

No. 20-1950

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN DOE, by and through his Mother and Next Friend, JANE DOE, and
BEN BLOGGS, by and through his Mother and Next Friend, JANE
BLOGGS,

Plaintiff-Appellants,

v.

HOPKINTON PUBLIC SCHOOLS,

Defendant-Appellee.

On Appeal from a Final Judgment
Entered in the United States District Court
for the District of Massachusetts

Brief of *Amici Curiae*
GLBTQ Legal Advocates & Defenders
and Anti-Defamation League
in Support of Defendant-Appellee and Affirmance

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Dated: May 18, 2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the *amici curiae* state that each is a nonprofit corporation, neither has a corporate parent, neither issues stock, and no publicly held corporation owns 10% or more of either of them, individually or collectively.

INTRODUCTION

The United States Centers for Disease Control and Prevention has declared that bullying is a significant public health problem. R. Matthew Gladden et al., Ctrs. for Disease Control and Prevention, *Bullying Surveillance Among Youths: Uniform Definitions for Public Health and Recommended Data Elements 4* (1st ed. 2014). It is “associated with severe baseline psychopathology” and “predicts future mental health problems.” Benjamin Shain et al., *Suicide and Suicide Attempts in Adolescents*, 138 *Am. Acad. of Pediatrics* e1, e3 (2016); *see also* Jeong-Kyun Choi et al., *Neighborhood Disadvantage, Childhood Adversity, Bullying Victimization, and Adolescent Depression: A Multiple Mediation Analysis*, 279 *J. of Affective Disorders* 554, 555 (2020) (“Bullying victimization, a major adversity faced within the school environment, is consequently associated with mental health problems . . . and poor socioemotional adjustment at school.”). The impact of bullying is both immediate and long-term, increasing the risk of depression, anxiety, and even suicidality in adulthood. *See* Shain et al., *supra*, at e3.

In the context of an appeal arising from the suspension of two public high school students for bullying, appellants have argued that the “emotional harm” prong of the definition of bullying in M.G.L. c. 71, § 37O(a) is unconstitutionally overbroad and vague. Appellants’ Brief at 44-47. This assertion is antithetical to

the statute's clear objective to protect youth. Emotional harm is at the core of bullying victimization. The Massachusetts Legislature's inclusion of emotional harm appropriately places students, school staff, and parents on notice of one of the principal consequences of bullying and triggers the statute's critical requirements of prevention, identification, and remediation.

The *amici curiae* GLBTQ Legal Advocates & Defenders and Anti-Defamation League submit this brief to emphasize the vital importance of the emotional harm prong of the Massachusetts anti-bullying law and in particular (1) to bring to the Court's attention the key medical and social science literature illuminating the consequences of emotional harm from bullying, which disproportionately and more severely impacts stigmatized groups, including lesbian, gay, bisexual, and transgender (LBGT) youth, *see* Argument, § I, *infra*; and (2) to clarify that the term "emotional harm" is a well-established and recognized concept in law and medicine, which, in the context of the language and requirements of M.G.L. c. 71, § 37O, provides more than satisfactory notice of the statute's prohibitions. *See* Argument, § II, *infra*.

INTEREST OF AMICI CURIAE¹

Founded in 1978, *amicus curiae* GLBTQ Legal Advocates & Defenders (GLAD) is New England's leading public interest legal organization dedicated to creating a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has successfully litigated many cases in the federal courts, including before this Court and the U.S. Supreme Court, to advance the rights of LGBT people and people living with HIV, including *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Gill v. Office of Pers. Mgmt.*, 682 F.3d 1 (1st Cir. 2012); *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000); and *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997). GLAD has a strong record of advocacy to empower lesbian, gay, bisexual, transgender, and queer youth in all systems, including the education, child welfare, and juvenile justice systems. For LGBT youth, access to safe and equitable education, free from bullying and its life-long negative effects, is central to their ability to thrive in society.

Amicus curiae Anti-Defamation League (ADL) is a leading anti-hate and civil rights organization committed to stopping the defamation of the Jewish

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Only *amici* contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. (29)(c)(5).

people and securing justice and fair treatment to all. Through its nationally-recognized anti-bias education programming and resources, ADL helps educators, students, and K-12 school communities across the country understand and challenge bias and create safe and inclusive learning environments where all students can thrive. In light of this experience, ADL has first-hand expertise when it comes to bias and bullying in K-12 schools, including in Massachusetts schools. ADL knows that this behavior can have lasting consequences if left unchecked, as targets of bullying are often more likely than other children to have lower self-esteem and higher rates of loneliness, depression, anxiety, and suicidal ideation. ADL has been a key proponent of anti-bullying legislation in Massachusetts and we continue to have an interest in ensuring that M.G.L. c. 71, § 37O is applied in a constitutional manner to protect students who experience emotional harm arising from this conduct in our K-12 schools.

ARGUMENT

I. BULLYING CAUSES PROFOUND AND ENDURING EMOTIONAL HARM, PARTICULARLY FOR STIGMATIZED GROUPS SUCH AS LGBT YOUTH.

A. Bullying is a Form of Violence and Trauma.

According to the American Academy of Pediatrics, bullying is defined as having three elements: “aggressive or deliberately harmful behavior (1) between peers that is (2) repeated over time and (3) involves an imbalance of power, for

example, related to physical strength or popularity, making it difficult for the victim to defend” themselves. Shain et al., *supra*, at e2; *see also* Gladden et al., *supra*, at 7 (“Bullying is any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated.”). Bullying behavior can be direct-physical (*e.g.*, assault), direct-verbal (*e.g.*, threats, insults, name calling), indirect-relational (*e.g.*, social exclusion, spreading rumors), and cyberbullying (*e.g.*, bullying that happens with computers or mobile devices). Shain et al., *supra*, at e2.

Bullying, regardless of its mode, is a form of violence and threat exposure in childhood that has been categorized in medical research as an “Adverse Childhood Experience” (ACE). David Finkelhor, *Trends in Adverse Childhood Experiences (ACEs) in the United States*, 108 *Child Abuse and Neglect* 1, 1 (2020).² ACEs are a cluster of childhood experiences that are not typical in child development, overwhelm normal coping resources of a child, and are particularly damaging to health development. *Id.* at 1-2. Other ACEs include physical and sexual abuse, domestic violence and crime, and parental death, incapacitation, or absence. *Id.* ACEs have been consistently associated with many long-term negative effects such

² Choi et al. also classify bullying as a “type of violence.” Choi et al., *supra*, at 555.

as depression, substance abuse, and physical health problems such as heart disease. *Id.* at 1. The “working model to explain such effects is that ACEs have particular developmental toxicity and reprogram the stress response system and neuro-developmental processes.” *Id.* Bullying likewise causes “changes in the stress response systems and in the brain that are associated with increased risk for mental health problems, cognitive function, self-regulation, and other physical health problems.” Nat’l Acads. of Scis., Eng’g, and Med., *Preventing Bullying Through Science, Policy, and Practice* 159-60 (2016). Bullying is an ACE whose “effects can be more severe than other forms of being maltreated as a child.” *Id.* at 159.

B. Bullying is All Too Common in Schools and Affects Vulnerable Youth in Stigmatized Groups at Alarming High Rates.

Although estimates of bullying prevalence vary, the CDC has concluded that “a considerable amount of youth are bullied.” Gladden et al., *supra*, at 5. One meta-analysis concluded that approximately 15% to 35% of adolescents experienced at least one type of verbal, physical, psychological, or social bullying. *See* Choi et al., *supra*, at 555.

Young people with identities or traits associated with stigmatization and discrimination, including LGBT youth, youth with disabilities, and youth who are overweight, are more vulnerable to bullying. *See* Ctrs. for Disease Control and Prevention, *The Relationship Between Bullying and Suicide: What We Know and What It Means for Schools* 6 (2014); Nat’l Acads. (2016), *supra*, at 59; Marla E.

Eisenberg et al., *Bullying Victimization and Emotional Distress: Is There Strength in Numbers for Vulnerable Youth?*, 86 J. of Psychosomatic Res. 13, 13-18 (2016). Youth with disabilities are 1.5 times more likely to be bullied than youth without disabilities. Nat'l Acads. (2016), *supra*, at 50. Being overweight or obese is one of the most common reasons that youth are bullied in school, *see* Dario Bacchini et al., *Bullying and Victimization in Overweight and Obese Outpatient Children and Adolescents: An Italian Multicentric Study*, 10 PLoS 1, 1 (2015), and one study found that 22% of youth reported harassment based on weight. Kelly Lynn Mulvey et al., *Understanding Experiences with Bullying and Bias-Based Bullying: What Matters and for Whom?*, 8 Psychol. of Violence 702, 702-11 (2018).

LGBT youth experience some of the highest rates of bullying. *See* Nat'l Acads. (2016), *supra*, at 59; *see also* Valerie A. Earnshaw et al., *Bullying Among Lesbian, Gay, Bisexual, and Transgender Youth*, 63 Pediatric Clinics of N. Am. 999, 999-1004 (2016). A 2015 national youth behavior survey found that 34% of lesbian, gay, and bisexual youth report experiencing bullying as opposed to 18.8% of heterosexual youth. Valerie E. Earnshaw et al., *LGBTQ Bullying: Translating Research to Action in Pediatrics*, 140 Am. Acad. of Pediatrics e20170432, 2 (2017). A similar 2017 survey demonstrated that 35% of transgender youth reported being bullied at school. Nat'l Acads. of Scis., Eng'g, and Med., *Understanding the Well-Being of LGBTQI+ Populations* 233 (2020).

Anti-gay epithets, such as “that’s so gay,” “no homo,” “faggot,” and “dyke” are commonplace in our nation’s schools. *See* Joseph G. Kosciw et al., *The 2019 National School Climate Survey Executive Summary* 3-4 (2020) (reporting that 90% of LGBT students had heard such remarks). Indeed, the facts described in the district court’s opinion demonstrate the typical ways that repeated anti-gay attitudes pervade society and are used to degrade, ostracize, and subjugate others as a harmful aspect of bullying. *See Doe v. Hopkinton Pub. Schs.*, 490 F. Supp. 3d 448, 454 (D. Mass. 2020) (attempting to get bullying victim to say “I am gay,” mocking “[h]is face in his gay ass helmet,” and demeaning his voice). It is therefore unsurprising that a 2019 national survey found that 68.7% of LGBT students experienced verbal harassment on the basis of sexual orientation, and 56.9% experienced verbal harassment because of gender expression. Kosciw et al., *supra*, at 4.

LGBT youth are at a higher risk of “poly victimization.” Nieves Moyano & María del Mar Sánchez-Fuentes, *Homophobic Bullying at Schools: A Systematic Review of Research, Prevalence, School-Related Predictors and Consequences*, 53 *Aggression and Violent Behav.* 3 (2020); *see also* Kosciw et al., *supra*, at 4 (noting that, of LGBT students bullied or harassed for other characteristics, 36.5% were bullied for disability or perceived disability, 23.1% based on religion or perceived religion, and 21.4% based on actual or perceived race or ethnicity). More

specifically, LGBT youth with multiple intersecting identities are more likely to experience bullying based on those intersecting identities. Moyano & del Mar Sánchez-Fuentes, *supra*, at 3. Research demonstrates differences in bullying prevalence of LGBT youth by racial identity.³ African-American LGBT students are more likely to experience anti-LGBT bullying at school than their white LGBT peers. Stephen T. Russell et al., *Being Out at School: The Implications for School Victimization and Young Adult Adjustment*, 84 Am. J. of Orthopsychiatry 635, 636 (2014). Another study noted that “[B]lack and Hispanic LGB students were more likely to feel unsafe and were more likely to be threatened or injured with a weapon than white LGB students.” Michelle M. Johns et al., *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students—Youth Risk Behavior Survey, United States, 2015-2019*, 69 Morbidity and Mortality Weekly Report (MMWR) 19, 25 (2020).

Gender differences also have been observed in LGBT youths’ experience with bullying. Boys are more likely than girls to be targets of LGBT bullying. See Moyano & del Mar Sánchez-Fuentes, *supra*, at 3; see also Russell et al. (2014), *supra*, at 636. Boys who are gender nonconforming, regardless of their sexual

³ The harms of race-based bullying are clear: “[r]acial/ethnic discrimination is associated with distress and compromised academic performance.” Stephen T. Russell et al., *Adolescent Health and Harassment Based on Discriminatory Bias*, 102 Am. J. of Pub. Health 493, 493 (2012).

orientation, are at “even greater risk for bullying victimization and depressive symptoms than were females who were gender nonconforming.” Andrea L. Roberts et al., *Childhood Gender Nonconformity, Bullying Victimization, and Depressive Symptoms Across Adolescence and Early Adulthood: An 11-Year Longitudinal Study*, 52 *J. Am. Acad. Child Adolescent Psychiatry* 143, 7 (2013); *see also* Earnshaw et al. (2016), *supra*, at 1002 (noting that “[a]dolescent boys who are bullied because they are perceived to be gay owing to nonconforming gender expression . . . also experience more verbal and physical bullying than boys who are bullied for other reasons”).

C. The Emotional Harm Resulting from Bullying Manifests as a Variety of Debilitating, and Sometimes Life-Threatening, Social, Psychological, and Behavioral Problems.

The emotional harm from bullying has been demonstrated to result in a range of categorizable social, psychological, and behavioral problems that can occur immediately or emerge later in adolescence or adulthood.⁴ First, bullying victimization increases the risk of social problems. These include acting younger than one’s age, being overly dependent on adults, and social immaturity, “all

⁴ Although not the primary focus of this brief, it is important to note that bullying also harms perpetrators and, in fact, “[e]vidence . . . suggests that people who both experience and perpetrate bullying (*i.e.*, bully-victims) may exhibit the poorest functioning (*e.g.*, depression, health problems, and externalizing disorders) in comparison with youths who just report being bullied or perpetrating bullying.” Gladden et al., *supra*, at 6.

factors that heighten the risk of social isolation within the peer group.” Randy A. Sansone & Lori A. Sansone, *Bully Victims: Psychological and Somatic Aftermaths*, 5 *Psychiatry* 62, 63 (2008); *see also* Gladden et al., *supra*, at 6 (noting that victims of bullying are more likely to report not having a lot of friends at school and having a negative view of school).

Second, bullying results in internalized negative emotions that are harmful in intensity and duration. For example, a study of over 7,000 predominantly African-American and Hispanic middle and high school students found that victims of bullying reported frequent worries, sadness, nervousness, and fearfulness. *See* Sansone & Sansone, *supra*, at 2; *see also* Melissa Fleschler Peskin et al., *Bullying and Victimization and Internalizing Symptoms Among Low-Income Black and Hispanic Students*, 40 *J. Adolescent Health* 372, 373 (2007). Similarly, a study of students in an urban public school district noted that bullying victims were “significantly more likely than bystanders to feel unsafe at school and sad most days” and that “[t]he symptom of frequent sadness is known to have high sensitivity and specificity for the diagnosis of major depression.” Gwen M. Glew et al., *Bullying and School Safety*, 152 *J. of Pediatrics* 1, 5 (2008). These emotions can result in school avoidance due to fear and lack of safety. Kirsten L. Hutzell & Allison Ann Payne, *The Impact of Bullying Victimization on School Avoidance*, 10 *Youth Violence and Juvenile Justice* 370, 377 (2012).

Third, bullying victimization can contribute to psychological sequelae such as anxiety and depressive symptoms and disorders and self-harm, including eating disorders and suicidal ideation, during adolescence and adulthood. The CDC has concluded that “bullying during childhood predicts being depressed as an adult.” Gladden et al., *supra*, at 6; *see also* Sansone & Sansone, *supra*, at 2 (“[P]sychological sequelae may develop in the aftermath of repetitive bullying, including anxiety and depressive symptoms and disorders . . . [b]ullying by peers may also contribute to the development of eating disorders.”).

Depressive symptoms associated with bullying victimization are often a mechanism leading to subsequent and greater harms. One study found that being bullied during childhood was associated with subsequent depression symptoms, which, in turn, increased the risk of self-harm, including cutting, burning, and ingesting harmful substances, later in adolescence. Suzet Tanya Lereya et al., *Being Bullied During Childhood and the Prospective Pathways to Self-Harm in Late Adolescence*, 52 *J. of the Amer. Acad. of Child & Adolescent Psychiatry* 608, 608-18 (2013). Another study found that fifth-grade peer victimization contributes to seventh-grade depressive symptoms which in turn were an independent factor in tenth-grade substance use. Earnshaw et al. (2017), *supra*, at 1.

Further, increased risk of suicide and suicidal ideation are a particularly severe consequence of bullying. Suicide is the second leading cause of death for

adolescents ages fifteen to nineteen and discussed a review of thirty-one studies which concluded that there is a “clear relationship between both bullying victimization and perpetration and suicidal ideation and behavior in children and adolescents.” Shain et al., *supra*, at e3; *see also* Choi et al., *supra*, at 555 (finding suicidal ideation among adolescents as a risk of bullying).

D. Bullying Directed at Youth with Stigmatized Identities is Particularly Pernicious and More Likely to Cause Emotional Harm Than Bullying that Does Not Target a Youth’s Identity.

Bias-based bullying is a specific form of bullying motivated by a person’s actual or perceived membership in a socially devalued or stigmatized group. Earnshaw et al. (2017), *supra*, at 1; *see also* Mark L. Hatzenbuehler et al., *Proposition 8 and Homophobic Bullying in California*, 143 *Pediatrics* 1, 2 (2019). Race-based bullying, disability-based bullying, and anti-LGBT bullying are particularly frequent forms of bias-based bullying. Mariah Xu et al., *Racial and Ethnic Differences in Bullying: Review and Implications for Intervention*, 50 *Aggression & Violent Behav.* 1, 33 (2020); *see also* Mulvey et al., *supra*, at 702-03.

Although all involvement in bullying has serious negative effects on youth, *see* CDC, *Relationship Between Bullying and Suicide*, *supra*, at 7, bias-based bullying “is more strongly associated with adverse outcomes than bullying unrelated to bias.” Hatzenbuehler et al., *supra*, at 2. It is more likely to involve

multiple perpetrators, to last for longer periods of time, and to include multiple episodes. Xu et al., *supra*, at 33. Racial discrimination, for example, can cause emotional and psychological trauma. *Id.* Adding a layer of race-based trauma on top of the already harmful impacts of bullying causes even more profound emotional harm. *Id.* at 33-34.

The risk of harm is highest for youth with intersecting identities. *Id.* at 34. One study noted that the “risk for . . . negative outcomes increases with each additional type of harassment youth experience.” Mulvey et al., *supra*, at 703; *see also* Nat’l Acads. (2016), *supra*, at 159 (“Poly-victims (individuals who are targets of multiple types of aggression) are more likely to experience negative emotional, behavioral, and mental health outcomes than individuals targeted with only one form of aggression.”).

Bias-based bullying, in contrast with non-bias-based bullying, has been associated with more frequent and significant negative outcomes including depression, suicidal ideation, poor self-esteem, self-harm, substance use issues, and academic difficulties. *See* Xu et al., *supra*, at 33-34; Mulvey et al., *supra*, at 703. One study found “that youth who experienced bias-based bullying had increased odds of being victimized in a romantic relationship, endorsing depressive symptoms and suicidal ideation, and making a suicide attempt that were roughly

twice as high as those who had only experienced general bullying.” Xu et al., *supra*, at 33.

For LGBT youth, the multiple, negative impacts of bias-based bullying are clear. See U.S. Dep’t of Health & Human Servs., *LGBTQ Youth*, stopbullying.gov, <https://www.stopbullying.gov/bullying/lgbtq> (noting that for LGBT youth, the increased health risks associated with bullying, including depression, suicidal ideation, misuse of drugs and alcohol, are even higher than the health risks for non-LGBT youth). Adverse mental health impacts include “greater symptoms of depression and anxiety, and lower self-esteem” than for non-LGBT youth.

Earnshaw et al. (2016), *supra*, at 1003. LGBT bullying also negatively effects behavioral health, influencing LGBT youth to engage more with harmful substance use including “tobacco, alcohol, marijuana, and other illicit drugs.” *Id.* LGBT youth who experience bullying are more likely to experience adverse physical health effects including “increased abdominal pain, headache, poor appetite, sleeping problems, and skin problems, as well as greater body mass index, higher systolic and diastolic blood pressures, and decreased self-rated health.” *Id.* In short, victimization based on discriminatory anti-LGBT bias “is particularly undermining for youth based on multiple indicators of health and risk behavior.” Russell et al. (2014), *supra*, at 641.

These emotional and psychological harms, particularly for LGBT youth, inflict life-long and sometimes tragic results. “[T]he mental, behavioral, and physical health consequences of bullying may last into adulthood.” Earnshaw et al. (2016), *supra*, at 1004. Stress-related physical and mental health symptoms “can have especially harmful health consequences” for youth targeted because of their core identity, including their sexual orientation. Mark A. Schuster & Laura M. Bogart, *Did the Ugly Duckling Have PTSD? Bullying, Its Effects, and the Role of Pediatricians*, 131 *Pediatrics* e289, e288-e291 (2013). LGBT youth face increased risk of suicide and suicidal ideation compared to their non-LGBT peers. Johns et al. (2020), *supra*, at 19-20. One researcher, in a review of 90 articles addressing anti-LGBT bullying in schools, noted the tremendous emotional harms facing LGBT youth: “LGBTQ individuals who suffer bullying are at higher risk of negative consequences, such as depression and anxiety symptoms, low self-esteem, post-traumatic stress, substance abuse and isolation. In other cases, consequences may be catastrophic, such as suicide or suicide attempts.” Moyano & del Mar Sánchez-Fuentes, *supra*, at 2 (internal citations omitted).

Because of long-standing and deeply engrained stigma associated with LGBT identity, anti-gay language or anti-gay verbal bullying generates significant harm even for non-LGBT youth. Caroline B.R. Evans & Mimi V. Chapman, *Bullied Youth: The Impact of Bullying Through Lesbian, Gay, and Bisexual Name*

Calling, 84 Am. Journal of Orthopsychiatry 644, 645 (2014) (“[V]erbal bullying based on a victim’s perceived sexual orientation (e.g., calling a victim gay, lesbian, or queer) has particularly harmful effects for high school students.”). One study found that, in a sample of 251 high school boys, “those who reported they were bullied by use of *gay* as a verbal epithet reported worse psychological outcomes, including increased rates of depression and anxiety, and more negative perceptions of school than males who were bullied by being called other names or by other means.” *Id.* (emphasis in original). Other research showed that “boys of any orientation who are bullied by being called ‘gay’ show worse distress in comparison with boys who are bullied in other ways.” Schuster & Bogart, *supra*, at e289.

LGBT youth are not alone in experiencing increased risk of harm from bias-based bullying. Ethnic or race-based bullying “is associated with greater negative mental health consequences, harmful behaviors, and adjustment problems compared to general bullying.” Xu et al., *supra*, at 32. Students with disabilities experience greater emotional health harms than youth without disabilities. *See* Eisenberg et al., *supra*, at 13. One Massachusetts study found that 45% of youth with disabilities who are victims of cyberbullying experienced depression compared with 31% of youth who experienced cyberbullying and did not have a disability. Shai Fuxman et al., Ruderman Family Found., *The Ruderman White*

Paper on Social Media, Cyberbullying, and Mental Health 3 (2019). Additionally, “38% of cyberbullying victims with disabilities report suicidality, compared to 23% of victims without disabilities.” *Id.*

II. THE CONCEPT OF EMOTIONAL HARM IS WELL-ESTABLISHED IN LAW AND MEDICINE, AND THE PREVENTION AND EDUCATION REQUIREMENTS OF M.G.L. C. 71, § 370 NEGATE ANY CONCERNS OF INSUFFICIENT NOTICE.

The appellants assert that the term “emotional harm” is unconstitutionally vague because it “does not provide sufficient notice to a high school student of what speech he or she [is] prohibited from uttering.” Appellants’ Brief at 44. The well-documented significant emotional harm that flows from bullying, and the language and educational requirements set forth in the anti-bullying statute, invalidate appellants’ concern.

As a preliminary matter, the term “emotional harm” is a well-established and recognized concept, and appellants do not seriously contend otherwise. The Restatement of the Law defines emotional harm as “impairment or injury to a person’s emotional tranquility” that “encompasses a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, depression (and other mental illnesses), and a host of other detrimental – from mildly unpleasant to disabling – mental conditions.” *See* Restatement (Third) of

Torts § 45 (2012).⁵ Similarly, the CDC defines “harm” in the context of bullying as “a range of negative experiences or injuries” that “can include . . . psychological consequences such as feelings of distress, depression or anxiety . . . [and] social damage to reputation or relationship.” Gladden et al., *supra*, at 8.

Consideration of the language, purpose, and myriad requirements of M.G.L. c. 71, § 37O negates any concern that the “emotional harm” provision will bring within its sweep distress that is merely trivial, *de minimis*, or simply part of normal life experience, or that students will have insufficient guidance about prohibited bullying. *See Commonwealth v. Gernrich*, 476 Mass 249, 251, 67 N.E.3d 1196, 1199 (2017) (“[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied, and the main object to be

⁵ While the Restatement requires proof of “severe” emotional harm for the tort of intentional infliction of emotional distress, or “serious” emotional harm for the tort of negligent infliction of emotional distress, *see* Restatement (Third) of Torts §§ 46-47, the application of tort liability is not akin to the objective of M.G.L. c. 71, § 37O which is to ensure that school officials safeguard from harm young and vulnerable students in their charge. As this Court has noted, “school administrators must be permitted to exercise discretion in determining when certain speech crosses the line from merely offensive to more severe or pervasive bullying or harassment.” *See Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 29 n.18 (1st Cir. 2020).

accomplished.’” (quoting *Lowery v Klemm*, 446 Mass. 572, 576-77, 845 N.E.2d 1124, 1128 (2006))).

First, as the district court correctly pointed out, “[t]he context of the phrase ‘emotional harm’ amidst the litany of other serious behavior banned by the statute, which includes behavior causing ‘physical harm,’ a ‘hostile environment,’ or that ‘infringes on the rights of others’ narrows it down in context to actions” that are understood to be harmful and not benign. *Doe v. Hopkinton Pub. Schs.*, 490 F. Supp. 3d at 468-69; *see also* M.G.L. c. 71, § 37O (defining bullying as “repeated” and “directed at a victim”). In other words, the phrase’s meaning is directly informed by the surrounding terms identifying other types of harms that would compel a school to intervene.

Further, the Legislature incorporated into the statute provisions aimed at providing students with age-appropriate knowledge and guidance about bullying and its impact. *See* M.G.L. c. 71, § 37O(c) (requiring schools to “provide age-appropriate instruction on bullying prevention in each grade”); M.G.L. c. 71, § 37O(d)(3) (a school’s required bullying plan “shall include the specific steps . . . to provide all students with the skills, knowledge and strategies needed to prevent or respond to bullying or harassment”). In addition, staff are required to undergo professional development training to build skills “to prevent, identify and respond to bullying.” M.G.L. c. 71, § 37O(d)(4). Parents must be informed about the anti-

bullying curriculum and notified about the expectations for students. M.G.L. c. 71, § 37O(d)(5). Through these requirements the Legislature appropriately delegated to school officials the task of helping students understand and discern the harmful consequences of speech or behavior that rises to the level of bullying, including the infliction of emotional harm. The extensive requirements of the statute are more than adequate to ensure that students learn about bullying and its resultant harms.

CONCLUSION

For the foregoing reasons, this Court should reject appellants' assertions that the "emotional harm" prong of M.G.L. c. 71, § 37O is unconstitutional and affirm the judgment of the district court.

Dated: May 18, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amici Curiae* GLTBQ Legal Advocates & Defenders and Anti-Defamation League in Support of Defendant-Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 4,636 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2016, the word processing system used to prepare the brief, in 14-point Times New Roman font.

Dated: May 18, 2021

By: /s/ Bennett Klein.

CERTIFICATE OF SERVICE

I certify that on this 18th day of May, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: May 18, 2021

By: /s/ Bennett Klein.