Case No. 18-35708

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PARENTS FOR PRIVACY; KRIS GOLLY and JON GOLLY, individually and as guardians ad litem for A.G.; NICOLE LILLY; MELISSA GREGORY, individually and as guardian ad litem for T.F.; and PARENTS RIGHTS IN EDUCATION, an Oregon nonprofit corporation,

Appellants,

v.

DALLAS SCHOOL DISTRICT NO. 2; OREGON DEPARTMENT OF EDUCATION; GOVERNOR KATE BROWN, in her official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION; UNITED STATES DEPARTMENT OF EDUCATION; BETSY DEVOS, in her official capacity as United States Secretary of Education as successor to JOHN B. KING, JR.; UNITED STATES DEPARTMENT OF JUSTICE; JEFF SESSIONS, in his official capacity as United States Attorney General, as successor to LORETTA F. LYNCH,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon, Portland Division, No. 3:17-cv-01813-HZ
The Honorable Marco A. Hernandez

APPELLANTS' OPENING BRIEF

Herbert G. Grey, OSB #810250
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
Telephone: 503-641-4908

Ryan Adams, OSB # 150778
Email: ryan@ruralbusinessattorneys.com
181 N. Grant Street, Suite 212
Canby, OR 97013
Telephone: 503-266-5590

Of Attorneys for Appellants

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this civil action arose under the Fourteenth Amendment and under a federal statute, Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX). The district court also had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and (4) over a civil action to secure legal and equitable relief under the Civil Rights Act, 42. U.S.C. § 1983, and Title IX. Finally, the district court had supplemental jurisdiction under 28 U.S.C. § 1367(a).

This court also has jurisdiction over this appeal of the order of the district court that dismissed plaintiffs' complaint in its entirety under 28 U.S.C. §§ 1291 and 1292(a)(1) without leave to replead. ER 65.

This appeal was timely filed. The district court entered its order and judgment dismissing plaintiffs' complaint on July 24, 2018. ER 8-9, 10-65. Appellants filed their Notice of Appeal from that order and judgment on August 21, 2018, 2017. ER at 1-7. The order and judgment dismissing plaintiffs' complaint were immediately appealable by appellants pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

STATEMENT OF THE ISSUES

1) Whether the district court erred in failing to recognize that a school policy permitting students of one sex to access the privacy facilities of the opposite sex (if they self-identify with the opposite sex violated the Fourteenth Amendment right to

bodily privacy in a manner not accounting for physical differences between the sexes. ER 31-44. *Infra*, pp. 9-26.

2) Whether the district court erred in failing to recognize that a school policy permitting students of one sex to access the privacy facilities of the opposite sex (if they self-identify with the opposite sex) violated Title IX when federal and Oregon law expressly allows separate facilities for school students. ER 46-48, 55. *Infra*, pp. 26-41.

3) Whether the district court erred in failing to recognize and apply controlling United States Supreme Court authority concerning parental rights of Appellants rather than inapposite limiting authority from the Ninth Circuit relating only to curricula. ER 59-61. *Infra*, pp. 41-45.

4) Whether the district court erred in failing to conduct the strict scrutiny analysis to determine whether a compelling governmental interest accomplished by the least restrictive means justified infringement of the fundamental rights of Appellants, thereby assuming without expressly deciding that the interests of transgender students predominated over the interests of Appellants. ER 62-63. *Infra*, pp. 45-54.

5) Whether the district court erred in dismissing Appellants' complaint in its entirety without the opportunity to replead. ER 65. *Infra*, pp. 54-56.

STATEMENT OF THE CASE

In the fall of the 2016-17 school year, the Dallas School District ("Dallas" or the "District") adopted a "Student Safety Plan" authorizing a single student (Student A), who subjectively self-identified with the opposite sex, to use the restroom, locker room and showers of the opposite sex. ER 132-133. During the previous 2015-2016 school year, Student A (physically a female) was granted the option of utilizing a single-user restroom, including to change clothes for PE class; Student A later requested access to opposite-sex facilities. ER 88-89. The District informed neither students nor parents of this new policy prior to its implementation. ER 90. Instead, the Dallas High School principal and PE teacher disclosed the policy to Student A's PE class at the beginning of a class in November 2016. ER 90.

The justification for the new policy was to "educate and accommodate District students" by affirming the gender identity of Student A. ER 339. In adopting the Student Safety Plan, Dallas transformed facilities designed to protect persons based on physical differences between the two sexes into places of vulnerability where students see and may be seen by persons of the opposite sex while undressed. When parents and other students in the Dallas community became aware of the Student Safety Plan, many (including Appellants) opposed it publicly in successive school board meetings in a vain effort to dissuade the District from implementing the policy.

ER 92-93. Students, including Lindsay Golly, who opposed the Student Safety Plan attempted to circulate a petition opposing the policy, but the high school principal confiscated the petitions and ordered students to discontinue doing so or face disciplinary action. ER 92.

Parents for Privacy is an unincorporated association of members of the Dallas community led by Appellants Jon and Kris Golly. ER 70. Jon and Kris Golly are parents of two students, and guardians ad litem for their younger child: plaintiff Lindsay Golly, who was then a student at Dallas High School, but subsequently graduated (ER 71); A.G. was at the time a student at the LaCreole Middle School. ER 71. Nicole Lillie is the mother of Student A. Melissa Gregory is the parent and guardian ad litem of T.F., a student at Dallas High School. ER 71. These parents object to interference with their parental rights, as well as the invasion of their students' bodily privacy rights. ER 97-98, 100-101, 114-116.

Parents Rights in Education is a nonprofit corporation advocating for the rights of parents in connection with the education of their children, most particularly Oregon's comprehensive sexuality education (CSE) curriculum and other curriculum-related sexuality matters. ER 4, 69-70, 333.

Student plaintiffs allege they have experienced, or may experience, adverse impacts from having to share intimate facilities with students of the opposite sex,

including embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity because they will have to use locker rooms, showers and restrooms with a student of the opposite biological sex, thus violating their bodily privacy. ER 80-81, 90-91, 94-97, 98-99, 111-113, 120. Some also feel compelled to avoid using restrooms and other facilities due to fear of encountering an opposite-sex student there in a manner interfering with their enjoyment of educational benefits and programs. ER 80-81. As an alternative, objecting students were offered use of a single-user restroom with no functioning shower. ER 92, 97.

Appellee Dallas School District ("District") is a public school district in Dallas, Oregon which at all times acted under color of law. ER 71-72. Dallas schools receive federal funds and are subject to Title IX. *Id.* Dallas has promulgated numerous policies affecting students, including the Student Safety Plan. ER 72-74, 88, 131, 132-133.

Appellee Basic Rights Oregon (BRO) is an LGBTQ advocacy organization (ER 13), which acknowledged its involvement in the development and implementation of the Student Safety Plan policy. ER 451. Later, BRO successfully moved to intervene in the litigation (ER 449) and filed a motion to dismiss (ER 380), which the court allowed. ER 13.

Amicus parties Governor Kate Brown and Oregon Department of Education were originally named defendants in the litigation (ER 74-75), but they were voluntarily dismissed on Eleventh Amendment grounds with leave to appear later as amici. ER 13, 826-827. Amici did in fact reappear subsequently with their own motion to dismiss. ER 13, 638.

The United States defendants were involved at various times in the issuance and enforcement of various guidance documents attached to the complaint that initially promoted accommodation of transgender students in public schools, including on Title IX grounds. ER 13, 67-68, 75-79, 86-87. Subsequently, some of those guidance documents were withdrawn, and others were later superseded by contrary guidance documents. ER 79-80. U.S. defendants also filed a motion to dismiss. ER 494.

Appellees' similar motions to dismiss the complaint were briefed and argued on May 23, 2018. Following oral argument, the district court issued its order and judgment dismissing the complaint with prejudice on or about July 24, 2018 (ER 8-9, 10-65), and appellants timely filed their notice of appeal thereafter. ER 1-7.

SUMMARY OF ARGUMENT

Americans enjoy a well-established fundamental right to bodily privacy, protected by separate privacy facilities for males and females, mandated precisely

because of physical differences between the sexes. Were such physical differences between the sexes not *the* defining factor for privacy facilities, there would be no reason to separate the sexes. The district court's rejection of "sex", grounded in human reproductive nature and objectively confirmable via physical differences between male and female, in favor of a subjective continuum of "gender identities" undermines the law's longstanding respect for the real differences between the sexes, deeply rooted in established traditions and embodied in the Fourteenth Amendment, in Title IX and in Oregon law.

In so doing, the district court imposed a novel right to violate fundamental privacy rights by allowing one sex to access the privacy facilities of the opposite sex (if they subjectively self-identify with the opposite sex) in a way inconsistent with the Fourteenth Amendment. The court's determination herein results in loss of personal modesty, dignity, and bodily privacy and other consequences (*Supra*, p. 5; *Infra*, p. 34), as well as the incongruity of protecting privacy rights of incarcerated prisoners to a greater degree than is afforded to students in a public high school. *Infra*, p. 17.

Additionally, the district court erred in failing to recognize and apply well-established Fourteenth Amendment law upholding the fundamental right of parents to direct the education and upbringing of their children, instead repurposing contrary Ninth Circuit authority involving school curriculum to limit parental rights outside

of a curriculum context. In particular, the district court's ruling that parental rights extended no further than the decision where to send their children to school, and that parents were free to send their children elsewhere (ER 61), is inconsistent with fundamental parental rights articulated by the United States Supreme Court.

The district court issued these novel rulings without undertaking strict scrutiny analysis to determine whether a compelling government interest existed or was accomplished by the least restrictive means, both of which are required to justify infringement of Appellants' fundamental rights. The court should also have applied strict scrutiny because the policy at issue is neither neutral nor generally applicable, and because Appellants asserted multiple fundamental rights, thereby requiring strict scrutiny of hybrid rights.

Finally, the district court committed reversible error in ruling that Appellants did not have the right to replead, granting dismissal with prejudice under FRCP 12(b)(6). ER 65.

ARGUMENT

I. STANDARD OF REVIEW

The applicable standard of review in this appeal is *de novo* because a judgment of dismissal with prejudice was entered without granting Appellants leave to replead. *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir 1991). *See* ER 65.

II. THE LOWER COURT ERRED IN FAILING TO RECOGNIZE THAT A POLICY AUTHORIZING STUDENTS OF ONE SEX TO ACCESS THE PRIVACY FACILITIES OF THE OPPOSITE SEX VIOLATES THE FOURTEENTH AMENDMENT RIGHT TO BODILY PRIVACY.

The issues on appeal all turn on whether persons of the opposite sex may invade privacy areas traditionally reserved for a single sex. The district court properly distinguished "sex" and "gender" in its definitions (ER 15), but the court erred in finding that self-identification with the opposite sex must necessarily diminish Appellants' rights under the First and Fourteenth Amendments to the United States Constitution[1], Title IX[2], and state law[3] as applied to privacy facilities.

If students entering boys' facilities were boys, and students entering girls' facilities were girls, Appellants would not be before the court. Historically, cases discussing these issues shared a common understanding of sex as physical differences rooted in biology, not individual subjective perceptions of gender or sex-stereotypes. The purpose behind sex-based privacy facilities is eliminated if facilities are provided based on gender identity rather than sex because it results in the intermingling of the two sexes.

The district court began its privacy analysis on the wrong foot when it opined:

While there is no generalized right to privacy, the Supreme Court has

[1] *Infra*, pp. 9-26.
[2] *Infra*, pp. 26-41.
[3] *Infra*, pp. 15-16.

> recognized a privacy right against certain kinds of governmental intrusions under the Due Process Clause of the Fourteenth Amendment.

ER 31 (emphasis added, citations omitted). As noted below, the court failed to recognize the long history of such privacy rights. ER 43 ("To hold otherwise would sweepingly expand the right to privacy beyond what any court has recognized."). In truth, the Ninth Circuit has recognized just such a bodily privacy right in *York v. Story*, 324 F.2d 450 (9th Cir. 1963):

> The desire to shield one's unclothed figure from views of strangers, and *particularly* strangers *of the opposite sex*, is impelled by elementary self-respect and personal dignity.

Id. at 455. (emphasis added).

After choosing to overlook *York* and other Ninth Circuit cases (ER 38-40), the district court noted the absence of any other Ninth Circuit authority to guide it and justified its decision by reliance mostly on *district court* decisions from other jurisdictions:

> The following decisions are not binding upon this Court; however, *in the absence of binding authority from the Ninth Circuit*, the Court relies on these opinions for their persuasiveness.

ER 33 (citations omitted). Ironically, the court then rejected Appellants' reliance on established out-of-circuit authorities as "unpersuasive out-of-circuit cases." *Id. See also* ER 38 (authorities cited by plaintiffs were "outside of the school context."); ER 41. The court similarly rejected arguments by Appellants consistent with a majority

of other circuits as "inconsistent with *contemporary* notions of liberty and justice" (ER 33)(emphasis added), adopting its preferred outcome based on a minority of cases still being reviewed. *Infra*, pp. 17, 26, 30-31.

Dallas and its supporters argued generally that no right of privacy exists, and that in any event there has been no infringement of plaintiffs' privacy rights here. ER 335 ("Plaintiffs do not have a constitutional right not to share restrooms and locker rooms with transgender students."). ER 336 ("There is no legal support for the proposition that plaintiffs have a fundamental privacy right to avoid coming in contact with transgender students in common spaces", relying on two district court cases from Illinois and Pennsylvania). ER 337-338. Dallas is wrong on both counts.

Based on Appellees' briefing, the district court adopted the reasoning of *Students & Parents v. U.S. Dept of Education*, USDC Case No. 16-cv-4945, 2016 WL 6135121 at 22 (N.D. Ill., October 18, 2016), in framing the question presented as follows:

> Do high school *students* have a constitutional right not to share restrooms or locker rooms with *transgender students* whose sex assigned at birth is different than theirs?

ER 32, 33 (emphasis added). The error of the court's overly narrow focus is clear when the question is put more simply: does a person's bodily privacy depend on what another person thinks about their own gender?

In framing the issue narrowly and selectively as it did, the district court departed from a principled, precedential, historical evaluation of Appellants' fundamental right to bodily privacy in the following respects: 1) it failed to recognize the full contours of the right; 2) it failed to recognize that a policy opening facilities to persons of the opposite sex necessarily violates that right;[4] 3) it failed to evaluate whether this policy identifies and advances a compelling government interest;[5] and 4) it erred in failing to evaluate whether the policy was narrowly tailored to that interest.[6]

The district court failed to recognize the contours of the right to bodily privacy.

The right of bodily privacy is well established in constitutional and statutory law. As even the district court noted, the due process clause

> "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."

ER 31, citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). *Cf.* ER 43. *Griswold v. Connecticut*, 381 U.S. 479 (1965) recognized the Fourteenth Amendment "right of privacy [is] older than the Bill of Rights…"). *Id.* at 486.

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[4] *Infra,* pp. 25-27.

[5] *Infra,* pp. 46-50.

[6] *Infra,* pp. 50-51.

This fundamental Fourteenth Amendment right includes a "constitutionally protected privacy interest in his or her *partially* clothed body." *Doe v. Luzerne Cty.*, 660 F.3d 169, 175-76 n.5 (3d Cir. 2011) (emphasis added). *Accord: York v. Story*, 324 F.2d 455; *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) ("right to privacy is now firmly ensconced among the individual liberties protected by our Constitution"; the privacy interest is vitiated when a member of one sex is "viewed by a member of the opposite sex.") *Poe v. Leonard*, 282 F.3d 123, 138 (2d Cir. 2002) (a "right to privacy in one's unclothed or partially unclothed body"). *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993)("society's undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation. . . ."). That is why "same-sex restrooms [and] dressing rooms" are allowed "to accommodate privacy needs" and why "white only rooms," which have no basis in bodily privacy, are illegal. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). There is no "requirement that certain anatomical areas of one's body, such as genitals, must have been exposed for that person to maintain a privacy claim under the Fourteenth Amendment. . . ." *Luzerne Cty.*, 660 F.3d at 176. A "reasonable expectation of privacy" exists "particularly while in the presence of members of the *opposite sex*." *Id.* at 177 (emphasis added). *State v. Lawson*, 340 P.3d 979, 982 (Wash. ER 2014)(Females "using a women's restroom expect[] a certain degree of privacy from ... members of the opposite sex.")

Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993), quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)("[M]ost people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'")

Bodily privacy in locker rooms, showers, and restrooms falls squarely within these fundamental due process protections. Ordered liberty cannot exist if government officials authorize intrusion upon the bodily privacy of others, justified only by an individual desire for psychological self-affirmation. Even Dallas School District acknowledges the importance of privacy rights in its own policies. ER 146 (Policy JF/JFA).

Until recent efforts to redefine "sex" (objectively male or female, grounded in reproductive roles) to mean "gender" (subjectively perceiving oneself to be male, female, or something else), bodily privacy claims typically arose under Fourth Amendment searches in correctional or juvenile facilities or in employment discrimination cases under Title VII where privacy would be compromised. *Katz v. U.S.*, 389 U.S. 347 (1967), upon which Dallas relies (ER 336), is a Fourth Amendment search and seizure case arising from audio surveillance of a conversation in a public phone booth. While *Katz* did not involve bodily privacy, it expresses a reasonable expectation of privacy standard. *Id.* Normatively, restrooms and locker rooms carry with them a reasonable expectation of bodily privacy.

That sense of privacy is magnified for teens, who are "extremely self-conscious about their bodies[.]" *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993). "[A]dolescent vulnerability intensifies the . . . intrusiveness of the exposure." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009). See also *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988)(teens are "embarrass[ed] ... when a member of the opposite sex intrudes upon them in the lavatory.") Oregon's federal district court long ago recognized that for teens in a juvenile facility, "...the lack of privacy for the use of showers and bathrooms contribute to feelings of anxiety and loss of self-esteem ..." *DB v. Tewksbury*, 545 F. Supp. 896, 904 (D-Or 1982). The Supreme Court itself recognized that the real physical differences between male and female students merited provision of sex-specific privacy facilities when it mandated admission of women at the Virginia Military Institute ("VMI"). *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).

Oregon law similarly recognizes a privacy interest in privacy facilities.[7] *State*

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[7] *See* ORS 30.865(1), (6) creating a statutory cause of action for invasion of personal privacy for recording in a state of nudity "in a place and circumstances where the plaintiff had a reasonable expectation of personal privacy", which "includes, but is not limited to, a bathroom, dressing room, locker room that includes an enclosed area for dressing or showering..."); ORS 163.700 invasion of privacy in the second degree; ORS 163.701 invasion of personal privacy in the first degree; ORS 163.467 private indecency for exposing one's genitals where another person has a reasonable expectation of privacy.

v. Holiday, 258 Or. App. 601, 608 (2013), quoting *State v. Casconi*, 94 Or. App. 457, 461 (1988)("Generally, a restroom is a place where a person has a protected privacy interest."). *Sterling v. Cupp*, 44 Or. App. 755, 761 (1980), *aff'd as modified* 290 Or. 611, 624 (1981)("The final bastion of privacy is to be found in the area of human procreation and excretion and the nudity which may accompany them. If a person is entitled to any shred of privacy, then it is to privacy as to these matters.")

The privacy interest is so strong that courts make clear an entire facility--not just a commode stall--is private. *See Koeppel v. Speirs*, 779 N.W. 2d 494, *6 (Iowa Ct. ER 2010) (videotaping a person in a bathroom, even if they are not viewed on a toilet, "is sufficient [because] the seclusion of the bathroom, a private area, was intruded upon"); *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992) (collection of urine samples may constitute an invasion of privacy if "it involves the use of one's senses to oversee the private activities of another" since the performance in public of such activities are "generally prohibited by law as well as social custom." Both "visual or aural observation" were of concern.)

Numerous other case authorities protect the right to bodily privacy in the context of schools, and even prisons. In a school dress code case, the Sixth Circuit observed:

> To compel [someone] to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals.

Blau v. Fort Thomas Public Sch. Dist., 401 F.3d 381 (6th Cir. 2005), quoting with approval *Union Pacific Railway v. Botsford*, 141 U.S. 250, 252 (1891). *York v. Story*, *supra*, 324 F.2d at 455. *See also Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135 (9th Cir. 2011). *Caribbean Marine Services, Inc. v. Baldwin*, 844 F.2d 668 (9th Cir. 1988).

The district court summarily rejected these established authorities as "unpersuasive out-of-circuit cases" (ER 31-32, 111-113) and "inconsistent with *contemporary* notions of liberty and justice" (ER 34, 41). The incongruous result: high school students and others at Dallas High School enjoy less bodily privacy from the opposite sex than prisoners in jails. ER 35-42. The district court's reliance on district court decisions from Illinois and Pennsylvania that have not been subjected to appellate review does not justify dismissing plaintiffs' privacy claims as a matter of law. ER 32-38, 337-338. Specifically, the district court's reliance on *Doe v. Boyertown Area School District,* 897 F.3d 515, amended 897 F.3d 518 (3rd Cir. 2018), reasoning ""that a male's constitutional privacy rights are violated . . . even by seeing a female in a state of undress in a locker room, would extend constitutional privacy rights beyond acceptable bounds" is unfathomable. ER 34. The denial of a preliminary injunction in *Boyertown* is currently the subject of a cert petition (Case No. 18-658, filed November 19, 2018). ER 34, 36-38.

The constitutional principle requiring privacy from the opposite sex is also what inspired the Title IX regulation that provided for privacy facilities to continue separation on the basis of sex. 34 C.F.R. § 106.33. That norm is why the Kentucky Supreme Court observed that "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commonwealth*, 865 S.W.2d 332, 336 (Ky. 1993). *See also Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657, 669 (W.D. Pa. 2015)(ensuring "the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex.")

Separating restrooms and locker rooms based on gender identity rather than sex requires students to attend to intimate bodily needs and change clothing in the presence of opposite-sex persons. The weight of authority overwhelmingly confirms the right to bodily privacy does not permit this outcome.

Similarly, the constitutional principles at issue here also appear in employment discrimination cases arising out of Title VII recognizing privacy rights of restroom users. Until 2017, all eleven courts of appeals considering the question had concluded that Title VII's prohibitions on sex discrimination in employment do not apply to sexual-orientation discrimination. *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton* v. *Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261

(3d Cir. 2001), *cert. den.*, 534 U.S. 1155 (2002); *Wrightson* v. *Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *Vickers* v. *Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006), *cert. den.*, 551 U.S. 1104 (2007); *Hamm* v. *Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Horton v. Midwest Geriatric Management*, 2017 WL 6536576, *3 (E.D. Mo. Dec 21, 2017), petition for cert. pending, Case No. 18-1104; *Williamson* v. *A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1089 (1990); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-330 (9th Cir. 1979), abrogated on other grounds; *Nichols* v. *Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-875 (9th Cir. 2001); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). *Medina* v. *Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans* v. *Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.), cert. denied, 138 S. Ct. 557 (2017); *Bostock v. Clayton County, Georgia*, 723 Fed. Appx. 964 (11th Cir. 2018), rehearing, en banc, denied 894 F.3rd 1335.

The rationale for agreeing sex does not include sexual orientation or gender identity (as expressed in recent cases) is instructive. For instance, the Tenth Circuit found no Title VII violation and rejected the claim of a female-identifying male employee fired because that employee used women's restrooms. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215. The employee argued that "the use of women's

restrooms is an inherent part of" living in accordance with their gender. *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1224. The court noted other restroom users' interests and ruled Title VII does not require allowing biological males who identify as female to use the women's restroom. *Id.* The Eighth Circuit concluded likewise in *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748-50 (8th Cir. 1982), finding no Title VII violation when an employer discharged a man who identified as a female who insisted on using the women's restroom. The court agreed that the employee's presence in the women's restroom threatened the female employees' privacy rights. *Id. See also Horton v. Midwest Geriatric Management*, 2017 WL 6536576, *3; *Goins v. West Group, Inc.*, 635 N.W.2d 717 (Minn. 2001) (a state statute parallel to Title VII was not violated when an employer refused to allow a man identifying as a woman to use the women's restroom).

Since April 2017, however, three courts—the Second, Sixth and Seventh Circuits — have overruled their prior decisions and held that sexual orientation discrimination constitutes sex discrimination in violation of Title VII. *See Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 112-115, 124-131 (2d Cir. 2018) (en banc), petition for cert. pending, No. 17-1623 (filed May 29, 2018); *EEOC v. RG & GR Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2017), petition for cert. pending, No. 18-107; *Hively* v. *Ivy Tech Cmty.Coll.*, 853 F.3d 339, 343-352 (7th Cir. 2017) (en banc).

Appellants acknowledge the district court's reliance on Ninth Circuit authority holding that sex includes gender identity for purposes of Title VII. ER 52, 53, citing *Kastl v. Maricopa County Comm. Coll. Dist.*, 325 F.App'x 492, 493 (9th Cir. 2009). *Prescott v. Rady Children's Hospital*, 265 F. Supp. 3d 1090 (S.D. Cal 2017). As the district court properly noted, however, those cases did not go so far as to support Appellees' position they must open all facilities based on gender identity to prevent sex discrimination. ER 53. *Kastl* properly recognized that limiting access on the basis of gender identity may be done for safety reasons which, if true, suggests that bodily privacy interests may suffice for the same purpose. *Kastl v. Maricopa County Comm. Coll. Dist.*, 325 F.App'x at 494.

It is unlikely that the emerging circuit split will be resolved without the intervention of the United States Supreme Court.

Exposure Coercive

Dallas' secretive implementation of the policy was itself coercive. Under the policy, it was inevitable that students would find themselves changing with members of the opposite sex without opportunity to object to the policy beforehand. ER 90.

Moreover, the court below discounted students' right to privacy because some privacy cases relied upon dealt with forced exposure (ER 38-43), and the court felt no student was forced to use the privacy facilities. ER 33. But while compelled exposure would be an egregious privacy violation, violations also arise under

policies like the Student Safety Plan (ER 132-133), which create potential *unconsented* exposure. The government cannot condition the use of a legal benefit--in this instance, access to government-provided multi-user privacy facilities--on foregoing a constitutional right. This is precisely what Dallas has done, and what the law does not permit.

Thus, while students may be strip searched by same-sex teachers, opposite-sex teachers may not conduct the search. *Cornfield*, 991 F.2d at 1320. At bottom, government actors cannot force minors to endure the risk of unconsented intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy. "[P]rivacy matters" to children and is "central to their development and integrity." Samuel T. Summers, Jr., *Keeping Vermont's Public Libraries Safe: When Parents' Rights May Preempt Their Children's Rights*, 34 VT. L. REV. 655, 674 (2010) (quoting Ferdinand Schoeman, *Adolescent Confidentiality and Family Privacy*, in PERSON TO PERSON 213, 219 (George Graham & Hugh Lafollette eds., 1989)). Allowing opposite-sex persons to view adolescents in restrooms and locker rooms, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

Schools have separate facilities for boys and girls to protect each student's right to privacy. "Unquestionably, a girls' locker room is a place where a normal

female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People v. Grunau*, No. H015871, 2009 WL 5149857, *3 (Cal. Ct. ER Dec. 29, 2009). In *Grunau*, the defendant argued that briefly viewing (from outside of the locker room) a teenager showering in a full swim suit, which was no different than swimming where both sexes were present, would not shock or irritate the average person. The *Grunau* court vigorously disagreed: "[A] normal female who was showering in a girls locker room would unhesitatingly be shocked, irritated, and disturbed to see a man gazing at her, no matter how briefly he did so." *Id.* It further explained:

> [h]ere, defendant *blithely* ignores an important fact: where his conduct took place. [The victim] was not simply rinsing off under an outdoor shower at a public pool. *She was on a high school campus, out of general public view, and inside a girls' locker room, a place that by definition is to be used exclusively by girls and where males are not allowed.*

Id. (emphasis added).

The District cannot escape liability by telling students that they may use alternative facilities, because the students already have a right to use facilities that are designated exclusively for one sex. ER 121. Accordingly, the district court cannot require them to do so. ER 33. Conditioning the use of multi-user privacy facilities upon students having to self-cure privacy violations created by the school's

policy violates the unconstitutional conditions doctrine, which protects constitutional rights "by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586, 2594 (2013).

Even where a benefit is discretionary, the government cannot condition that benefit on the beneficiary yielding their constitutional right. *United States v. American Library Assn., Inc.*, 539 U.S. 194, 210 (2003); *Lebron v. Sec'y, Fla. Dept. of Children and Families*, 710 F.3d 1202 (11th Cir. 2013)(financial assistance benefits could not be conditioned on the recipient consenting to searches); *Vignolo v. Miller*, 120 F.3d 1075, 1078 (9th Cir. 1997) ("even in a prison setting, the Constitution places some limits on a State's authority to offer discretionary benefits in exchange for a waiver of constitutional right"); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (an inmate may not be transferred to a new prison in retaliation for exercising his or her First Amendment rights, "despite the fact that prisoners generally have no constitutionally-protected liberty interest in being held at, or remaining at, a given facility"); *Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F.Supp.2d 936 (E.D. Pa. 2012) (low rent benefit could not be conditioned on giving up right of association). Appellees cannot escape constitutional privacy liability by telling Appellants to abandon the very facilities provided for their privacy under state law and 34 C.F.R. § 106.33.

The lower court failed to recognize that a policy opening privacy facilities to persons of the opposite sex violates the right to bodily privacy.

The district court expressly acknowledged the record of significant impact on student plaintiffs (ER 17-18, 44), yet minimized those impacts while magnifying similar impacts on Student A. ER 34-36, 44-46. The court also discussed at great length the alleged impact on a transgender student in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018). ER 34-35, 46. The court's expressed concern for a transgender student while discounting the same impacts for other students is unacceptable. *Id.*

The record makes clear students undress in locker rooms *and* bathrooms, sometimes partially and sometimes completely. *See* ER 81, 89. However, the court cited *Vernonia School District v. Acton*, 515 U.S. 646 (1995) in an attempt to minimize student privacy claims on the basis that "Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful." *See* ER 43. Note first that the court in *Vernonia* was speaking to privacy with respect to the same sex, not the opposite sex. The sports context in *Vernonia* also supports Appellants' argument that opposite-sex students should not be admitted to locker rooms.

For these reasons, the right to bodily privacy is violated when the sexes

intermingle in these facilities. Appellants' bodily privacy is at risk any time they use the multi-user facilities provided by law to protect their privacy. Because the policy infringes a fundamental right, it may survive only if it withstands strict scrutiny, as the district court acknowledged. ER 44. *Infra*, pp. 46*ff*.

The district court in this case has chosen sides with a novel minority position that is still being tested, including relying on *Doe v. Boyertown Area School District*, 897 F.3d 518. ER 36. *Supra*, p. 17. *Infra*, p. 30.

In the end, regardless of whether Student A entered the locker room at the times when males were present and identifies as a biological girl or a transgender boy, Student A was anatomically female. It is the physical differences between the sexes that have justified separate spaces and that inform a principled understanding of privacy, and which should guide this Court as it analyzes the claims below.

III. THE DISTRICT COURT ERRED IN FAILING TO RECOGNIZE THAT THE DISTRICT'S POLICY VIOLATES TITLE IX BY TURNING LOCKER ROOMS, SHOWERS, AND MULTI-USER RESTROOMS INTO SEXUALLY HARASSING ENVIRONMENTS AND BY FORCING STUDENTS TO FORGO USE OF SUCH FACILITIES AS THE SOLUTION TO THE HARASSMENT.

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

policies. ER 138.

Affirming the constitutional authorities referenced above, Title IX and its regulations unequivocally uphold the right to bodily privacy. 20 USC §1686 provides that "...nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *See also* 34 CFR §106.32. Separate toilet, locker room and shower facilities are also specifically authorized:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

34 CFR §106.33.

The law allows Dallas to continue status quo sex-segregated facilities without sacrificing the privacy interests of the vast majority of the student body and others coming on the campus. The court was wrong as a matter of law to rely on *Whitaker v. Kenosha Unified Sch. Dist.,* 858 F.3d 1034, to decide that "A court order directing District to require students to use only facilities that match their biological sex or to use gender-neutral alternative facilities would violate Title IX." ER 55.

The District Court erred by treating gender identity and sex as interchangeable in the privacy facility context, thereby eliminating Title IX protections for bodily privacy.

The district's policy fails to conform with Title IX, which was created to prevent discrimination based on "sex." Title IX's language uses the phrases "one

sex," "the other sex," and "both sexes."[8] The regulations likewise require that facilities "of one sex" shall be comparable to those for "the other sex." *See* 34 C.F.R. §§106.32-106.33. This language explicitly emphasizes the binary view of sex, not non-binary "gender identity." Title IX's legislative history also leaves no doubt that Congress intended "sex" to mean *biological sex.*

Bodily privacy is the foundation upon which the implementing regulations for Title IX preserve separate facilities on the basis of biological "sex." *See* 34 C.F.R § 106.33. Title IX's sponsor stated that the bill would not require co-ed dormitories or locker rooms. *See* 117 Cong. Rec. 30407 (1971). As Ruth Bader Ginsburg once said, "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, THE WASHINGTON POST, April 7, 1975.

The legislative record also confirms that Title IX allows differential treatment

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[8] *See*, 20 U.S.C. § 1681(2) (some educational institutions admit "students of both sexes"); 20 U.S.C. § 1681(8) (if certain sex-specific activities are provided "for one sex," reasonably comparable ones must be provided to "the other sex"); 20 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes").

among the biological sexes, such as "classes for pregnant girls . . . , in sport facilities *or other instances where personal privacy must be preserved*." 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added). As one court recently said in issuing a nationwide injunction against redefining sex to include gender identity:

> The structure of 20 U.S.C. § 1681 et seq. (Title IX) supports this conclusion. For example, in § 1686 Congress authorized covered institutions to provide different arrangements for each of the sexes. 20 U.S.C. § 1686. These authorized distinctions based on sex can only reasonably be interpreted to be necessary for the protection of personal privacy, and confirm Congress's biological view of the term "sex."

Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 688 (N.D. Tex. 2016).

Cases from other jurisdictions confirm that "sex" in Title IX means male or female rather than gender identity. For example, the court in *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) held:

> *Title IX's language does not provide a basis for a transgender status claim. On a plain reading of the statute, the term "on the basis of sex" in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex. See Etsitty*, 502 F. 3d at 1222. The exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited.

Id. at 676-677 (emphasis added).

In the context of Title IX's prohibitions on sex discrimination in education, only

the Third, Fourth and Seventh circuits have hitherto adopted this novel approach, and their decisions have either been withdrawn, abrogated or are awaiting review by the United States Supreme Court. *Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), vacated and remanded 137 S. Ct. 1239 (2017); *Whitaker v. Kenosha Unified School Dist.*, 858 F.3d 1034 (dismissed); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, petition for cert. pending.

The plain language of Title IX, legislative history and the weight of case authority from across the country all communicate that Congress intended to preserve distinct privacy facilities based on biological sex, not gender identity. It is Congress' prerogative, not the district court's, to decide otherwise.

Nowhere in the district court's opinion is it evident why, as a matter of law, Appellants' bodily privacy rights under Title IX to use sex-segregated privacy facilities may be diminished solely because a student of the opposite sex has a subjective belief about their own personal gender identity (*i.e.*, requiring them to choose whether to use other single-user facilities that Student A is not required to do). *See* ER 47, 92, 118-122; ER 351, 357-358. In short, Appellants believe Title IX privacy protections should be applied consistently for everyone rather than selectively for a few (ER 351, 357-358), and the district court erred by redefining the meaning of sex in Title IX to justify invasion of bodily privacy.

Appellants satisfy the elements of a prima facie case to prove sex discrimination under Title IX.

Title IX hostile environment claims require that the school district: (1) had actual knowledge of; (2) and was deliberately indifferent to; (3) harassment because of sex that was; (4) "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999), cited at ER 47, 342. As the district court noted (ER 47), the dispute in this case centers on the third and fourth hostile environment elements addressing whether the Student Safety Plan targets or treats student plaintiffs any differently from other students who attend Dallas High School, as well as whether transgender students' use of school facilities is severe, pervasive, or objectively offensive. Accordingly, Appellants will not address the knowledge, indifference or pervasiveness elements in this appeal, although the record shows appellants properly stated claims satisfying each disputed element. ER 120.

The policy subjects students to harassment based on sex in violation of Title IX.

As noted above (*Supra*, pp. 12-21), federal and state law expressly contemplate separate privacy facilities for boys and girls to preserve their privacy. But when the school authorizes a student to enter a privacy facility for the opposite sex, that student is not seeking *privacy* from the opposite sex but to be *affirmed* in

their identification with the opposite sex at the expense of other students' privacy rights.

The Student Safety Plan is obviously sex-based because the only way to achieve the policy's purpose of opposite-sex affirmation is to select facilities based on the sex (or gender identity) of the users. The school's policy creates sexual harassment conditions for students by permitting Student A (biologically female) to enter the boys locker room and restrooms, which is not erased by letting biologically male students enter the girls locker room and restrooms. This violates Title IX by removing privacy protections based on sex, thus creating a hostile environment on the basis of sex.[9]

Here the district court determined that there has been no harassment based on sex adversely impacting student Appellants and denying them access to equal educational benefits or opportunities because the policy affects male and female students equally. ER 47. *See also* ER 342. This two-wrongs-make-a-right approach is legally and logically indefensible. A calendar of nude females in the workplace would not cease to create a hostile environment on the basis of sex merely because the employer permitted another employee to post a second calendar of nude men.

[9] In addition to the argument on the merits, Dallas' argument in the district court in support of its Student Safety Plan is also contrary to its own Policy JF/JFA, which expressly notes students' right of privacy. *See* ER 73, 146, 341-344. Dallas offers no explanation to justify taking a position contrary to its own policy.

Likewise, allowing one supervisor to improperly proposition men while another improperly propositions women would not insulate an employer from a sexual harassment claim on the basis that the employer permitted both sexes to be equally subjected to sexual harassment.

The district court's decision also begs the threshold question in this case whether "based on sex" under Title IX even includes gender identity. In substance, the court is allowing Dallas to treat separate-sex facilities as a violation of Title IX for transgender students because "sex" includes gender identity, but then denies relief to objecting student plaintiffs who claim they too are subject to discrimination based on sex. ER 92, 118-122; ER 341-342, 351, 357-358. Title IX cannot permit such contradictory results. What the district court and Appellees overlook is that once the Student Safety Plan was implemented, there was no legitimate basis for denying *anyone* (transgender or not) besides Student A unfettered access to restrooms, locker rooms or showers. ER 357-358.

Dallas argued below there is no allegation of plaintiffs being "targeted or singled out on the basis of sex", and everyone is being treated the same. ER 342-343. However, the complaint recites a plethora of allegations about student plaintiffs' reasonable apprehensions of encountering someone of another sex in an intimate space. *Supra*, p. 5; *Infra*, pp. 37, 41. Sharing intimate facilities may not be an issue for Student A, who rejected continuing use of a single-user restroom as an

accommodation (ER 89), but the record shows it is a crucial matter for Appellants.

In addition, reliance by the district court and Dallas on *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964 (D. Minn. 2001), *aff'd sub nom. Cruzan v. Special School District,* 294 F.3d 981 (8th Cir. 2002) (involving teachers sharing intimate facilities with a transgender teacher in the workplace) is misplaced and is not helpful in evaluating the impact on students at Dallas High School. ER 51, 343-344. *Cruzan* is easily distinguishable, as Appellants argued in the district court below. ER 358-359. In *Cruzan*, a teacher alleged that her school's policy of letting a transitioning male-to-female teacher use the female teachers' restroom was, among other things, a hostile work environment under Title VII. The district court disagreed, rejecting the hostile environment claim by noting that the male employee could only use one women's restroom (not every women's restroom), and saying "Cruzan has the option of using the female faculty restroom used by Davis *or using other restrooms in the school not used by Davis*." *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d at 969 (emphasis added). Unlike Dallas High School, all other employees in *Cruzan* could use other group facilities without threat to their privacy.

Also, the Tenth Circuit has rejected *Cruzan*'s rule, saying that the presence of a male in the women's restrooms, even in the form of a male-to-female transgender, was legally problematic. *Etsitty v. Utah Transit Auth.*, 502 F.3d at 1227. ER 358-359.

Another distinction with *Cruzan* is that "harassment in the workplace is vastly different from sexual harassment in a school setting." ER 359-360. In *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1193 (11th Cir.1996) (citation omitted), rev'd, 120 F.3d 1390 (1997), rev'd on other grounds, 526 U.S. 629 (1999), the court noted how schools have important differences with workplaces, including how "the ability to control and influence behavior exists to an even greater degree in the classroom", "damage caused by sexual harassment also is arguably greater in the classroom", "greater and longer lasting impact on its younger victims", and "it is virtually impossible for children to leave their assigned school." *Id.* at 1193. *See also Jane Doe v. Green*, 298 F. Supp. 2d 1025, 1037 (D-Nev., 2004) (limiting *Davis* to peer to peer harassment); *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226–27 (7th Cir. 1997)("Schools are charged with acting *in loco parentis*, while employers owe no such duty to their employees.").

Unlike *Cruzan*, in this case Student A is officially authorized to enter every male restroom (and locker room and shower) in the school while other students have no refuge. ER 89, 92, 97, 113, 121-122. Arguing that no student plaintiff "has alleged a single specific instance of harassment or improper use of District facilities" (ER 343) begs the question whether sharing facilities is "improper" in the first instance just because it is specifically authorized by the District, and it overlooks students' reasonable apprehensions. *Supra*, pp. 5, 33; *Infra*, pp. 37, 41.

Appellees also apparently argue that until there is an incident, the court should defer to their policy choice, leaving appellants no recourse. It is not appropriate to defer to the judgments of school officials under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), in this specific context. ER 33-34, 337. Such deference where student privacy, dignity and safety are at issue, and where the record reflects the community has taken vigorous exception to Dallas' Student Safety Plan, transgresses constitutional standards. ER 33-34. *See also* ER 92-92, 111-114, 120-121.

The harassing environment based on sex is severe and offensive.

Dallas relies on cases saying that "a student's use…that corresponds to gender identity is not severe, pervasive and objectively offensive." ER 343. The record and case law beg to differ.

"[I]n order for conduct to constitute harassment under a 'hostile environment' theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 205 (3d Cir. 2000). As argued above, most jurisdictions even now agree that employers who permit members of the opposite sex into privacy facilities create a hostile and sexually harassing environment (*Supra*, pp. 18-21); the same reasoning applies even more to high school students when a school officially authorizes opposite-sex access

to school privacy facilities. *Supra*, pp. 15-17.

a. The Record Shows the District's policy was viewed subjectively as harassment by the Appellants.

The record herein leaves no doubt that student Appellants subjectively viewed the District's practice as harassment. *See* ER 72-74, 80-81, 90-91, 94-99, 120. In fact, they have been forced to either continue to subject themselves to sexual harassment when using multi-user facilities or to opt to leave the harassing situation and give up the provision of educational services covered by Title IX. *Id.*

b. The practice objectively subjects Appellants and other students to sexual harassment.

> [T]he objective prong of this inquiry must be evaluated by looking at the 'totality of the circumstances.' 'These may include . . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Saxe, 240 F.3d at 205 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). These standards have been imported into the Title IX context, so courts have restated the "work performance" phrase to fit harassment in the education setting that "so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities." *Dejohn v. Temple Univ.,* 537 F.3d 301, 316 n.14 (3rd Cir. 2008) (quoting *Saxe*, 240 F.3d at 205-06).

Conduct need not be *both* severe *and* pervasive; one or the other suffices.

Castleberry v. STI Group, 863 F.3d 259, 264 (3rd Cir. 2017) (specifically clarifying the correct standard is "severe *or* pervasive"). "Indeed, the distinction 'means that severity and pervasiveness are alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive." *Id.* Both are present here.

The mental state or motive of the opposite-sex person entering the privacy facility is irrelevant. *See Lewis v. Triborough Bridge & Tunnel Auth.*, 31 F. App'x 746 (2d Cir. 2002)(a company created a hostile sexual environment when it failed to prevent male cleaners inside the women's locker room while female employees were changing clothes). *See also Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1422 (N.D. Ill. 1984) ("privacy would be invaded" by permitting employees to clean restrooms while members of the opposite sex are present even though the cleaners had no motive other than to do their job). In *Norwood*, an expert testified that permitting opposite sex entry would constitute an "extreme" violation of privacy by their presence in that facility, and "would cause embarrassment and increased stress in both male and female washroom users." *Id.* at 1417.

The forced intermingling of sexes in school privacy facilities is equally, if not more, a severe sexually harassing environment than intermingling adults in commercial privacy facilities, and a reasonable student would find the environment

created by the school hostile and harassing. *People v. Grunau*, 2009 WL 5149857 at *3 (a teenage girl would "unhesitatingly be shocked, irritated, and disturbed" because a girls locker room "by definition is to be used exclusively by girls and where males are not allowed"). The same is true for restrooms. A person's right to bodily privacy does not spring into existence, or cease to exist, depending on what another person believes about the nature of their own internal sense of "gender identity."

c. The harassment is severe.

The protections offered by requiring sex-specific privacy facilities in 34 C.F.R. § 106.33 no longer exist at Dallas High School. Indeed, this creates an ongoing environment that is objectively offensive because a reasonable person would find the practice of allowing students to use the opposite sex facilities to be hostile, threatening, and humiliating--an assessment backed up by 34 C.F.R. § 106.33.

The *EEOC Policy Guidance on Current Issues of Sexual Harassment* recites that the "Commission believes that a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant."[10] Surely

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[10] https://www.eeoc.gov/policy/docs/currentissues.html.

if a pinup picture constitutes harassment, there can be no question that officially authorizing members of the opposite sex to be present where students are disrobing or using the bathroom creates a more harassing environment.

d. The harassment effectively denies access to school resources.

As noted above, a school is responsible for harassment that "so undermines and detracts from the victims' educational experience, that [he or she is] effectively denied equal access to an institution's resources and opportunities." *Dejohn v. Temple University*, *supra*, 537 F.3d at 316 n.14 (quoting *Saxe*, 240 F.3d at 205-06). That is the case here because Dallas' policy now dictates that Appellants can only use the locker rooms, showers, and multi-user restrooms if they are willing to share these spaces with persons of the opposite sex.

Dallas argues that there is no Title IX claim available to Appellants because those who elect to use single-user facilities cannot say that those facilities are not comparable. ER 344. Comparable facilities are not the issue in this case, but rather *access* to comparable facilities on an equal basis. ER 360-361. With no factual basis, Dallas asserted plaintiffs were actually offered and rejected this accommodation. ER 344. *Contra*: ER 120-121. The fallacy of Dallas' logic becomes more apparent when the record reflects Dallas High School's principal made the same offer to Student A, who eventually rejected it, and the Student Safety Plan ensued. ER 89, 360-361. Why it is permissible to compel plaintiffs and others to use single-user facilities, and

it is not permissible to require Student A to use single-user facilities, is not evident from the record.

Nor may the court require victims to remove themselves from the environment. In an analogous situation, a school that responded to allegations of harassment by moving the victim to a different class rather than addressing the harassment, violated Title IX. *See Harrison v. Clatskanie Sch. Dist., supra*, USDC-Or Case No. 3:13-cv-01837-ST (2015); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

The record shows student Appellants avoid using the restroom as much as possible. *See* ER 90-91, 94-99, 121. Student plaintiffs have more than satisfied their initial burden of showing elements of sexual harassment and denial of access to school resources under Title IX.

IV. THE DISTRICT COURT ERRED IN FAILING TO RECOGNIZE AND PROTECT FUNDAMENTAL RIGHTS OF PARENTS.

The district court, as well as Appellees, acknowledges a long line of well-established constitutional and statutory authorities supporting parents' fundamental right to direct the care, education and upbringing of their children, then limits those rights based on inapposite cases involving curriculum matters. *See* ER 59-60, 338-339, relying on *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir 2003) (referring to "what his or her child will or will not be *taught*"). *See also Fields v. Palmdale Sch.*

Dist., 427 F.3d 1197 (9th Cir. 2005). In so doing, the court eviscerates fundamental parental rights, in effect substituting Ninth Circuit's judgments outside their context for controlling Supreme Court case authority. Such analysis also invites the court and appellees to dismiss plaintiffs' views about privacy as "idiosyncratic" under *Fields v. Palmdale Sch. Dist.*, *supra*, 427 F.3d at 1206.

As noted in briefing by the parties on Dallas' motion to dismiss (ER 338, 355-356), a long line of authority dating back to 1923 upholds the fundamental right of parents to direct the education and upbringing of their children. *Meyer v. Nebraska*, 262 U.S. 390) (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Moore v. Cleveland*, 431 U.S. 494 (1977); *Troxel v. Granville*, 530 U.S. 57 (2000). As the court recited in *Pierce*:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. at 535, quoted with approval in *Wisconsin v. Yoder*, 406 U.S. at 233 and *Troxel v. Granville*, 530 U.S. at 65.

The United States Supreme Court more recently described parents' liberty interest in this manner:

> The liberty interest at issue in this case – the interest of parents in the care, custody and control of their children- is perhaps the oldest of the fundamental liberty interests recognized by this court. More than 75 years ago, in *Meyer v. Nebraska* [citation omitted], we held that the "liberty" interest protected by the Due Process Clause includes the rights of parents to "establish a home and bring up children" and "*to control the education of their own.*" Two years later, in *Pierce v. Society of Sisters* [citation omitted], we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control…It is cardinal with us that *the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder*"[

Troxel v. Granville, 530 U.S. at 65-66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)(emphasis added). *See also Washington v. Glucksberg*, 521 U.S. 702, 720 (1977).

In the face of these authorities, it can scarcely be said that the "so called *Meyer-Pierce* right does not extend beyond the threshold of the school door.'" ER 59-60, 338, citing *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197. This case, unlike *Fields*, is not about curriculum; it is about conduct authorized by the school allowing opposite-sex students into privacy facilities. The Supreme Court has in fact extended parental rights "beyond the threshold of the school door" into the classroom, where students from Jehovah's Witness families could not be compelled to recite the Pledge of Allegiance:

> "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

> nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

J. Robert Jackson, *Minersville School District v.Gobitis*, 310 U.S. 586, 642 (1940), quoted with approval in W. *Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Additionally, no one would seriously suggest parents lack any means to assure their students are free from physical assault, coercive threats or criminal activity. *Harrison v. Clatskanie School District*, USDC-Or Case No. 3:13-cv-01837-ST. Even Dallas School District policies agree with that principle. *See* ER 136 ("The Dallas School District has a shared responsibility with parents/legal guardians…"); ER 140 ("The student and the student's parents or staff member who initiated the [harassment] complaint shall be notified of the findings of the investigation and, if appropriate, that remedial action has been taken."); ER 143 ("This [sexual harassment and sexual violence] policy as well as the complaint procedure will be made available to all students, parents/legal guardians of students and staff in student/parent and staff handbooks."); ER 147 ("The Board, in its commitment to providing a positive and productive learning environment will consult with parents/guardians, employees, volunteers, students, administrators and community representatives in developing this policy.")

Even in matters of curriculum, federal law and Oregon law confer on parents the right to inspect instructional materials upon request, further undercutting the

district court's unprincipled expansion of *Fields*. *See* Protection of Pupil Rights Act, 20 USC § 1232h; ORS 336.035(2). *See also* ORS 336.035(2)(allowing parents to opt their children out of comprehensive sexuality education programs); OAR 581-022-1910(1)("The school district may excuse students from a state required program or learning activity, where necessary, *to accommodate students' disabilities or religious beliefs:…* ")(emphasis added).

Incredibly, the district court opined that "It is within Parent Plaintiffs' right to remove their children from Dallas High School if they disapprove of transgender student access to facilities." ER 61. *See also* ER 339. One can only imagine the reaction if someone suggested that LGBTQ or other minority students unhappy with their educational environment can simply go elsewhere – a concept also at odds with Title IX. In effect, the court applied a special rule beyond its intended scope to achieve its desired result based on subjective gender identity in this case.

V. THE DISTRICT COURT ERRED IN FAILING TO CONDUCT STRICT SCRUTINY ANALYSIS TO DETERMINE IF A COMPELLING GOVERNMENTAL INTEREST ACCOMPLISHED BY THE LEAST RESTRICTIVE MEANS JUSTIFIED INFRINGEMENT OF APPELLANTS' FUNDAMENTAL RIGHTS.

The strict scrutiny standard requires Appellees to show that the policy serves a compelling interest and uses the least restrictive means of furthering that interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). ER 113-114. Strict scrutiny analysis

is generally required whenever the government seeks to infringe a fundamental right unless it can be said that the law at issue is a neutral law of general applicability. ER 124-125. For laws that are not neutral or generally applicable, strict scrutiny applies. *Id. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-532 (1993). *See also Stormans, Inc. v. Weisman*, 794 F.3d 1064, 1076 (9th Cir. 2015).

Compelling Government Interest

The strict scrutiny standard requires a *particularized* focus, not just the *general* assertion of a compelling state interest. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). The relevant government interest herein *cannot be* a general interest in prohibiting discrimination because that position has already been rejected by the Supreme Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573. (1995). *Hurley* also confirms the government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities", nor may they "compel affirmance of a belief with which the speaker disagrees." *Id.* at 573. *See also Cantwell v. Connecticut,* 310 U.S. 296, 303-304 (1940); *Sherbert v. Verner,* 374 U.S. 398, 402 (1963).

A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount

interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The Supreme Court has described a compelling interest as a "high degree of necessity," noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2738, 2741 (2011)(citations omitted). *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). Put another way, a compelling interest asserted must have sound evidentiary support. *Bush v. Vera*, 517 US 952, 977 (1996). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 543 (1980).

The district court acknowledged the need for strict scrutiny (ER 44), but still erred in several ways: (1) in accepting that the District's policy advances a compelling government interest without requiring Dallas and its appellee supporters to demonstrate a particularized interest; (2) in failing to analyze whether the means of accomplishing the compelling government interest was narrowly tailored; (3) in finding the school district's policy was a neutral law of general applicability; and (4) in failing to engage in hybrid rights analysis on a record that included both parental and free exercise rights, rejecting out of hand the Golly's free exercise claim.

Contrary to *Hurley*, 515 U.S. 557, the district court implicitly concluded, without analysis, that the student safety policy identified and advanced a compelling

governmental interest in eradicating discrimination and only briefly mentioned narrow tailoring. ER 46. The court thus failed to require appellees to articulate and justify the actual interest that the policy advances, which is far narrower: affirming an individual student's subjective perception of gender by officially authorizing their use of opposite-sex privacy facilities. Whether that rises to the level of a compelling interest remains in doubt.

In contrast, bodily privacy has already been recognized as a compelling governmental interest. *See, e.g., York v. Story*, 324 F.2d 450. A Pennsylvania case involving a women-only health club demonstrates the compelling nature of bodily privacy:

> [W]here there is a distinctly private activity involving exposure of intimate body parts, there exists an implied bona fide public accommodation qualification which may justify otherwise illegal sex discrimination. Otherwise . . . sex segregated accommodations such as bathrooms, showers and locker rooms, would have to be open to the public.

Livingwell, Inc. v. Pa. Human Relations Comm'n, 606 A.2d 1287, 1290 (Pa. Commw. Ct. 1992) (citing *Philadelphia v. Pa. Human Relations Comm'n*, 300 A.2d 97). Livingwell, 606 A.2d at 1291. The court continued:

> The standard for recognizing a privacy interest as it relates to one's body is not limited to protecting one where there is an exposure of an 'intimate area,' but such a right may also be recognized where one has a reasonable basis to be protected against embarrassment or suffer a loss of dignity because of the activity taking place.

Id. at 1293.

> "To hold otherwise would mean that separate changing rooms in factories, mines and construction sites where workers change from street clothes to work clothes and back and where 'intimate areas' are not exposed, would not be permitted."

Id. at 1293 n.6. As sex discrimination itself must give way to such a compelling interest, so must mere affirmation of subjective perceptions about gender.

The *Livingwell* court further reasoned that "in relation to one's body, there are societal norms, i.e., a spectrum of modesty, which one either follows or respects, and if one is required to breach a modesty value, one becomes humiliated or mortified." *Id.* at 1292. Moreover,

> *[p]rivacy interests are not determined by the lowest common denominator of modesty* that society considers appropriate. What is determinative is whether a reasonable person would find that person's claimed privacy interest legitimate and sincere, even though not commonly held.

Id. at 1293 (emphasis added).

Dallas cannot claim a legitimate interest in acting to "comply with the law" because the law (including regulations under Title IX) at the time of adoption of the Student Safety Plan clearly authorized separate sex facilities. *Supra*, pp. 14-21. Whether the law required accommodation of transgender students, including Student A, or the nature of any accommodations to be made, was being hotly debated, including at school board meetings. ER 92-93.

The foregoing cases demonstrate that anti-discrimination interests are properly limited by bodily privacy interests in the school and employment contexts, especially when the alleged state interest (personal affirmation) is novel, and the privacy concerns are enhanced due to the young age and vulnerability of students.

Narrow Tailoring/Least Restrictive Means

Even if the student safety plan arguably did advance a compelling governmental interest affirming a single student's gender identity, the district court did not properly analyze whether the broad brush, no exceptions, all-facility access policy officially authorizing the two sexes to intermingle in privacy facilities was the least restrictive means of effectuating such an interest. The only mention of narrow tailoring or least restrictive means was in the court's RFRA analysis. ER 64.

Here, the school may affirm gender identity by other alternatives that do not encroach upon privacy interests, including forming a LGBTQ student club or enforcing its nondiscrimination policies in an even-handed manner to prevent harassment and bullying problems. With respect to privacy facilities, a much more tailored solution is to provide single-user accommodations. The district court rejected the notion that the dignity rights of a transgender student could be respected by access to single-user facilities (ER 34-35), yet had no problem requiring other objecting students to do so. ER 61. If all students were given the choice to access

individualized facilities, no stigma would attach to a self-identifying transgender student (or any other student) using them, and everyone's privacy would be preserved. *See* ER 34-35.

Neutral Law of General Applicability

The Student Safety Plan is neither a neutral law, nor a law of general applicability, that meets the standards of strict scrutiny. ER 124-125, 346. The district court erred in deciding otherwise. ER 54. Even worse, the district court's Opinion and Order conspicuously ignored hybrid rights analysis, which also requires strict scrutiny as the proper standard of review. ER 53-54.

As to neutrality, Dallas' own argument betrays the lack of neutrality when it says "the Student Safety Plan was adopted in order to support *a* District student…" ER 346 (emphasis added). *See also* ER 88. True neutrality would be demonstrated by making the same accommodation to any student to use single-user facilities rather than giving one student access to opposite-sex facilities they choose at the expense of other students. Similarly, a policy implemented for a single student is not generally applicable unless the District is prepared to concede that the Student Safety Plan in fact opens the door for anyone to claim the right to use any facilities, so it applies to more than one student. If it does, the impact of the Student Safety Plan extends far beyond the students of Dallas High School. If the policy is *not* so

expansive, it suffers from being under-inclusive because it does not benefit everyone with similar preferences to use certain facilities, again failing the narrow tailoring standard. *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978).

Hybrid Rights

Where, as here, plaintiffs allege multiple fundamental rights arising under the First and Fourteenth Amendments (bodily privacy, parental rights and free exercise rights), hybrid rights analysis requires strict scrutiny as well. *Employment Division v. Smith*, 494 U.S. 872, 882 (1990). *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). *See also Leebaert v. Harrington*, *supra*, 332 F.3d at 143 (distinguishing First Circuit rejection of "hybrid rights" from contrary holdings in the First, Ninth, Tenth and DC Circuits).

The hybrid rights analysis has never been fully developed since its recognition in *Employment Division v. Smith*, 494 U.S. 872 (1990), where the court considered "…the Free Exercise Clause in conjunction with other constitutional protections." *Id.* at 881. Admittedly, *Smith* remains controversial. *See, e.g. City of Boerne v. Flores*, 521 U.S. 507, 547 (1997)(O'Connor dissenting); 565 (Souter dissenting); 566 (Breyer dissenting). *See also Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1734 (2018)(Gorsuch and Thomas concurring). Even so, the Supreme Court did not repudiate the application of strict scrutiny in "these

hybrid situations." *Employment Division v. Smith*, 494 U.S. at 882, quoted with approval in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 200 (2012)(Alito concurring). The Ninth Circuit also follows the hybrid rights doctrine. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999).

In addition to the fundamental privacy rights of students and the fundamental rights of parents discussed above, the district court dismissed the Golly family's free exercise claim because it deemed the policy to be a neutral law of general applicability, and because it had already dismissed the parental rights claim. ER 54, 62-63. In so doing, the district court failed to undertake any strict scrutiny analysis (including identification of a compelling governmental interest) before reaching its erroneous conclusion. *See* ER 63, n. 10.

It also bears noting that the lower court rejected Appellants' free exercise and parental rights claims based on *Fields v. Palmdale School District*, 427 F.3d at 1202-1203, even though no First Amendment issues were raised in that case. *Id.* at 1206, fn 7 ("We offer no comment as to any First Amendment issues that may arise with any of these matters.")

Because the current policy burdens fundamental privacy rights, serves no identified compelling government interest, does not employ the least restrictive

means, is not neutral or generally applicable, and it fails to account for hybrid rights, it fails strict scrutiny, and the district court's judgment must be reversed.

VI. THE DISTRICT COURT ERRED IN FAILING TO ALLOW PLAINTIFFS LEAVE TO REPLEAD.

As recited in Dallas' motions to dismiss (ER 333-334) and Appellants' response (ER 350), plaintiffs agreed to replead to dismiss Lindsay Golly, to include allegations concerning Nicole Lillie's involvement in the case inadvertently omitted, and to withdraw claims for damages brought by plaintiffs AG and TF. On that record, the district court conspicuously misstated Appellants' position, saying "... the parties agree that Plaintiff Nicole Lillie should be dismissed; while her name is in the case caption, she is not included in any of the Complaint's allegations." ER 14.

Apart from the clear misstatement of the record as to Nicole Lillie, the district court precipitously denied leave for Appellants to file an amended complaint and entered a judgment of dismissal in favor of Appellees with prejudice with the words "[...] that Plaintiffs cannot plausibly re-allege their claims and that any amendment would be futile.". ER 65. Dismissal without granting leave to amend is reversible error unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment. *Polich*, 942 F.2d 1467, 1472 (9th Cir 1991)(emphasis added).

Under *Polich,* the district court erred in dismissing Appellants' complaint without leave to replead, and its judgment should be reversed.

At the motion to dismiss stage, the complainants' allegations are presumed true. *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). ER 15. The purpose of a hearing on a motion to dismiss is for the district court to examine the sufficiency of the pleadings. "[F]or a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.,* 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). The court, however, need "not assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Id.* "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." Id. at 555.

Plaintiffs' 65-page detailed complaint (not including numerous exhibits) certainly exceeded both the *Twombly* and *Iqbal* standards set forth above because Plaintiffs provided more than enough information to Defendants to apprise them of the allegations. Appellants' claims were not conclusory; rather, they were extensive, well-articulated statements of fact that clearly pleaded claims for relief.

Leave to amend should be granted if underlying facts provide proper grounds for relief, or if the complaint can be saved by amendment. *Balistreri v. Pacifica Police Dep't*, 901 F2d 696, 701 (9th Cir 1988). Further, this court has reversed a district court's dismissal of a complaint insofar as it denied leave to amend because the Court could "conceive of facts" that would render plaintiff's claim viable and could "discern from the record no reason why leave to amend should be denied." *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1111 (9th Cir 1975).

Here, a cursory statement at the end of a 56-page opinion dismissing the Appellants' 65-page fact-intensive complaint with prejudice where the issues are being hotly contested in multiple courts and are potentially going to be reviewed by the United States Supreme Court begs for reversal and a chance for repleading.

CONCLUSION

Appellees' policy violates the right to bodily privacy under the Fourteenth Amendment and constitutes sex discrimination within the meaning of Title IX and

Title VII. The rationale for separate privacy facilities is recognizing physical differences between the two sexes, and importing "gender identity" into "sex" eliminates that distinction. Moreover, the Student Safety Plan undermines fundamental parental rights and other rights requiring proof of a compelling governmental interest and narrow tailoring to accomplish that compelling interest. The district court's decision does not meet the standards of strict scrutiny, and it wrongly denied Appellants an opportunity to replead.

Appellants respectfully request that the District Court be reversed.

Respectfully submitted this 29th day of November, 2018.

Herbert G. Grey, OSB No. 810250
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
Telephone: 503-641-4908
Email: herb@greylaw.org

Ryan Adams
181 N. Grant Street, Suite 212
Canby, OR 97013
Telephone: 503-266-5590
Email: ryan@ruralbusinessattorneys.com

Of Attorneys for Appellants

STATEMENT OF RELATED CASES

No cases related to this appeal are currently pending within the meaning of Circuit Rule 28-2.6.

DATED: November 29, 2018.

s/ Herbert G. Grey

Herbert G. Grey, OSB No. 810250

Of Attorneys for Appellants

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-35708

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [13,512] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is [13,512] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/Herbert G. Grey

Date: Nov 29, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

Ninth Circuit Case No. 18-35708

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 29, 2018.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

s/ Herbert G. Grey

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 29, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first class U.S. Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants.

[INSERT ADDRESSEES, IF ANY]

s/ Herbert G. Grey

APPENDIX TO APPELLANTS' OPENING BRIEF
Case No. 18-35708

CONSTITUTIONAL PROVISIONS

Amendment I, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, United States Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

****

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTES

20 U.S.C. §1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the

participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(Pub. L. 92–318, title IX, §901, June 23, 1972, 86 Stat. 373; Pub. L. 93–568, §3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94–482, title IV, §412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96–88, title III, §301(a)(1), title V, §507, Oct. 17, 1979, 93 Stat. 677, 692; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095.)

20 U.S.C. §1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

(Pub. L. 92–318, title IX, §907, June 23, 1972, 86 Stat. 375.)

ORS 30.865 Action for invasion of personal privacy; attorney fees. (1) A plaintiff has a cause of action for invasion of personal privacy if the plaintiff establishes any of the following:

(a) The defendant knowingly made or recorded a photograph, motion picture, videotape or other visual recording of the plaintiff in a state of nudity without the consent of the plaintiff, and at the time the visual recording was made or recorded the plaintiff was in a place and circumstances where the plaintiff had a reasonable expectation of personal privacy.

(b) For the purpose of arousing or gratifying the sexual desire of the defendant, the defendant was in a location to observe the plaintiff in a state of nudity without the consent of the plaintiff, and the plaintiff was in a place and circumstances where the plaintiff had a reasonable expectation of personal privacy.

(c) For the purpose of arousing or gratifying the sexual desire of any person, the defendant knowingly:

(A) Made or recorded a photograph, motion picture, videotape or other visual recording of an intimate area of the plaintiff without the consent of the plaintiff; or

(B) Viewed an intimate area of the plaintiff without the consent of the plaintiff.

(d) Without the consent of the plaintiff, the defendant disseminated a photograph, motion picture, videotape or other visual recording of the plaintiff in a state of nudity, and the defendant knew that at the time the visual recording was made or recorded the plaintiff was in a place and circumstances where the plaintiff had a reasonable expectation of personal privacy.

(2) A plaintiff who prevails in a cause of action for invasion of personal privacy under this section is entitled to receive:

(a) Compensatory damages; and

(b) Reasonable attorney fees.

(3) An action under this section must be commenced not later than two years after the conduct that gives rise to a claim for relief occurred.

(4) The remedy provided by this section is in addition to, and not in lieu of, any other claim for relief that may be available to a plaintiff by reason of conduct of a defendant described in subsection (1) of this section.

(5) The provisions of subsection (1)(a) and (d) of this section do not apply to a photograph, motion picture, videotape or other visual recording of a person under 12 years of age if:

(a) The person who makes, records or disseminates the visual recording is the father, mother, sibling, grandparent, aunt, uncle or first cousin, by blood, adoption or marriage, of the person under 12 years of age; and

(b) The visual recording is made, recorded or disseminated for a purpose other than arousing or gratifying the sexual desire of the person or another person.

(6) As used in this section:

(a) "Intimate area" means:

(A) Undergarments that are being worn by a person, are covered by clothing and are intended to be protected from being seen; and

(B) Any of the following that are covered by clothing and are intended to be protected from being seen:

(i) Genitals;

(ii) Pubic areas; or

(iii) Female breasts below the point immediately above the top of the areola.

(b) "Made or recorded a photograph, motion picture, videotape or other visual recording" includes, but is not limited to, making or recording or employing, authorizing, permitting, compelling or inducing another person to make or record a photograph, motion picture, videotape or other visual recording.

(c) "Nudity" means any part of the uncovered or less than opaquely covered:

(A) Genitals;

(B) Pubic area; or

(C) Female breast below a point immediately above the top of the areola.

(d) "Places and circumstances where the plaintiff has a reasonable expectation of personal privacy" includes, but is not limited to, a bathroom, dressing room, locker room that includes an enclosed area for dressing or showering, tanning booth and any area where a person undresses in an enclosed space that is not open to public view.

(e) "Public view" means that an area can be readily seen and that a person within the area can be distinguished by normal unaided vision when viewed from a public place as defined in ORS 161.015. [2005 c.544 §1; 2009 c.877 §3; 2013 c.1 §3]

ORS 163.700 Invasion of personal privacy in the second degree. (1) Except as provided in ORS 163.702, a person commits the crime of invasion of personal privacy in the second degree if:

(a)(A) For the purpose of arousing or gratifying the sexual desire of the person, the person is in a location to observe another person in a state of nudity without the consent of the other person; and

(B) The other person is in a place and circumstances where the person has a reasonable expectation of personal privacy; or

(b)(A) The person knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person's intimate area without the consent of the other person; and

(B) The person being recorded has a reasonable expectation of privacy concerning the intimate area.

(2) As used in this section and ORS 163.701:

(a) "Intimate area" means nudity, or undergarments that are being worn by a person and are covered by clothing.

(b) "Makes or records a photograph, motion picture, videotape or other visual recording" includes, but is not limited to:

(A) Making or recording or employing, authorizing, permitting, compelling or inducing another person to make or record a photograph, motion picture, videotape or other visual recording.

(B) Making or recording a photograph, motion picture, videotape or other visual recording through the use of an unmanned aircraft system as defined in ORS 837.300, even if the unmanned aircraft system is operated for commercial purposes in compliance with authorization granted by the Federal Aviation Administration.

(c) "Nudity" means any part of the uncovered or less than opaquely covered:

(A) Genitals;

(B) Pubic area; or

(C) Female breast below a point immediately above the top of the areola.

(d) "Places and circumstances where the person has a reasonable expectation of personal privacy" includes, but is not limited to, a bathroom, dressing room, locker room that includes an enclosed area for dressing or showering, tanning booth and any area where a person undresses in an enclosed space that is not open to public view.

(e) "Public view" means that an area can be readily seen and that a person within the area can be distinguished by normal unaided vision when viewed from a public place as defined in ORS 161.015.

(f) "Reasonable expectation of privacy concerning the intimate area" means that the person intended to protect the intimate area from being seen and has not exposed the intimate area to public view.

(3) Invasion of personal privacy in the second degree is a Class A misdemeanor. [1997 c.697 §1; 2001 c.330 §1; 2009 c.877 §1; 2013 c.1 §11; 2015 c.321 §§1,4; 2016 c.72 §11]

ORS 163.701 Invasion of personal privacy in the first degree. (1) Except as provided in ORS 163.702, a person commits the crime of invasion of personal privacy in the first degree if:

(a)(A) The person knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person in a state of nudity without the consent of the other person; and

(B) At the time the visual recording is made or recorded the person being recorded is in a place and circumstances where the person has a reasonable expectation of personal privacy; or

(b) The person violates ORS 163.700 and, at the time of the offense, has a prior conviction for:

(A) Invasion of personal privacy in any degree, public indecency, private indecency or a sex crime as defined in ORS 163A.005; or

(B) The statutory counterpart of an offense described in subparagraph (A) of this paragraph in another jurisdiction.

(2)(a) Invasion of personal privacy in the first degree is a Class C felony.

(b) The Oregon Criminal Justice Commission shall classify invasion of personal privacy in the first degree as crime category 6 of the sentencing guidelines grid of the commission.

(3) The court may designate invasion of personal privacy in the first degree as a sex crime under ORS 163A.005 if the court finds that the circumstances of the offense require the defendant to register and report as a sex offender for the safety of the community. [2015 c.645 §2]

ORS 336.035 Required courses of study; supplemental courses; district courses; courses concerning sexually transmitted diseases. (1) The district school board shall see that the courses of study prescribed by law and by the rules of the State Board of Education are carried out. The board may establish supplemental courses that are not inconsistent with the prescribed courses and may adopt courses of study in lieu of state courses of study upon approval by the Superintendent of Public Instruction.

(2) Any district school board may establish a course of education concerning sexually transmitted diseases including recognition of causes, sources and symptoms, and the availability of diagnostic and treatment centers. Any such course established may be taught to adults from the community served by the individual schools as well as to students enrolled in the school. The board shall cause the parents or guardians of minor students to be notified in advance that the course is to be taught. Any such parent or guardian may direct in writing that the minor child in the care of the parent or guardian be excused from any class within the course. Any parent or guardian may inspect the instructional materials to be used before or during the time the course is taught.

(3) The district school board shall coordinate the course provided in subsection (2) of this section with the officials of the local health department and the Superintendent of Public Instruction. Teachers holding endorsements for health education shall be used where available. No teacher shall be subject to discipline or removal for teaching or refusing to teach courses concerning sexually transmitted diseases. [Formerly 336.225; 1967 c.67 §26; 1967 c.200 §6; 1973 c.565 §1; 1993 c.45 §74; 2005 c.209 §21]

REGULATIONS

34 CFR § 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex. (Authority: Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

34 CFR § 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

OAR 581-022-1910
Exemptions

(1) The school district may excuse students from a state required program or learning activity, where necessary, to accommodate students' disabilities or religious beliefs:

(a) Approval of the exemption shall be based upon and shall include:

(A) A written request from the student's parent or guardian or the student, if the student is 18 years of age or older or a legally emancipated minor, listing the reasons for the request and a proposed alternative for an individualized learning activity which substitutes for the period of time exempt from the program and meets the goals of the learning activity or course being exempt;

(B) An evaluation of the request and approval by appropriate school personnel (the alternative should be consistent with the student's educational progress and career goals as described in OARs 581-022-1670 and 581-022-1510).

(b) Following approval by the district school board, and upon completion of the alternative, credit shall be granted to the student.

(2) The school district may approve and grant credit to a student for the alternative to a state required program or learning activity if the procedures in section (1) of this rule are followed.

(3) Subsections (1) and (2) of this rule do not apply to exemption from participating in Oregon's statewide summative assessments, which are defined as statewide assessments used to meet both participation and performance requirements for state and federal systems accountability. Exemption from Oregon's statewide summative assessments is instead governed by Section 2, chapter 519, Oregon Laws 2015 (Enrolled House Bill 2655). ODE will annually publish notice about Oregon's statewide summative assessments and an opt-out form as required under by Section 2, chapter 519, Oregon Laws 2015 (Enrolled House Bill 2655).

(4) Subsection (3) of this rule will sunset as of July 1, 2021.

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(Attach this certificate to the end of each paper copy brief)

Ninth Circuit Case No. 18-35708

I, Herbert G. Grey, certify that this brief is identical to the version submitted electronically on November 29, 2018.

DATED: November 29, 2018

Signature: s/ Herbert G. Grey