Youth Face Unique and Often Long-Term Vulnerabilities When Their Sexual Orientations Are Disclosed.

A. Youth Whose Sexual Orientations Are Disclosed Are Likely to be Victimized by Their Families.

Studies have concluded that “[f]ew issues have as profound an impact on the

³ For a more detailed discussion, see Caitlin M. Cullitan, *Please Don’t Tell My Mom! A Minor’s Right to Informational Privacy*, 40 J. L. & Educ. 417, 427-29 (2011).

course of family life as the disclosure that someone in the family is lesbian, gay, or bisexual.” Anthony R. D’Augelli, Scott Hershberger & Neil W. Pilkington, *Lesbian, Gay and Bisexual Youth and Their Families: Disclosure of Sexual Orientation and its Consequences*, 68 Am. J. Orthopsychiatry 361, 361 (1998). “[D]isclosure status within the family is a crucial variable in understanding how lesbian, gay, and bisexual adolescents are treated by their families.” *Id.* at 366-67. Parents and other family members of LGBT youth often react negatively after learning of the youth’s sexual orientations. Ritch C. Savin-Williams & Eric M. Dubé, *Parental Reactions to Their Child’s Disclosure of a Gay/Lesbian Identity*, 47 Family Relations 7, 7 (1998). Negative reactions to all LGBT orientations are most common among fathers, but roughly one-third of LGBT participants in one study reported verbal abuse by their mothers. D’Augelli *et al.* at 366. According to one study, fifty percent of gay men experienced a negative parental reaction when they came out. The Nat’l Gay & Lesbian Task Force, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness* 16 (2007), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>. More recent research has also found that among LGBT young men are the most likely to face negative family reactions, Ryan *et al.* at 349, but young women like S.W. are far from immune: among LGBT teens, lesbians are most vulnerable to threats of and actual physical abuse at the hands of their parents. D’Augelli *et al.* at 366. Overall, one

study found, forty-one percent of fathers and nineteen percent of mothers reacted negatively when they learned of the sexual orientation of their LGBT children. *Id.*

Some studies have even suggested that families often respond negatively to *mere suspicions* that their child *may* have an LGBT sexual orientation. *See* Wardenski at 1380. “For those residing with potentially hostile families”—a subset of adolescents unlikely to be known to individuals like Appellants Fletcher and Newell—“secrecy is self-protective.” D’Augelli *et al.* at 368. Indeed, LGBT youth whose families were unaware of their sexual orientations reported low levels of physical harm at the hands of their families. *Id.* at 366 (reporting “virtually no incidence of attack among the nondisclosed”).

Anecdotal reports of parental reactions suggest that initial responses of shock and surprise are typical, followed by varying degrees and durations of psychological distress. *Id.* at 361. “[A] period of uncertainty, disruption, and, in more tempestuous cases, chaos is often created within the family” after an LGBT youth’s sexual orientation is disclosed. Savin-Williams & Dubé at 7. Negative familial reactions can range from temporarily adverse to permanently punitive and traumatic, and many scientific studies have linked them to both short- and long-term consequences for LGBT youth.

In the short term, LGBT youth whose parents learn of their sexual orientations are vulnerable to domestic violence and verbal abuse. One study found

that thirty percent of LGBT youth experience family violence after coming out, *see* Himmelstein & Brückner at 50, while another found that one-third of LGBT youth have faced both verbal and physical abuse from family members. *See* Higdon at 857. Lesbians are most vulnerable to physical abuse by their parents, while gay male children face substantial risks of abuse by their male siblings. D’Augelli *et al.* at 366. Frequent conflicts and altercations over sexual orientation drive more than a quarter of LGBT youth from their families, voluntarily or otherwise, and many of these victimized children find themselves temporarily or permanently homeless. Himmelstein & Brückner at 50.⁴

Over the longer term, parental rejection and abuse takes a harsh psychological toll on vulnerable LGBT teens, about a third of whom meet diagnostic criteria for psychiatric disorders. *See* Brian S. Mustanski, Robert Garofalo & Erin M. Emerson, *Mental Health Disorders, Psychological Distress, and Suicidality in a Diverse Sample of Lesbian, Gay, Bisexual, and Transgender Youths*, 100 Am. J. Pub. Health 2426, 2428-29 & tbl.2 (2010). For instance, a recent study of ethnically diverse LGBT youth in Chicago found that nearly ten percent met the diagnostic criteria for post-traumatic stress disorder. *See id.* at 2429 tbl.2. LGBT youth are more likely than heterosexual youth to engage in self-harm

⁴ Between twenty and forty percent of all homeless youth self-identify as LGBT. Nat’l Gay & Lesbian Task Force at 16.

such as cutting. See Richard T. Liu & Brian Mustanski, *Suicidal Ideation and Self-Harm in Lesbian, Gay, Bisexual, and Transgender Youth*, 42 Am. J. Preventive Med. 221 (2012); Mass. Dep't of Educ., 2005 Massachusetts Youth Risk Behavior Survey Results 50 (2007), available at <http://www.doe.mass.edu/cnp/hprograms/yrbs/05/ch6.pdf> (reporting that forty-four percent of students who self-identified as gay, lesbian, or bisexual or reported any same-sex sexual contact had hurt themselves on purpose, compared with seventeen percent of other students). LGBT youth, particularly those whose orientations have been disclosed to their families, are also much more likely than their peers to attempt suicide. One study concluded that roughly twenty percent of LGBT respondents attempted suicide in the previous twelve months, compared with only 4.2% of heterosexual respondents. Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay & Bisexual Youth*, 127 Pediatrics 896, 899 (2011). Another concluded that a staggering fifty-one percent of LGBT teens who were out to their families had attempted suicide in the past and a third were currently thinking about doing so, while only twelve percent of closeted LGBT teens had. D'Augelli *et al.* at 367. Indeed, the tragic case of *Sterling v. Borough of Minersville*, in which a gay teen committed suicide, arose because a police officer threatened to expose the teen's undisclosed sexual orientation to his family. See *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000).

Familial rejection further compounds the disparate health outcomes already experienced by LGBT young adults. Ryan *et al.* at 346. LGBT young adults who reported high levels of familial rejection during adolescence were significantly more likely than other LGBT young adults to report illegal drug use and substance-related problems. *Id.* at 349-50 & tbl. 4. They were also 5.9 times more likely to report high levels of depression. *Id.* These outcomes in turn have a cascading impact on rejected youths' abilities to maintain healthy relationships as adults. LGBT young adults who faced rejection by their families are 3.4 times more likely to engage in risky behaviors such as unprotected casual sex. *Id.* Men whose mothers reacted negatively to their sexual orientations during adolescence have also been found to have higher levels of attachment anxiety in their romantic relationships. See Katherine B. Carnelley, Erica G. Hepper, Colin Hicks & William Turner, *Perceived Parental Reactions to Coming Out, Attachment, and Romantic Relationship Views*, 13 Attachment & Human Dev. 217 (2011).

While there is some evidence suggesting that LGBT teens' expectations of familial rejection somewhat exceed the actual incidence of familial rejection, see D'Augelli *et al.* at 368, scientific journals are replete with studies demonstrating that familial rejection is a real and continuing threat for many youth. The ever-present specter of rejection—and the accompanying threats of abuse and even homelessness—may explain one study's finding that LGBT teens self-identify an

average of four years before they disclose their sexual orientations to their families. *See id.* Fully one-third of LGBT youth in that same study waited until adulthood to come out to their parents. *Id.* Another study of college students reported that numerous respondents who were active in campus LGBT communities nonetheless “returned to the ‘closet’ at home.” Susan R. Rankin, *Campus Climate for Gay, Lesbian, Bisexual, and Transgender People: A National Perspective* 21 (2003). This literature suggests that for many LGBT youth, “[d]elay of disclosure to particular family members may be advisable until these youngsters have achieved emotional and financial independence.” *Id.* The National Education Association, citing the deleterious consequences experienced by many LGBT youth, has therefore cautioned its members to “not blindside students by telling family members without their knowledge.” Nat’l Educ. Ass’n, *Strengthening the Learning Environment: A School Employee’s Guide to Gay, Lesbian, Bisexual, & Transgender Issues* 20 (2d ed. 2006), available at <http://www.nea.org/assets/docs/glbststrengthenlearningenvirong2006.pdf>.

For parents who love their children unconditionally, it may be tempting to assume that disclosure of a minor’s sexual orientation to his or her mother or father is the best course of action. We see our own loving and accepting reaction and cannot imagine a world where it would happen any other way. But the reality is markedly different from this picture-perfect fantasy. As the findings above show,

the home is not necessarily a sanctuary for LGBT youth. Recognition and protection of minors' right to informational privacy regarding sexual orientation is the first step toward ensuring that vulnerable minors like S.W. are not subject to undue victimization at the hands of those whose support is most crucial to both their short- and long-term wellbeing.

B. Disclosure of or Perception of LGBT Sexual Orientation Are Associated With Adverse Educational Outcomes.

LGBT youth fortunate enough to have supportive families—or confidants who honor their right to informational privacy with respect to their families—are still vulnerable to harassment at school. The same is true of youths who are merely *perceived* to be LGBT. One-third of adolescents report that students at their schools are frequently harassed by their peers because they are, or are merely perceived to be, LGBT. Gay, Lesbian & Straight Educ. Network, *From Teasing to Torment: School Climate in America-A National Report on School Bullying* 3 (2005), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/499-1.pdf (“*From Teasing to Torment*”). The number of adolescents in Texas schools making such reports is sixty-four percent, nearly double the national figure. Gay, Lesbian & Straight Educ. Network, *From Teasing to Torment: A Report on School Climate in Texas* (2005), available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/1872.html?state=research>. LGBT students are three times as likely as non-LGBT students to say that they do not feel safe at school

(twenty-two percent vs. seven percent) and ninety percent of LGBT students (vs. sixty-two percent of non-LGBT teens) have been harassed or assaulted during the past year. *From Teasing to Torment* 7.

Students who are (or are perceived to be) LGBT also endure a remarkable amount of verbal abuse, often from school staff as well as students. Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Schools*, 7 U. Pa. J. Const. L. 183, 188 (2004). Some of this abuse is indirect: For example, the average public high school student hears about twenty-five anti-gay remarks during the course of a typical school day. Kellye Carter, *Gay Slurs Abound*, Des Moines Register, March 7, 1997, p.1. And nearly ninety percent of respondents to the 2009 National School Climate Survey reported that they heard the term “gay” used in a negative fashion at school “frequently” or “often.” Joseph G. Kosciw, Emily A. Greytak, Elizabeth M. Diaz & Mark J. Bartkiewicz, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, at xvi (2010).⁵ In Texas, that percentage exceeds ninety-five percent. Gay, Lesbian & Straight Educ. Network, *Research Brief: School Climate in Texas* (2011). Some of the abuse is targeted: A survey of Massachusetts youth showed

⁵ The National School Climate Survey is a biennial survey of lesbian, gay, bisexual, and transgendered students enrolled in secondary schools across the United States.

that LGBT youth were significantly more likely than their heterosexual peers to have been assaulted or involved in at least one physical fight in school, nearly three times as likely to have been threatened with a weapon at school, and more than twice as likely to skip school because they felt unsafe. Mass. Dep't of Educ., 2001 Massachusetts Youth Risk Behavior Survey Results 52 & tbl. 5.1 (2002).

Openly LGBT students are the most frequent targets of these prejudicial slurs, but the sad reality is that “[a]ny student whose behavior is perceived to be different in some way can be isolated and harassed using anti-gay insults.” Elizabeth J. Meyer, *Gender, Bullying, and Harassment: Strategies to End Sexism and Homophobia in Schools* 4 (2009); *see also* Joyce Hunter, *Introduction: Safe Passage*, 19 J. Gay & Lesbian Soc. Servs. 1, 1 (2007) (“While a high correlation has been found between lesbian/gay orientation and gender non-conformity, straight youth can also be ‘mistaken’ for lesbian/gay and victimized as a result.”). Nonetheless, “the more open youths were about their sexual orientation in high school, the more they were victimized.” Anthony R. D’Augelli, Neil W. Pilkington & Scott L. Hershberger, *Incidence and Mental Health Impact of Sexual Orientation Victimization of Lesbian, Gay, and Bisexual Youths in High School*, 17 Sch. Psychol. Q. 148, 160 (2002).

The daily exposure to these hostile environments has lasting negative academic and career consequences for students who are or are perceived to be

LGBT. “Chronic harassment by peers is associated with serious adjustment problems, including depression, anxiety, emotional dysregulation, social withdrawal, low self-esteem, loneliness, suicidal tendencies, dislike and avoidance of school, poor academic performance, rejection by mainstream peers, and a lack of friends.” David G. Perry, Ernest V.E. Hodges & Susan K. Egan, Determinants of Chronic Victimization by Peers: A Review and a New Model of Family Influence, *in* Peer Harassment at School: The Plight of the Vulnerable and Victimized 73 (Jaana Juvonen & Sandra Graham eds., 2001). Ridiculed and ostracized LGBT students have significantly lower academic achievement than their heterosexual and more accepted peers. Kosciw *et al.* at 46-47; Mass. Dep’t of Educ. at 114 (“Sexual minority youth were significantly less likely than their peers to report receiving mostly A’s, B’s, or C’s in the year before the survey.”).

S.W.’s experiences bear this out. After she was outed, S.W.’s previously high standardized test scores dropped noticeably, she failed a class, and she reported that her career hopes had been dashed. (R.2 at 593.) This deflation of aspirations is common among victimized youth; students who reported high levels of in-school victimization because of their actual or perceived sexual orientation or gender expression were more likely than other students to report that they did not plan to pursue any post-secondary education. Kosciw *et al.* at 46. Those who do attend college too often encounter similarly unfriendly environments: one study

found that approximately one-third of LGBT undergraduates reported being harassed because of their sexual orientations. Rankin at 27. Nearly sixty percent of LGBT college students conceal their sexual orientations to avoid such intimidation and victimization. *Id.* at 25. Failing to afford LGBT youth the same right to do so from the earliest stages of their sexual development forces these vulnerable minors to experience even more victimization for longer periods of time and may prevent them from even reaching college and, in many tragic situations, adulthood.

These findings document the verbal and physical abuse and harassment that students face because of their actual or perceived sexual orientation. For these marginalized students, making it through the school day is already an uphill climb, to say nothing of successfully completing their education. Failure to protect these students' right to information privacy regarding sexual orientation only promises to make it much more difficult.

III. Enforcement of the Right to Informational Privacy for Adolescents Can Reduce Negative Outcomes.

As shown above, vulnerable and impressionable adolescents who face rejection by their families and peers because of actual or perceived sexual orientation face negative outcomes in many aspects of their lives. In many cases, the mere threat of rejection can drive adolescents and young adults down the dangerous path of suicidal ideation and self-harm. The decision in *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000), is such an example. There, a

police officer in rural Pennsylvania arrested a pair of teenage boys for underage drinking. The boys, who had been sitting together in a parked car, reluctantly acknowledged that they were gay. Believing himself to be acting in a quasi-parental role, *id.* at 198 n.7, the officer told one of the boys that he would inform the youth's grandfather of the youth's sexual orientation if the youth failed to do so himself. Fearing the repercussions that would result from such a disclosure, the youth committed suicide upon his release from custody.

The Third Circuit's determination that the officer's threat to disclose the youth's sexual orientation violated his clearly established right to informational privacy came too late to improve the outcome for eighteen-year-old Marcus Wayman. It may even be too late for S. W.: though the violation of her privacy rights did not result in the tragic ending of *Sterling*, S.W. still experienced personal unrest, family turmoil, academic decline, and social isolation. Recognition of students' right to informational privacy here—and the acknowledgement that S.W. and other minors have a clearly established right to informational privacy generally—undoubtedly will markedly reduce the above-discussed health, academic, and social disparities experienced in the future by the population of youths who are actually LGBT or perceived to be LGBT.

Research suggests that sexual orientation, behavior, and identity are not the driving forces behind dire situations like that in *Sterling*.⁶ Rather, it is the heightened level of stress and victimization that these youths experience after their sexual orientations become known, or merely suspected, by others that results in the disproportionate levels of suicide ideation, attempts, and completions.⁷ Indeed, “gay adolescents who report a history of suicide attempts score significantly lower on scales of family support, self-perception and self-esteem, and extra-familial social support when compared to similar adolescents without a reported history of suicidal ideation or suicide attempts.” Kitts at 626. Subjecting these youth to additional anxiety brought on by the possibility of unwanted “outing” at the hands

⁶ See Ritch C. Savin-Williams & Geoffrey L. Ream, *Suicide Attempts Among Sexual Minority Male Youth*, 32 J. Clinical Child & Adolescent Psychol. 509 (2003); Gary Remafedi, Simone French, Mary Story, Michael D. Resnick & Robert Blum, *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 Am. J. Pub. Health 57 (1998); cf. Mark L. Hatzenbuehler, Katie A. McLaughlin, Katherine M. Keyes & Deborah S. Hasin, *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 Am. J. Pub. Health 452 (2010).

⁷ See Robert Li Kitts, *Gay Adolescents and Suicide: Understanding the Association*, 40 Adolescence 621, 623 (2005) (“Being gay in-and-of-itself is not the cause of the increase in suicide. The increased risk comes from the psychosocial stresses associated with being gay.”); Savin-Williams & Ream, *supra* note 78; cf. Robert Garofalo, R. Cameron Wolf, Shari Kessel, Judith Palfrey & Robert H. Durant, *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101 Pediatrics 895 (1998).

of local officials—the police officer in *Sterling*, or school officials here—only exacerbates their victimization.

Recognizing that youth, like their adult counterparts, have a clearly established right to informational privacy may not be a panacea for these risk factors or the troubling levels of suicide, homelessness, and other negative outcomes experienced by marginalized youth. Yet the protection of students' privacy interests in their deeply personal information can go far toward reducing the incidence of dire outcomes like that in the *Sterling* case. "According to research, the perceived presence of adults who are supportive of GLBT and gender-nonconforming students is one of the most effective predictors of decreased feelings of threat, truancy, and suicide attempts." Robert Kim, National Education Association, *A Report on the Status of Gay, Lesbian, Bisexual and Transgender People in Education: Stepping Out of the Closet, Into the Light* 50 (2009), available at <http://www.nea.org/assets/docs/HE/glbstatus09.pdf>. Family connectedness, adult caring, and school safety also serve as significant protectors against suicidal ideation and suicide attempts. See Marla E. Eisenberg & Michael D. Resnick, *Suicidality Among Gay, Lesbian, and Bisexual Youth: The Role of Protective Factors*, 39 J. Adolescent Health 662 (2006). Making clear to youth that public school employees who come to learn their sexual orientations have an obligation to maintain the confidentiality of that sensitive information to the extent

they lack a legitimate interest in disclosing it will improve at least the appearance of adult support. It can also serve to protect youth who lack “family connectedness,” or who fear that disclosure of sexual orientation may throw a delicate family dynamic into turmoil.

It is true that, as a general rule, students’ “privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.” *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830-31 (2002). But in this instance, enforcement of the clearly established right of informational privacy stands to *improve* schools’ ability to maintain the health and safety of both vulnerable LGBT students and their heterosexual peers. *See* Mass. Dep’t of Educ. at 43 (“Sexual minority youth (i.e., students who either identified as gay, lesbian, or bisexual or reported any same-sex sexual contact) were significantly more likely than other students to have carried a weapon (26% vs. 15%), been in a physical fight (42% vs. 28%), and to have been in a gang (19% vs. 9%).”); *cf.* National Assoc. of Sch. Psychologists, *Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Youth Position Statement 4* (2011), available at http://www.nasponline.org/about_nasp/positionpapers/LGBTQ_Youth.pdf (“Schools can only be truly safe when every student, regardless of sexual orientation, gender identity, and gender expression is assured of access to an education without fear of harassment,

discrimination, or violence.”). Enforcing LGBT youths’ right to disclose (or not) sensitive personal information about their sexual orientations where no legitimate reason for its disclosure by school officials exists⁸ may reduce the risks that such youths will experience significant damaging harms at the hands of their families, peers, and even themselves. It also advances schools’ purported interest in “inculcating the child with the habits of good citizenship” (Br. Appellants 20), by demonstrating to students like S.W. that personal information should be respected, and by encouraging students to seek help from faculty and staff when needed.

CONCLUSION

Amici support the right of the individual to self-disclose, or to not disclose, sexual orientation. Minors in particular, who face unique vulnerabilities at both home and school, should be able to express their sexual orientations to confidants as they—not others—see fit. Diligent enforcement of minors’ constitutional right to informational privacy advances this goal. Protection of the long-recognized constitutional right to informational privacy in this context has the further long-term benefit of minimizing negative health and educational outcomes of

⁸ Amici agree with the district court’s conclusion that the right to informational privacy is not an absolute one (*see* R.2 at 727), and do not advocate for such an extreme outcome in this case. (*Contra* Br. Appellants 20.) But while exceptions in cases of abuse or sexual exploitation, for example, may call out for different treatment, they do not require limiting recognition of the informational privacy right as it applies to sexual identity, at issue here.

individuals who are LGBT or perceived to be LGBT. Accordingly, Amici respectfully request that the Court reaffirm existing law and uphold the judgment of the District Court.

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Respectfully submitted,

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**COMBINED CERTIFICATION OF COMPLIANCE AND
CERTIFICATION OF SERVICE**

I, Peter E. Perkowski, counsel for Amici, certify:

1. Under Fifth Cir. R. 32.2 and 32.3, that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), in that it contains **6,861** words, excluding the parts of the brief exempted by Fifth Cir. R. 32.2.; and further that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Cir. R. 31.1, and the type style requirements of Fed. R. App. P. 32(a)(6), in that it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

3. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

I further certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system in No. 11-41359 on June 20, 2012.

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/s/ Peter Perkowski
Peter E. Perkowski