No. 10-30378

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JANE DOE, as next friend to her minor
Daughters, JOAN DOE and JILL DOE,

Plaintiffs-Appellants

v.

VERMILION PARISH SCHOOL BOARD, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

REGULATIONS:

REGULATIONS (continued): **PAGE**

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QUESTIONS PRESENTED

1. Whether the district court erred in concluding that the school board's creation of single-sex classes for boys and girls was consistent with the Department of Education's Title IX regulations, 34 C.F.R. 106.34, as amended in 2006, which prohibit single-sex classes except under specific, limited circumstances.

2. Whether the district court erred in concluding that the single-sex classrooms did not violate the Equal Protection Clause.

INTEREST OF THE UNITED STATES

The United States is authorized under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, to bring actions against public schools for violations of the Fourteenth Amendment's Equal Protection Clause, including cases alleging discrimination on the basis of sex. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681, states 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." The United States Department of Education (ED) administers federal financial assistance to education programs and activities and is authorized by Congress to effectuate Title IX. ED has issued regulations that generally prohibit recipients of federal financial assistance from offering single-sex classes, except in limited circumstances and subject to specific restraints. The Department of Justice, through the Civil Rights Division, coordinates the implementation and enforcement of Title IX by ED and other executive agencies, Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980), and can enforce Title IX in federal court upon referral of a case from an executive agency.

STATEMENT OF THE CASE

Plaintiffs Jane Doe and her two minor daughters filed suit against the Vermilion Parish School Board (School Board or Board) and various school officials, alleging that the Board unlawfully segregated girls and boys into separate classrooms at the Rene A. Rost Middle School in Kaplan, Louisiana, during the 2009-2010 school year. The plaintiffs alleged that the single-sex classes violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, ED's Title IX regulations, and other federal statutes and regulations. On April 19, 2010, the district court denied plaintiffs' motion for a temporary restraining order (TRO) and preliminary injunction, and ordered an implementation plan for the school's single-sex classes for the 2010-2011 school year. Plaintiffs appealed.

A. Facts

1. In January 2008, David Dupuis, the principal of the Rene A. Rost Middle School, met with the school superintendent to obtain approval for Dupuis' proposal to conduct some single-sex classes at the school during the 2008-2009 school year. Dupuis explained that he wanted to conduct the single-sex classes to form the basis for his dissertation in his Doctor of Education program at Nova Southeastern University. The School Board approved the proposal, and eighth grade students were assigned first to coeducational classes, and then to single-sex classes, for Math and English for alternating 12-week periods. Although Dupuis

told the School Board that participation in the plan would be voluntary, in that all parents would be allowed to decide if their child would participate, neither the students nor their parents were given consent forms. See generally USCA5 2089-2091, 2150-2152, 2371-2372, 2399-2400.[1]

On June 4, 2009, Dupuis presented the results of his dissertation to the School Board. USCA5 2374, 2440. He told the Board that the single-sex classes resulted in significant improvements in academic performance and fewer disciplinary problems. USCA5 2557-2559, 2797-2798. He also cited the results of a parents' survey he said he sent to parents on single-sex education; he claimed that the survey demonstrated that 95% of the parents wanted single-sex classes in all subjects. USCA5 2559, 2611, 2688.

Dupuis then requested permission from the School Board to adopt single-sex classes for all grades at the middle school for the 2009-2010 school year. USCA5 23, 26, 31-32. Under the plan, there would be five classes for each of the core courses within each grade – two all-boy classes, two all-girl classes, and one coeducational class. USCA5 2617-2619. Dupuis stated that the coeducational class was to consist of those students who fell within various "special needs" programs. USCA5 2618-2622. Parents and students were not to be given the

[1] Citations to "USCA5 __" refer to the page numbers in the sequentially paginated record on appeal.

option to choose single-sex or coeducational classes. USCA5 2122-2123, 2221, 2226. The School Board approved the plan. USCA5 2378-2379.

On August 4, 2009, the school held a parent orientation meeting at which Dupuis informed the parents for the first time that for the upcoming school year the students (except those with special needs) would be segregated by gender in their core classes. USCA5 31-32, 1862, 2090, 2874. On August 12, plaintiffs' counsel contacted the School Board, asserting that the program was unlawful. USCA5 43, 2380. The School Board acknowledged that the assignment of students to single-sex classes had not been voluntary, and stated that consent letters would be sent to parents on August 17, the first day of school, permitting parents to take children out of single-sex classes. USCA5 45, 2225-2226. Those letters were sent on August 21, after the School Board approved changing the program to make it voluntary. USCA5 2124-2125. Because some parents whose children were assigned to single-sex classes chose the coeducational class, the school realigned the classes in early September. USCA5 281-282, 2124-2125. Not all parents' choices were honored. USCA5 2227-2228.

2. On September 8, 2009, plaintiffs – two girls who attend the middle school and their mother – filed suit, challenging the segregation of boys and girls in classes at the school. USCA5 20. The complaint alleged that the sex-segregated classes violate the Equal Protection Clause of the Fourteenth Amendment, the

Equal Educational Opportunities Act of 1974 (20 U.S.C. 1701 *et seq.*), Title IX, and the Title IX implementing regulations of ED (34 C.F.R. 106.34(b)), the United States Department of Health and Human Services (HSS) (45 C.F.R. 86.34), and the United States Department of Agriculture (USDA) (7 C.F.R. 15a.34). USCA5 26-30.

With regard to the Equal Protection Clause claim, plaintiffs asserted that "[b]y segregating classes by sex * * * on the basis of overbroad, imprecise, and/or inaccurate gender stereotypes and generalizations and by treating boys and girls differently and unequally, Defendants have intentionally discriminated against Plaintiffs on the basis of their sex." USCA5 37. Plaintiffs also asserted that such discrimination "is not based on an exceedingly persuasive justification or substantially related to an important state interest." USCA5 37.

With regard to the Title IX claims, plaintiffs stated that the 2006 amendments to ED's Title IX regulations permit recipients of ED funding to operate sex-segregated classes in only certain limited circumstances. USCA5 27 (citing 34 C.F.R. 106.34(b)). Plaintiffs asserted that the School Board was violating the ED regulations because it failed to ensure that enrollment in the single-sex classes was completely voluntary, as the ED Title IX regulations require, and because the School Board was not offering "substantially equal coeducational classes in the same subjects as the sex-segregated classes," also as

required under ED's regulations. USCA5 35. Plaintiffs also alleged that the School Board was violating the Title IX regulations of HHS and USDA, which prohibit single-sex academic classes except in extremely limited circumstances not applicable here. USCA5 27-28, 35.

On the same day they filed their complaint, plaintiffs filed a motion for a TRO and a preliminary injunction to enjoin the School Board from implementing the single-sex classroom plan. USCA5 50-66. In support of their motion, plaintiffs stated that the School Board's plan was based solely on the principal's use of single-sex classes at the school during the 2008-2009 school year and the conclusions he set out in his resulting dissertation on the effects of single-sex classes. USCA5 1277-1279. Plaintiffs asserted that the dissertation was based on stereotypes about the learning and developmental needs of the "average" boy and "average" girl, and therefore was insufficient to justify the sex-segregated classes under either the Equal Protection Clause or ED's Title IX regulations. USCA5 1284-1285.

3. On February 24-25, 2010, the court held an evidentiary hearing. USCA5 1845-2855. The testimony showed that the School Board's decision to adopt single-sex classes for the 2009-2010 school year was based solely on Principal Dupuis' dissertation and the benefits of the single-sex classes he told the School Board were established during the 2008-2009 school year. USCA5 2374-

2379, 2405-2406. The testimony also showed, however, and Dupuis himself acknowledged, that some of the conclusions reflected in his dissertation about the benefits of the single-sex classes during the 2008-2009 experiment were seriously flawed. USCA5 2030-2055, 2190-2193, 2210, 2296-2297, 2877. For example, in some cases, the grade point averages he used in the study did not match the grades sent home to the students on their report cards. USCA5 2035-2036, 2177. In others, the grades of some students in a coeducational class were included in the grades for single-sex classes (USCA5 2190-2193); no "F" grades in the single-sex Math and English classes were included when the report cards showed 36 "Fs" (USCA5 2183-2184); there were mathematical errors (USCA5 2035-2038, 2408); and information about the decrease in disciplinary issues in the single-sex classes was not correct (USCA5 2209-2216). The testimony also showed that Dupuis told the School Board that he conducted a parent survey on single-sex classes; although he told the School Board that a survey showed that 95% of the parents favored such classes, he had not conducted any survey at all. USCA5 2214, 2291. Finally, the testimony showed that, prior to the adoption of the single-sex classes, none of the academic and behavior problems that Dupuis said he was seeking to remedy through single-sex classes even existed at the school; in fact, Dupuis testified that the school had been recognized for its academic achievement prior to the implementation of single-sex classes. USCA5 2219, 2265, 2281.

The parties filed additional briefs after the hearing. The School Board argued that plaintiffs failed to prove the discriminatory intent required under the Equal Protection Clause because, the School Board argued, the segregation of students into different classes by gender, in and of itself, does not establish discriminatory intent and therefore does not require the defendants to justify the segregation under heightened scrutiny. USCA5 2492. Rather, the School Board asserted, discriminatory intent requires a showing that the Board's action intended to deprive or otherwise harm students of one sex of some benefit or opportunity because of their gender. USCA5 2492-2495. The School Board also argued that its plan met the requirements for permissible single-sex classes under ED's Title IX regulations, as the classes were based on the important government objective of "more effectively address[ing] the emotional, social, academic and developmental needs of boys and girls." USCA5 2505.

Plaintiffs argued that any facially sex-based classification by a state actor – even one adopted in good faith – is subject to heightened scrutiny under the Equal Protection Clause. USCA5 2470-2474. Plaintiffs asserted that the School Board's gender-based policy was subject to heightened scrutiny because "segregating classes by sex * * * is both facially discriminatory – it divides students on the basis of sex – and intentional," and thus defendants must establish an "exceedingly persuasive justification." USCA5 2474. Plaintiffs also argued that the plan

violates ED's Title IX regulations because, *inter alia*, it was not part of an established policy to provide diverse educational opportunities and does not address particular, identified needs of the students. USCA5 2476 (addressing 34 C.F.R. 106.34(b)(1)(i)).

B. District Court's Decision

On April 19, 2010, the district court denied plaintiffs' motion and adopted a specific plan governing the school's implementation of its single-sex class requirements for the 2010-2011 school year. USCA5 2872-2879. First, the court held that the School Board had not *intentionally* discriminated against plaintiffs because the evidence did not show that the School Board "intended to cause an adverse [e]ffect on males and females" attending the school. USCA5 2876. In other words, the court held that the segregation of students into separate classes on the basis of sex does not, by itself, constitute the kind of intentional and sex-based state action that must be justified under heightened judicial scrutiny.

Second, although the court did not expressly state that it was addressing whether the program satisfied ED's Title IX regulations, the court stated, tracking those regulations, that the single-sex classes were proper "so long as the program is completely voluntary *and* there is a substantially equal co-ed opportunity available to every student." USCA5 2877. The court acknowledged that "the data contained in Principal Dupuis' dissertation (which was the basis for the program) was

extremely flawed," and that the school board "was negligent in failing to investigate and research Principal Dupuis' proposed plan for same-sex classes." USCA5 2877. But the court found these problems "immaterial." USCA5 2877. The Court stated that "[i]nstead, * * * it must focus on what is in the best interests of the children of Rene Rost in future school years, not who is to blame for the wrongful implementation of this flawed program." USCA5 2877.

The court concluded that a single-sex plan was "in the best interest of the children." USCA5 2877. The court stated that, "[t]he same-sex program at Rene Rost is proper so long as the program is completely voluntary *and* there is a substantially equal co-ed opportunity available to every student." USCA5 2877. The court then adopted and ordered the School Board to implement a plan for the single-sex classes for the 2010-2011 school year. USCA5 2877-2879. This plan requires that there be one single-sex class for boys and one for girls in each grade, as well as a coeducational class, and that the default option for students will be a coeducational class. USCA5 2878-2879. Each coeducational class should have the same gender balance as is in that grade level overall, and any parents who object to single-sex classes on "principle" can enroll their child in the nearest middle or elementary school that does not have single-sex classes. USCA5 2878-2879. Parents will be informed of the plan during the summer and given a choice of a single-sex or coeducational class. USCA5 2878.

SUMMARY OF ARGUMENT

The issue presented in this case is whether the Vermilion Parish School Board's use of single-sex classes violates Title IX, the Department of Education's Title IX single-sex classes regulations, and the Equal Protection Clause of the Constitution. As explained below, it violates all three and the district court should be directed to enjoin the implementation of these classes.[2]

Recognizing that the use of single-sex classes is an exception to the generally accepted use of coeducational classes in public education, and that the use of gender to differentiate between individuals has a history of discriminatory use, ED's regulations, issued in 2006, generally prohibit a recipient from establishing single-sex classes. The regulations provide for an exception in limited circumstances and only when the recipient meets all of the requirements of the regulations. Under ED's Title IX regulations, a recipient of federal financial assistance, like Vermilion Parish, may offer a single-sex class only after first demonstrating that the single-sex class is based on one of the two "important objectives" specified in the regulations and, in either case, that the single-gender nature of the class is substantially related to the objective. These two objectives are: (1) to improve the educational achievement of a recipient's students through

[2] We note that to the extent the single-sex classroom plan violates ED's Title IX regulations, it necessarily violates Title IX.

an established policy to provide diverse educational opportunities, or (2) to meet the particular, identified educational needs of a recipient's students. 34 C.F.R. 106.34(b)(1)(i)(A) & (B).

In this case, the record demonstrates that the School Board was unable to show that its decision to offer each single-sex class was based on one of the two objectives set forth in the regulations, thereby violating Title IX and ED's Title IX regulations. The only evidentiary support the School Board relied on was "extremely" flawed data in the principal's dissertation that was thoroughly discredited at trial. Without any evidence satisfying ED's Title IX regulations, the School Board clearly violated Title IX and those regulations.

In addition, the use of single-sex classes violated the Constitution. The district court made a serious legal error in holding that in order to subject the use of an explicitly sex-based classification to heightened judicial scrutiny, the plaintiffs must prove not only that the school district employed a sex-based classification on its face, but also that the school district's motivation in adopting the classification was to harm or deny benefits to members of one sex or the other. This is obvious legal error; the Supreme Court has established that a state actor that uses a sex-based classification is required to satisfy heightened scrutiny simply because of its use, regardless of whether it intended to harm – or benefit – one sex. Here, the fact

that the School Board adopted sex-segregated classes requires it to justify that segregation under heightened scrutiny.

Clearly, the School Board's use of single-sex classes fails to satisfy the intermediate scrutiny the Constitution requires of sex-based classifications. The use of sex-separated classes here was not supported by an important governmental interest. Indeed, the only evidence on which the Board relied for the sex-segregation was the principal's discredited dissertation. Given the lack of evidentiary support for the use here of sex-separated classes, their use violates the Constitution.

ARGUMENT

I

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SCHOOL BOARD'S SINGLE-SEX CLASSES DO NOT VIOLATE TITLE IX AND THE DEPARTMENT OF EDUCATION'S TITLE IX REGULATIONS

The district court concluded that single-sex classes do not violate ED's Title IX regulations "so long as the program is completely voluntary *and* there is a substantially equal co-ed opportunity." USCA5 2877.[3] This was error. The district court's conclusion fails to address ED's first regulatory requirement –

[3] As noted, p. 10, *supra*, the district court did not expressly state whether it was addressing ED's Title IX regulations or the Title IX regulations of HHS and USDA. The court's focus on whether the single-sex classes are voluntary and whether there is a substantially equal coeducational option, see USCA5 2877, suggests that it was addressing ED's regulations.

specifically, that the School Board is required to determine that *each* single-sex class is based on one of the two objectives set forth in the regulations, and that the single-sex nature of each class is substantially related to achieving that objective. This determination must be made *prior to* determining whether the class complies with any of the other requirements in ED's regulations for implementing single-sex classes. 34 C.F.R. 106.34(b)(1)(i); see also 71 Fed. Reg. 62,530, 62,534 (2006) (recipients must base any single-sex class on an important governmental or educational objective). Moreover, here the evidence fails to demonstrate such a valid objective.

A. ED's Regulations Require That The Use Of Single-Sex Classes Be Based On One Of The Objectives Set Forth In The Regulations

ED's Title IX regulations state that, except as otherwise provided, "a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex." 34 C.F.R. 106.34(a). In 2006, ED adopted regulations adding a new exception that would permit single-sex classes under limited circumstances. 71 Fed. Reg. 62,530. To establish single-sex classes under the 2006 ED regulations, a recipient must satisfy four requirements: (1) each single-sex class must be based on the objective of either improving educational achievement "through [an] established policy to provide diverse educational opportunities" or meeting the "particular, identified educational needs of its

students," and the single-sex nature of the class must be substantially related to the objective; (2) the implementation of single-sex classes must be "evenhanded"; (3) enrollment in each single-sex class must be "completely voluntary"; and (4) the recipient must provide "all other students, including students of the excluded sex, a substantially equal, coeducational class * * * in the same subject." 34 C.F.R. 106.34(b). These regulations adopted a case-by-case approach that generally was "informed by" the constitutional standards of intermediate scrutiny. See generally 71 Fed. Reg. at 62,533; see also discussion of the appropriate constitutional standards applicable here at pp. 25-30, *infra*.

ED's regulations thus make clear that single-sex classes are the exception rather than the rule and place the burden on recipients wishing to establish such classes to show that they have met the criteria specified in the regulations. See 71 Fed. Reg. at 62,533 (citing *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*) and *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). By referring to single-sex education as the "exception" rather than the educational rule, ED was appropriately recognizing that, both historically and currently, sex-based classifications often reflect or perpetuate stereotypes. In addition, as ED itself acknowledged in 2006 when it published the preamble, there was "a debate among educators on the effectiveness of single-sex education." 71 Fed. Reg. at 62,532.

As the Supreme Court has held, and as is required by ED's regulations, "[t]he justification [for the use of sex-separated education] must be genuine, not hypothesized or invented *post hoc* in response to litigation[,] [a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533; 34 C.F.R. 106.34(b)(4)(i); see also 71 Fed. Reg. at 62,533 (citing *VMI*). Therefore, under ED's regulations, "a recipient's failure to have a justification, *i.e.*, an important objective * * * that is genuine would be sex discrimination." 71 Fed. Reg. at 62,533. "[T]he regulations also make clear that a recipient's use of overly broad sex-based generalizations in connection with offering single-sex education would be sex discrimination." 71 Fed. Reg. at 62,534.

B. The Record In This Case Demonstrates That The Single-Sex Class Plan Implemented In 2009-2010 Violated Title IX And ED's Title IX Regulations

The record demonstrates, quite clearly, and the district court found, that the School Board's plan for single-sex classes implemented during the 2009-2010 school year failed at least two aspects of ED's Title IX regulations. The court recognized that enrollment in the single-sex classes was not voluntary and that the educational quality in the coeducational classes was not "substantially equal" to the educational quality offered in the single-sex classes. At the beginning of the 2009-2010 school year, parents and students were not given the right to choose single-sex or coeducational classes, USCA5 2122-2123, 2221, 2226, and even after the

School Board belatedly sought consent and realigned the classes, not all choices were honored, USCA5 2227-2228. Further, the coeducational class comprised those students who fell within various "special needs" programs, USCA5 2221-2225, so the educational programs in those classes obviously did not match the programs offered in the single-sex classes. For these reasons, the 2009-2010 plan for single-sex classes did not satisfy ED's Title IX regulations and the court erred in denying plaintiffs' motion for injunctive relief.

There were, in addition, other critical ways in which the 2009-2010 plan violated ED's Title IX regulations, which the district court did not address. First, under ED's regulations, the recipient must meet the regulatory requirements for *each* single-sex class; here, the School Board made a wholesale decision to create single-sex classes in every grade without identifying an important interest for any of the classes. Second, the School Board did not establish that any of the single-sex classes were based on one of the "important objectives" set forth in the regulations, *i.e.*, to "improve the educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities," or "to meet the particular, identified educational needs of its students." 34 C.F.R. 106.34(b)(1)(i)(A) & (B).

First, the record reflects, and the district court found, that the single-sex classes were adopted for 2009-2010 because of the principal's interest in single-sex

education, his single-sex "experiment" at the school during the 2008-2009 school year, his resulting "dissertation" addressing the purported academic and disciplinary success of single-sex classes during that year, and his request to the School Board that, given his description of the positive educational results of the experiment, the Board should adopt single-sex classes for the 2009-2010 school year. USCA5 1105-1106, 2440-2441, 2877. As the court found, however, the data contained in his dissertation were "extremely flawed," USCA5 2877, and in many instances were entirely invented.[4] Because the dissertation was so flawed, and there is no other evidence supporting the School Board's decision to adopt single-sex classes, there is nothing in the record justifying the single-sex classes.[5]

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[4] The principal's dissertation contained results to five "research questions" that addressed the effects of single-sex classes on boys' and girls' English and Math grades and disciplinary referrals in those classes. USCA5 723-727. In all cases, the dissertation concluded that the single-sex classes showed positive results. USCA5 723-727. It was the underlying data to these results that the district court concluded were "extremely flawed." USCA5 2877.

[5] During the course of the litigation, the School Board cited to a 2005 study by ED reviewing the literature on single-sex versus coeducational schooling. See USCA5 1201-1202 (citing *Single-Sex Versus Coeducational Schooling: A Systematic Review*, U.S. Department of Education, Policy and Program Studies Service (2005) (available at http://www2.ed.gov/about/offices/list/opepd/ppss/reports.html#singlesex)). The 2005 review concluded that "[a]s in previous reviews, the results are equivocal," and that for "many outcomes, there is no evidence of either benefit or harm." *A Systemic Review* at x. The School Board acknowledged, in seeking to exclude evidence from plaintiffs' expert witness on single-sex education, that this review does not fully support the conclusion that single-sex is beneficial, USCA5 1201-

(continued…)

Therefore, the School Board has not advanced the kind of objective necessary to justify its use of single-sex classes that ED's Title IX regulations require. As ED has explained, the "regulations make clear that a recipient's failure to have a justification * * * that is genuine would be sex discrimination." 71 Fed. Reg. at 62,533. ED's preamble and its regulations make exceedingly clear that, as here, without evidentiary support, the use of single-sex classes is based on nothing more than stereotypes or generalizations and is not permissible.[6]

More particularly, the School Board cannot establish that the single-sex classes were adopted in furtherance of either of the objectives set forth in the regulations. The regulations state that single-sex classes are potentially permissible as part of an effort to improve educational achievement though an

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(continued…)
1202, nor would it demonstrate how it might be beneficial in Vermilion Parish. The *post hoc* reference to that review is thus a far cry from what is necessary to meet the standards set forth in ED's regulation.

[6] The fact that the members of the School Board and the Superintendent apparently were misled by the principal about his proof of the benefits of single-sex classes does not provide a defense to a Title IX violation. The members of the School Board obviously were aware that they were creating sex-based distinctions among students when approving the use of sex-separated classes. In doing so, the Board obviously had approved a policy that implicated Title IX and ED's Title IX regulations, both of which apply to sex-based action taken by recipients of federal financial assistance. The fact that the members of the School Board may have acted in good faith in creating explicitly sex-based distinctions is not a defense to a court's finding that the implementation of the policy violated Title IX and ED's regulations.

established policy to provide students a "diversity of educational options." 34 C.F.R. 106.34(b)(1)(i)(A); 71 Fed. Reg. at 62,531. However, ED's regulations and preamble make clear that if this form of "diversity" is offered as the basis for single-sex classes, there must actually be a diversity of educational options of which single-sex classes is only one. ED made clear that "diversity" to support single-sex classes cannot be supported by only offering single-sex classes. 71 Fed. Reg. at 62,534.

In this case, the school superintendent admitted that the School Board did not have an established policy to provide diverse education opportunities. USCA5 2429-2431; see 34 C.F.R. 106.34(b)(1)(i)(A). He testified that the only education policy he was aware of was the "mission statement" on the School Board's website, USCA5 2429-2431, which did not address diversity in educational opportunities at all.[7] ED has explained that a school district cannot satisfy the Title IX regulations by "establish[ing] a single-sex class and [then] declar[ing] that the class by definition promotes diversity and is therefore consistent with the[] regulations," 71 Fed. Reg. at 62,535, which is precisely what was done here.

[7] See http://www.vrml.k12.la.us/mission.htm. A similar "mission" statement, prepared during the litigation to answer plaintiffs' interrogatories, also does not address diversity of educational opportunities. See USCA5 787-788, 1203, 1218-1219.

These deficiencies make perfectly clear that the 2009-2010 use of single-sex classes violated Title IX and ED's Title IX regulations.

The regulations also state that single-sex classes may be part of an effort to meet the particular, identified educational needs of its students. 34 C.F.R. 106.34(b)(1)(i)(B). However, apart from the principal's "extremely flawed" dissertation, there was no evidence presented that the single-sex classes were in fact implemented to meet the "particular, identified educational needs" of *any* students at the middle school. According to ED's regulations, to establish this "important objective," a school board must "evenhandedly identify the particular educational needs of students of both sexes," and such needs must be "evidenced by limited or deficient educational achievement." 71 Fed. Reg. at 62,535. Moreover, "[t]his determination must be made on a nondiscriminatory basis and should include nondiscriminatory consideration of whether a single-sex class would meet the particular needs identified for *its* male and female students." *Ibid.* (emphasis added).

The record reflects that, prior to the adoption of the single-sex classes and contrary to Principal Dupuis' assertions to the School Board, there were no academic or behavior problems at the school; to the contrary, Dupuis testified that the school had been recognized for its academic achievement. USCA5 2219, 2265, 2281. The principal's admissions about his "dissertation," and the court's findings

that there were no individualized educational or behavioral issues identified, provides additional evidence that the School Board violated Title IX and ED's Title IX regulations in 2009-2010.

C. The Court-Ordered Plan For The 2010-2011 School Year Violates Title IX And ED's Title IX Regulations

The district court, recognizing some of the deficiencies in the 2009-2010 plan, appears to have tried to fix them in adopting a plan for single-sex classes in the middle school for the 2010-2011 school year. See USCA5 2877-2879. The court order established a process for notice to parents about the single-sex classes, an opportunity for parents to discuss them with school officials, and options for those students who choose not to be in single-sex classes to attend coeducational classes.

Even assuming the 2010-2011 plan addresses these infirmities, the court's modifications fail to address the first and foremost requirement for establishing single-sex classes under 34 C.F.R. 106.34(b)(1), *i.e.*, the requirement that each single-sex class be substantially related to an important educational objective. Despite the evidentiary vacuum regarding support for the use of single-sex classes, the district court nonetheless ordered single-sex classes into effect for the 2010-2011 school year. The court explained that it "must focus on *what is in the best interests of the children* of Rene Rost in future school years, not who is to blame

for the wrongful implementation of this flawed program." USCA5 2877 (emphasis added).

But the district judge's view of what is in the students' "best interests" is tied to no legal standard and was in no way linked to either of the objectives that ED has determined is required before single-sex classes may be offered. Therefore, for all the reasons discussed above, requiring the middle school to implement this plan will continue its direct conflict with Title IX and ED's Title IX regulations. This Court should reverse the district court's order.

II

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SINGLE-SEX CLASSES DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. When Challenging A Facial Gender-Based Classification By A State Actor, Plaintiffs Do Not Need To Show That The State Actor Intended To Harm Members Of One Group To Trigger Heightened Scrutiny

The district court fundamentally erred in its application of the Equal Protection Clause to plaintiffs' challenge to the School Board's facial gender-based classification, *i.e.*, the sex-segregated academic classrooms at a public middle school. The district court concluded that to establish the requisite discriminatory intent, it was not enough to show that the School Board intentionally and explicitly segregates students by sex. Rather, plaintiffs must also establish that the School Board intended to harm or disadvantage either boys or girls. As demonstrated

below, the district court's application of the Equal Protection Clause to the School Board's facial gender classification directly contradicts well-established law. Where, as here, a state actor classifies individuals explicitly on the basis of sex, the intent necessary to implicate the Equal Protection Clause does not require proof of intent to harm or disadvantage. See, *e.g*., *City of Richmond* v. *Croson*, 488 U.S. 469, 493-494 (1989). Therefore, if permitted to stand, the district court's decision would create a significant and counter-productive barrier to challenges to explicit gender-based classifications under the Equal Protection Clause.

The Court has made clear that intentional sex segregation is subject to heightened – "intermediate" – scrutiny; "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *VMI*, 518 U.S. at 531; see also *Hogan*, 458 U.S. at 724 (a party "seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification"). In other words, in "cases of official classifications based on gender," heightened scrutiny applies. *VMI*, 518 U.S. at 532. The state must show that the challenged classification serves "important governmental objectives" and that the means employed are "substantially related to the achievement of those objectives." *Id.* at 533. The justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad

generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* Further, "[t]he burden of justification * * * rests entirely on the State." *Ibid.* The basis for the application of heightened scrutiny is the undeniable history that the use of gender to separate individuals, or to define or allocate benefits, has often disadvantaged women based on incorrect and unwarranted assumptions and stereotypes about the abilities and talents of women.

Courts have often stated that a plaintiff may establish an equal protection violation in several ways. A plaintiff can point to a law that "expressly classifies on the basis of race," or show that a facially neutral law or policy has a discriminatory impact and was motivated by an intent to cause one group harm. *Pyke* v. *Cuomo*, 567 F.3d 74, 76 (2d Cir.) (per curiam), cert. denied, 130 S. Ct. 741 (2009); see also *Monroe* v. *City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009), cert. denied, 130 S. Ct. 1740 (2010); *Antonelli* v. *New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005). In the first situation, proof of additional discriminatory intent is unnecessary. *Anderson* v. *City of Boston*, 375 F.3d 71, 82 (1st Cir. 2004); see also *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."); *Personnel Adm'r of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."). It does not matter if persons

are "equally" segregated. See, *e.g.*, *Johnson* v. *California*, 543 U.S. 499, 506-508 (2005) (rejecting argument that strict scrutiny does not apply to racial segregation of prisoners because prisoners are equally segregated, stating that because the "policy is an express racial classification, it is 'immediately suspect'"). The same principle applies to explicit gender classifications, even though the Supreme Court has used different language in describing the level of scrutiny applicable to gender and racial classifications. See *Kazmier* v. *Widmann*, 225 F.3d 519, 539 (5th Cir. 2000) (Dennis, J., dissenting) ("governmental action based on race or gender classifications is presumed to be unconstitutional, warrants heightened or strict scrutiny, and places the burden of justification entirely on the state"); see also *Craig* v. *Boren*, 429 U.S. 190, 197-198 (1976) (stating that "statutory classifications that distinguish between males and females" or "gender-based classifications" are subject to scrutiny under the Equal Protection Clause); *Cohen* v. *Brown Univ.*, 101 F.3d 155, 183 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) (in the context of gender-based classifications, there is no distinction between invidious and benign discrimination). [8]

[8] The two cases the district court cited do not support its conclusion. See USCA5 2876. One involved a disparate impact challenge to a law criminalizing the distribution of drugs within 1000 feet of a school. In that case, the court stated that disparate impact fails to establish a valid equal protection claim, which requires "a showing of discriminatory intent or purpose." *United States* v. *Crew*, 916 F.2d 980, 984 (5th Cir. 1990). In the other case, a convicted state prisoner

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Therefore, under settled law, the Court does not address whether, in adopting a gender classification, the public actor intended to disadvantage or harm one gender. "If an action is gender-based, then it is subject to heightened scrutiny under the Equal Protection Clause." *McKee* v. *City of Rockwall*, 877 F.2d 409, 422 (5th Cir. 1989) (Goldberg, J., concurring in part and dissenting in part), cert. denied, 493 U.S. 1023 (1990). Indeed, historically, many gender-based classifications were intended to benefit or protect women; for example, in *VMI*, the state argued, in part, that most women were just not strong enough for the school's rigorous military program, or interested enough in VMI's "adversative" method of education. See, *e.g.*, *United States* v. *Virginia*, 766 F. Supp. 1407, 1438-1440 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992). As the Court has noted, sex discrimination was long "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero*

(continued…)
asserted that he was denied equal protection because he was tried without a transfer order required under state law and in other cases transfer orders had been entered. In rejecting the claim, the court noted that the Equal Protection Clause is violated only by intentional discrimination, not the mere "awareness of consequences." *Lavernia* v. *Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1988). The court further stated that "discriminatory purpose" implies that the decision maker selected "his course of action at least in part for *the purpose* of causing its adverse effect on an identifiable group." *Ibid.* In these cases, the Court was not addressing challenges to the intentional and facial segregation of persons in a protected class.

v. *Richardson*, 411 U.S. 677, 684 (1973).[9] Placing the burden on those challenging a gender classification to show, not only that the state intentionally segregated individuals by gender or precluded those of one gender from an opportunity available to the other, but also that it did so with the intent to harm or disadvantage women, would be particularly inappropriate in light of this history, cf. *VMI*, 518 U.S. at 534, and the Court has rejected such an evidentiary requirement. *Feeney*, 442 U.S. at 273 ("Classifications based upon gender, not unlike those based on race, have traditionally been the touchstone for pervasive and often subtle discrimination."). Indeed, the very purpose of heightened scrutiny is to "smoke out" the illegitimate use of a protected status and ensure that the state actor is pursuing a sufficiently important goal in using the classification, and is not relying on stereotypes; to allow a state to avoid heightened scrutiny by asserting

[9] The history of the disparate treatment of women by state actors is replete with instances where the state believed it was acting in the best interest of women. See, *e.g.*, *Bradwell* v. *Illinois*, 83 U.S. 130 (1872) (Bradley, J.) (upholding state law precluding women from practicing law); *Muller* v. *Oregon*, 208 U.S. 412 (1908) (upholding state law limiting women's work in a factory or laundry); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948) (upholding state law limiting opportunities for women to be bartenders); see also *Frontiero*, 411 U.S. at 686-687 ("statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members"); see generally *VMI*, 518 U.S. at 531-532; *Hogan*, 458 U.S. at 725 & n.10.

that its discrimination was benign would short-circuit the entire doctrine. See *Croson*, 488 U.S. at 493.

In sum, the explicit use of sex-based classifications has a history that demands that any such use be presumed to be improper, and therefore must be examined under heightened scrutiny, regardless of an assertion of a benign motive. It is the official classification or segregation itself that constitutes the requisite "intentional" discrimination.

B. The School Board's Use Of Single-Sex Classes At The Middle School Fails To Satisfy Intermediate Scrutiny

Given this well-established judicial precedent, the district court erred in concluding that the School Board's single-sex classes did not violate the Equal Protection Clause. The single-sex class plan fails to satisfy the heightened scrutiny standard under the Equal Protection Clause for the same reasons that it violates Title IX and ED's Title IX regulations, *i.e.*, the School Board lacked any evidentiary basis for an objective that supports using gender as a basis for student assignments. As we have discussed above, the district court's order is based, at best, on unsupported generalizations and gender-based stereotypes. The principal's "dissertation" has been fully discredited as based on "extremely" flawed data, and in its absence, there is no other credible evidence demonstrating that single-sex classes are supported by an "exceedingly persuasive justification." The school's single-sex program implemented in 2009-2010, and district court's

single-sex classroom plan for 2010-2011, fail to meet the constitutional standard and should be enjoined.

CONCLUSION

This Court should vacate the decision of the district court and direct the district court to enter a preliminary injunction barring implementation of single-sex classes for the 2010-2011 school year, pending further proceedings under the correct legal standards.

Respectfully submitted,

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I hereby certify that on June 4, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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